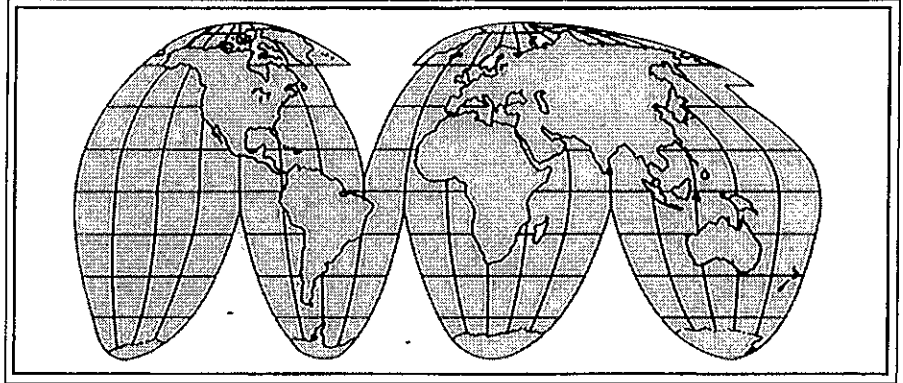


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## **The Israel-Palestinian Peace Process: A Critical Analysis of the Cairo Agreement**

*by Justus R. Weiner*

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## BOOK REVIEW

### THE ISRAEL-PALESTINIAN PEACE PROCESS: A CRITICAL ANALYSIS OF THE CAIRO AGREEMENT

AGREEMENT ON THE GAZA STRIP AND THE JERICHO AREA, Published by the Israel Ministry of Foreign Affairs, 198 pages with additional maps, May 4, 1994 (Government of Israel, 1994).

It must be stated at the outset that international agreements are to be judged largely by different criteria than other agreements, particularly regarding the intentional use of ambiguous terminology and generally weak control, adjudicatory and enforcement mechanisms.<sup>1</sup> The *sui generis* nature of international agreements is even more pronounced in the exceptional cases in which the agreement is not between two sovereign states,<sup>2</sup> but rather between a state and a national liberation movement with aspirations of statehood. The Israel-Palestine Liberation Organization Agreement on the Gaza Strip and Greater Jericho Area (hereinafter, Cairo Agreement)<sup>3</sup> is therefore somewhat of a legal novelty and any analysis of its text or context must take this into consideration.

It is useful to briefly survey the series of five interim accords that have been concluded thus far between Israel and the Palestine Liberation Organization (hereinafter, PLO).<sup>4</sup> The first of this sequence of agreements, the Declaration of Principles<sup>5</sup> (hereinafter, DOP), sets out the overall

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<sup>1</sup> The International community lacks an authority capable of sanctioning lawbreakers. Therefore, with no equivalent sovereign or police force in international politics, entities violate agreements with the knowledge that the sanctions they are likely to suffer, if any, will likely be negligible. Although several types of courts exist, they are unable to impose penalties. Except in isolated cases when the United Nations or allied governments are willing to use economic measures or armed force to impose penalties for misconduct, most sanctions can only be carried out by the aggrieved government, not by a third party. Naturally, various complex issues arise out of the use of self-help to redress violations of international agreements.

<sup>2</sup> The Vienna Convention on the Law of Treaties states that a treaty is always an international agreement "concluded between states . . ." Vienna Convention on the Law of Treaties, U.N. Doc. A/CONF. 39/27 at 289 (1969), 1155 U.N.T.S. 331, *reprinted in* 8 I.L.M. 679 (1969).

<sup>3</sup> Agreement on the Gaza Strip and the Jericho Area, May 4, 1994, Isr.-PLO, 33 I.L.M. 622 [hereinafter Cairo Agreement].

<sup>4</sup> The current Israeli-Palestinian peace process began with the 1991 Madrid Peace Conference. In those talks, the local Palestinian negotiators were forced, at the insistence of Israel, to participate as part of the Jordanian team. When the Madrid conference, which adjourned to Washington, stalemated it was largely superseded by secret negotiations. The secret negotiations were originally undertaken by persons without official diplomatic credentials. They began in London and shortly thereafter moved to Oslo. As it became clear to the late Israeli Prime Minister Yitzhak Rabin that the deadlocked official negotiations were unlikely to bear fruit, he gradually made the backdoor negotiations official by involving Israeli Foreign Ministry staff.

<sup>5</sup> Declaration of Principles on Interim Self-Government Arrangements, Sept. 13, 1993, Isr.-PLO, 32 I.L.M. 1525 [hereinafter DOP].

framework of the peace process with the objective of reaching a final settlement.<sup>6</sup> The subsequent Cairo Agreement, the subject of this review, provides for the withdrawal of Israeli administration and military forces from most of the Gaza Strip and Jericho area and the transfer of most local governing powers and responsibilities to the Palestinian Authority (hereinafter, P.A.).<sup>7</sup> It also allows for the establishment of a strong Palestinian police force. Israel, however, continues to exercise direct control or overriding security responsibility over approximately forty percent of the Gaza Strip, including the Jewish settlements in the area, together with the roads connecting them to Israel.<sup>8</sup> The ensuing Agreement on Preparatory Transfer of Powers and Responsibilities<sup>9</sup> (hereinafter, Erez Agreement) which was signed at the Erez checkpoint between Israel and the Gaza Strip, allows for the transfer of powers to the Palestinian Authority in certain limited spheres such as health, social welfare, direct taxation, tourism, education and culture in the parts of the West Bank outside of the Jericho area. The fourth agreement, The Protocol on Further Transfer of Powers and Responsibilities, which was signed in Cairo on August 27, 1995, provides for the transfer of civil powers in the West Bank to the P.A. in the spheres of labor, industry and commerce, gas, petroleum, agriculture, local government, statistics and postal services.

On September 28, 1995, the Israeli-Palestinian Interim Agreement on the West Bank and Gaza Strip<sup>10</sup> (hereinafter, Oslo II) was signed at the White House. It constitutes the final interim agreement. Its major provisions include establishing an elected Palestinian Interim Self-Governing Authority and Executive Authority and specifying the adoption of a quasi-constitutional document, scheduling a staged redeployment of Israel forces out of the Palestinian populated centers, releasing several thousand Palestinian

<sup>6</sup> *Id.* The DOP was signed at the White House by the late Israeli Prime Minister Yitzhak Rabin and PLO Chairman Yasser Arafat. A general document, only 5 pages in length, the DOP features pledges to abandon terrorism and military force and sets forth a framework for future negotiations with the stated purpose of reaching several interim agreements and ultimately a "final status agreement" no later than May 4, 1999.

<sup>7</sup> The P.A. is the body established under the Cairo Agreement for the purpose of administering the responsibilities transferred. The Palestinians frequently refer to the body as the "Palestinian National Authority," or "P.N.A.," a title that reflects their aspirations to sovereignty but which does not appear in the accords.

<sup>8</sup> HUMAN RIGHTS WATCH MIDDLE EAST, *THE GAZA STRIP AND JERICHO: HUMAN RIGHTS UNDER PALESTINIAN SELF-RULE* 33 (1995).

<sup>9</sup> Reproduced in 24(2) J. PAL. ST. 109 (1995) (signed at the Erez checkpoint between Israel and the Gaza Strip on Aug. 29, 1994) [hereinafter Erez Agreement].

<sup>10</sup> Interim Agreement on the West Bank and the Gaza Strip, Sept. 28, 1995, Isr.-PLO, Isr. Min. For. Aff. [hereinafter Oslo II].

prisoners held by Israel and reiterating the PLO's commitment to cancel provisions in its National Charter that call for the destruction of Israel.

In its book form, the official English text of the Cairo Agreement comprises 198 pages, exclusive of maps. The actual agreement contains twenty-three articles and is nineteen pages in length. The remainder of the volume primarily consists of four annexes of protocols dealing respectively with the withdrawal of Israeli military forces and security arrangements, civil affairs, legal matters and economic relations. Also included is a side letter to the protocol on civil affairs and the letters exchanged by the PLO Chairman Arafat and the late Israeli Prime Minister Rabin at the signing of the Cairo Agreement. Despite its considerable length and the ensuing detail covering many topics, the negotiators of the Cairo Agreement made liberal use of the tool of creative ambiguity by postponing controversial issues to a later stage in the negotiations.

The negotiators of the agreements faced daunting barriers in attempting to reach a final peace after decades of bloodshed and animosity. In a broad sense, their task was to negotiate provisions that would enable Israelis and Palestinians to live in the small area between the Mediterranean Sea and the Jordan River in peace, security and dignity while preserving their separate identities.<sup>11</sup> Indeed, reaching *any* meeting of the minds under these circumstances was a miracle by itself. Numerous earlier efforts to bridge the chasms between Israel and the Arabs, including the 1949 Armistice Agreements, 1973 Geneva Peace Conference, the Rogers plan, the Reagan peace initiative, the Arab League's Fez peace plan<sup>12</sup> and the Madrid conference, made little headway in solving the Israeli-Palestinian conflict.<sup>13</sup> Perhaps the most promising opportunity for an accommodation arose out of the 1978 Camp David Accords and the ensuing Israel-Egypt Peace Treaty of 1979.<sup>14</sup> These also, however, achieved little for Israeli-Palestinian relations.

<sup>11</sup> The drafters of the Cairo Agreement envisioned a rosy future for the Middle East. Acting Israeli Prime Minister Shimon Peres has said, "[e]stablishing peace and security requires a conceptual revolution." SHIMON PERES, *THE NEW MIDDLE EAST* 62 (1993). By "peace," Peres specifically refers to a regional community of nations based on four principles: political stability, economics, national security and democratization. *Id.* at 62-66.

<sup>12</sup> Harold H. Saunders, *Reconstituting the Arab-Israeli Peace Process in the Middle East: Ten Years After Camp David* 422-23 (William B. Quandt ed., 1988).

<sup>13</sup> ROBERT SLATER, *RABIN OF ISRAEL* 430-37 (1993). See generally, *THE ARAB-ISRAEL CONFLICT AND ITS RESOLUTION: SELECTED DOCUMENTS* (Ruth Lapidot & Moshe Hirsch eds., 1992).

<sup>14</sup> At Camp David the goal was to establish a "self-governing authority" for the Palestinians as an interim arrangement, pending a final resolution of the issues of peace and territory. Camp David Agreements, Sept. 17, 1978, Egypt-Isr.-U.S., 17 I.L.M. 1466. This autonomy was to have been negotiated by Egypt, Israel and representatives of the Palestinians. Under pressure from the PLO, prospective Palestinian participants boycotted the negotiations from the outset. Egypt, which initially participated in the negotiations, also walked out before an agreement could be reached. Subsequently, Israel, of its own accord, took a major step toward creating autonomy by replacing the military government with a Civil

What has been achieved in the sequence of agreements, since the current peace process commenced, must be measured against what was possible in the highly charged political atmosphere of 1993. The regional political environment featured a pledge by the then recently elected Israeli Prime Minister to reach an autonomy agreement with the Palestinians within nine months of taking office.<sup>15</sup> Concurrently, the Palestinian uprising persisted while *intrafada* (Palestinian on Palestinian) killings surged. The temporary expulsion by Israel of 415 Islamic militants to Southern Lebanon placed further obstacles in the way of the stalled Middle East Peace talks which, having begun in Madrid, had moved to Washington.<sup>16</sup> A major factor in the global environment was the foreign policy agenda of newly elected President Bill Clinton and his Secretary of State Warren Christopher. Their intention was to capitalize upon the momentum of the allied victory in the Gulf War and the demise of the Soviet Union (long the superpower patron of the PLO and many Arab states) to broker peace agreements between Israel, the Palestinians and other Arab states.

However, the history of animosity and the chasm separating the Israeli and Palestinian positions made it obvious that a *full* settlement of the multi-faceted Israeli-Palestinian dispute was out of reach in 1993. Hence, the need for interim agreements. As Henry Kissinger grasped two decades earlier, when he mediated the 1974 and 1975 Arab-Israeli disengagement agreements in the aftermath of the 1973 Yom Kippur War, the objective of interim arrangements is to create workable mechanisms that transform the political environment. This considerably facilitates dealing with increasingly difficult issues by demonstrating to the parties that lesser ones are manageable.<sup>17</sup> The politics of transition must provide the foundation before the building blocks of final arrangements can be negotiated. Negotiators should learn to work with one another and the public must become accustomed to seeing agreements signed and kept. Over time, the process

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Administration. While not required by the Camp David Accords or international law, this effort was made in an attempt to normalize the daily life of the Arab residents of the West Bank and Gaza Strip by diminishing its interaction with the Israel Defense Forces. See Justus R. Weiner, *Human Rights in the Israeli Administered Areas During the Intifada: 1987-1990*, 10 WIS. INT'L L.J. 185, 185-92 (1992).

<sup>15</sup> SLATER, *supra* note 13, at 398.

<sup>16</sup> *Id.* at 430.

<sup>17</sup> See Saunders, *supra* note 12, at 413. Saunders observed in the 1988 Brookings Institute study that one objective of would-be peace makers is to fundamentally change the character of the underlying conflict. Their goal is to attempt to alter the structure and patterns of relationships within bodies politic and across lines in a way to offer opportunities not previously available. This is done, in part, by building working relationships between Israelis and Palestinians who want to negotiate peace. Thus, the peace process must be reconstituted as a supportive political process for moving toward some form of reconciliation that can be defined and consolidated through realistic negotiation. *Id.*

will become mutually reinforcing as words and acts in one body politic begin to build confidence and overcome distrust in the other.

An additional difficulty, however, is the negativism with which many Palestinians and Israelis view interim agreements. Uncertainty about the final outcome of the process was stoked by the popular and ambiguous slogan, "Gaza and Jericho first," which avoided mention of the subsequent stages of the process. Many Israelis are skeptical of interim stages in which control over territory is ceded. This skepticism is due to the belief that the Arabs simply want to improve their tactical position for a later effort at weakening or destroying Israel. Palestinians and other Arabs have traditionally feared interim agreements because of apprehension that Israel would freeze the process after making token concessions while holding fast in other areas, like the Golan Heights or Jerusalem.<sup>18</sup> Moreover, as veteran U.S. diplomat Harold Saunders correctly observed:

[A]s the peace process comes closer to dealing with the issues in an overall settlement, the divisions within each body politic become deeper and more open. Those divisions constitute and reflect the most difficult obstacles still blocking the path to peace.<sup>19</sup>

Not surprisingly, the Cairo Agreement postponed addressing the most difficult issues. Topics including water, the custody of religious sites sacred to both Jews and Muslims, the Palestinian refugees, the future of the Jewish settlements, Palestinian claims to statehood<sup>20</sup> and political sovereignty over

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<sup>18</sup> Indeed, many Palestinians fear that should the opposition Likud party come to power the current peace negotiations will be brought to a halt and the Oslo II interim agreement turned into a permanent status agreement. See Yarayach Tal, *Israeli Source: Palestinians Fear That Likud Government Will Change Interim Agreement into Permanent Status Deal*, HA'ARETZ, August 7, 1995, at A5 (Hebrew original).

<sup>19</sup> Saunders, *supra* note 12, at 423.

<sup>20</sup> Among the qualifications for statehood which the P.A. lacks is the capacity to enter into relations with the other states. See Cairo Agreement, *supra* note 3, at art. VI.2.a. On the subject of the legal criteria of statehood, see, e.g., IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 72-79 (4th ed. 1990). According to Brownlie, the capacity to enter in relations with other states is tantamount to demonstrating independence: "[T]he concept of independence is represented by the requirement of capacity to enter into relations with other states. Independence has been stressed by many jurists as the *decisive* criterion of statehood." *Id.* at 73-74 (emphasis added). Moreover, Israel is solely responsible for ensuring the defense of Gaza and Jericho against external threats. Cairo Agreement, *supra* note 3, at art. VIII.1.

Many observers (See, e.g., Antonio Cassese, *The Israel-PLO Agreement and Self Determination*, 4 EUR. J. INT'L L. 564 (1993); Note, *The Israel-PLO Declaration of Principles: Prelude to a Peace?*, 34 VA. J. INT'L L. 435, 465-69 (1994)) believe that a Palestinian state will eventually ensue from the peace process, among them Yossi Sarid, a Member of the Israeli Knesset (parliament) and Cabinet. See *Palestinian Elections Will Result In State - Sarid*, JERUSALEM POST, Mar. 19, 1995, at 1. However, both the late Prime Minister Yitzhak Rabin and his successor Shimon Peres have expressed their opposition to the idea of a Palestinian State in the West Bank and Gaza Strip. See David Makovsky, *Rabin to P.A.: The Streets are*

Jerusalem<sup>21</sup> were intentionally left to the final status round because of their highly controversial nature.<sup>22</sup> A conflict concerning any of these topics could have resulted in an early impasse, if not the complete breakdown, of the negotiations.

One of the core problems with the Cairo Agreement, and indeed with all five of the interim agreements, is that Israel and the Palestinians have divergent needs and aspirations in connection with the peace process. For Israelis, security issues are of paramount importance—a desire for a new era in personal as well as national security. This is supplemented by a yearning for a breakthrough in cordial commercial relations with the neighboring Arab states and the Palestinians, and a desire to escape diplomatic isolation. Palestinians, not surprisingly, view the negotiations as a vehicle to end the Israeli occupation and actualize their objectives of statehood and economic advancement. In light of these differing goals, the overall verdict on the Cairo Agreement is mixed.

Despite its length, the Cairo Agreement and accompanying documents leave unresolved many important questions that were intended to be covered. The first unresolved issue pertains to the legal status of the areas under P.A. local control during the interim period. This is important because it determines whether the law of armed conflict continues to be in effect in the areas transferred to local P.A. administration during the interim period. According to the Cairo Agreement, the Israeli Civil Administration in Gaza and Jericho was dissolved upon completion of the Israeli military withdrawal and the transfer of powers to the P.A.<sup>23</sup> Thus, the P.A. is entrusted with significant governmental powers in Gaza and Jericho for the interim period, acting as an intermediary between the Israeli military government and the local population.

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*Yours*, JERUSALEM POST, Apr. 14, 1995, at 9.; *Peres Denies Proposal to Turn Gaza Strip into a Palestinian State*, BBC Short Wave Broadcasts, Voice of Israel, Jerusalem, Mar. 28, 1995 (ME/2265, MED/4).

<sup>21</sup> The future legal status of Jerusalem appears to be the most intractable of the issues to be addressed in the peace process. Following one public opinion poll, sixty-five percent of Israelis support Israeli sovereignty over the united city, while ninety percent of Palestinians are opposed to such an idea. See Yosef Algazi, *Poll: 65 Percent of Israeli Jews Support Israeli Sovereignty Over Jerusalem*, HA'ARETZ, June 5, 1995, at A6 (Hebrew original).

<sup>22</sup> From a domestic political perspective, the decision to leave the outstanding issues for the permanent status negotiations was an undoubtedly wise one for both sides. Each of these issues is extremely sensitive for the Israeli and the Palestinian political constituencies. Not to have postponed the negotiations concerning these topics would have placed considerable strain on the talks by domestic public opinion at a time when they could ill afford them. See generally PAUL R. PILLAR, *NEGOTIATING PEACE: WAR TERMINATION AS A BARGAINING PROCESS* 223 (1983). See also Amos Perlmutter, *The Israel-PLO Accord is Dead*, FOREIGN AFFAIRS 61-62 (1995).

<sup>23</sup> See Cairo Agreement, *supra* note 3, art. III.4

Based on the text of the Cairo Agreement, it may be argued that the sole source of the P.A.'s authority and legitimacy lies in the accords it concluded with Israel, according to which the legal status of both Gaza and Jericho remains unchanged. It would follow that these regions continue to be under the occupation of the Israeli military, with the P.A. acting as nothing more than an agent of the Israeli occupation administration.<sup>24</sup> Indeed, such a claim is supported by numerous provisions found in the various texts which stress that the status of the Gaza and Jericho has not been altered.<sup>25</sup> For instance, paragraph seven of Article XXIII of the Cairo Agreement states:

The Gaza Strip and the Jericho Area shall continue to be an integral part of the West Bank and the Gaza Strip, and their status shall not be changed for the period of this Agreement. Nothing in this Agreement shall be considered to change this status.<sup>26</sup>

Other articles support this understanding by stressing that the Israeli military government continues to exercise certain prerogatives in Gaza and Jericho.<sup>27</sup>

A second vital topic, which the Cairo Agreement treats inadequately, is the transfer of persons suspected of committing grave offenses, namely terrorist attacks, where the prosecution of such offenses falls under the criminal jurisdiction of the other party.<sup>28</sup> This issue is of critical importance for Israel, since it allows for a direct assessment of the P.A.'s seriousness in fulfilling Arafat's promise to thwart acts of terror<sup>29</sup> carried out from

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<sup>24</sup> See Joel Singer, *The Declaration of Principles on Interim Self-Government Arrangements*, 1 JUSTICE 4, 6 (1994). But see Eyal Benvenisti, *Responsibility for the Protection of Human Rights under the Interim Israeli-Palestinian Agreements*, 28 ISR. L. REV. 297 (1994).

<sup>25</sup> See also Cairo Agreement, *supra* note 3, at art. XXIII.6; Erez Agreement, *supra* note 9, at art. XIII.5.

<sup>26</sup> Cairo Agreement, *supra* note 3, art. XXIII.7. In addition, Article IV of the DOP states that, "[t]he two sides view the West Bank and the Gaza Strip as a single territorial unit, whose integrity will be preserved during the interim period." DOP, *supra* note 5. Article VI of Annex II of the DOP emphasizes that, "the status of the Gaza Strip and Jericho area will continue to be an integral part of the West Bank and Gaza Strip, and will not be changed in the interim period." *Id.*

<sup>27</sup> Cairo Agreement, *supra* note 3, art. V.3.b. See also *id.* art. III.1.

<sup>28</sup> See *id.*, Annex III, art. II.7.

<sup>29</sup> Chairman Arafat's historic September 9, 1993 letter to the late Prime Minister Rabin, which made possible the breakthrough in relations, stated:

The PLO renounces terrorism and other acts of violence, and will assume responsibility over all PLO elements and personnel in order to assure their compliance, prevent violations and discipline violators.

PLO Chairman Yasser Arafat's Letter to the late Israeli Prime Minister Yitzhak Rabin, Sept. 9, 1993 (emphasis added). See also Cairo Agreement, *supra* note 3, art. XVIII. The peace process has been seriously undermined because of the PLO's failure to adequately curb Palestinian terrorism against Israeli targets. Numerous suicide bombings by Hamas and Islamic Jihad have resulted in a seventy-three percent increase in Israeli fatalities since the signing of the DOP. See Peace Watch Press Release, *Increase of 73%*

Palestinian domain against Israeli targets. Yet in two respects, Israeli hopes for Palestinian cooperation on this issue have been frustrated. First, the P.A.'s reading of the Cairo Agreement concluded that the transfer provisions do not apply to offenses alleged to have taken place prior to the signing of the Cairo Agreement.<sup>30</sup> Israelis who have lost their loved ones to Palestinian terrorists prior to the Cairo Agreement have protested this interpretation.<sup>31</sup> This interpretation has also been criticized by the impartial Peace Watch organization as a violation of the Cairo Agreement.<sup>32</sup> The second cause for Israeli disappointment is the practice of the P.A. in its treatment of Palestinians alleged by Israel to have perpetrated terrorist attacks *after* the signing of the DOP. Instead of arresting the suspects and transferring them to Israel, as mandated by the Cairo Agreement, suspects are hurriedly brought to trial in P.A. courts, convicted and imprisoned.<sup>33</sup> Thus, they evade Israeli prosecution for their violent acts. Relying on the provision establishing that where a suspect requested for transfer is already serving a prison sentence, "the side receiving the request may delay the transfer to the requesting side for the duration of the detention or imprisonment,"<sup>34</sup> P.A. officials claim to have justification for this bad faith practice.<sup>35</sup>

*in Number of Israelis Killed in Terror Attacks in Two Years Since Oslo Accords* (Sept. 10, 1995).

<sup>30</sup> See Uri Nir, *Palestinian Officers: We Have No Information Demonstrating That Terrorists Escaped to Jericho*, HA'ARETZ, July 20, 1995, at A4 (Hebrew original); PEACE WATCH, TRANSFER OF SUSPECTS IN CRIMINAL AND TERRORIST ACTS BETWEEN ISRAEL AND THE PALESTINIAN AUTHORITY 5 (Dec. 6, 1994). Every international agreement makes use of what diplomats call "creative ambiguity" to avoid reaching clear, but politically dangerous results, for one or both parties. This tactic is almost always intentional although the diplomats may later claim innocence or surprise at the other side's interpretation of what they regard as susceptible to only one understanding. Generally, this usage is based on the hope that the anticipated positive political and economic relations will, over time, make the current impasse less critical. A more cynical view of the phenomenon of "creative ambiguity" is that the current leadership would rather take the credit (i.e., in electoral terms, international trade, perhaps even a Nobel Peace Prize) for the breakthrough and leave to a subsequent political leadership or generation the insurmountable questions.

<sup>31</sup> *Terror Victims' Families Demand Government Insist PA Extradite Suspects*, JERUSALEM POST, Sept. 15, 1995, at 3.

<sup>32</sup> PEACE WATCH, *supra* note 30.

<sup>33</sup> Uri Nir & Eytan Rabin, *Palestinian Authority Sentenced to 7 and 12 Years of Imprisonment 2 Members of Hamas Apparently Involved in Jerusalem Bombing*, HA'ARETZ, Aug. 27, 1995, at A3 (Hebrew original); Alouf Ben et al., *Rabin Rejects Ministers' Criticism: Non-Transfer of Terrorists Does Not Violate Agreement; Terrorists Suspected of Murder in Wadi Kelt Sentenced to Prison in Jericho, Will Not be Transferred to Israel*, HA'ARETZ, Sept. 9, 1995, at A1 (Hebrew original); Dan Margalit, *Maliciousness and Hastiness*, HA'ARETZ, Sept. 14, 1995, at B1 (Hebrew original).

<sup>34</sup> Cairo Agreement, *supra* note 3, Annex III, art. II.7.f.2.

<sup>35</sup> A related P.A. violation of the text of the Cairo Agreement is its failure to disarm the Hamas and other militias. Cairo Agreement, *supra* note 3, art. IX.3; Jon Immanuel, *PA's Gun-Licensing Campaign Lacks Pop*, JERUSALEM POST, May 12, 1995, at 9; PEACE WATCH, WEAPONS CONTROL AND THE PALESTINIAN AUTHORITY (June 1995).

It is clear, as several members of the Israeli Cabinet have recently admitted,<sup>36</sup> that the Israeli anticipation of Palestinian compliance and cooperation with regard to the implementation of the transfer of suspects provisions was unrealistic. Indeed, compliance with even one request for the transfer of suspected Palestinian terrorists to Israeli authorities would be considered by most Palestinians as an act of treason, tantamount to political suicide for PLO Chairman Arafat.<sup>37</sup>

A third topic which, in light of subsequent events, has proven to be inadequately treated by the Cairo Agreement is the protection of so-called "collaborators" from acts of violence by their Palestinian compatriots. Although the Cairo Agreement commits the P.A. "not to prosecute these Palestinians or to harm them in any way,"<sup>38</sup> numerous instances of violence and unlawful arrest have been documented by both international and local human rights organizations.<sup>39</sup> This problem has reached such proportions that Israel has intervened and absorbed thousands of individuals and their families into Israeli territory.<sup>40</sup>

Also worthy of mention, the P.A. has circumvented the Cairo Agreement's mechanism for the communication of all legislation promulgated by the P.A. to the Israeli side for prior examination. This significant innovation of the Cairo Agreement,<sup>41</sup> which has yet to be

<sup>36</sup> Gideon Alon, *Liba'i & Beilin: Claim that P.A. Should Transfer Suspects - Not Realistic*, HA'ARETZ, Oct. 6, 1995, at A2 (Hebrew original).

<sup>37</sup> *Id.*

<sup>38</sup> Cairo Agreement, *supra* note 3, art. XX.4

<sup>39</sup> See generally B'TSELEM, NEITHER LAW NOR JUSTICE: EXTRA-JUDICIAL PUNISHMENT, ABDUCTION, UNLAWFUL ARREST, AND TORTURE OF PALESTINIAN RESIDENTS OF THE WEST BANK BY THE PALESTINIAN PREVENTIVE SECURITY SERVICE (1995); AMNESTY INTERNATIONAL, *Human Rights: A Year of Shattered Hopes* (May 11, 1995) (Amnesty International Index MDE/15/07/95); HUMAN RIGHTS WATCH MIDDLE EAST, *supra* note 8.

<sup>40</sup> Thirty-one Palestinians suspected of having "collaborated" with Israel have been killed since the P.A. assumed authority in Gaza and Jericho. Hundreds more fear for their security as the Israeli military prepares its withdrawal from parts of the West Bank. See Eytan Rabin, *Hundreds of Collaborators and Civil Administration Workers Seek Refuge in Israel in Fear of Their Fate After Withdrawal*, HA'ARETZ, Oct. 6, 1995, at 1A (Hebrew original); Eytan Rabin, *Security Branches Examine Possibility of Assisting Collaborators to Purchase Homes in Israel*, HA'ARETZ, July 17, 1995, at A3 (Hebrew original). The wave of Palestinian on Palestinian violence began in 1987, much of it sponsored by the PLO and Hamas, and has claimed approximately 1000 lives. See Weiner, *supra* note 14, at 277-80.

<sup>41</sup> Article VII.3 of the Cairo Agreement, provides for the communication of all legislation promulgated by the P.A. to the Legislative Subcommittee for prior examination. Cairo Agreement, *supra* note 3. The Legislative Subcommittee is established by the Joint Civil Affairs Coordination and Cooperation Committee which is composed of an equal number of representatives from Israel and from the P.A. See *Id.* at art. III.5 & Annex II, art. I.3. In cases of indecision, the matter may be referred subsequently to a board of review (comprised of two judges, one from each side) for further consideration. Where the Legislative Subcommittee remains incapable of reaching a decision on the matter, Article VII.7 stipulates that it will be referred to the Joint Israeli-Palestinian Liaison Committee for a final decision. *Id.* This Committee was established by Article X of the DOP, *supra* note 5, and Article XV of the Cairo Agreement, *supra* note 3, and is composed of an equal number of members from each party.

implemented, gives Israel the right to prevent legislative enactments adopted by the P.A. from taking effect. Its general purpose is to ensure that all P.A. legislation is consistent with the Cairo Agreement. However, the mechanism has yet to be invoked since the P.A. has refrained thus far from enacting *any* laws or regulations.<sup>42</sup> The common explanation for this avoidance is the P.A.'s desire to protect its own power and prestige. The P.A. considers this procedure an illegitimate infringement by Israel on Palestinian internal affairs. On the same grounds, the P.A. made a *de facto* refusal to apply the laws and military orders enacted by Israel, in spite of the fact that the Cairo Agreement clearly provides for their remaining in force, "unless amended or abrogated in accordance with this Agreement."<sup>43</sup>

In his letter to the late Israeli Prime Minister Rabin, which accompanied the signing of the Cairo Agreement, PLO Chairman Arafat reiterated the promise to annul the provisions contained in his organization's National Covenant<sup>44</sup> declaring illegal the establishment of the State of Israel.<sup>45</sup> Arafat also pledged to repeal all additional provisions that are inconsistent with the peace process.<sup>46</sup> The PLO has reiterated this unfulfilled promise in the new Oslo II agreement.<sup>47</sup> This commitment to abolish these articles of the Covenant was a prerequisite to Israel's formal recognition of the existence of the Palestinian people and the PLO as its representative. Indeed, until the signing of the DOP, Israel had always considered the Palestinians solely as Arab residents of the West Bank and Gaza and never as a group possessing a separate national identity.<sup>48</sup>

The Cairo Agreement, like all the other agreements concluded between the parties thus far, embodies no sanctions against violations of its terms. The absence of sanctions is understandable. Both sides, no doubt, foresaw the multitudinous ways in which onerous provisions of the agreements could be circumvented, if not directly violated. The preference

<sup>42</sup> Telephone interview with Dan Polisar, Executive Director, *Peace Watch* (June 12, 1995).

<sup>43</sup> Cairo Agreement, *supra* note 3, art. VII.9. Yasser Arafat, in his first official declaration as the Chairman of the P.A., which has also been published in an official gazette issued by the P.A., proclaimed the abolition of all Israeli military law enacted since 1967, and that, "the laws, regulations and orders in force before 5 June 1967 in the West Bank and the Gaza Strip shall remain in force until unified." See Raja Shehadeh, *Questions of Jurisdiction: A Legal Analysis of the Gaza-Jericho Agreement*, 23(4) J. PAL. ST. 18, 23 (1994).

<sup>44</sup> See THE PALESTINIAN CHARTER [COVENANT] OF 1964 AND THE PALESTINIAN CHARTER [COVENANT] OF 1968 IN THE ARAB-ISRAELI CONFLICT - VOLUME III: DOCUMENTS 698-711 (John N. Moore ed., 1974).

<sup>45</sup> *Id.* art. 17, 18 (1964) & 19, 20 (1968).

<sup>46</sup> PLO Chairman Yasser Arafat's letter to the late Israeli Prime Minister Yitzhak Rabin, May 4, 1994 (accompanying the Cairo Agreement, *supra* note 3).

<sup>47</sup> Oslo II Agreement, *supra* note 10, art. XXXI.9.

<sup>48</sup> See Benvenisti, *supra* note 24, at 542; MAHMOUD ABBAS, THROUGH SECRET CHANNELS 218 (1995).

was to respond flexibly to such occurrences, without predetermining a course of action.

A final major failing of the Cairo Agreement is its cursory and imprecise reference to human rights. Article XIV reads:

Israel and the Palestinian Authority shall exercise their powers and responsibilities pursuant to this Agreement with due regard to internationally-accepted norms and principles of human rights and the rule of law.<sup>49</sup>

Despite the importance of human rights to both the Jewish and Palestinian peoples, new and perplexing human rights questions have emerged from the interim political arrangements. Since the Israeli military's withdrawal, neither Israel nor the P.A. has exerted much of an effort in defending the rights of Palestinians living under Palestinian autonomy in Gaza and Jericho.<sup>50</sup>

The P.A., as demonstrated by the first year and a half of its rule in Jericho and Gaza, lacks the capability or will to make a serious effort to protect individual human rights.<sup>51</sup> In their Western historical context, human rights developed as a protective concept to defend the autonomy of the individual citizen against threats by the sovereign. However, in the context of the Middle East, human rights priorities have differed. Palestinian concepts of human rights have been closely connected to the principle of self-determination within the context of foreign occupation. From this collective interpretation of human rights, a new emphasis on individual rights within Palestinian society will have to develop. Put simply, Israel will no longer be

<sup>49</sup> Cairo Agreement *supra* note 3, art. XIV. Other references to human rights, equally devoid of specific content, are found in the Annexes to the Cairo Agreement. For example, Annex III, art. II.7 addresses transferred suspects and Annex I, art. VIII addresses the use of force by security personnel. *Id.*

<sup>50</sup> See generally, B'TSELEM, *supra* note 39; AMNESTY INTERNATIONAL, *supra* note 34.; HUMAN RIGHTS WATCH MIDDLE EAST, *supra* note 8.

<sup>51</sup> See *Id.* Since they were only deployed in May of 1994, it is too early to judge if the varied individuals who constitute the Palestinian Police can be made to assume the role of a capable law enforcement body that will respect human rights. Indeed, even if they are properly trained and supervised, they will face a serious problem: after enduring years of intifada and intefada (Palestinian on Palestinian) violence, see Weiner, *supra* note 14, at 277-80, and since from an early age they have related to authority with distrust and alienation, law and order are not widely respected by the Palestinian youth.

After months of negotiations, the sides reached an agreement on the size, armament and deployment of this police force. The Cairo Agreement limits the number of policemen to 9,000; Cairo Agreement, *supra* note 3, Annex I, art. III.3.c. However, sources estimate that the P.A. has violated the Agreements since it has enlisted at least 15,000 Palestinian policemen. See HUMAN RIGHTS WATCH MIDDLE EAST, *supra* note 8, at 15 (relating the UN's special coordinator for Gaza and Jericho affirmation that the PA security forces are 15,000 strong).



regarded as the major constraint to the implementation of human rights.<sup>52</sup> What mechanisms can be devised to defend the human rights of Palestinians living under the rule of the P.A., which is not a sovereign state and therefore not capable of joining the leading multilateral conventions on the subject? How can Israel, which according to the clear text of the Cairo Agreement remains the military occupier of the entire West Bank and Gaza Strip, exercise its responsibilities to enforce human rights in Gaza and Jericho?<sup>53</sup>

Lacking a sovereign international personality, the body of international human rights law does not formally apply to the P.A.'s conduct. This follows from the general view that this body of law normally binds only states which have either ratified or are otherwise bound (i.e., by customary law) to comply with certain strictures.<sup>54</sup> Moreover, if the areas under P.A.'s autonomy are no longer considered occupied by Israel (as would be the case if one ignores the language of the Cairo Agreement and the official Israeli interpretation of it), then the humanitarian law, which is a subset of the law of war, would not apply either. This vacuum, especially if it continues for a lengthy period, would place the human rights of millions of people in a precarious legal limbo. Even if ultimately all the issues in the interim and final status negotiations are successfully bridged, a prolonged period of

<sup>52</sup> See Bastiaan de Gaay Fortman, *The Human Rights Project in the New Palestine*, ORGANIZED THE FIRST INTERNATIONAL CONFERENCE ON HUMAN RIGHTS IN JERUSALEM: DEC. 9-11, 1993 at 71, 78 (1994) (available at Land and Water Establishment for Studies and Legal Services, Jerusalem).

<sup>53</sup> On numerous occasions human rights groups, and even governments, have called on Israel to account for the conduct of other groups over which it has little or no command or control. Amnesty International has frequently held Israel jointly responsible for conditions at the Al-Khiam prison of the South Lebanese Army in South Lebanon. See, e.g., Amnesty Int'l Report 1986, 334-36 (Amnesty International held Israel accountable for poor prison conditions and torture although Israel insisted it had no presence in the facility); Amnesty Int'l Report 1993, 170-71; Amnesty International, *Israel and Occupied Territories: Oral Statement to the United Nations Commission on Human Rights on the Israeli Occupied Territories 2* (Feb. 1994) (AI Index: MDE 15/02/94). Amnesty International also attempted to hold Israel responsible for the Lebanese Christian Phalange which committed the massacre at Sabra and Shatilla. See Letter from Itzhak Zamir, Att'y Gen., Isr., to Thomas Hammarberg, Sec. Gen., (discussing Amnesty International Report of 1983 on Lebanon) (on file with the author). Amnesty International and the Israeli Human Rights Organization, B'tselem, both held Israel solely responsible for the killing of Palestinian "collaborators" by other Palestinians in the West Bank and Gaza Strip. See, *The Killing of Alleged Collaborators* AMNESTY INT'L NEWSLETTER 8 (Autumn 1988); B'TSELEM, COLLABORATORS IN THE OCCUPIED TERRITORIES 201 (1994). See also generally B'TSELEM, *supra* note 39. Both the United States State Department and Amnesty International have blamed Israel for the violent behavior of the Jewish settlers in the West Bank and Gaza Strip. Cf. U.S. State Dep't, Country Reports on Human Rights Practices for 1989, 1204 (1993); *Israel Must Conduct Policing Review in the Wake of the Hebron Massacre*, AMNESTY INT'L NEWSLETTER 1 (May, 1994). During the interim period Israel may again be called to account for the conduct of others—the others in this case being the Palestinian Police, Security Services, courts and prisons.

<sup>54</sup> Interestingly, the International Committee of the Red Cross continues to operate in Gaza and Jericho on the vague basis of "international principles." Dr. Palwanka, Address at Conference on Torture at the Hebrew University Law Faculty (June 9, 1995).

uncertainty, during which human rights are in jeopardy, would be a dangerous precedent for the Palestinian entity that will likely emerge.

The peace process boosted the Palestinians' aspirations for economic progress and political liberation. Regrettably, two years after the DOP was signed on the White House lawn, the Palestinians are experiencing widespread disillusionment due primarily to their lingering economic crisis, widespread corruption and nepotism practiced by Arafat's administration and the torturous pace of the peace talks. No less disappointing for many Palestinians, however, has been the P.A.'s failure to usher in a new era of political freedom and respect for human rights.

In sum, the Cairo Agreement is an ambitious albeit highly flawed document. While it represents the first detailed effort to promote Israeli-Palestinian peace and has spawned three additional efforts to further cultivate this turnabout in relations, many of the provisions are unrealistic or overly vague. Exaggerated optimism and ambiguity have produced recriminations which opponents of the agreements, both Palestinian and Israeli, have proffered as proof of the futility of the entire process and the unreliability of the other party.<sup>55</sup> Even given the enormous political difficulties that plagued the efforts from the inception, a more thoughtful document could have avoided many of these pitfalls.

JUSTUS R. WEINER, ADVOCATE\*

<sup>55</sup> See, e.g., Uri Avnery, *Is Oslo Dead?*, 2 PALESTINE-ISRAELI J. OF POL., ECON. & CULTURE 26 (1995); Lisa Beyer, *Sick to Death of Peace: A Majority of Israelis and Palestinians Now Regret Making Their Historic Accord*, TIME, June 5, 1995, 44-45.

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