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HUMAN RIGHTS IN LIMBO DURING THE
INTERIM PERIOD OF THE ISRAELI-PALESTINIAN
PEACE PROCESS: REVIEW, ANALYSIS,
AND IMPLICATIONS

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INTRODUCTION

Much of the world was heartened on September 13, 1993, when the late Israeli Prime Minister Yitzhak Rabin¹ and Palestinian Liberation Organization [PLO] Chairman Yasser Arafat shook hands and exchanged hesitant smiles at the signing of the Declaration of Principles² on the White House lawn.

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1. In an act unprecedented in Israel's history, Prime Minister Yitzhak Rabin was assassinated on November 4, 1995 by a young religious extremist. See Raine Marcus, et al., *Rabin Assassinated: Pronounced Dead at 11:15 P.M. After Being Shot*, JERUSALEM POST, Nov. 5, 1995, at 1; Raine Marcus & Herb Keinon, *Assassin: God Told Me To Kill Rabin*, JERUSALEM POST, Nov. 5, 1995, at 1.

2. *Israel-Palestine Liberation Organization Declaration of Principles on Interim Self-Government Arrangements*, Sept. 13, 1993, 32 I.L.M. 1525 (1993) [hereinafter DOP]. For a discussion of the various aspects of the DOP, see Eyal Benvenisti, *The Israeli-Palestinian Declaration of Principles: A Framework For Future Settlement*, 4 EUR. J. INT'L L. 542 (1993); Raja Shihadeh, *Can the Declaration of Principles Bring About a "Just and Lasting Peace?"* 4 EUR. J. INT'L L. 555 (1993); Antonio Cassese, *The Israel-PLO Agreement and Self-Determination*, 4 EUR. J. INT'L L. 564 (1993); N.K. Calvo-Goller, *Le Regime D'Autonomie Prevü Par La Declaration De Principes Du 13 Septembre 1993*, XXXIX Ann. Fr. D. I. 435 (1993); Joel Singer, *The Declaration of Principles on Interim Self-Government Arrangements*, 1 JUSTICE 4 (1994) (published by the International Association of Jewish Lawyers and Jurists); Note, *The Israel-PLO Declaration of Principles: Prelude to a Peace?*, 34 VA. J. INT'L L. 435 (1994); Justus R. Weiner, *Hard Facts Meet Soft Law—The Israeli-PLO Declaration of Principles and The Prospects for Peace: A Response to Katherine W. Meighan*, 35 VA. J. INT'L L. 931 (1995). Regarding other issues relating to the peace process and the interim agreements con-

Under the aegis of Russia and the United States, old enemies pledged to forego military action and terrorist violence and settle their differences through negotiation and compromise. This new reality has forced both Israelis and Palestinians to challenge long-held convictions and set in motion a process which may lead to the resolution of a seemingly intractable conflict.³

Security and economic development are widely recognized as essential prerequisites for the furtherance of the Israeli-Palestinian peace process. Scant attention, however, has been given to the critical issue of human rights. This neglect of human rights exists despite the fact that recent decades have witnessed dramatic advancements in the legal safeguards for human rights and a commensurate growth in public expect-

cluded thus far between Israel and the PLO, *see generally* "The Peace Process," 38 ISR. L. REV. 207 (1995); RUTH LAPIDOTH, *THE PEACE PROCESS IN THE MIDDLE EAST: A STOCKTAKING, JERUSALEM LETTER/VIEWPOINTS* (1995) (issued by the Jerusalem Center for Public Affairs).

Thus far, five agreements have been concluded between Israel and the PLO. First, the DOP sets out the overall framework for negotiations with the objective of reaching interim and permanent status agreements. Second, the Israel-Palestine Liberation Organization Agreement on the Gaza Strip and the Jericho Area, May 4, 1994, 33 I.L.M. 622 (1994) [hereinafter *Cairo Agreement*] provides for the withdrawal of Israeli administration and military forces from most of the area and the transfer of most local powers to the Palestinian Authority. Thereafter, the Israel-PLO Agreement on Preparatory Powers and Responsibilities, Aug. 29, 1994, 34 I.L.M. 455 (1995) [hereinafter *Erez Agreement*], allows for the transfer of powers to the Palestinian Authority in certain limited spheres such as health, social welfare and education in the parts of the West Bank outside of the Jericho area.

A subsequent agreement, The Protocol on Further Transfer of Powers and Responsibilities [hereinafter *Further Transfer Protocol*] signed in Cairo on Aug. 27, 1995, provides for the transfer of powers in the West Bank to the Palestinian Authority in the spheres of labor, industry and commerce, gas, petroleum, agriculture, local government, statistics, and postal services.

Shortly thereafter, a major agreement, The Israeli-Palestinian Interim Agreement on the West Bank and Gaza Strip [hereinafter *Oslo II Agreement*] was signed at the White House on Sept. 29, 1995. Constituting the final interim agreement, it largely supercedes all previous interim agreements between the parties, including the Cairo and Erez Agreements.

3. The DOP was ratified by the PLO's Central Council which functions as a steering committee for the PLO's legislature. Nora Boustany, *PLO Council Ratifies Pact; Accord with Israel Accepted After Heated Debate*, WASH. POST, Oct. 12, 1993, at A12. The Israeli Parliament voted to approve the DOP shortly after it was signed. *See* John Kifner, *Israel's Parliament Backs P.L.O. Accord*, 61 to 50, N.Y. TIMES, Sept. 24, 1993, at A1.

tations that human rights will be protected. In the words of McGill University Law Professor Irwin Cotler, "human rights has emerged as the secular religion of our time, as an organizing idiom of the contemporary political culture."⁴

With the advent of Palestinian autonomy, administered in the interim by the Palestinian Authority⁵ [PA] in the Gaza Strip and areas in the West Bank, a number of new and complex human rights questions have arisen. Three of these questions are particularly urgent. First, how can human rights be protected if the PA lacks the ability of a sovereign state to ratify international human rights instruments?⁶ Second, to what extent is Israel, as the military occupier, responsible for enforcement of human rights within areas subject to the authority of the PA?⁷ Third, will the Israeli Supreme Court sitting as the High Court of Justice step into the legal vacuum created by the

4. Irwin Cotler, *Human Rights in the New International Legal Order, Israel in the New World Order: Third Annual Public Policy Day June 21, 1991*, at 51, 52 (1992) (on file with the Jerusalem Center for Public Affairs).

5. The PA was 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 "PNA," a title which reflects their national aspirations but does not appear in the accords. Joel Singer, former Legal Advisor of the Israeli Ministry of Foreign Affairs and senior legal negotiator in the talks with the Palestinians, commented that the term PNA is without any legal foundation since it does not appear in the Cairo Agreement. Joel Singer, lecture given at the Beit Ha'praklit in Tel Aviv (Mar. 16, 1995). Articles I and III of the DOP, *supra* note 2, provided for the general political elections held in the West Bank and Gaza Strip for the establishment of a Palestinian Interim Self-Government Authority, the elected Council, which officially replaced the Palestinian Authority. In addition, the Oslo II Agreement, *supra* note 2, also provides for the simultaneous election of the Executive Authority's chairman.

6. In the 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 differed. Palestinian concepts of human rights have been closely connected to the principle of self-determination within the context of foreign occupation. This collective interpretation of human rights yields a new emphasis on individual rights within Palestinian society. Put simply, Israel will no longer be regarded as the major constraint to the implementation of human rights.

7. For an analysis of Israel's responsibility as an occupier of the West Bank and Gaza Strip within the framework of the Camp David agreements, *see* Theodor Meron, *West Bank and Gaza: Human Rights and Humanitarian Law in the Period of Transition*, 9 ISR. Y.B. HUM. RTS. 106 (1979).

partition of authority under the Agreements and attempt to protect human rights?

Surprisingly, the topic of individual human rights does not appear in the DOP.⁸ Chairman Arafat's historic September 9, 1993 letter to Prime Minister Rabin, which made possible the breakthrough in relations, merely states that "[t]he 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."⁹ Arafat's commitment that the PLO will refrain from acts of terrorism against Israeli targets addresses a major human rights issue. Indeed, Israeli citizens have a right to life under international human rights law.¹⁰ Since the signing of the DOP, this fundamental human right has been repeatedly violated as civilians were the victims of terrorist attacks perpetrated by Hamas and Islamic Jihad.¹¹

Although the Agreements do not specify how individual human rights will be safeguarded, they do include a number of provisions stating that human rights norms are to be observed by the parties throughout its implementation. Thus, the issue of human rights does appear in the Cairo Agreement, albeit in a brief and vague formulation. 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.¹²

8. The collective rights of the Palestinians are addressed in the DOP. Article III states that the Council elections "will constitute a significant interim preparatory step toward the *realization of the legitimate rights of the Palestinian people* and their just requirements." DOP, *supra* note 2, art. III.3.

9. PLO Chairman Yasser Arafat's Letter to Israeli Prime Minister Yitzhak Rabin, Sept. 9, 1993 (emphasis added).

10. See, e.g., Universal Declaration of Human Rights, G.A. Res. 217A (III), art. 3 at 71, U.N. Doc. A/810 (1948); International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI), U.N. GAOR, 21st. Sess., Supp. No. 16 at 52, U.N. Doc. A/6316, art. 6 (1966).

11. See *infra* note 156.

12. Cairo Agreement, *supra* note 2, art. XIV. Other equally vague references to human rights are found in annexes of the Cairo Agreement on the subjects of transferred suspects (Annex III, art. II.7.h.) and the use of force by security personnel (Annex I, art. VIII.1).

The Oslo II Agreement uses similar language on human rights. Article XIX, for example, states that:

Israel and the Council 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.¹³

Without making reference to particular international norms or their conventional or customary law sources, it is very difficult to ascertain the meaning of this provision. One interpretation that an activist Israeli Supreme Court, sitting as the High Court of Justice, might make, is that Article XIV obligates the court to accept jurisdiction and issue rulings in the interest of preserving the "norms and principles of human rights and the rule of law."¹⁴ Whether the High Court is the institution, or one of several of the institutions that is intended to "exercise their powers"¹⁵ is certainly open to argument.

Unfortunately, these and other new issues have thus far been largely ignored by Israel, the PLO, local and international human rights organizations, the media, foreign governments, and the United Nations. It would be a tragic irony if concern for human rights which contributed heavily to reaching the September 1993 political breakthrough between Israel and the PLO, were to be considered obsolete or politically irrelevant as the peace process unfolds.

This article is divided into seven sections. Section I offers a brief overview on the application of human rights standards embodied in international law to the areas captured by Israel during the Six-Day War of 1967. The second section examines the expanded role of the Israeli Supreme Court in protecting human rights and the rule of law. Section III considers the nature and extent of Israel's continued human rights responsibilities beyond its pre-1967 borders, principally in the Palestinian autonomous region. This is followed by Section IV which,

In the Oslo II Agreement similar language on human rights appears in Article XIX: "Israel and the Council 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." Oslo II Agreement, *supra* note 2, art. XIX.

13. Oslo II Agreement, *supra* note 2, art. XIX. See Cairo Agreement, *supra* note 2, Annex I, art. XI.1, Annex IV, art. II.7.h.

14. Cairo Agreement, *supra* note 2, art. XIV.

15. Cairo Agreement, *supra* note 2, art. XIV.

by juxtaposing the literal language of the Agreements with the dynamics of the peace process, analyzes the apportionment of authority in the Gaza Strip, Jericho, and additional areas in the West Bank between Israel and the PA. Section V makes the argument that under international law the PA's violations of human rights can be attributed to Israel. The sixth section evaluates the scrutiny of the PA's human rights policies by local and international human rights organizations. Section VII addresses hypothetical challenges to human rights during the interim period and suggests approaches to their resolution that the Israeli judiciary could implement. The article closes with the author's conclusions and outlook.

I. AN OVERVIEW OF INTERNATIONAL HUMAN RIGHTS STANDARDS AS APPLIED TO THE WEST BANK AND GAZA STRIP SINCE 1967

The two primary sources of international law relevant to the humanitarian rights of populations in occupied territories are the Hague Regulations of 1907¹⁶ and the Fourth Geneva Convention of 1949.¹⁷ Essentially, these international instruments seek to ensure the humane treatment of occupied populations while simultaneously balancing their needs with those of the occupier.¹⁸ Whereas the Hague Regulations have indubitably attained the status of customary international

16. Annex to The Hague Convention of 1907 (IV) Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539 [hereinafter Hague Regulations].

17. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention].

18. For a brief summary of the general purposes of the law of occupation, see Adam Roberts, *Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967*, 84 AM. J. INT'L L. 44, 45-47 (1990). Dan Simon observed that, "[g]enerally speaking, belligerent occupation law is designed to balance an occupying power's interest in governing a region effectively and securely, with its obligation to protect the interests of the civilian population. The law aims ultimately to regulate and mediate the tension between military necessity and human rights." Dan Simon, *The Demolition of Homes in the Israeli Occupied Territories*, 19 YALE J. INT'L L. 1, 19 (1994).

law,¹⁹ the latter's binding character on all states and in all circumstances remains in dispute.²⁰

By virtue of its control of the West Bank and Gaza Strip, Israel is obligated under international law to carry out administrative functions and to maintain order. Article 43 of the Hague Regulations sets forth the core principle as follows:

The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all measures in his power to restore, and ensure, as far as possible, *public order and safety*²¹

Although Israel is a party to the Fourth Geneva Convention, the Knesset (Parliament) has yet to legally incorporate it into its internal law.²² Therefore, actions taken by the Israeli Military Forces in the West Bank and Gaza Strip may not be reviewed by Israeli courts solely because of an alleged incompatibility with the state's obligations in the international arena.²³ Former Israel Attorney General Meir Shamgar (who

19. Theodor Meron has written that "the customary law status of the Regulations annexed to the Convention is universally recognized." THEODOR MERON, *HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW* 226 (1989). See judgments issued by the International Military Tribunals in Nuremberg, 41 AM. J. INT'L L. 172, 248-49 (1947), and Tokyo, 15 I.L.R. 356, 365-66.

20. See Theodor Meron, *The Geneva Conventions as Customary Law*, 81 AM. J. INT'L L. 348 (1987). For a discussion of the declarative or constitutive character of the Fourth Geneva Convention, see Eli Nathan, *The Power of Supervision of the High Court of Justice Over Military Government*, in *MILITARY GOVERNMENT IN THE TERRITORIES ADMINISTERED BY ISRAEL 1967-1980: THE LEGAL ASPECTS* 109, 137-40 (Meir Shamgar ed., 1982).

21. Hague Regulations, *supra* note 16, art. 43 (emphasis added).

22. The Fourth Geneva Convention has been incorporated into standing orders governing the conduct of soldiers serving in the West Bank and Gaza Strip. See General Staff Orders of the Israeli Defense Forces, Appendices No. 61-62 (1955), Order 33.01333 (July 30, 1982).

23. H.C. 785/87, 845/87, 27/88, *Affo v. IDF Commander of Judea and Samaria*, 42(2) P.D. 4, 38. In the *Abu-Acta* case President Shamgar gave the following definition of an international custom:

Essentially, what is meant is a general practice which has acquired *binding* legal force . . . ; general practice means a stable, general and consistent mode of action—as opposed to temporary or casual phenomena—which is accepted by the overwhelming majority of those who are active in the said area of law. In other words, the source of the existence of international custom are its subjects, that they are under a legal obligation to act in the manner determined by accepted custom.

recently retired as President of the Israeli Supreme Court) announced in 1971 that his government's administration of the territories would be in accordance with the humanitarian provisions of the Fourth Geneva Convention on a de facto basis.²⁴ While in the final analysis the application of the Fourth Geneva Convention may hinge more on political factors²⁵ than legal arguments,²⁶ it is worth noting that among the many states that have captured territory in recent decades, only

H.C. 69/81, *Abu-Acta v. Commander of the Judea and Samaria Region*, 37 P.D. 197, 238-239, excerpted in *Judicial Decisions: Judgments of the Supreme Court of Israel*, 13 ISR. Y.B. HUM. RTS. 348 (1984). See also Yoram Dinstein, *The International Law of Belligerent Occupation and Human Rights*, 8 ISR. Y.B. HUM. RTS. 104, 108 (1978); Natan Feinberg, *Declaratory and Constitutive Treaties in International Law*, 24 HA PRAKLT 433, 443 (1967-68). The rationale for the distinction between customary and conventional international law and the judiciary's willingness to apply only the former in the absence of incorporation into the internal legal system stems from the separation of powers doctrine. See H.C. 785/87, 845/87, 27/88, *Affo v. IDF Commander of Judea and Samaria*, 42(2) P.D. 4.

24. This has been Israel's policy despite the probable irrelevance of the Fourth Geneva Convention to Israel's presence in the West Bank and Gaza Strip. This is due primarily to Article 2 of that Convention which limits its applicability to "occupation of the territory of a High Contracting Party." Fourth Geneva Convention, *supra* note 17, art. 2. Neither Egypt nor Jordan acquired sovereign rights due to their having taken control of the West Bank and Gaza Strip in 1948-1949 via a war of aggression. Thus this basic prerequisite for applicability was not met. See, e.g., Meir Shamgar, *The Observance of International Law in the Administered Territories*, 1 ISR. Y.B. HUM. RTS. 262 (1971); Yehuda Z. Blum, *The Missing Reversioner: Reflections on the Status of Judea and Samaria*, 3 ISR. L. REV. 279 (1968).

25. At least since 1977, successive Israeli governments, including the government of the late Prime Minister Rabin and his successor Shimon Peres, have maintained that the state's presence in the West Bank and Gaza Strip is not a belligerent occupation under the Fourth Geneva Convention and therefore, the Convention should not apply *de jure*. See Roberts, *supra* note 18, at 62-63. Rejection of the *de jure* applicability of the Fourth Geneva Convention has been advanced over the years by various senior Israeli government officials, including then Foreign Minister Moshe Dayan and then United Nations ambassador Chaim Herzog. See Nissim Bar-Yaacov, *The Applicability of the Laws of War Judea and Samaria (The West Bank) and to the Gaza Strip*, 24 ISR. L. REV. 485, 488-89 (1990).

26. A difference of opinion has existed between successive Israeli governments and the Israeli Supreme Court regarding the applicability of the two above-mentioned treaties to the Israeli military's presence in the West Bank and Gaza Strip. See Bar-Yaacov, *supra* note 25.

Israel has undertaken to apply the Fourth Geneva Convention on even a de facto basis.²⁷

II. THE ROLE OF THE HIGH COURT OF JUSTICE

The Israeli Supreme Court's role in protecting human rights and the rule of law has not been limited to oversight of official conduct within Israel. Especially in recent years, activist justices have construed the court's jurisdiction broadly, scrutinizing a wide range of conduct by agencies and persons acting in the name of or under authority delegated by the state but beyond the pre-1967 borders. These developments and their significance to the possibility that the court could entertain petitions against instrumentalities of the PA are the topic of this section.

A. The Powers of the Supreme Court

The Supreme Court of Israel functions in two capacities. Its first role is as a court of appeals reviewing decisions rendered by the district courts. The Supreme Court's second function, which is central to the ensuing discussion, is to sit as the High Court of Justice.²⁸ The court's powers when fulfilling this latter function are set out in paragraphs 15(c) and (d) of Basic Law: Judiciary:

(c) The Supreme Court shall sit also as a High Court of Justice. When so sitting, it shall hear matters in which it deems it necessary to grant relief for the sake

27. See Yoram Dinstein, *Expulsion of Mayors from Judea*, 8 TEL AVIV L. REV. 158, 167-68 (1981); Oliver M. Ribblink, *Palestinian Higher Education in the West Bank: Academic Freedom and Int'l Law*, AMSTERDAM INT'L STUDIES 12, 19 (1990) (Department of International Relations and Public International Law, University of Amsterdam). See also Professor Adam Roberts' comments:

Israel deserves credit for acknowledging openly, albeit inadequately, the relevance of international legal standards. Its position contrasts with those of the many occupying powers in the past 40 years that have avoided expressing any view on the applicability of international legal agreements: such powers have included the Soviet Union in Hungary (1956), Czechoslovakia (1968), Afghanistan (1979); and South Africa in Namibia.

Roberts, *supra* note 18, at 63.

28. Basic Law: Judiciary, sec. 15, 1984, 1110 S.H. 78, as amended by 1992, 1383 S.H. 72 [hereinafter Basic Law: Judiciary].

of justice and which are not within the jurisdiction of another court.

(d) Without prejudice to the generality of the provisions of subsection (c), the Supreme Court sitting as a High Court of Justice shall be competent:

(1) to make orders for the release of persons unlawfully detained or imprisoned.

(2) to order State and local authorities and the officials and bodies thereof, and other persons carrying out public functions under law, to do or refrain from doing any act in the lawful exercise of their functions or, if they were improperly elected or appointed, to refrain from acting;

(3) to order courts and bodies and persons having judicial or quasi-judicial powers under law, other than courts dealt with by this Law and other than religious courts, to hear, refrain from hearing, or continue hearing a particular matter or to void a proceeding improperly taken or a decision improperly given;²⁹

This provision authorizes the court to assert supervisory jurisdiction over bodies or persons exercising public, judicial, or quasi-judicial functions.³⁰ The large majority of petitions adjudicated by the court grant relief against persons "fulfilling public functions under law,"³¹ meaning the State or any of its administrative authorities, including the Israeli Defence Forces [IDF]. The court is granted jurisdiction over almost every power exercised by the executive branch and may order its officers "to do or refrain from doing any act in the lawful exercise of their functions."³² Jurisdiction is implemented by the use of writs analogous to *habeas corpus*, *mandamus*, *certiorari*, prohibition, and *quo warranto*. In addition, the court may also issue injunctions and declaratory judgments.³³

29. *Id.* at sec. 15 (c), (d).

30. *Id.* at sec. 15(d)(2), (3).

31. *Id.* at sec. 15(d)(2).

32. *Id.* at sec. 15(d)(2).

33. See Courts Law (Consolidated Version), sec. 75, 1984, 38 L.S.I. 271, (1983-84); Justus R. Weiner, *Terrorism: Israel's Legal Responses*, 14 SYR. J. OF INT'L L. & COM. 183, 197-99 (1987).

B. The Supreme Court's Application of the Law of Occupation

The Israeli Supreme Court has not refrained from characterizing Israel's rule over the West Bank and Gaza Strip as an exercise of belligerent occupation³⁴ under international law. The court's review of the IDF's operations in the West Bank and Gaza Strip is mainly grounded in the rules of the Hague Regulations together with the rules of administrative law, since it views only the Hague Regulations and not the Fourth Geneva Convention as constituting customary law that is applicable in Israeli courts.³⁵ That is not to imply that the Fourth Geneva Convention is totally absent from the Supreme Court's reasoning when adjudicating cases touching upon the law of occupation.³⁶ Indeed, even though it has never based a decision solely on the Convention, its text has often been discussed in considerable detail in the process of reaching a decision.³⁷ Since a thorough analysis of the Israeli Supreme Court's treatment of the Fourth Geneva Convention is beyond the scope of this article, suffice it to note that the court has examined pertinent articles of the Convention in numerous contexts, including motions for family reunification, petitions for the establishment of an appellate instance above the military tribunals in the West Bank and Gaza Strip, petitions contesting the legality

34. See, e.g., H.C. 390/79, Mustafa Dweikat v. The Government of Israel, 34(1) P.D. 1, 13, excerpted in *Judicial Decisions of the Supreme Court of Israel*, 9 ISR. Y.B. HUM. RTS. 349, 349-50 (1980).

35. H.C. 606/78, Ayub et al. v. Minister of Defence, 33(2) P.D. 113, excerpted in *Judicial Decisions of the Supreme Court of Israel*, 9 ISR. Y.B. HUM. RTS. 337, 337-341 (1979); H.C. 390/79, Mustafa Dweikat v. The Government of Israel, 34(1) P.D. 1, excerpted in *Judicial Decisions of the Supreme Court of Israel* 9 ISR. Y.B. HUM. RTS. 345 (1980); H.C. 69/81, Abu-Acta v. Commander of the Judea and Samaria Region, 37(2) P.D. 197, excerpted in *Judicial Decisions of the Supreme Court of Israel*, 13 ISR. Y.B. HUM. RTS. 348 (1984).

36. A well-established canon of interpretation in Israeli case-law is the assumption that the legislature does not intend to derogate from the international obligations of the state, including those based on their engagements by treaty, unless a conflicting intention is expressly present in the text. See, e.g., H.C. 302, 306/72, Hilu v. State of Israel, 27(2) P.D. 169, 177.

37. See, e.g., H.C. 785/87, 845/87, 27/88, Affo v. IDF Commander of Judea and Samaria, 42(2) P.D. 4, 38. However, the court appears somewhat ambivalent in its stance regarding the weight of the Fourth Geneva Convention. Perhaps this ambiguity stems from a reluctance to overstep the limits of the judicial function and interfere with the conduct of foreign relations by the executive. See Bar-Yaacov, *supra* note 25, at 499.

of confiscation of property, and petitions against expulsion from the West Bank and Gaza Strip.³⁸

C. *The High Court of Justice's Jurisdiction in the West Bank and Gaza Strip*

The High Court of Justice's jurisdiction to consider petitions from the West Bank and the Gaza Strip stems not from a territorial basis, but rather from the court's authority over the Military Commander of the IDF as a member of the executive branch of government fulfilling a public duty under Israeli Law.³⁹ Indeed, the internationally recognized rule⁴⁰ which is followed by Israel,⁴¹ posits that the jurisdiction of the national courts extends only to the territories over which the State enjoys sovereignty.⁴² The West Bank and the Gaza Strip have never been claimed to be a part of the territory of the State of Israel.⁴³ Thus, the legal basis of the court's authority is of an exclusively personal (rather than a territorial) nature, applying only to acts by agents of Israel.⁴⁴ As such, the court enjoys full

38. See LAPIDOTH, *supra* note 2.

39. See generally Nathan, *supra* note 20; UZI AMIT-KOHN ET AL., ISRAEL, THE "INTIFADA" AND THE RULE OF LAW 59-83 (1993). At first, the question of whether the court had jurisdiction to hear a petition against an act of the military government in the West Bank and Gaza Strip was deliberately set aside since the Government did not argue the question. Thus, in H.C. 302, 306/72, Hilu v. State of Israel, 27(2) P.D. 169, 176, Justice Landau decided to, "presume on this occasion also, without making any ruling, that the jurisdiction exists *rationae personae* against the officials in the Military Administration who belong to the Executive Branch of the State" With time, however, this presumption became law, and the jurisdiction of the court over activities conducted in the West Bank and Gaza Strip became firmly entrenched. See H.C. 393/82, Jamait Askan v. Commander of Judea and Samaria, 37(4) P.D. 785.

40. The exercise of this personal jurisdiction is well founded in international law; see Nathan, *supra* note 20, at 112.

41. For an expression of this principle in Israeli law, see Courts Law, 1957, 11 L.S.I. 157, (1956-57).

42. See, e.g., GERHARD VON GLAHN, OCCUPATION OF ENEMY TERRITORY: A COMMENTARY ON THE LAW AND PRACTICE OF BELLIGERENT OCCUPATION 213 (1957).

43. Haim H. Cohen, *Forward*, in INTERNATIONAL COMMISSION OF JURISTS (ISRAEL NATIONAL SECTION), THE RULE OF LAW IN THE AREAS ADMINISTERED BY ISRAEL vii (1981).

44. See, e.g., H.C. 393/82, Jamait Askan v. Commander of Judea and Samaria, 37(4) P.D. 785, excerpted in *Judicial Decisions of the Supreme Court of Israel*, 14 ISR. Y.B. HUM. RTS. 301 (1984), in which Justice Barak furnished

jurisdiction to supervise acts committed by members of the IDF, whether they are executed within the territorial boundaries of Israel or not.⁴⁵

The judicial review of the IDF's actions in the West Bank and Gaza Strip, initiated by petitions brought to the court by the region's inhabitants, is conducted pursuant to the principles of Israeli administrative law as well as customary international law.⁴⁶ Palestinians, utilizing the same procedure as citizens of Israel, have been granted access to an affordable and immediate forum to challenge actions of the military government.⁴⁷

Although the petitions lodged by residents of the West Bank and Gaza Strip with the court are seldom completely suc-

the legal foundation for the court's jurisdiction in the West Bank and Gaza Strip:

[T]oday there [are no] doubts concerning the rule by which the Supreme Court, sitting as the High Court of Justice, has jurisdiction to exercise judicial review over the acts of the Military Government in Judea, Samaria and the Gaza Strip [I]n accordance with the provision of [Article 15 of the Basic Law: Judiciary], the right of review is vested in this Court. The reason . . . is that the Military Commander and his subordinates are public servants, fulfilling a public function under law.

H.C. 393/82, Jamait Askan v. Commander of Judea and Samaria, 37(4) P.D. 785, 809.

45. For the same reason, the court has considered on the merits petitions touching upon activities conducted by the IDF in Lebanon. See H.C. 102/82, 150/82, 593/82, 690/82, 271/83, Tsemel v. Minister of Defence, 37(3) P.D. 365; H.C. 574/82, Al-Nawar v. Minister of Defence, 39(3) P.D. 449.

46. Justice Barak, in Jamait Askan v. Commander of Judea and Samaria, 37(4) P.D. 785, stated:

Judicial review by this Court extends both to an examination of the existence of a formal source for the authority of the Military Government (whether in local law or in security legislation) and to the manner by which this authority is exercised. This last review has been made both in the light of the rules of customary international law and in the light of Israeli administrative law. From this point of view, it may be said that every soldier carries with him in his pack the rules of customary public international law dealing with the laws of war, and the basic rules of Israeli administrative law.

Id. at 810.

47. See MOSHE NEGBI, JUSTICE UNDER OCCUPATION: THE ISRAELI SUPREME COURT VERSUS MILITARY ADMINISTRATION IN THE OCCUPIED TERRITORIES 12 (1981); Esther R. Cohen, *Justice for Occupied Territory? The Israeli High Court of Justice Paradigm*, 24 COLUM. J. TRANSNAT'L L. 471, 473 (1986); Nathan, *supra* note 20, at 110.

cessful,⁴⁸ the effectiveness of this institution in preserving their rights should not be underrated.⁴⁹ In many cases the petitioners are initially successful in obtaining an order *nisi* against the military government and summoning it to appear before the court to justify its action. This causes a delay in the implementation of the contested measure during which the authorities, perhaps fearing a possible adverse precedent, may reevaluate their conduct or decision prompting an out of court settlement with the petitioner.⁵⁰ In other instances the court may refuse to grant a petition for lack of legal grounds, while expressing its recommendation to the respondent governmental agency that the petitioner's request should be granted.⁵¹ Such 'recommendations' are taken seriously.⁵²

Sometimes the temporary order issued by the court creates the necessary climate for pressure to be exerted on the authorities by actors from the Israeli or international political arenas.⁵³ The potential for media attention that is typically given to such petitions also contributes to the protection of the rule of law. However, the most significant, yet least discernable, impact of the High Court of Justice's oversight may

48. See Ronen Shamir, "Landmark Cases" and the Reproduction of Legitimacy: *The Case of Israel's High Court of Justice*, 24 L. & SOC'Y REV. 782 (1990); MENACHEM HOFNUNG, ISRAEL—SECURITY NEEDS VS. THE RULE OF LAW 322-23 (1991); Simon, *supra* note 18, at 24.

49. See generally HOFNUNG, *supra* note 48, at 322-25; SHIMON SHETREET, JUSTICE IN ISRAEL: A STUDY OF THE ISRAELI JUDICIARY 488-93 (1994).

50. See, e.g., H.C. 507/85, Tamimi v. The Minister of Defence, 41(4) P.D. 57. It is also noteworthy that no precedent can be found in the history of occupying nations for granting the residents of the occupied territory access to the highest court of the occupier. See HOFNUNG, *supra* note 48, at 323; Cheryl V. Reicin, *Preventive Detention, Curfews, Demolition of Houses, and Deportations: An Analysis of Measures Employed by Israel in the Administered Territories*, 8 CARDOZO L. REV. 515, 532 (1987); ISRAELI MINISTRY OF JUSTICE HUMAN RIGHTS AND INTERNATIONAL RELATIONS DEPARTMENT, ISRAEL'S USE OF ADMINISTRATIVE DETENTION, File No. 164.1-549(2), at 3 (Aug. 31, 1993).

51. See, e.g., H.C. 81/85, Arjub v. Commander of the IDF, 42(1) P.D. 353. Although the court dismissed the petition seeking a right to appeal against a judgment of a military court in the West Bank and Gaza Strip, it nonetheless voiced its criticism of the government in this respect, recommending that it grant the petitioner the right anyway. See also Kawasmeh v. Minister of Defence, 35(1) P.D. 617; H.C. 253/88, Sejdiah v. Minister of Defence, 42(3) P.D. 801.

52. See SHETREET, *supra* note 49, at 463.

53. See the attempted deportation in 1979 of Bassam Shaka, Mayor of Nablus, related by NEGBI, *supra* note 47, at 93-100.

well be the prophylactic effect of the court's jurisprudence vis-a-vis conduct of the authorities in the exercise of their discretion. Accordingly, the "sword of judicial review"⁵⁴ hangs over the military government in the West Bank and Gaza Strip and ensures a measure of protection for the inhabitants' rights, as well as the rule of law.⁵⁵

D. The Expanded Judicial Function

1. Significant Developments In Recent Years

As noted above, the High Court of Justice has the authority by law to review all administrative actions undertaken by the executive branch of government. By the same token, the exercise of this power by the court is restricted by the principle of separation of powers. Accordingly, the judiciary must respect the executive's domain and not interfere unduly in its affairs. To this end, a number of threshold tests have been imposed by the court. If they are not met by the petitioner, he is refused a hearing on the merits. The two major threshold tests are justiciability⁵⁶ and standing.⁵⁷

a. Justiciability

According to the doctrine of justiciability, certain matters should not be dealt with by the courts since they are not suitable for judicial determination. Three categories predominate in cases where justiciability is an issue: subjects of a predominantly political nature, matters touching upon the executive's discretion in the realm of foreign relations, and operations of the military.

In recent years the standards of justiciability in Israel have undergone significant development.⁵⁸ As a result of change in

54. SHETREET, *supra* note 49, at 493.

55. SHETREET, *supra* note 49, at 493. See Justus R. Weiner, *Human Rights in the Israeli Administered Areas during the Intifada: 1987-1990*, 10 WIS. INT'L L. J. 185, 212 (1992).

56. See generally Ariel Ben-Dor, *Justiciability in the High Court of Justice*, 17 MISHPATIM 592 (1987).

57. See generally ZEEV SEGAL, *STANDING BEFORE THE SUPREME COURT SITTING AS THE HIGH COURT OF JUSTICE* (2d ed. 1993).

58. See generally David Kretzmer, *Forty Years of Public Law*, 24 ISR. L. REV. 341 (1990), and, in response, Itzhak Zamir, *Administrative Law: Revolution or Evolution?*, 24 ISR. L. REV. 356 (1990).

the attitude of the Supreme Court sitting as the High Court of Justice,⁵⁹ far fewer issues have been exempted from judicial review. Increasingly, subjects which in the past⁶⁰ were judged inappropriate for judicial resolution have been subjected to the court's scrutiny.⁶¹

In 1988 the court rendered a landmark decision on justiciability, *Ressler v. Minister of Defence*.⁶² The issue before the court was the controversial exemption from compulsory military service enjoyed by religious seminary students pursuant to the administrative discretion of the Minister of Defense. Although in other cases the court previously had ruled this matter non-justiciable, the court in *Ressler* held otherwise and proceeded to examine the decision of the Minister of Defence on the merits.

In so doing, a distinction was drawn by the court between *normative* and *institutional* justiciability.⁶³ It ruled that a dispute is normatively justiciable if there exist legal standards for its resolution. Since the court is of the view that all activities conducted by the public authorities are governed, in one way or another, by the law, it ensues that all disputes brought

59. For an analysis of the factors prompting the adoption of a more activist posture by the court, see Itzhak Zamir, *Courts and Politics in Israel*, PUB. L. 523, 533-37 (1991); SHETREET, *supra* note 49, at 387-89, 449-53.

60. For the old rules laid down by the court with respect to the doctrine of justiciability, see H.C. 65/51, *Jabotinsky v. Weizmann*, 5 P.D. 801; H.C. 165/65, *Reiner v. Prime Minister*, 19(2) P.D. 485; H.C. 561/75, *Ashkenazi v. Minister of Defence*, 30(3) P.D. 309.

61. The last fifteen years have seen the court deal with the lawfulness of decisions taken on issues such as the enactment of summer daylight savings time, H.C. 217/80, *Segal v. Minister of Interior*, 34(4) P.D. 429; the exemption from military service granted to students of rabbinical seminaries H.C. 910/86, *Ressler v. Minister of Defence*, 42(2) P.D. 441; a pardon accorded by the President to the heads of the General Security Service, H.C. 320/86, *Barzilai v. Government of Israel*, 40(3) P.D. 505; the allocation of time on national radio and television for electoral propaganda, H.C. 246/81, *Agudath Derech Eretz v. Broadcasting Authority*, 35(4) P.D. 1; the decision of the Knesset Speaker fixing the date for a vote of no confidence, H.C. 652/81, *Sarid v. Speaker of the Knesset*, 36(2) P.D. 197; budgetary allocations to rabbinical seminaries, H.C. 780/83, *Yeshivat Tomchei Temimim v. State of Israel*, 38(2) P.D. 273; and the decision of the military censor prohibiting publication of information pertaining to the Chief of the Institute for Intelligence and Special Operations (the 'Mossad'), H.C. 680/88, *Schnitzer v. Chief Military Censor*, 42(4) P.D. 617.

62. H.C. 910/86, *Ressler v. Minister of Defense*, 42(2) P.D. 441.

63. *Id.*

before the judiciary will meet this criterion.⁶⁴ Institutional justiciability, on the other hand, refers to the question whether the court is the appropriate institution for adjudicating the dispute. Put another way, perhaps the nature or the subject of a dispute is such that it is incumbent upon other governmental institutions, such as the Knesset, the executive, or their extensions, to resolve such matters.⁶⁵ With regard to the criteria of institutional justiciability, views were split among the justices of the court.

Justice Aharon Barak, who was recently elevated to President (a position roughly analogous to Chief Justice) of the court, opined that it is incumbent upon the court to determine the lawfulness of all actions taken by government authorities.⁶⁶ According to his viewpoint, even those disputes where the subject matter is closely related to another branch of government (i.e., of a political, military, or diplomatic nature), should be subject to judicial scrutiny and thus considered institutionally justiciable. Indeed, in Barak's view such an approach complements rather than negates the separation of powers doctrine, since it ensures that each branch of government fulfills its constitutional duty and that the law is constantly observed:

The significant issue is not the respect due this authority or another. The significant issue is respect for the law. As for me, I cannot see how insisting that a government authority respect the law can harm that authority or mar the relations between it and other authorities . . . [A]ccordingly, nothing in the separation of powers doctrine justifies negation of judicial review of governmental acts, whatever their character or content. To the contrary: the separation of powers principle justifies judicial review of government actions even if they are of a political nature, because it ensures that every authority acts lawfully within its own domain and thus ensures separation of powers.⁶⁷

64. *Id.*

65. See Ben-Dor, *supra* note 56, at 604-20.

66. See Ben-Dor, *supra* note 56, at 604-20.

67. H.C. 910/86, *Ressler v. Minister of Defense*, 42(2) P.D. 441.

Professor Shimon Shetreet⁶⁸ has stated that Justice Barak's expansive concept of the role of the judiciary is tantamount to abolishing the doctrine of justiciability in its entirety.⁶⁹ The mere presence of a legal controversy is sufficient to consider even a politically-charged issue as being justiciable. Indeed, Justice Barak stated in dicta that "[D]ecisions to go to war or to make peace [are] 'justiciable' decisions which may be 'contained' within a legal norm and a judicial hearing."⁷⁰

Then Supreme Court President Meir Shamgar (who was joined by the then Deputy President Miriam Ben-Porat) did not share Justice Barak's conception of justiciability. In Justice Shamgar's view, predominantly political matters should not be adjudicated by the court. Rather, they are to be resolved by the political branches of government, i.e., the executive and the legislature, whose function and activities make the government better equipped to deal with such questions:

As appears from the discussion by my esteemed colleague Justice Barak, there is no topic in the world as to which the questions of formal lawfulness and of reasonableness could not be asked; meaning, there is no topic which is not justiciable. The problem is that, quite frequently, the question is not merely endorsement of the existence or non-existence of a legal test . . . but rather a question arises which *essentially* relates to taking a stance on topics *which require a material decision by those who dealt with the matter*.⁷¹

Despite former President Shamgar's strong reservations with regard to political questions, it is nonetheless clear that

68. Former Member of the Knesset from the Labor Party and Minister of Religious Affairs.

69. SHETREET, *supra* note 49, at 383-84.

70. See H.C. 448/81, Ressler v. Minister of Defense, 36 (1) P.D. 66. A reference to the famous Marbury v. Madison, 5 U.S. 137 (1803) opinion of Justice John Marshall in one of Barak's books aptly named *Judicial Discretion* offers a revealing Freudian slip. In his ruling on another major case Justice Marshall established the principle of judicial review in America. Marshall wrote, "[w]e must never forget it is a constitution that we are expounding." *McCulloch v. Maryland*, 17 U.S. 316, 407 (1819). In Barak's treatise the word "expounding" was inadvertently replaced with the apt word "expanding." Peter Hirschberg, *The Lawgiver*, JERUSALEM REP., Aug. 24, 1995, at 14.

71. SHETREET, *supra* note 49, at 97 (emphasis added).

even according to his viewpoint, the doctrine of justiciability has been sharply circumscribed.⁷² Moreover, with the retirement of Shamgar, and Barak's assumption of duties of President of the Court, it appears that the latter's views are likely to be most influential in the future. This is in part because of the widely recognized view among lawyers and jurists in Israel that Barak is a genius, the outstanding legal scholar on the Supreme Court, and perhaps of this generation.⁷³ In addition, as distinct from the United States Supreme Court where all nine justices hear every case, most cases in Israel are heard by a panel comprised of three of the fourteen justices.⁷⁴ In fulfilling his role as President of the Court, it falls upon Barak to determine which justices are assigned to each case.⁷⁵ He therefore has unfettered discretion to appoint himself and others of like mind to hear precedent setting matters involving the availability and scope of judicial review. Finally, Barak's imprint on the judiciary will be extended well beyond the year 2006 when he reaches mandatory retirement as a result of his primary role on the committee that appoints and promotes judges at all levels.⁷⁶

b. *Standing*

A second critical threshold test applied by the High Court of Justice in order to determine whether or not to hear a petition is that of *locus standi*—standing to sue. In the past, the court only opened its gates to a petitioner who could show a personal interest in the matter.⁷⁷ This narrow approach has, however, long been abandoned. It is widely accepted today that where a constitutional question is at stake or where the issue is of a predominantly public nature, the court will not refrain from exercising its authority simply because the appli-

72. Kretzmer, *supra* note 58, at 343.

73. Hirschberg, *supra* note 70, at 12.

74. Courts Law, *supra* note 33, sec. 26.

75. Courts Law, *supra* note 33, sec. 27(a).

76. Courts Law, *supra* note 33, sec. 27(a).

77. See H.C. 40/70, Becker v. Minister of Defence, 24(1) P.D. 238; H.C. 448/81, Ressler v. Minister of Defence, 36(1) P.D. 81; H.C. 2/82, Ressler v. Minister of Defence, 36(1) P.D. 708. See generally, SEGAL, *supra* note 57.

cant lacks a direct interest in the case.⁷⁸ Furthermore, as Justice Barak emphasized in *Ressler*, "the more serious the alleged wrong in the authority's action, the more the dispute is of a public nature, and the fewer the number of people possessing a right and interest, because the problem is of a general public nature, the more the considerations in favor of recognizing the 'public petitioner' increase."⁷⁹

These developments in the court's application of the doctrines of standing and justiciability have brought about a momentous expansion in the function of the judiciary within the Israeli governmental system. According to the widely respected Professor Itzhak Zamir (now a Justice of the Supreme Court), the main reason for this drastic change is the court's self-conception as the guardian of the rule of law:

The court's role, according to the dominant opinion on the court itself, is not only to settle disputes between parties to a conflict. It is also to safeguard the rule of law. The rule of law is universal in the sense that all public bodies, without exception, must abide by it. And who is more suitable and competent than the court to ensure that the rule is observed? As one judge (Barak J.) put it, the court "is an organ of the State which must contribute its share in imposing the rule of law."⁸⁰

Thus, the prevailing conception of the court is that it is obliged to act to ensure that public bodies conduct themselves in accordance with the rule of law. As a result, the threshold tests of justiciability and standing have been truncated and the court will hear any petition that it considers to be in the public interest.⁸¹

2. Reasonableness

An additional aspect of the court's expanded scope of review is manifested in the evolution of a general doctrine of reasonableness. Decisions of governmental officials are sus-

78. See, e.g., H.C. 320/86, Barzilai v. Government of Israel, 40(3) P.D. 505; H.C. 852/86, Aloni v. Minister of Justice, 41(2) P.D. 1; H.C. 2/82, *Ressler v. Minister of Defence*, 36(1) P.D. 708.

79. H.C. 2/82, *Ressler v. Minister of Defence*, 36(1) P.D. 708.

80. Zamir, *supra* note 59, at 534.

81. Zamir, *supra* note 59, at 534.

ceptible to challenge on the grounds that they were poorly informed or thought out.⁸² Thus, virtually every official act is potentially subject to judicial examination on the merits, and even the findings of fact underlying the decision are subject to reevaluation by the court. As Justice Barak explained:

Frequently a number of reasonable courses of action exist, and then it is incumbent on the authority to choose that course of action which seems best to it, from among the reasonable courses of action ("the realm of reasonableness"). The boundaries of the realm of reasonableness are determined pursuant to the proper balance between the various interests and values which are struggling for primacy, and primarily the individual's interests and values on the one side, and the public's interest and values on the other . . . The determination of the reasonableness of the action is therefore not technical but substantive.⁸³

Other major High Court decisions which have expanded the court's jurisdiction under the rubric of 'reasonableness' include *Schnitzer v. Chief Military Censor*⁸⁴ and *Shofan et al. v. The Military Advocate General*.⁸⁵

The *Schnitzer* case, the particulars of which are discussed below,⁸⁶ gave Justice Barak the opportunity to develop the doctrine of reasonableness as a core concept of administrative law. Basing his opinion on the general principle that every administrative authority must operate within the framework of the purpose for which the law established the authority in question, Barak opined:

The number of possibilities available to the decision-maker may be great or small, but it is never unrestricted Deliberation assumes freedom of choice between legal options. Subjective delibera-

82. See H.C. 840/79, *Contractors and Builders Centre in Israel v. Government of Israel*, 34(3) P.D. 729; H.C. 389/80, *Golden Pages Ltd. v. Broadcasting Authority*, 35(1) P.D. 421; H.C. 2/82, *Ressler v. Minister of Defence*, 36(1) P.D. 708; H.C. 680/88, *Schnitzer v. Chief Military Censor*, 42(2) P.D. 617.

83. H.C. 2/82, *Ressler v. Minister of Defence*, 36(1) P.D. 708.

84. H.C. 680/88, *Schnitzer v. Chief Military Censor*, 42(4) P.D. 617.

85. H.C. 425/89, *Shofan et al. v. The Military Advocate General*, 43(4) P.D. 718.

86. See *infra* note 95.

tion assumes that the choice between options will be exercised through assessment of the nature of the options by the authorized person. This assessment must be made in accordance with the rules of administrative law. Thus the assessment must be made with sincerity, without arbitrariness or obfuscation, having consideration of all the relevant facts, and these facts only. Furthermore: assessment of the options and choice of the preferred option must be made reasonably Sometimes there exist a number of options, all of which are reasonable. There is created a 'range of reasonableness'. . . . It is for him to choose any option that seems to him the best among the options available within the range. He may not choose an option located outside this range.⁸⁷

In *Shofan* the court utilized the expanded reasonableness doctrine to intervene for the first time in the discretion of the Military Advocate General who is responsible for the supervision of law enforcement in the IDF.⁸⁸ The case arose out of charges brought against Colonel Yehuda Meir who was suspected of ordering his soldiers to severely beat Palestinian rioters apprehended by his troops during the first month of the intifada. The Military Advocate General relieved Colonel Meir of his command and elected to settle for formal disciplinary proceedings against him rather than institute a full court martial. This determination was overturned by the High Court of Justice which determined that the Military Advocate General's decision was unreasonable when considering the seriousness of the offenses of which Colonel Meir was suspected.⁸⁹

E. Judicial Review of Security Considerations

The increased willingness of the judiciary to play an active role in the maintenance of the rule of law in all sectors of gov-

87. H.C. 425/89, *Shofan et al. v. The Military Advocate General*, 43(4) P.D. 718.

88. AMIT-KOHN ET AL., *supra* note 39, at 80.

89. H.C. 425/89, *Shofan et al. v. The Military Advocate General*, 43(4) P.D. 718, 735. The effect of this ruling was to impose an additional level of judicial review over acts of IDF members towards the Palestinian residents of the West Bank and Gaza Strip. Thereafter soldiers became aware that the legality of their conduct is subject not only to scrutiny by the IDF's own criminal justice structure but also by the civilian High Court of Justice.

ernmental activity manifests itself most strikingly in the judiciary's readiness to examine on the merits administrative acts motivated by security considerations. Previously, the High Court of Justice avoided scrutinizing the substantive decisions of security officials.⁹⁰ Rather, the justification for judicial intervention was always a defect of a procedural, jurisdictional, or technical nature.⁹¹

The last fifteen years, however, have witnessed the development of a more comprehensive approach on the part of the court.⁹² Thus, in the *Elon Moreh*⁹³ case, a Military Order for the seizure of private land earmarked for the establishment of a Jewish settlement in the West Bank was declared unlawful. The reason for the court's judgment was that the considerations motivating the decision were not of a military nature, as required by Article 52 of the Hague Regulations, but rather primarily political in origin.⁹⁴

The court's newfound disinclination to exempt from review executive decisions motivated by security considerations was again demonstrated in the *Schnitzer*⁹⁵ case. The court in

90. In 1973, Justice Moshe Landau stated in dicta that the court should refrain from meddling in the affairs of the military:

The extent of the interference of the Court with the action of military authorities relating to matters of security must be very limited [T]he rule that the Court will not substitute its own discretion for that of an administrative authority will apply with greater force to a decision regarding the suitability of a soldier to a military appointment since the superior officers of the soldiers, they and no others, are capable of deciding his fitness because of their expertise and professional experience.

H.C. 302, 306/72, *Hilu v. Government of Israel*, 27(2) P.D. 169, 177. See also Y.S. Zemach, *The Non-Justiciability of Military Measures: The Rafah Approach Case*, 9 ISR. L. REV. 128 (1974).

91. See, e.g., H.C. 7/48, *Al Karbutelli v. Minister of Defence*, 2 P.D. 5; H.C. 95/49, *Al Khori v. Chief of Staff*, 4 P.D. 34; H.C. 220/51, *Aslan v. Military Government*, 5 P.D. 1480.

92. See generally SHETREET, *supra* note 49, at 458-67.

93. H.C. 390/79, *Mustafa Dweikat v. The Government of Israel*, 34(1) P.D. 1, excerpted in *Judicial Decisions of the Supreme Court of Israel*, 9 ISR. Y.B. HUM. RTS. 345 (1980).

94. The first paragraph of Article 52 of the Hague Regulations prescribes that, "Requisitions in kind and services shall not be demanded from municipalities or inhabitants except for the needs of the army of occupation." Hague Regulations, *supra* note 16, art. 52. The government deferred to pressure exerted by religious Zionist groups.

95. H.C. 680/88, *Schnitzer v. Chief Military Censor*, 42(4) P.D. 617.

Schnitzer scrutinized the Military Censor's decision to prohibit publication of certain items which were critical of the Chief of the Institute for Intelligence and Special Operation (the 'Mosad') and information on certain forthcoming changes in the Institute's leadership. The court, guided by Justice Barak, rejected the Military Censor's decision to forbid publication on the ground that the material involved was not sufficiently prejudicial to state security in order to warrant limiting the press' democratic right to freedom of expression. In so doing, he expressed the currently widespread view in the court regarding the susceptibility to judicial review of executive decisions prompted by security considerations:

In the past the security aspect of administrative deliberation has been a deterrent to judicial review Over the years it has become clear that there is nothing exclusive about security considerations, in regard to judicial review [S]ecurity considerations enjoy no special status [T]here are no special limits on the scope of judicial review as applied to administrative deliberation concerning State security.⁹⁶

In its supervision of the military's activities in the West Bank and Gaza Strip, the court has always sought to achieve a balance between security requirements and the maintenance of normal life in the area.⁹⁷ Thus, although it has upheld expulsions of persons involved in terrorist activities⁹⁸ as well as the demolition of houses⁹⁹ used as springboards for terror attacks resulting in murder, the court has invalidated refusals on the part of the authorities to allow lawyers in the West Bank to establish a Bar Association¹⁰⁰ and to grant an entry visa for family reunification,¹⁰¹ and shortened by one year the period

96. *Id.* (emphasis added).

97. See, e.g., H.C. 5973/92, Association for Civil Rights in Israel v. Minister of Defense (unpublished) (unofficial translation on file with the Israeli Government Press Office).

98. *Id.*

99. See, e.g., Association for Civil Rights in Israel v. IDF Commanders of the Central and Southern Commands, 43(2) P.D. 529.

100. H.C. 507/85, Tamimi v. The Minister of Defence, 41(4) P.D. 57 (1987).

101. H.C. 802/80, Samra v. The Commander of the Judea and Samaria Area, 34(4) P.D. 1.

of closure of a Palestinian social club that was being used as a front for subversive activities.¹⁰²

F. *The Political Question Doctrine and Judicial Intervention*

It has been remarked that the adoption of a rule allowing for the intervention of the judiciary in spheres traditionally considered exclusively reserved for the executive branch, such as national security and foreign affairs, is tantamount to abolishing what is commonly known as the 'political question doctrine.'¹⁰³ The doctrine, found in American,¹⁰⁴ British,¹⁰⁵ and French¹⁰⁶ jurisprudence, has often been invoked by domestic courts to avoid passing judgment on executive or legislative conduct. As the U.S. Supreme Court explained in its landmark decision *Baker v. Carr*:¹⁰⁷

102. H.C. 660/88, The Inash El Asra Association v. The Commander of IDF Forces in the Judea and Samaria Area, 43(3) P.D. 673. See Weiner, *supra* note 55, at 259-60.

103. See Eyal Benvenisti, *Judges and Foreign Affairs: A Comment on the Institut de Droit Internationale Resolution on 'The Activities of National Courts and the International Relations of their State'*, 5 EUR. J. INT'L L. 423, 433 (1994). Benvenisti commented on Article 2(1) of the Institute of International Law's Resolution on the Activities of National Courts and the International Relations of their State. The article reads in part:

[N]ational courts called upon to adjudicate a question related to the conduct of the Executive, should not refuse to exercise their competence on the basis of the political nature of the question if the conduct of the Executive is subject to a rule of international law.

Benedetto Conforti (Rapporteur), *The Activities of National Judges and the International Relations of Their State*, 65 Y.B. INST. INT'L LAW Part I 327, at 445 (1993).

104. See generally Robert F. Nagel, *Political Law, Legalistic Politics: A Recent History of the Political Question Doctrine*, 56 U. CHI. L. REV. 643 (1989).

105. See Council of Civil Service Unions v. Ministry of Civil Service, 1985 App. Cas. 374; PETER CANE, AN INTRODUCTION TO ADMINISTRATIVE LAW (2d ed. 1992).

106. The doctrine of *acte de gouvernement* in effect immunizes executive action from judicial review with respect to foreign policy. Its application was exemplified in the 1975 decision of the *Conseil d'Etat* refusing to examine the international legality of the government's declaration of a security zone suspending all sea navigation so that French nuclear experiments could be conducted in the Pacific Ocean. 103 JOURNAL DU DROIT INT'L 104, 126 (1976). See L. NEVILLE BROWN & J. BELL, FRENCH ADMINISTRATIVE LAW 155-57 (4th ed. 1993).

107. *Baker v. Carr*, 369 U.S. 186 (1962).

Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.¹⁰⁸

In the United States a number of rationales have been advanced in support of the political question doctrine.¹⁰⁹ First, there are separation of powers concerns.¹¹⁰ The United States Constitution specifically commits the resolution of certain issues, such as foreign affairs and national security, to the political branches of the federal government rather than to the judiciary.¹¹¹ Second, it would arguably be anti-majoritarian for the courts to supersede democratically constituted institutions in the decision and policy making process.¹¹² Lastly, it is contended that the judiciary should avoid disputes that are patently political in character for fear of being thrown into the political arena and having its legitimacy undermined.¹¹³ This view posits that controversial political matters are better handled by those branches of government that are chosen by the polity and are accustomed to political disputes.

108. *Id.* at 217.

109. See generally Michael J. Glennon, *Foreign Affairs and the Political Question Doctrine*, 83 AM. J. INT'L L. 814, 814-15 (1989); Russell W. Galloway, *Basic Justiciability Analysis*, 30 SANTA CLARA L. REV. 911, 914-17 (1990). See Lea Brilmayer, *International Law in American Courts: A Modest Proposal*, 100 YALE L. J. 2277, 2289-90 (1991).

110. See Justice Brennan's assessment in *Baker v. Carr* that "[T]he nonjusticiability of a political question is primarily a function of the separation of powers." *Baker v. Carr*, 369 U.S. at 210.

111. *Id.* at 211.

112. See Fritz W. Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517, 588 (1966).

113. *Id.* at 549-50.

G. The Act of State Doctrine

A corollary of the political question doctrine developed by both English¹¹⁴ and American¹¹⁵ case-law is the doctrine of the 'act of state.' This controversial¹¹⁶ doctrine avers that domestic courts ought to refrain "from sitting in judgment on other acts of a governmental character done by a foreign state within its own territory and applicable there."¹¹⁷

This doctrine was applied in the landmark U.S. Supreme Court decision in *Banco Nacional de Cuba v. Sabbatino*.¹¹⁸ The case arose from a commercial dispute prompted by the Cuban expropriation of a sugar company owned primarily by U.S. residents. Banco Nacional, on behalf of the Cuban government, sued for the recovery of proceeds from a sale of sugar concluded in New York shortly before Castro's rise to power. The defendant, a commodity broker, argued that the plaintiff's title was invalid because the Cuban nationalization decree violated international law. The U.S. Supreme Court, finding for the plaintiff, refused to examine the legality of the expropriation decree, declaring it to be nonjusticiable. In reaching this conclusion, Justice Harlan stated:

[The] Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of the suit, in the absence

114. See *Buttes Gas & Oil Co. v. Hammer*, 1982 App. Cas. 888; *Williams and Humbert, Ltd. v. W. H. Trademarks (Jersey) Ltd.*, 1986 (vol. 2) W.L.R. 24.

115. See generally *Underhill v. Hernandez*, 168 U.S. 250 (1897); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964); *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759 (1972); *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682 (1976); *W.S. Kirkpatrick & Co., Inc. v. Environmental Tectonics Corp., Int'l*, 493 U.S. 400 (1989).

116. See Michael J. Bazylar, *Abolishing the Act of State Doctrine*, 134 U. PA. L. REV. 325 (1986); Gregory H. Fox, *Reexamining the Act of State Doctrine: An Integrated Conflicts Analysis*, 33 HARV. INT'L L. J. 521 (1992); THOMAS FRANCK, *POLITICAL QUESTIONS/JUDICIAL ANSWERS* 98-101 (1992). The Institute of International Law's Article 3 of its Revised Draft Resolution emphatically rejects the act of state doctrine. Conforti, *supra* note 103, at 446.

117. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, sec. 443.1, (1987). See Malvina Halberstam, *Sabbatino Resurrected: The Act of State Doctrine in the Revised Restatement of U.S. Foreign Relations Law*, 79 AM. J. INT'L L. 68 (1985).

118. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).

of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law.¹¹⁹

Although the act of state doctrine originally derived from the positivistic legal outlook and its territorial conception of judicial power,¹²⁰ it is clear today that the doctrine's basis has been supplanted by separation of powers concerns.¹²¹ Like its sibling, the political question doctrine, the act of state doctrine is meant to ensure that the judiciary does not encroach upon the executive's prerogatives in (foreign) policy making, a role which is postulated to be within the special competence of the executive.¹²² The act of state doctrine seeks, *inter alia*, to avoid "adjudications involving the legality of acts of foreign states on their own soil that might embarrass the Executive Branch of our Government in the conduct of our foreign relations."¹²³ In addition, it has often been argued that with respect to the state's external affairs, it is essential that the nation "speak with one voice."¹²⁴

These rationales, which question the judiciary's right and competence to interfere with the executive and legislative

119. *Id.* at 428.

120. See Fox, *supra* note 116, at 523. Indeed, the Supreme Court's decision in *Underhill v. Hernandez* was founded on a thoroughly positivistic theory of state sovereignty as is evidenced by Chief Justice Fuller's following words:

Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgement on the acts of the government of another within its own territory.

Underhill v. Hernandez, 168 U.S. 250, 252 (1897).

121. See Fox, *supra* note 116, at 525. See also Brilmayer, *supra* note 109, at 2289-90.

122. In the *Sabbatino* decision, Justice Harlan declared that the doctrine's purpose is to ensure "the proper distribution of functions between the judicial and political branches of the Government on matters bearing on foreign affairs." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427-28 (1964).

123. *Alfred Dunhill of London v. Cuba*, 425 U.S. 682, 697 (1976). See Scharpf, *supra* note 112, at 578.

124. Phillip Tremble, *A Revisionist View of Customary International Law*, 33 UCLA L. REV. 665, 715; Scharpf, *supra* note 112, at 573-74; See also Justice Brennan's assertion that questions of foreign policy "uniquely demand [a] single-voiced statement of the Government's views." *Baker v. Carr*, 369 U.S. 186, 211 (1962).

branches' prerogatives in the domain of foreign policy, readily explain the development of the *Bernstein*¹²⁵ exception. By virtue of this rule, when the executive branch gives the court written assurances that the act of state doctrine need *not* be applied, it may move forward and hear the case on the merits.¹²⁶ The main assumption here is that the executive is the only branch of government apt to evaluate the potential adverse effects that a judicial examination of a foreign sovereign act might have on the country's diplomatic relations with that state. Hence, it is only fitting that the matter be deferred to the executive before the court undertakes an examination of the merits in the case.¹²⁷

Furthermore, it is argued that the judiciary is not institutionally competent to intervene in matters relating to foreign policy.¹²⁸ Foreign affairs, in this context, is perceived as a field

125. *Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 210 F.2d 375 (2d Cir. 1954).

126. See *First Nacional City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 768 (1964). It should be noted, however, that the application of the *Bernstein* exception has never been accepted by a Supreme Court majority. Indeed, a strong argument exists that the *Bernstein* rule patently violates any idea of judicial independence, rendering the court "a mere errand boy for the Executive Branch which may choose to pick some people's chestnuts from the fire, but not others." *Id.* at 773 (Douglas, J., concurring). See also Bayzler, *supra* note 116, at 375.

127. RESTATEMENT, *supra* note 117, sec. 372, cmt. h. See also Fritz Scharpf's comment regarding the judiciary's limitations when adjudicating disputes touching upon the state's international relations:

[With regard to foreign relations] the Court is confronted with a wider context in which domestic courts may not be sure of their grasp of all relevant data and in which they cannot even potentially determine the conduct of all important participants in the process of interaction. Deference to those departments of the government which have a specific responsibility for the actions and reactions of the United States in the external arena would appear to be no more than the realistic assumption of the functional limitations of the judicial process.

Scharpf, *supra* note 112, at 596.

128. See Justice Jackson's explanation why the judiciary should not intervene in the executive and legislative branch's decisions in the realm of foreign policy:

[T]he very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy They are decisions of a kind for which the

inherently lacking any "judicially discoverable and manageable standards."¹²⁹ Indeed, judicial decisions are founded on legal principle and judicial precedent while the conduct of foreign relations is done on the basis of negotiation and diplomacy.¹³⁰ Courts suffer from a substantial deficiency in that they lack adequate factfinding faculties—unlike their governmental counterparts, Congress and the executive, whose access to information is virtually unlimited.¹³¹ Therefore, it follows that courts are not adequately informed to commit their government with regards to matters of foreign policy and that consequently they should be precluded from reaching decisions which might be at odds with positions taken by the political branches of government.

H. *Judicial Avoidance Doctrines and the Israeli Supreme Court*

If one compares the rather prudential attitude of the British¹³² and American¹³³ courts in application of the political question and act of state doctrines, with the significantly more interventionist approach developed over the past fifteen years by the Israeli judiciary concerning questions of justiciability and standing, it is clear that Israeli judicial policy stands in sharp contrast with that of its U.S. and English counterparts. Indeed, the Israeli Supreme Court has never accepted any restriction on its capacity for judicial review of governmental conduct similar in scope to either the political question,¹³⁴ the British¹³⁵ or American act of state doctrines.¹³⁶ On the con-

Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.

Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948).

129. *Baker v. Carr*, 369 U.S. 186, 217 (1962).

130. Tremble, *supra* note 124, at 709, 713-14.

131. See Scharpf, *supra* note 112, at 567-68.

132. See *supra* notes 114-15.

133. See *supra* note 115, and accompanying text.

134. Eyal Benvenisti, *Judicial Misgivings Regarding the Application of International Law*, 4 EUR. J. INT'L L. 159, 181 (1993); but see *Jabotinsky v. Weizmann*, 5 P.D. 801.

135. According to the British act of state doctrine, courts are precluded from examining activities conducted on behalf of the Crown outside of English territory. See F.A. MANN, *FOREIGN AFFAIRS IN ENGLISH COURTS* 184-90 (1986).

trary, as has been demonstrated above, the Israeli Supreme Court has made it a point to be very active in maintaining respect for the rule of law and in safeguarding civil rights. According to Supreme Court Justice Yitzhak Zamir, this difference in judicial attitudes may be attributable to the considerable differences that exist between the three political-legal cultures:

We can certainly say that our Supreme Court is an active court, that it is not being deterred by the level of political questions . . . [F]or many years the Court abstained from such interference and the Court only interfered recently because the Court was convinced that there was no other institution, nor the public generally, to act and rectify wrongs. We must realize that there is a difference in political traditions and culture between Israel and other countries . . . The question was whether the Court too should remain indifferent and say, well, this is a political question; if we interfere, we may threaten our position. So let's leave it as it is. Immunize such unlawful acts; not only immunize, actually sanction them by not interfering. The Court thought that in this stage of the life of Israel, when we are just shaping our political culture, actually our democracy, the Court cannot be guided by its narrow interest of self-preservation. It should go into the arena and do what it can to establish proper standards and norms in the spirit of other democracies.¹³⁷

While Israeli judicial practice may significantly differ from American and British precepts regarding limits of justiciability,

136. *Id.* See also Professor David Kretzmer's comment in this respect: "Act-of-state doctrine has been totally rejected by the Israeli judiciary. It's hardly been mentioned but in one or two cases in which it has been totally rejected out-of-hand. It is not the kind of argument that a government can make before the court." David Kretzmer, Remarks at the International Conference on the Nature and Legitimacy of Judicial Review, Hebrew University, Jerusalem, Session III: Justiciability, Political Questions and the Legitimacy of Judicial Review 46-47 (Dec. 11-13, 1994) (on file with author).

137. Yitzhak Zamir, Remarks at the International Conference on the Nature and Legitimacy of Judicial Review, Hebrew University, Jerusalem, Session III: Justiciability, Political Questions and the Legitimacy of Judicial Review 55, 58-59 (Dec. 11-13 1994) (on file with author).

it does find much common ground with the activist model followed by German courts in ascertaining the scope of their authority to review decisions taken by the executive. Under German jurisprudence, no sphere of executive activity is exempted from the judiciary's supervisory powers. In other words, every dispute is adjudicable. Yet, where the subject matter is of a political nature, for example foreign relations, German courts grant broad discretionary power to the governmental authority whose decision is in dispute and interfere only where there is clear abuse of constitutional norms. Professor Thomas Franck explains:

[T]he highest constitutional court of the German Federal Republic . . . the ultimate guardian of constitutional legality . . . [has] long rejected the political-question doctrine as a matter of formal conceptual jurisprudence even while deciding the substance of various cases in the government's favor. While usually giving the political authorities ample political discretion to conduct foreign relations, the German judges have been careful to reserve full power to determine on the basis of all relevant evidence whether a particular exercise of discretion is within the ambit of unfettered choice of means allocated to the political sector by the constitution.¹³⁸

Even though in the end, German/Israeli and U.S./British judicial traditions may be very similar as to the extent to which the courts are inclined to intervene in the executive's exercise of discretion on particularly sensitive matters, there does exist a critical divergence: Ultimately, only Israel and Germany closely safeguard the rule of law. Professor Karl Doehring makes this point very lucidly:

Comparing the two systems—political question doctrine in United States and the German position that only the non-observance of the limits imposed on the discretionary governmental power [warrant judicial review]—we can state: The American system, i.e. to declare the incompetence of the court to decide a case results in the risk that the public authority acts

138. FRANCK, *supra* note 116, at 115. See Donald P. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* 163-64 (1989).

arbitrarily and uncontrolled. A court cannot discover any arbitrariness committed by the public authority, because the lawsuit is not admitted. Under the German system the court is enabled to test whether a governmental decision is based on an abuse of public power, although that will seldom occur due to the broad space of discretionary power of the public authority.¹³⁹

Thus, it is evident that in contradistinction to its U.S./British counterparts, Israeli judicial practice does not preclude adjudicating petitions touching upon matters traditionally considered privy to the executive, such as national security and foreign affairs. In addition, the Israeli judiciary, since the inception of the State of Israel, has demonstrated its vigorosity especially in those cases where issues of democracy, human rights and the rule of law were involved. As a consequence, the possibility that the Supreme Court sitting as the High Court of Justice may intervene during the interim period in order to safeguard the human rights of the Palestinians subject to the PA should not be dismissed out of hand merely because of the likely political fallout it would trigger.

III. THE NATURE AND LIMITS OF ISRAEL'S HUMANITARIAN AND HUMAN RIGHTS RESPONSIBILITIES DURING THE INTERIM STAGE OF THE PEACE PROCESS

A. Occupation and the Effective Control Test

The presence of effective control on the ground by the occupant is the essential prerequisite of occupation. Article 42 of the Hague Regulations states that "[t]erritory is considered occupied when it is actually placed under the authority of the hostile army."¹⁴⁰ Moreover, the occupation extends only to the territory where such authority has been established and

139. Karl Doehring, Remarks at the International Conference on the Nature and Legitimacy of Judicial Review, Hebrew University, Jerusalem, Session III: Justiciability, Political Questions and the Legitimacy of Judicial Review 4 (Dec. 11-13, 1994) (on file with author).

140. Hague Regulations, *supra* note 16, art. 42. It should be stressed, however, that the Hague Regulations do not determine how an occupation comes to an end. See Theodor Meron, *West Bank and Gaza: Human Rights and Humanitarian Law in the Period of Transition*, 9 ISR. Y.B. HUM. RTS. 106, 116 (1979).

can be exercised.¹⁴¹ Article 43 of the Hague Regulations describes the occupant as the one, into whose hands, "the authority of the legitimate power ha[s] in fact passed."¹⁴² Thus, the main factor here is that of effective control.¹⁴³ Professor Yoram Dinstein elaborates on this point:

To qualify as such under international law, a belligerent occupation must be effective It appears that the efficacy may be relative To remove doubts, the occupant usually issues a proclamation in which he gives notice to the inhabitants about the new state of affairs. The proclamation reflects the fact of occupation, *but does not create it*: it is the effective control over the area, rather than the proclamation, that establishes the legal ground for belligerent occupation. The occupation applies to the region over which the occupant *in effect* assumes control, and not necessarily to the one to which the proclamation refers.¹⁴⁴

Yet, in order to examine the question of responsibility (i.e., as a consequence of effective control) for the protection of humanitarian and human rights norms in those areas where authority has been transferred during the interim period, we must ascertain the scope of each side's authority both according to the terms of the Agreements and in practice. Indeed, an assessment of the situation in view of determining who has effective control in those areas for which governmental authority has been transferred to the PA for the interim period must be both textual and realistic in approach. A purely textual analysis of the Agreements which would simply tabulate the various spheres of authority allocated to each side would be misleading because it would ignore the daily reality. Also while the power each side exercises on the ground is indicative of their prerogatives as allowed for by the Agreements, a mere snap-shot portrait of the daily reality in the the Palestinian self-governing areas and elsewhere in the Gaza Strip and the West

141. Hague Regulations, *supra* note 16, art. 42.

142. Hague Regulations, *supra* note 16, art. 43.

143. See 2 Oppenheim, *International Law: A Treatise* 434-35 (Hersch Lauterpacht ed., 7th ed. 1952); VON GLAHN, *supra* note 42, at 28-31; MORRIS GREENSPAN, *THE MODERN LAW OF LAND WARFARE* 213-14 (1959); EYAL BENVENISTI, *THE INTERNATIONAL LAW OF OCCUPATION* 3-6 (1993); L.C. GREEN, *THE CONTEMPORARY LAW OF ARMED CONFLICT* 247-48 (1993).

144. Dinstein, *supra* note 23, 104-05 (emphasis added).

Bank would be deceptive since it would fail to take into consideration Israel's *potential*¹⁴⁵ exercise of authority as allowed under the Agreements.¹⁴⁶ The legal grounding for a continued involvement by Israel in law enforcement as regards areas where many aspects of local authority have been transferred to the PA pursuant to the interim Agreements will now be discussed.

B. *The Sui Generis Nature of the PA's Authority During the Interim Period*

The Cairo Agreement together with the earlier DOP, allowed PLO Chairman Yasser Arafat and his appointed administration to assume substantial local administrative control over most of the Gaza Strip, Jericho, and additional areas in the West Bank.¹⁴⁷ Pursuant to the Erez and Oslo II Agreements, together with the Further Transfer Protocol, the PA has assumed powers in a vast array of fields touching upon the daily life of all Palestinian residents of the West Bank and Gaza Strip.

Nonetheless, the PA lacks essential elements of sovereignty.¹⁴⁸ Israel, on the other hand, has given up exclusive

145. See *infra* notes 176-219 and the accompanying text.

146. A different interpretation has been offered by Professor Eyal Benvenisti. While acknowledging that the Agreements stipulate that the legal status of the Gaza Strip, Jericho, and areas of the West Bank remains unchanged, Benvenisti avers that this should not be determining when ascertaining which entity or entities bears international law responsibility for the protection of the local population's humanitarian and human rights. He reasons that under both the law of armed conflict and the international law of human rights, the essential prerequisite for this responsibility with respect to occupied territories is not legal authority but rather "effective control." In his view, since the IDF withdrew and the PA has assumed a large portion of the governmental functions for the Gaza Strip, Jericho, and other areas of the West Bank, it is evident that the PA has "effective control" of these areas. Eyal Benvenisti, *Responsibility for the Protection of Human Rights under the Interim Israeli-Palestinian Agreements*, 28 ISR. L. REV. 297 (1994).

147. Subject to the stringent limitations provided for in the Cairo Agreement, the PA obtained legislative, executive, and judicial powers and responsibilities with respect to Gaza and Jericho; see Cairo Agreement, *supra* note 2, art. V.2.

148. Among the qualifications for statehood which the PA lacks is the capacity to enter into relations with the other States. See Cairo Agreement, *supra* note 2, art. VI.2.a.; Oslo II Agreement, *supra* note 2, art. IX.5.a. On the subject of the legal criteria of statehood, see IAN BROWNLIE, *PRINCIPLES OF*

control over Gaza, Jericho, and other areas of the West Bank, although its impact on the daily lives of the Palestinian inhabitants remains significant. At this point in the peace process therefore, it is clear that both Israel and the PA, each in its own spheres of authority, exercises considerable control over the West Bank and Gaza Strip. In this regard, the legal-political arrangement has been characterized as being of a *sui generis* nature.¹⁴⁹ One of the troubling issues is that since the

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).

Nevertheless many observers believe that a Palestinian state will ultimately emerge from the peace process. See, e.g., Antonio Cassese, *The Israel-PLO Agreement and Self Determination*, 4 EUR. J. INT'L LAW 564 (1993); Note, *The Israel-PLO Declaration of Principles: Prelude to a Peace?*, 34 VA. J. INT'L L. 435, 465-69 (1994); Jerry Lewis, *Kissinger: Palestinian State Inevitable*, JEWISH CHRONICLE, Oct. 29, 1993. According to Yossi Sarid, a Member of the Knesset and Cabinet, the establishment of a Palestinian State as a result of the peace process will be inevitable after the elections. 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. ROBERT SLATER, RABIN OF ISRAEL 401 (1993); see David Makovsky, *Rabin to P.A.: The Streets are 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).

149. Professor Eyal Benvenisti, an expert on the field of the international law of occupation, has commented:

[T]he regime in the Gaza Strip and the Jericho Area represents a novel form of autonomy. So far, two types of autonomies existed. Internally based autonomies, such as South Tirol in Italy, have been established within existing states through the laws of that state. Internationally based autonomies have so far been established by international agreements with the active participation of the League of Nations or the United Nations, like in the case of Memel, or the aborted attempts in 1947 to establish international administration in both Trieste and Jerusalem, in which sovereignty was deemed to be vested in these institutions. In contrast, the autonomy in the Gaza Strip and Jericho Area is based on the Agreement, which eludes the question of sovereignty by artificially maintaining the framework of the Israeli military occupation.

PA's authority over these territories is not that of a sovereign entity, the body of international human rights law does not formally apply. This follows from the general understanding that it normally applies only to *states* which have either ratified or are otherwise bound (i.e., by customary law) to comply with certain strictures.¹⁵⁰ Moreover, if areas of the West Bank and Gaza Strip are no longer occupied by Israel, then the humanitarian law, which is a subset of the law of armed conflict, does 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 predicament.

The question arises therefore as to the extent of the PA and Israel's responsibility under international law for the protection of human rights in the areas under Palestinian self-rule. Professors Naseer Aruri and John Carroll explain the perils of being subject to the rule of both the PA and the Israeli military government as regards the protection of Palestinian human rights:

The dangers inherent in the lack of ironclad safeguards are clear, particularly during the transition period when Palestinians would be subject to two administrations: the new Palestinian Authority and the existing occupation regime. Dissidents are likely to be exceptionally vulnerable in view of the uncertain

EYAL BENVENISTI, THE PRESENT STATUS OF THE PALESTINIAN AUTHORITY, (1995) (unpublished manuscript on file with author).

150. Formal recognition of the role of sub-state entities in international law, including autonomies, has nevertheless slowly been taking form. See BENVENISTI, *supra* note 149, at 28; Christoph Schreuer, *The Waning of the Sovereign State: Towards a New Paradigm for International Law?* 4 EUR. J. INT'L L. 447 (1993).

On June 14, 1989 the Permanent Observer Mission of Palestine submitted a letter to the Swiss government expressing its will to be bound by the four Geneva Conventions of 1949 and the Additional Protocols of 1977. The request was not accommodated because of doubt whether a state of Palestine existed. Cf. AL-HAQ, A HUMAN RIGHTS ASSESSMENT OF THE DECLARATION OF PRINCIPLES ON INTERIM SELF-GOVERNMENT ARRANGEMENTS FOR PALESTINIANS 9-10 (1993).

Interestingly, the International Committee of the Red Cross [hereinafter ICRC] continues to operate in Gaza and Jericho on a vague basis of "international principles" according to the presentation given by Dr. Palwanka, ICRC Legal Advisor, at a conference on torture given at the Hebrew University Law Faculty on June 9, 1995.

jurisdictions and accountability of the two authorities.¹⁵¹

The import of this question becomes apparent when one considers that, even according to the original timetable, the interim period is to last for as long as five years,¹⁵² of which only two have elapsed. Should the sluggishness of negotiations conducted thus far¹⁵³ be taken as an indicator of the parties' capacity to resolve outstanding issues,¹⁵⁴ all of the timetables fixed within the DOP appear foolishly optimistic. Further delays in the negotiations are readily envisioned, all of the previous deadlines have been missed by months and some by more than a year.¹⁵⁵ Israel's exasperation with the PA's limited effectiveness in thwarting acts of terror,¹⁵⁶ in particular a

151. Naseer H. Aruri & John J. Carroll, *A New Palestinian Charter*, 23 J. PALESTINE STUD. 5, 11 (1994).

152. See DOP, *supra* note 2, art. V.1; Cairo Agreement, *supra* note 2, art. XXIII.3.

153. None of the deadlines specified have thus far been honored. See, e.g., Weiner, *supra*, note 2.

154. See, e.g., *PLO Accuses Israel of Stalling Talks*, JERUSALEM POST, Jun. 23, 1995, at 2.

155. See Ahmad S. Khalidi, *The Palestinians: Current Dilemmas, Future Challenges*, 24 J. PALESTINE STUD. 5 (1995).

156. See, e.g., Danny Rubinstein, *The Understandings and the Rules of the Game*, HA'ARETZ, Apr. 20, 1995, at B2; 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 (underlining that Palestinian security services have failed to disarm militias in Gaza); Jon Immanuel, *PA-Hamas Collusion: Fact or Fiction*, JERUSALEM POST, Sep. 1, 1995; Alon Pinkas, *Arrests Are Only Temporary Setback For Hamas Operations*, JERUSALEM POST, Aug. 24, 1995, at 1; Yigal Carmon, *Resolute in the Face of Terror*, JERUSALEM POST, Sep. 8, 1995, at 6. But see Jon Immanuel, *PA's Security Courts Begin Working*, JERUSALEM POST, Feb. 17, 1995, at 2; *Palestinian Security Court Gives Hamas Activist 15-Year Sentence*, BBC Short Wave Broadcasts, Voice of Palestine, Jericho, Apr. 10, 1995 (ME/2275, MED/6); *PNA Statement Announces Ban On Possessing Guns and Explosives*, BBC Short Wave Broadcasts, Voice of Palestine, Jericho, Apr. 12, 1995 (ME/2278, MED/2); *Palestinian Police Storm Houses in Gaza; 210 Arrested; Arms Surrendered*, BBC Short Wave Broadcasts, Voice of Israel, Jerusalem, Apr. 13, 1995 (ME/2278, MED/5); Amira Hess, *Military Supreme Court in Gaza Sentences For the First Time Two Hamas Activists to Imprisonment*, HA'ARETZ, Apr. 13, 1995, at A3; Amira Hess, *Military Court in Gaza Sentences Man Who Assisted Hamas in Preparing Attack to Seven Years Imprisonment*, HA'ARETZ, Apr. 14, 1995, at A3; Amira Hess, *Four and Seven Years Imprisonment For Two Hamas Activist in Gaza Who Implored Youth to Perpetrate Suicide Attack*, HA'ARETZ, Apr. 23, 1995, at A6; Amira Hess, *Palestinian Authority Members: The Opposition Is Prepared to Consider Suspending the Attacks*,

string of suicide bombings, drive-by shootings, roadside bombs, kidnappings, and knife attacks by the Hamas and Islamic Jihad groups have been major factors in the delays.¹⁵⁷

HA'ARETZ, Apr. 23, 1995, at A10; *Palestinian Police Arrested More Than Ten Armed Hamas Activists in Gaza*, HA'ARETZ, May 5, 1995, at A3; PA: *Hand in Weapons By Sunday or Face Prosecution*, JERUSALEM POST, May 11, 1995, at 2; Amira Hess, *Palestinian Police Located Hamas Firearm Stock in Gaza*, HA'ARETZ, May 25, 1995, at A2; Eytan Rabin, *Reports Arriving to Israel: "Arafat Strengthening Fight Against Terror"*, HA'ARETZ, May 28, 1995, at A3; *Palestinian Police Arrested Two Wanted Terrorists*, HA'ARETZ, May 5, 1995, at A12; Jon Immanuel, *PA Police Arrest Man Planning Suicide Attack*, JERUSALEM POST, Aug. 20, 1995, at 1; Jon Immanuel, *Palestinian Police Catch Gunman on Way to Attack*, JERUSALEM POST, Aug. 24, 1995, at 1; Herb Keinon, *Gaza Council Calls Ex-Soldiers to Hunt Megidish's Killers*, JERUSALEM POST, Oct. 20, 1995, at 2. Over a period of about two months (May-June 1995), terrorist attacks against Israeli targets ceased as a result of a calculated decision taken by Hamas and Islamic Jihad leaders so as not to be held responsible by the Palestinian public for any delays in the withdrawal of Israeli forces from the Palestinian populated areas in the West Bank. However, the suicide attacks later resumed. See Danny Rubinstein, *Hamas' "Restraint"*, HA'ARETZ, Jun. 6, 1995, at B1; Zeev Scheif, *Terror May Shock Again*, HA'ARETZ, Jun. 9, 1995, at B1; Amira Hess, *Hamas Sources: Agreement With Palestinian Authority Not Cause of Truce*, HA'ARETZ, Jun. 11, 1995, at A3; Danny Rubinstein, *Arafat's Break*, HA'ARETZ, Jun. 16, 1995, at B3; Jon Immanuel, *Jihad Vows to Avenge Activist's Murder*, JERUSALEM POST, Jun. 23, 1995; *Hamas Warns: Truce Over*, JERUSALEM POST, Jun. 25, 1995, at 2; Alon Pinkas, *Herb Keinon, Suicide Bomber Explodes Donkey Cart Near Khan Yunis, 3 Soldiers Hurt*, JERUSALEM POST, Jun. 26, 1995, at 1; Ouri Nir, *Gideon Alon, Hamas Officers Arrested in Gaza After Cart Explosion in Gush Katif*, HA'ARETZ, Jun. 27, 1995, at A1 (mentioning that the suicide bomber was affiliated with Hamas); Eytan Rabin, *Two Hikers Murdered in Wadi Kelt; Gang of Terrorists Escaped to Jericho*, HA'ARETZ, Jul. 19, 1995, at A1; Moshe Toubal, *Reuven Shapira, Yarayach Tal & Eytan Rabin, 5 Killed in Suicide Bombing of Bus in Ramat-Gan*, HA'ARETZ, Jul. 25, 1995, at A1; Serge Schemann, *Bus Bombing Kills Five in Jerusalem; 100 are Wounded*, N.Y. TIMES, Aug. 22, 1995, at A1.

157. Hamas is in the forefront of the Palestinian groups opposed to all manifestations of the current peace process. Its ideology combines extreme Islamic fundamentalism with absolute opposition to any arrangement with Israel or recognition of it. Hamas' Covenant calls for the liberation of 'Palestine' in its entirety from the Mediterranean to the Jordan river. Since the signing of the DOP the number of Israelis killed in terrorist attacks has increased 73 percent. Peace Watch, *Increase of 73% in Number of Israelis Killed in Terror Attacks in Two Years Since Oslo Accords* (Sept. 10, 1995).

These attacks have repeatedly interrupted the peace talks¹⁵⁸ and threatened their continuance.¹⁵⁹

Curtailling these attacks assumed added urgency during the period preceeding the Israeli elections on May 29, 1996 as then Prime Minister Peres and his party's governing coalition in the Knesset found their support in polls dwindling. Indeed, the escalation in Israeli fatalities as a result of acts of terror since the signing of the DOP¹⁶⁰ thwarted one of the former Rabin-Peres led government's key arguments for achieving an agreement with the Palestinians.¹⁶¹ Public support for the peace process, which enables the government to make painful concessions, was consequentially substantially undermined.¹⁶² Even some Members of the Knesset from the late Prime Minister Rabin's Labor Party¹⁶³ along with the President of the State¹⁶⁴ have called for suspension of the negotiations to pressure Arafat to crack down on the perpetrators of this wave of terrorism.¹⁶⁵

158. See, e.g., Jon Immanuel, *Israel Suspends Talks in Cairo*, JERUSALEM POST, Oct. 12, 1994, at 2. The Palestinian representatives also suspended the peace talks in the aftermath of the murderous attack perpetrated by the Jewish settler Baruch Goldstein in Hebron. See David Makovsky, *Arabs Halt Talks, Demand More Measures*, JERUSALEM POST, Feb. 28, 1994, at 1.

159. See, e.g., Derek Brown, *Israeli Fears Put Pact With P.L.O. At Risk*, THE GUARDIAN, Dec. 7, 1994, at 14.

160. See *Suicide Bombings Almost Double Terror Toll Since Oslo*, JERUSALEM POST, Mar. 13, 1995, at 2.

161. During his election campaign in 1992 Rabin declared:

I am unwilling to give up a single inch of Israel's security, but I am willing to give up many inches of sentiments and territories—as well as 1,700,000 Arab inhabitants—for the sake of peace. That is the whole doctrine in a nutshell. We seek a territorial compromise which will bring peace and security. A lot of security.

Yitzhak Rabin, *Pragmatism and Compromise*, JERUSALEM POST, June 1, 1992, at 6 (quoted in SLATER, *supra* note 148, at 389).

162. See *Terrorism Takes Its Toll*, TEL AVIV UNIVERSITY NEWS, Spring 1995, at 15 (research revealing link between terrorism and Israeli support for the peace process).

163. See Liat Collins & David Rudge, *Labour MKs Call on Rabin to Send IDF Back into Gaza*, JERUSALEM POST, Apr. 12, 1995, at 1.

164. The President of Israel, Ezer Weizman, has on numerous occasions called for a suspension in the peace talks because of terrorist violence directed towards Israeli targets. See, e.g., Christopher Walker, *Weizman Speaks Out Against Talks With PLO*, THE TIMES (London), Jan. 24, 1995, at 12.

165. The peace process has been seriously undermined by the PLO's failure to adequately curb Palestinian terrorism, particularly during the first

Moreover, the Likud party victory will likely bring about further delays in the peace process and a thorough reevaluation of the previous government's policy of territorial concessions which lies at the very core of the peace process. Although most of its members do not favor returning the IDF to either the Gaza Strip or areas in the West Bank that have been evacuated, the party's leader, Prime Minister Binyamin Netanyahu, declared prior to the elections that when his party comes to power it would not honor the Agreements since, in his view, the PLO has already breached them and Israel need not consider itself bound where the other side dishonors its commitments.¹⁶⁶ More recent developments, however, indicate a reevaluation of this original policy, and a softening of the Likud rhetoric toward meeting with the PLO.¹⁶⁷ Even so, territorial concessions with the Palestinians will most likely be resisted by the new Likud government¹⁶⁸ and the final status negotiations might become deadlocked or simply collapse over disagreements regarding sensitive issues. Hence, Palestinian fears that the Oslo II Agreement will *de facto* represent the permanent status agreement may eventually crystallize.¹⁶⁹

year following the arrival of Palestinian forces in Gaza and Jericho. According to the Cairo Agreement:

Both sides shall take all measures necessary in order to prevent acts of terrorism, crime and hostilities directed against each other, against individuals falling under the other's authority and against their property, and shall take legal measures against offenders.

Cairo Agreement, *supra* note 2, art. XVIII. A series of suicide bombings by Hamas and Islamic Jihad have resulted in a 170 Israeli deaths since the beginning of the peace process. See *Peace, Terror and Dissent in Israel*, N.Y. TIMES, Aug. 23, 1995, at A20.

166. See Sarah Honig, *Netanyahu: Likud Won't Honor Deals Since P.L.O. Has Breached Agreement*, JERUSALEM POST, Jan. 4, 1993, at 2; Bernard Josephus & Albert Robinson, *The Likud Will Cancel PLO Accord Unless Covenant Clauses Are Deleted*, JERUSALEM POST, May 13, 1994, at 3; *Sharon Says Likud Will Not Implement Second Stage of Agreement*, BBC Short Wave Broadcasts, Voice of Israel, May 10, 1995 (ME/2300, MED/12).

167. See *Netanyahu Aid Calls Mahmoud Abbas*, JERUSALEM POST, June 2, 1996, at 1; *Netanyahu Advisor Stresses Consolidation of Arab Ties, Contacts PLO Official*, VOICE OF ISRAEL, JERUSALEM, June 6, 1996 (translated from Arabic).

168. See Sarah Honig, *Netanyahu Aims to Adapt Part Line to Oslo Reality*, JERUSALEM POST, Jan. 26, 1996, at 2.

169. See Yarayach Tal, *Israeli Source: Palestinians Fear that Likud Government Will Change Interim Agreement into Permanent Status Deal*, HA'ARETZ, Aug. 7, 1995, at 5.

Moreover, in an effort to avoid an early impasse, many of the most contentious issues, like the division of scarce water resources,¹⁷⁰ future sovereignty over Jerusalem,¹⁷¹ control of religious sites,¹⁷² Palestinian aspirations for statehood and the permanence of the Jewish settlements¹⁷³ were intentionally

170. *Gazit Heads Water Negotiating Team*, Peace Watch, UNITED STATES INSTITUTE OF PEACE, Oct. 1995, at 12; Ze'ev Schiff, *Again Forgetting the Water*, HA'ARETZ, July 7, 1995, at B1.

171. According to a statement made by Arafat during a visit to schools and mosques in Jericho:

Jerusalem is the capital of Palestine and those who think otherwise can go and drink Gaza sea water, and, I have been told, the waters of the Dead Sea . . .

Yasser Arafat, *Notable Quotes, Dispatch from Jerusalem*, July-Aug., 1995, at 8.

The future status of Jerusalem indubitably constitutes the thorniest issue 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, Jun. 5, 1995, at A6. A recent proposal in the U.S. Congress to move the American embassy to Jerusalem caused much agitation among Israelis and Palestinians and was perceived as posing a serious threat to the peace process. See Karen Farrell, *Jerusalem Overshadows Talks*, BILADI JERUSALEM TIMES, May 10, 1995, at 3; *Appeasement on Jerusalem*, JERUSALEM POST, Jun. 22, 1995, at 6. When he was a presidential candidate in 1992, Bill Clinton stated that he supported Jerusalem as Israel's undivided capital. RAPHAEL DANZIGER & ARTHUR RUBIN, *THE CLINTON-RABIN PARTNERSHIP IN THE MIDEAST PEACE PROCESS* 28 (1993) (issued by the American Israel Public Affairs Committee). Yitzhak Rabin made an identical pledge during the 1992 national election campaign. SLATER, *supra* note 148, at 401. Likud party member Ehud Olmert, the Mayor of Jerusalem, has begun to take measures to close Orient House because it serves the PLO as their Jerusalem headquarters, which is in violation of its municipal zoning permit and is expressly forbidden by the Cairo Agreement. See Bill Hutman, *Olmert Vows to Close Orient House*, JERUSALEM POST, Jun. 26, 1995, at 1.

172. Yossi Klein Halevi, *Defending Mother Rachel*, THE JERUSALEM REPORT, Aug. 24, 1995, at 18.

173. According to Marwan Kanfani, the Spokesman for Arafat:

Our position regarding the settlements is clear. We demand the breaking up of the settlements and the removal of the settlers from the Gaza Strip, West Bank and Jerusalem. The settlers are a foreign body living on land which is not theirs.

Marwan Kanfani, *Notable Quotes, Dispatch from Jerusalem*, July-Aug., 1995, at 8 (quoting article in HA'ARETZ). Following one public opinion poll, over seventy-five percent of the settlers remain opposed to any territorial concessions to the Palestinians. Uzi Benzamin, HA'ARETZ, Sep. 1, 1995, at B3.

left to the final status talks.¹⁷⁴ The prospects for a timely resolution of these central issues appears anything but encouraging.¹⁷⁵

IV. ANALYSIS OF THE APPORTIONMENT OF AUTHORITY

A. *The Unaltered Legal Status of the Palestinian Self-Governing Areas*

Based on the texts of the Agreements, it may be argued that the sole source of the PA's authority and legitimacy are the accords it concluded with Israel, according to which the legal status of the West Bank and Gaza Strip has remained unchanged. It would ensue that these regions continue to be under the occupation of the Israeli military, with the PA acting as nothing more than a delegate of the Israeli occupation administration.¹⁷⁶ Indeed, such a claim is supported by the numerous provisions found in the various texts which stress that the status of the Gaza Strip and the areas of the West Bank for which authority has been transferred to the PA, has not been altered.¹⁷⁷ For instance, paragraph 7 of Article XXIII of the Cairo Agreement states that "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."¹⁷⁸

Article IV of the DOP states that, "The two sides view the West Bank and the Gaza Strip as a single territorial unit, whose integrity will be preserved during the interim period."¹⁷⁹ Article 6 of Annex II of the DOP emphasizes that, "[T]he 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."¹⁸⁰

174. See, e.g., DOP, *supra* note 2, art. V.3.

175. See Weiner, *supra* note 2.

176. See Singer, *supra* note 2, at 6.

177. See Cairo Agreement, *supra* note 2, arts. XXIII.6, XXIII.7; Erez Agreement, *supra* note 2, art. XIII.5; Oslo II Agreement, *supra* note 2, art. XXXI.7.

178. Cairo Agreement, *supra* note 2, art. XXIII.7.

179. DOP, *supra* note 2, art. IV. See Oslo II Agreement, *supra* note 2, arts. XI.1, XXXI.8.

180. DOP, *supra* note 2, at Annex II, art. 6.

Other articles highlight that the Israeli military government continues to exercise certain prerogatives in those areas for which authority has been transferred to the PA. Thus, according to Article V.3.b. of the Cairo Agreement:

Israel shall exercise its authority through its military government, which, for that end, shall continue to have the necessary legislative, judicial and executive powers and responsibilities, in accordance with international law¹⁸¹

The implementation of the Cairo Agreement and the institution of the PA were realized through the local law of the West Bank and Gaza Strip¹⁸² which may further indicate Israel's reluctance to view the Agreements as international instruments.¹⁸³ Indeed, under international law no legislative implementation would be necessary if the Cairo Agreement was considered as an international instrument since, following the law of armed conflict, the Israeli military government draws its authority solely from international law. It logically ensues that if the Cairo Agreement is considered an international instrument it *automatically* forms part of the international norms which bind the Israeli military administration.¹⁸⁴ Arguably, since the PLO is not a state,¹⁸⁵ the Agreements are

181. Cairo Agreement, *supra* note 2, art. V.3.b.; III.1; Oslo II Agreement, *supra* note 2, art. I.5, XVII.4.

182. Both the West Bank and Gaza Strip commanders of the Israeli Defence Forces issued a similarly worded, "Proclamation concerning the Implementation of the Agreement regarding the Gaza Strip and Jericho Area" (Proclamation No. 4), 5754-1994.

183. See Benvenisti, *supra* note 146, 301-02.

184. See Benvenisti, *supra* note 146, at 301-02.

185. Pursuant to the Cairo Agreement the PA lacks the capacity to enter into relations with states. Paragraph 2(a) of Article VI of the Cairo Agreement provides:

[T]he PA will not have powers and responsibilities in the sphere of foreign relations, which sphere includes the establishment abroad of embassies, consulates or other types of foreign missions and posts or permitting their establishment in the Gaza Strip or Jericho Area, the appointment of or admission of diplomatic and consular staff, and the exercise of diplomatic functions.

Cairo Agreement, *supra* note 2, art. VI.2.a. The ability to enter in relations with other states is indicative of independence from foreign rule. See Joel Singer, *Aspects of Foreign Relations Under the Israeli-Palestinian Agreements on Interim Self-Government Arrangements For the West Bank and Gaza*, 28 ISR. L. REV. 268, 269 (1995).

not international instruments. This understanding coincides with the following statement made by Joel Singer, Legal Advisor of the Israeli Ministry of Foreign Affairs and senior legal negotiator in the talks with the PLO:

In this context, the fact that the military government in the West Bank and Gaza Strip will continue to exist is very significant. It emphasizes that, notwithstanding the transfer of a large portion of the powers and responsibilities currently exercised by Israel to Palestinian hands, *the status of the West Bank and Gaza Strip will not be changed during the interim period*. These areas will continue to be subject to military government. Similarly, this fact suggests that the Palestinian Council will not be independent or sovereign in nature, but rather will be legally subordinate to the authority of the military government. In other words, operating within Israel, the military government will continue to be the source of authority for the Palestinian Council and the powers and responsibilities exercised by it in the West Bank and Gaza Strip.¹⁸⁶

Indeed, a viable argument can be made that the PA constitutes nothing more than a substitute for the Civil Administration that was established in the Administered Areas by the Israeli military government in 1981. Thus, the PA would be entrusted under the Agreements with significant governmental powers in the Gaza Strip and areas of the West Bank for the interim period, acting as an intermediary between the Israeli military government and the local population.¹⁸⁷

Also worthy of attention is the mechanism, established under the Cairo Agreement, which enabled Israel to prevent

Even Arafat's senior aide Mahmoud Abbas, who negotiated much of the DOP, has written, "[w]e do not claim that we signed an agreement that created an independent Palestinian State; none of the provisions in the Declaration of Principles make such a claim." MAHMOUD ABBAS, THROUGH SECRET CHANNELS 218 (1995).

186. Singer, *supra* note 2, at 6 (emphasis added).

187. According to the Cairo Agreement, the Civil Administration in Gaza and Jericho was dissolved upon completion of the Israeli military withdrawal and the subsequent transfer of powers to the PA. See Cairo Agreement, *supra* note 2, art. III.4. Following the Oslo II Agreement, the Civil Administration in the West Bank will be dissolved upon inauguration of the Council. Oslo II Agreement, *supra* note 2, art. I.5.

legislative enactments adopted by the PA from taking effect.¹⁸⁸ This attempt by Israel to strictly control the PA's legislation was unavailing and failed to exert the intended restraint, regardless of what was written in the Agreement. In his first official declaration as the chairman of the PA, Yassir Arafat 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."¹⁸⁹ The declaration constituted a gross violation¹⁹⁰ since it was not promulgated following the procedure set forth in Article VII of the Cairo Agreement.¹⁹¹ In addition, the declaration violated Article VII.9 of the Cairo Agreement, which states that all "[l]aws and military orders in effect in the Gaza Strip or the Jericho Area prior to the signing of this Agreement shall remain in force, unless amended or abrogated in accordance with this Agreement."¹⁹² Indeed,

188. See Cairo Agreement, *supra* note 2, art. IV.3 (regarding changes in the membership of the PA); art. VII.3 (providing for the communication of all legislation promulgated by the PA to the Legislative Subcommittee for prior examination); Annex II, art. II.B.32 (with respect to planning and zoning decisions). The Legislative Subcommittee is established by the Joint Civil Affairs Coordination and Cooperation Committee which is comprised of an equal number of representatives from Israel and from the PA; see Cairo Agreement, *supra* note 2, art. III.5 and Annex II, art. I.3. The general purpose of this scrutiny is to ensure that the legislation is consistent with the provisions of the Cairo Agreement. In cases of indecision the matter may see itself 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 of the Cairo Agreement stipulates that it will be referred to the Joint Israeli-Palestinian Liaison Committee (established by Article X of the DOP and Article XV of the Cairo Agreement) which is composed of an equal number of members from each party, for a final decision. It has been said in this respect that the Cairo Agreement, "[c]reates a number of joint coordinating committees whose task is to reduce the National Authority to the status of a municipality in virtual receivership." See Aruri & Carroll, *supra* note 151, at 17 (emphasis added).

189. See Raja Shehadeh, *Questions of Jurisdiction: A Legal Analysis of the Gaza-Jericho Agreement*, 23 J. PALESTINE STUD. 18, 23 (1994). See also Yossi Tourpstein, *Arafat Declared Return of Pre-1967 Law, Together With Abolition of Israeli Military Law*, HA'ARETZ, May 25, 1994, at A4.

190. David Libai, *Legal Aspects of the Peace Process*, 1 JUSTICE 3, 38 (1994) (published by the International Association of Jewish Lawyers and Jurists); Benvenisti, *supra* note 146, at 304-05.

191. Cairo Agreement, *supra* note 2, art. VII.

192. Cairo Agreement, *supra* note 2, art. VII.

over the twenty-eight month period that has elapsed since the PA first assumed authority in the Gaza Strip and parts of the West Bank, it has sidestepped the mechanism established in the Cairo Agreement by manifestly disregarding the entire procedure and never submitting any laws for approval by the Israeli side.¹⁹³ The Oslo II Agreement, which was drafted in light of this experience, enables Israel only to "refer for the attention of the Legal Committee"¹⁹⁴ any legislation to which it objects. PA legislation that is inconsistent with the Agreements is deemed by the Oslo II Agreement to be of no effect.¹⁹⁵ But neither Israel nor the Legal Committee have a right of veto.

Further evidence which underscores the contention that the legal status of areas in which the PA assumes authority has not been affected by the Agreements includes an article contained in the DOP declaring that the Israeli military government will continue to retain powers not explicitly handed over to the PA.¹⁹⁶ Also, the Agreements expressly negate the assumption by the PA of any major powers and responsibilities in the realm of foreign relations.¹⁹⁷ Finally, Israel is solely responsible for ensuring the defense of areas under PA authority against external threats.¹⁹⁸

Moreover, by contrast to the position taken by Israel¹⁹⁹ according to which the PA draws its authority only from the accords concluded between the parties, the Palestinians have

193. See Peace Watch, *Analysis of Oslo II Agreement Reveals Several Changes From Previous Accords* 1 (Oct. 2, 1995).

194. Oslo II Agreement, *supra* note 2, art. XVIII.6.

195. Oslo II Agreement, *supra* note 2, art. XVIII.4.a.

196. The *Agreed Minutes to Article VII(5) of the DOP*, *supra* note 2, states, "The withdrawal of the military government will not prevent Israel from exercising the powers and responsibilities not transferred to the Council." See Oslo II Agreement, *supra* note 2, art. XVII.4.

197. See Cairo Agreement, *supra* note 2, art. VI.2.a; Oslo II Agreement, *supra* note 2, art. IX.5.a. The Agreements do however, allow for some Palestinian interaction with foreign states and international organizations for the purpose of obtaining economic assistance as well as in the limited spheres of culture, science, and education. According to Singer, however, these exceptions to the rule that the autonomous body is not to conduct foreign relations correspond to the accepted international practice in this domain. See Singer, *supra* note 2.

198. See Cairo Agreement, *supra* note 2, art. VIII.1; Oslo II Agreement, *supra* note 2, art. X.4.

199. See Singer, *supra* note 2, at 6.

adopted the view that the source of the PA's legitimacy lies elsewhere. Given the fact that the PA possesses a measure of international stature and legitimacy such a stance appears arguable. The PA was headed, prior to the elections, by the Chairman of the PLO, an organization which has enjoyed diplomatic relations with scores of countries²⁰⁰ and that has been recognized by the United Nations General Assembly as the "representative of the Palestinian People."²⁰¹ A number of resolutions adopted by the international body prior to the DOP have recognized the "inalienable rights of the people in Palestine,"²⁰² which include, of course, the right to self-determination.²⁰³ Some PLO officials have maintained that the Palestinian institutions established for the interim period, derive their authority essentially from the will of the Palestinian people.²⁰⁴

200. Prior to its 1988 declaration of statehood the PLO maintained diplomatic relations of various types with over a hundred different governments. See William V. O'Brien's words in this respect:

The political/diplomatic strategy employed by the PLO in carrying out its grand strategy has been highly successful The practical manifestations of "recognition" or "observer status" have often been obscure, but the sheer quantity of recognitions and grants of status have produced the appearance of an international person, notwithstanding the fact that for most of its existence the PLO has not even claimed to be a government-in-exile and, even after the proclamation of the state of Palestine, has possessed no territory and exercised sovereign powers over no population.

WILLIAM V. O'BRIEN, *LAW AND MORALITY IN ISRAEL'S WAR WITH THE PLO* 33 (1991).

201. For instance, General Assembly Resolution 48/158 (adopted on January 26, 1994), which endorses the peace process, refers to the PLO as "the representative of the Palestinian people." G.A. Res. 158, U.N. GAOR, 48th Sess., U.N. Doc. A/RES/48/158 (1993).

202. G.A. Special Political Committee Res. 2672(c), U.N. GAOR, 25th Sess., Supp. No. 28, at 36, U.N. Doc. A/8028 (1970). See G.A. Res. 3236, U.N. GAOR, 29th Sess., Supp. No. 30, at 4, U.N. Doc. A/9630 (1974); G.A. Res. 34/44, arts. 3 and 15, U.N. GAOR, 34th Sess., Supp. No. 46, at 168-69, U.N. Doc. A/34/46 (1980).

203. G.A. Special Political Committee Res. 2672(c), U.N. GAOR, 25th Sess., Supp. No. 28, at 36, U.N. Doc. A/8028 (1970). See G.A. Res. 3236, U.N. GAOR, 29th Sess., Supp. No. 30, at 4, U.N. Doc. A/9630 (1974); G.A. Res. 34/44, arts. 3 and 15, U.N. GAOR, 34th Sess., Supp. No. 46, at 168-69, U.N. Doc. A/34/46 (1980).

204. See Palestine Liberation Organization, *Draft Basic Law for the National Authority in the Transitional Period*, Tunis, April 1994, reprinted in 23 J. PALESTINE STUD. 137 (1994). This document constitutes a provisional basic law for the interim period, intended to serve as a proposed constitution for the to-

As a result, the Palestinians can argue that the PA's power does not stem from the Agreements, but rather from the continued international legitimacy and recognition the Palestinians have enjoyed and the present heightened international influence of the PLO.

B. *The Dynamics of Peace*

An alternative assessment is, however, that the literal language of the Agreements signed by the parties paints a static and incomplete portrait of the relationship constructed between the two sides. Such a textual reading fails to take into account the political environment as well as the more general context in which the Agreements are being carried out.

Significantly, the text of the Agreements do indicate that a long-term, step by step peace process has been undertaken in which the PA is to progressively take over responsibility for the Palestinians' collective well-being. Thus, for the first time in history, there is a "Palestinian entity on Palestinian soil run by the Palestinians themselves."²⁰⁵ Not to be overlooked as well are certain decisive steps which are being carried out within the implementation of the Oslo II Agreement. These include a withdrawal of Israeli forces from areas in the West Bank that are densely populated by Palestinians²⁰⁶ and elections for the "Palestinian Interim Self-Government Authority"²⁰⁷ which constituted a further step toward the realization of the Palestinian people's right to self-determination.²⁰⁸ In-

be elected Council. It has yet to be promulgated. Article 1 states: "The Palestinian people are the source of all authority which shall be exercised, during the transitional period, through the legislative, executive and judicial authorities in the manner provided for by this Basic Law." *Id.* See generally Aruri & Carroll, *supra* note 151.

205. Khalidi, *supra* note 155, at 7.

206. See Oslo II Agreement, *supra* note 2, art. X.1; DOP, *supra* note 2, art. XIII.

207. See Oslo II Agreement, *supra* note 2, art. II; DOP, *supra* note 2, art. III.

208. Cassese claims that the DOP provides for both *internal* and *external* self-determination. In brief, he believes that *internal* self-determination is assured by the promise of holding elections in the West Bank and the Gaza Strip, together with the agreement that the Israeli "Civil Administration will be dissolved" and that "the Israeli military government will be withdrawn." As for *external* self-determination, the DOP is silent as to the form the Palestinian entity will take once its "permanent status" is ascertained (independent statehood or some form of association with the surrounding states).

deed, the Palestinians' right to self-determination under international law can be adduced in support of the argument that the occupation of areas for which authority has been transferred to the PA for the interim period will be terminated by the Council's assumption of its governmental functions in accordance with the Oslo II Agreement.²⁰⁹ As well, once the agreement is implemented, negotiations concerning the permanent status agreement commenced.²¹⁰ According to the time-table set out in the DOP, arrangements for the interim period are to be replaced by those established in the permanent status agreements no later than May 4, 1999.²¹¹

In the light of this overall dynamic, the Israeli military's presence in the West Bank and the Gaza Strip has progressively diminished while, at the same time, the Palestinians have assumed broadened responsibilities. This dynamic, from both a legal and a political standpoint, can be viewed as supporting

Nonetheless, Cassese maintains, on the basis of the various provisions which stipulate that the main objective of the DOP is to lead to the establishment of a "permanent status" for the West Bank and the Gaza Strip which should be consonant with Security Council resolutions 242 and 338, that the DOP envisages, as the final outcome of the peace process, the creation of an autonomous Palestinian authority in the West Bank and Gaza Strip with "some sort of independent international status." Hence, "[i]t can be safely asserted that, although in an oblique and roundabout way, the Declaration [of Principles] is grounded upon, and logically presupposes, the idea of the final attainment by Palestinians of self-determination." Cassese, *supra* note 2, at 568-69.

However, Israel's recognition of the Palestinians' right to self-determination need not automatically imply its assent to the creation of a Palestinian state. The prevailing standard of international law as set out by the International Court of Justice, is ambiguous as to the forms that self-determination may take. Professor Malvina Halberstam explains:

[T]he establishment of an independent state for each group seeking "self-determination" may not be the best solution. The desirability of an independent state depends on its economic, political, and military viability and on the effect its independence would have on other states in the region.

Malvina Halberstam, *Self-Determination in the Arab-Israeli Conflict: Meaning, Myth, and Politics*, 21 N.Y.U. J. INT'L L. & POL. 465, 470-71 (1989).

209. Theodor Meron, *West Bank and Gaza: Human Rights and Humanitarian Law in the Period of Transition*, 9 ISR. Y.B. HUM. RTS. 106, 118 (1979).

210. These negotiations commenced May 5, 1996. See DOP, *supra* note 2, art. V.2; Cairo Agreement, *supra* note 2, art. XXIII.3.

211. See DOP, *supra* note 2, art. V.1; see also Cairo Agreement, *supra* note 2, art. XXIII.3.

the argument that the Israeli occupation will gradually terminate as a consequence of the already concluded Agreements. Moreover under the Agreements the PA has already been given powers²¹² with respect to the internal affairs of the Gaza Strip and areas of the West Bank; in particular, the PA has indeed proceeded to establish a strong police force, apparently stronger than that authorized in these Agreements.²¹³

Thus, after examining the various texts and considering the dynamics of the peace process it remains impossible to answer unequivocally whether Israel is still in occupation of the Gaza Strip and areas of the West Bank where the PA has assumed authority and as a consequence, is responsible for the protection of human rights. Therefore, an examination of the situation on the ground is necessary. Such an overview of the material changes which have taken place in the aftermath of the Oslo Accords furnishes an additional and valuable dimension in grappling with the question at hand.

C. The Exercise of Power on the Ground

The role of the PA in the territories evacuated thus far by the Israeli military portrays a much different picture of the relations between the parties than is suggested by the literal language of the Agreements. Here the Palestinians' "autonomy" *vis a vis* Israel is more pronounced. Nonetheless, it is useful to first examine the nature of the remaining Israeli authority.

212. Cairo Agreement, *supra* note 2; Annex II, Protocol Concerning Civil Affairs, and Annex III, Protocol Concerning Economic Relations (list of powers and responsibilities transferred to the PA).

213. See DOP, *supra* note 2, art. VIII; Cairo Agreement, *supra* note 2, arts. II.6, VIII.1, and IX.1 (specifically authorizing the establishment and deployment of the Palestinian police force); Oslo II Agreement, *supra* note 2, art. XIV. After months of negotiations the sides reached an agreement on the size (up to 9,000 members), armament and deployment of the Palestinian Police force in Gaza and Jericho. Article III.3.c. of Annex I of the Cairo Agreement limits the number of policemen to 9,000. Sources in Israel estimate that the PA has violated the Agreements since it has enlisted about 15,000 Palestinian policemen. Alex Fishman, *Gaza Like Lebanon*, MA'ARIV, Mar. 12, 1995, supp. at 3; State of Israel, Government Press Office, *Selections From the Hebrew Press* 60 (1995); *Rabin Says Palestinian National Authority Has Recruited Too Many Policemen*, (BBC Short Wave Broadcasts), Voice of Israel, Jerusalem, Mar. 28, 1995 (ME/2265, MED/5).

1. *The Potency of the Residual Israeli Presence*

The Israeli Occupation Administration still exercises considerable influence over the daily life of the Palestinians residing in the Palestinian self-governing areas. First, the Israeli military has not fully withdrawn from the Gaza Strip. It exercises either direct control or overriding security responsibility over approximately forty percent of the Gaza Strip.²¹⁴ Substantial numbers of troops remain at checkpoints on the roads, at bases and posts near the international borders with Egypt and Jordan, and around the Jewish settlements.²¹⁵ When stationed at their posts or when patrolling the borders, Israeli troops continue to come into regular contact with Palestinians from the Gaza Strip, although fewer clashes between the Israeli army and Palestinians have taken place since the IDF withdrawal from the densely populated cities and refugee camps.²¹⁶

Second, the Israeli military controls all points of passage into and out of the West Bank and Gaza Strip. This aspect of the military's continued role has had some serious repercussions on the life of the resident population. In particular, it has enabled Israel to limit Palestinian access to employment in Israel, a measure that has caused widespread unemployment in Gaza.²¹⁷ The Palestinian residents of the Gaza Strip have been most affected as they have frequently been denied per-

214. HUMAN RIGHTS WATCH MIDDLE EAST, *THE GAZA STRIP AND JERICHO: HUMAN RIGHTS UNDER PALESTINIAN PARTIAL SELF-RULE* (1995).

215. Israel exercises direct control over a "military installation area" on the Egyptian border and over Jewish settlements, as delineated in a map attached to the Cairo Agreement. See Cairo Agreement, *supra* note 2, Annex I, arts. IV.3 and IV.6.

216. Peace Watch, *Sharp Drop in Number of Palestinians Killed by Israeli Security Forces In Year Since Signing of Gaza-Jericho Accords; Decrease of 90% in Gaza, 30% in West Bank* (May 8, 1995). There have been, however, several large-scale, deadly shoot-outs between Palestinian policemen and IDF soldiers. See Alon Pinkas & Bill Hutman, *Barak: Palestinian Police Deliberately Shot At Us*, JERUSALEM POST, July 18, 1994, at 1. Jon Immanuel and Aryeh O'Sullivan, *4 Killed in Clashes Between the IDF, PA Police: Over 240 Arabs, 12 Soldiers Wounded in Rammallah, Bethlehem Riots*, JERUSALEM POST, Sept. 26, 1996, at 1; Aryeh O'Sullivan, *11 IDF Soldiers, Over 30 Palestinians Killed*, JERUSALEM POST, Sept. 30, 1996, at 1.

217. During the years of occupation many Palestinians came to depend on employment in Israel. See, e.g., Steve Rodan, *Resentment Rises in the "Prison,"* JERUSALEM POST, Apr. 7, 1995, at 8.

mission to travel to the West Bank or Jerusalem, where many essential institutions are located. Among them are university students from Gaza who attend Bir Zeit University in the West Bank.²¹⁸ In addition, Israel holds a veto power over who may enter the Gaza Strip and Jericho from Egypt and Jordan respectively, and who may receive residency status in these areas.²¹⁹

2. *Israeli Disengagement*

Aside from Israel's authority in matters relating to supervising entry points and controlling borders, Israeli practice, although not required by the Agreements, has followed a clear-cut policy of disengagement from the internal affairs of the Palestinians, especially those residing in the Gaza Strip and parts of the West Bank where local authority has been transferred to the PA. In the streets Palestinian security forces have assumed responsibility for maintaining order in the self-governing areas and thereby eliminated what was unquestionably the most visible manifestation of the occupation, regular Israeli army and Border Police patrols.

The DOP, and the Cairo and Oslo II Agreements, as well as the actual practice of Israeli and PA officials in Gaza and Jericho, leave contradictions regarding the issue of control. Both Israel and the PA can claim authority, albeit using different arguments to support their positions. Israel's broad prerogatives as set forth in the texts of the Cairo and Oslo II Agreements are mainly latent in nature at this stage of the peace process, at least as regards the daily lives of Palestinians who do not travel outside of the autonomous areas. The PA's argument is based on their self-conception of Palestinian identity and the momentum they have established towards acquiring additional significant day-to-day authority. Furthermore, the government of Israel has embarked on a long-term, step by step peace process according to which PA, particularly after it held elections, is to progressively take over responsibility for the Palestinians' collective well-being. In sum, at least at this stage of the interim developments, it cannot be said that Israel

218. HUMAN RIGHTS WATCH MIDDLE EAST, *supra* note 214, at 45-46.

219. See Cairo Agreement, *supra* note 2, Annex II, art. II.27.g,h,i. See also Justus R. Weiner, *The Palestinian Refugees' "Right to Return" and the Peace Process*, B.C. INT'L & COMP. L. REV. (forthcoming).

has fully disengaged from its responsibilities as occupier of all of the West Bank and Gaza Strip, including the areas under the local administration of the PA. It could well be that the diplomatic tool of 'creative ambiguity' is at work here. That is, the government of the late Prime Minister Rabin and his successor, former Prime Minister Shimon Peres, were not willing to give the Israeli public a clear understanding of how difficult it would be to reverse the steps that have been taken. Moreover, neither the previous government nor the current leadership has been eager to do anything at this stage which could be taken as recognizing Palestinian claims to sovereignty. Likewise, the Palestinians are willing, as long as their authority on the ground is on the increase, to indulge Israel's reluctance and fears regarding the future by signing rigid and concessionary terms.

V. ATTRIBUTION TO ISRAEL OF THE PALESTINIAN AUTHORITY'S HUMAN RIGHTS VIOLATIONS

A. *The Israeli Military Government Continues to Operate*

An argument can be formulated under international law that human rights violations in areas under Palestinian autonomy, perpetrated by agents of the PA, should be attributed to Israel. This argument is based on the rules of state responsibility under which the PA may be considered, for the interim period, a delegate of Israeli authority in the West Bank and Gaza Strip.²²⁰ Indeed, the Oslo II Agreement speaks of a "transfer [of] powers and responsibilities . . . from the Israeli military government and its Civil Administration to the Council"²²¹ and declares that the Israeli military government will continue its operations throughout the interim period.²²² Israel, therefore, continues to be the occupant²²³ of the West Bank and Gaza Strip in their entirety, while the PA is entrusted with sig-

220. Foreign Ministry, Jerusalem Transfer of Powers-Principles, Document 1153359, cited in 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).

221. Oslo II Agreement, *supra* note 2, art. I.1 (emphasis added); see also Cairo Agreement, *supra* note 2, art. III.1.

222. Oslo II Agreement, *supra* note 2, art. I.1.

223. See Eric David, *Principes de Droit des Conflits Armes* 524 (1994).

nificant governmental powers in the self-governing areas. This situation implies that under international law Israel could incur liability for the unlawful acts perpetrated by the PA in Gaza and Jericho, since the general principles governing state responsibility as regards attribution of liability to the state for acts of its organs are equally applicable in situations of armed conflict and occupation.²²⁴

B. *The Draft Articles on State Responsibility of the International Law Commission*

Imputation to Israel of responsibility for acts taken by the PA in violation of international law would thus be warranted, as the Draft Articles on State Responsibility²²⁵ adopted by the International Law Commission [ILC] explicitly indicates. Paragraph two of Article 7 of the Draft Articles reads:²²⁶

224. *Id.*

225. *Report of the Commission to the General Assembly on the Work of Its Twenty-Eighth Session*, U.N. GAOR, 31st Sess., Supp. No. 10, U.N. Doc. A/31/10 (1976), reprinted in THE INTERNATIONAL LAW COMMISSION'S DRAFT ARTICLES ON STATE RESPONSIBILITY: PART I, ARTICLES 1-35 157-59 (Shabtai Rosenne ed., 1991) [hereinafter DRAFT ARTICLES]. For the past four decades the International Law Commission has been working on codifying the principles of international law governing state responsibility. Since 1955, four Special Rapporteurs have been appointed and twenty-five reports have been issued on the subject. Over thirty-five articles have been adopted thus far by the Commission that touch upon fundamental issues of state responsibility, such as: the attribution of international responsibility to the state, the breach of an international obligation and circumstances that preclude wrongfulness. The Draft Articles are submitted periodically to the United Nations General Assembly with a view towards possible incorporation into future treaties. See generally IAN BROWNLIE, SYSTEM OF THE LAW OF NATIONS: STATE RESPONSIBILITY 13-18 (1981); UNITED NATIONS CODIFICATION OF STATE RESPONSIBILITY (Marina Spinedi & Bruno Simma, eds., 1987); UNITED NATIONS, THE WORK OF THE INTERNATIONAL LAW COMMISSION 89-100 (4th ed., 1988); THE INTERNATIONAL LAW COMMISSION'S DRAFT ARTICLES ON STATE RESPONSIBILITY 1-32 (Rosenne ed. 1991); ROSALYN HIGGINS, PROBLEMS AND PROCESS, INTERNATIONAL LAW AND HOW WE USE IT 146-47 (1994).

226. One commentator made the following remark concerning the Draft Articles:

[They] have undoubtedly taken on a certain importance. They are widely invoked and are often spoken of as if they are authoritative . . . even though they are not a source of international law in the formal sense of the term.

HIGGINS, *supra* note 224, at 148-49.

The conduct of an organ of an entity which is not part of the formal structure of the State or of a territorial governmental entity, but which is empowered by the internal law of that State to exercise elements of the governmental authority, shall also be considered as an act of the State under international law, provided that organ was acting in that capacity in the case in question.²²⁷

This rule represents a logical extension of the general principle that a state is to bear responsibility in the international arena for acts undertaken by its organs.²²⁸ Indeed, under prevailing standards of international law, a state must assume responsibility for the conduct of entities performing governmental functions within the territory of the state, such as municipalities, provinces, regions, cantons, and component states of a federal state, regardless of whether their authority is founded by the state's constitution or by delegation from the national government.²²⁹ Likewise, where an entity like the PA is empowered by internal law to exercise certain elements of the governmental authority outside of the territorial boundaries of the state, its conduct will be attributed to the state under international law. The reason for this attribution, as the ILC's Report²³⁰ makes clear, is that a state should not be allowed to escape international liability by assigning its duties to a distinct entity:

In the Commission's view, the question whether the conduct of organs of its territorial governmental entities should be attributed to the State under international law, calls for the same affirmative answer when

227. DRAFT ARTICLES, *supra* note 225, art. 7, para. 2.

228. DRAFT ARTICLES, *supra* note 225, art. 5. See generally BROWNLIE, *supra* note 225, 132-44.

229. See OPPENHEIM, INTERNATIONAL LAW: A TREATISE 339-40 (Hersch Lauterpacht ed., 8th ed., 1955); E. Jimenez de Arechaga, *International Responsibility*, in MANUAL OF PUBLIC INTERNATIONAL LAW 531, 544, 557-58 (M. Sorensen ed., 1968); D.P. O'CONNELL, INTERNATIONAL LAW 965-66 (2d ed. 1970); YORAM DINSTEIN, INTERNATIONAL CLAIMS 62-63 (1977); BROWNLIE, *supra* note 225, at 141-42; NGUYEN QUOC DINH, PATRICK DAILLIER & ALAIN PELLET, DROIT INTERNATIONAL PUBLIC 723, 727 (4th ed. 1992).

230. Report of the International Law Commission to the General Assembly on the Work of Its Twenty-Six Session, U.N. Doc. A/9610/Rev.1. (1974), reprinted in THE INTERNATIONAL LAW COMMISSION'S DRAFT ARTICLES ON STATE RESPONSIBILITY 71-92 (Shabtai Rosenne ed., 1991).

the organs involved are organs of entities whose separate existence meets a need for decentralization not *ratio loci* but *ratione materiae*, and for the same reasons. In both cases it is important that the State should not be able to evade its international responsibility in certain circumstances solely because it has entrusted the exercise of some elements of the governmental authority to entities separate from the State machinery proper.²³¹

Applying these principles of state responsibility to the situation in the West Bank and Gaza Strip during the interim stage of the peace process, it is evident that Israel may be held responsible for any breaches of international law (including human rights law) committed by the PA.²³² As previously dis-

231. Subsequently, the report discusses the criteria to be used in designating the entities concerned by Draft Article 7(2) are discussed:

The fact that an entity can be classified as public or private according to the criteria of a given legal system, the existence of a greater or lesser State participation in its capital or, more generally, in the ownership of its assets, and the fact that it is not subject to State control, or that it is subject to such control to a greater or lesser extent, and so on, do not emerge as decisive criteria for the purposes of attribution or non-attribution to the State of the conduct of its organs. Hence the Commission has come to the conclusion that the most appropriate solution is to refer to the real common feature which these entities have: namely that they are empowered, if only exceptionally and to a limited extent, to exercise specified functions which are akin to those normally exercised by organs of the State. The justification for attributing to the State, under international law, the conduct of an organ of one or other of the entities here considered still lies, in the final analysis, in the fact that the internal law of the State has conferred on the entity in question the exercise of certain elements of the governmental authority.

Id.

232. It must be emphasized that responsibility for violations of international law committed solely by the PA in their exercise of power in Gaza and Jericho are under discussion here. As for the many internationally unlawful acts perpetrated by the PLO since its inception in 1964, the question of who should assume international responsibility is dealt with by Articles 14 and 15 of the Draft Rules on State Responsibility that set out the rules in connection with the international responsibility of insurrectional movements. For more on this subject, see Hazam Adam, *National Liberation Movements and International Responsibility*, in UNITED NATIONS CODIFICATION OF STATE RESPONSIBILITY (Marina Spinedi & Bruno Simma eds., 1987).

cussed,²³³ the Cairo Agreement establishes the PA's assumption of power in Gaza and Jericho, and was implemented by military proclamation through the local law of the West Bank and Gaza Strip.²³⁴ The Israeli government has adopted the view that the PA draws its authority from, and is legally subordinate to, the Israeli military government in the West Bank and Gaza Strip.²³⁵ To be consistent, therefore, responsibility for the PA's violations of international law should be attributed to Israel.

Finally, lest it be argued that Israel should not bear responsibility for acts of the PA that contravene international human rights law because such acts are expressly prohibited by the Agreements, Article 10 of the Draft Articles provides:

The conduct of an organ of a State, of a territorial governmental entity or of an entity empowered to exercise elements of the governmental authority, such organ having acted in that capacity, shall be considered as an act of the State under international law even if, in the particular case, the organ exceeded its competence according to interval law or contravened instructions concerning its activity.²³⁶

It is well established in international law that no conduct of state organs nor other entities may be excluded from attribution to the state for reason of the conduct being *ultra vires*.²³⁷ The need for clarity and security in international relations constitutes the primary consideration. Otherwise, states could easily evade responsibility by invoking a breach of the municipal or constitutional law on the part of the organ, entity, or delegate in question.²³⁸ Therefore, the state should be held responsible under international law for the unlawful acts perpetrated by its organs or entities, irrespective of whether these acts conform with or are contrary to the municipal legal provisions governing their conduct.²³⁹

233. See *supra* text accompanying note 5.

234. See *supra* note 182.

235. See Singer, *supra* note 2, at 6; *supra* text accompanying note 176.

236. DRAFT ARTICLES, *supra* note 225, art. 10.

237. DRAFT ARTICLES, *supra* note 225, at 95, 105.

238. DRAFT ARTICLES, *supra* note 225, at 95, 100.

239. DRAFT ARTICLES, *supra* note 225, at 66.

VI. SCRUTINY OF THE HUMAN RIGHTS POLICIES AND PRACTICES OF THE PALESTINIAN AUTHORITY

Human rights issues, particularly allegations of violations of Palestinians' rights by Israel, became very high profile issues during the years that preceded the DOP.²⁴⁰ This can in part be attributed to the worldwide growth of interest in individual rights or to Israel's political isolation. These factors notwithstanding, a growing number of local and international organizations energetically and quite effectively emphasized Palestinian rights and put the spotlight on Israeli conduct. Unfortunately, most of the local and international human rights organizations have barely commented on the conduct of the PA or conditions in the Palestinian self-governing areas since its assumption of local control. Varied reasons exist for this uncharacteristic silence, including limited mandates, inadequate resources, or a willingness to give the PA a "honeymoon" period. These numerous excuses should not deter similar investigations into the conduct of the PA, even during the interim period.

240. 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 often held Israel jointly responsible for conditions at the Al-Khiam prison of the South Lebanese Army in Southern Lebanon. See, e.g., AMNESTY INTERNATIONAL, REPORT 334-36 (1986) (Amnesty International held Israel accountable for poor prison conditions and torture although Israel insisted it had no presence in the facility); AMNESTY INTERNATIONAL, REPORT 170-71 (1993); AMNESTY INTERNATIONAL, ISRAEL AND THE OCCUPIED TERRITORIES: ORAL STATEMENT TO THE UNITED NATIONS COMMISSION ON HUMAN RIGHTS ON THE ISRAELI OCCUPIED TERRITORIES 2. 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, Attorney General, Israel, to Thomas Hammarberg, Secretary General 1-4, (Feb. 8, 1984) (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 INTERNATIONAL, NEWSLETTER, at 8 (Autumn 1988); see generally B'TSELEM, *supra* note 220. Both the U.S. State Department and Amnesty International have blamed Israel for the violent behavior of the Jewish settlers in the West Bank and Gaza Strip. Cf. *Israel Must Conduct Policing Review in the Wake of the Hebron Massacre*, AMNESTY INTERNATIONAL 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.

1. *Palestinian and Israeli Human Rights Organizations*

The late Prime Minister Rabin startled many observers when he stated three years ago that the PLO would be able to enforce law in the territories because it had no need to be concerned about either criticism from human rights organizations or having its policies challenged before the Israeli Supreme Court sitting as the High Court of Justice.²⁴¹ He said: "If the Palestinians become a partner to the agreement, they will manage their internal affairs without a High Court of Justice, without B'Tselem [an Israeli human rights organization], and without various mother or father-type organizations . . ."²⁴²

a. *Al-Haq*

Al-Haq is a local Palestinian human rights organization.²⁴³ It was established in 1979 in order to "develop, uphold, and seek enforcement of human rights and the rule of law"²⁴⁴ in the West Bank and Gaza Strip. Thereafter, it published many reports drawing attention to allegations of Israeli human rights violations.²⁴⁵ Al-Haq is considered by Israeli government officials to be distinctly hostile and unobjective in its op-

241. See B'TSELEM, *supra* note 220.

242. See B'TSELEM, *supra* note 220.

243. Al-Haq is the West Bank affiliate of the Geneva-based International Commission of Jurists.

244. LINDA BEVIS, *THE APPLICABILITY OF HUMAN RIGHTS LAW TO OCCUPIED TERRITORIES: THE CASE OF THE OCCUPIED PALESTINIAN TERRITORIES* (1994).

245. See, e.g., LINDA BEVIS & ZUHAIR SABBAGH, *AN AILING SYSTEM: ISRAELI MILITARY GOVERNMENT HEALTH INSURANCE IN THE OCCUPIED PALESTINIAN TERRITORIES* (1993); ANGELA GAFF, *AN ILLUSION OF LEGALITY: A LEGAL ANALYSIS OF ISRAEL'S MASS DEPORTATION OF PALESTINIANS ON 17 DECEMBER 1992* (1993); LYNN WELCHMAN, *A THOUSAND AND ONE HOMES: ISRAEL'S DEMOLITION AND SEALING OF HOUSES IN THE OCCUPIED PALESTINIAN TERRITORIES* (1993).

erations and positions.²⁴⁶ Several of its field workers have been imprisoned for subversive activities.²⁴⁷

It is important that there be a Palestinian human rights leadership that acts independently of the political system. Al-Haq, the senior such organization, has asserted that it will speak out publicly,²⁴⁸ but during the first two years following the DOP it has chosen, except in three instances, to raise its objections in a private, quiet manner with the PA.²⁴⁹ This is in sharp contrast to the highly public profile that Al-Haq has taken in criticizing alleged human rights violations by Israel since its inception in 1979.²⁵⁰

A booklet published under the auspices of Al-Haq, after the signing of the DOP (but prior to the signing of the Cairo Agreement), discusses the issue of accountability under international law for human rights violations committed by a Palestinian self-governing authority in the West Bank and Gaza Strip during the interim period.²⁵¹ Generally speaking, the position adopted by Al-Haq reflects a clear inclination to attribute ultimate responsibility for PA human rights violations during the interim period to the Israeli military government.

246. AMIT-KOHN ET AL., *supra* note 39, at 238. In a related observation Professor Adam Roberts commented:

The language of law can easily become a language of right and wrong, of moralistic reproach, of the clothing of interest in the garments of rectitude, of the concealment of factual changes with legal fictions, of refined scholasticism in the face of urgent practical problems, and of the facile application of general rules without a deep understanding of situations that are unique. Such approaches are hardly the highest expressions of law; nor are they necessarily the best way of addressing complex and multilayered international problems such as those encountered in the occupied territories.

Roberts, *supra* note 18, at 45.

247. See Jonathan Auerbach, *Finding Terror in the Wrong Places*, BOSTON PHOENIX, Aug. 28-Sept. 3, 1987, at 1.

248. Myles Crawford, *Al-Haq and the New Authority*, BILADI JERUSALEM TIMES, Apr. 15, 1995, at 8.

249. *Id.*; see Ouri Nir, *Palestinian Human Rights Group Calls Upon P.A. to Annul Regulations that Violate Right to Freedom of Assembly*, HA'ARETZ, July 7, 1995, at A3.

250. Al-Haq's reports have frequently been criticized as being political in nature and the organization has been chided as being, in essence, a Palestinian rights group rather than a human rights organization. See, e.g., Cohen, *supra* note 43, at xii.

251. BEVIS, *supra* note 244, at 91-97.

Indeed, the following paragraph which provides the historical-legal background against which the analysis is conducted, reflects the position that the occupying government remains responsible even where numerous spheres of authority have been transferred to the local population:

Occupations come in many forms. Some occupiers prefer to rule directly, through a military government, as Israel did formally until 1981. Others prefer to create administrative bodies staffed mostly by the occupied population but headed by members of the occupier's regime. In 1981 . . . Israel transferred much of the administrative responsibility for the Occupied Territories to the "Civil Administration," a subordinate branch of the Israeli Ministry of Defense which retained overall responsibility for the occupation [footnote omitted]. Many of the employees of the Civil Administration were Palestinian teachers, doctors, police, technicians and bureaucrats. Notwithstanding these organizational changes, the structure that these employees worked within and the laws with which they were compelled to comply remained completely controlled by the Israeli occupation regime which had transferred to itself full legislative, executive, and judicial authority at the very beginning of the occupation. This case illustrates why different forms of occupation do not affect the occupier's full responsibility and accountability for its actions during a belligerent occupation according to international humanitarian and human rights law.²⁵²

Indeed, Al-Haq's position, is that as long as the Palestinians in the West Bank and Gaza Strip remain subject to the Israeli military government, Israel should be held accountable for any violations of international humanitarian law.²⁵³ In its

252. BEVIS, *supra* note 244, at 91.

253. BEVIS, *supra* note 244, at 94. Elsewhere, however, Al-Haq allowed that:

To the extent that the government of Israel no longer exercises the functions of government in certain spheres, it may be practically and/or juridically difficult to hold Israel accountable in those spheres, at least on the domestic plane. In such cases, provision must be made to hold the Palestinian authorities accountable.

AL-HAQ, *supra* note 150, at 15.

view, the DOP represents an agreement between the parties under the purview of Article 47 of the Fourth Geneva Convention,²⁵⁴ and, as such, may not exempt Israel from carrying out its obligations under international humanitarian law.

It is unfortunate that Al-Haq has not updated its position in light of the transfer of authority to the PA for the Gaza Strip and areas of the West Bank. Whether the human rights organization considers the Palestinians residing in these regions as still being subject to the "will of the Occupying Power,"²⁵⁵ is a crucial question which has regrettably gone unanswered. Nonetheless, it appears from Al-Haq's standpoint that the mechanism established in the Cairo Agreement (but revised by the Oslo II Agreement²⁵⁶), by virtue of which all Israeli military orders remain in force and all amendments thereof by the PA are subject to an Israeli veto,²⁵⁷ constituted a substantial and illegitimate handicap of the PA in its exercise of authority. As such, the Cairo Agreement's mechanism may have justified imputing liability on the international plane to Israel for any violations of human rights which may ensue from the PA's conduct.²⁵⁸ Such a conclusion, however, appears less assured

254. Article 47 of the Fourth Geneva Convention reads:

Protected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory, into the institutions or government of the said territory . . . nor by any annexation by the latter of the whole or part of the occupied territory.

Fourth Geneva Convention, *supra* note 17, art. 47. However, this article may also be seen as relating solely to changes introduced *unilaterally* by the occupier in the ways in which it maintains its authority over the occupied population.

255. BEVIS, *supra* note 244, at 94.

256. See *supra* note 193 and accompanying text.

257. See *supra* notes 176-81 and accompanying text.

258. The following discussion of Israel's obligations for the interim period under the international law of human rights would appear to support such a conclusion:

Israel must also continue to be held responsible under its human rights conventional and customary obligations in the Occupied Territories to the extent that it continues to exercise jurisdiction in the Occupied Territories. Application of this principle to specific rights may be difficult. If for instance, Israel agrees to grant control of health matters to Palestinians, this arguably releases Israel from its responsibility on the international plane for health conditions in the Occupied Territories. However, if Israel retains a veto over re-

Indeed, the following paragraph which provides the historical legal background against which the analysis is conducted, reflects the position that the occupying government remains responsible even where numerous spheres of authority have been transferred to the local population:

Occupations come in many forms. Some occupiers prefer to rule directly, through a military government, as Israel did formally until 1981. Others prefer to create administrative bodies staffed mostly by the occupied population but headed by members of the occupier's regime. In 1981 . . . Israel transferred much of the administrative responsibility for the Occupied Territories to the "Civil Administration," a subordinate branch of the Israeli Ministry of Defense which retained overall responsibility for the occupation [footnote omitted]. Many of the employees of the Civil Administration were Palestinian teachers, doctors, police, technicians and bureaucrats. Notwithstanding these organizational changes, the structure that these employees worked within and the laws with which they were compelled to comply remained completely controlled by the Israeli occupation regime which had transferred to itself full legislative, executive, and judicial authority at the very beginning of the occupation. This case illustrates why different forms of occupation do not affect the occupier's full responsibility and accountability for its actions during a belligerent occupation according to international humanitarian and human rights law.²⁵²

Indeed, Al-Haq's position, is that as long as the Palestinians in the West Bank and Gaza Strip remain subject to the Israeli military government, Israel should be held accountable for any violations of international humanitarian law.²⁵³ In its

252. BEVIS, *supra* note 244, at 91.

253. BEVIS, *supra* note 244, at 94. Elsewhere, however, Al-Haq allowed that

To the extent that the government of Israel no longer exercises the functions of government in certain spheres, it may be practically and/or juridically difficult to hold Israel accountable in those spheres, at least on the domestic plane. In such cases, provision must be made to hold the Palestinian authorities accountable.

AL-HAQ, *supra* note 150, at 15.

the DOP represents an agreement between the parties under the purview of Article 47 of the Fourth Geneva Convention²⁵⁴ and, as such, may not exempt Israel from carrying out obligations under international humanitarian law.

It is unfortunate that Al-Haq has not updated its position in light of the transfer of authority to the PA for the Gaza Strip and areas of the West Bank. Whether the human rights organization considers the Palestinians residing in these regions as still being subject to the "will of the Occupying Power,"²⁵⁵ is a legal question which has regrettably gone unanswered. Nonetheless, it appears from Al-Haq's standpoint that the mechanism established in the Cairo Agreement (but revised in the Oslo II Agreement²⁵⁶), by virtue of which all Israeli military orders remain in force and all amendments thereof by the PA are subject to an Israeli veto,²⁵⁷ constituted a substantial illegitimate handicap of the PA in its exercise of authority. Such, the Cairo Agreement's mechanism may have justified placing liability on the international plane to Israel for any violations of human rights which may ensue from the PA's conduct.²⁵⁸ Such a conclusion, however, appears less assured

Article 47 of the Fourth Geneva Convention reads:

Protected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory, into the institutions or government of the said territory . . . nor by any annexation by the latter of the whole or part of the occupied territory.

Fourth Geneva Convention, *supra* note 17, art. 47. However, this article may be seen as relating solely to changes introduced *unilaterally* by the occupier in the ways in which it maintains its authority over the occupied popula-

BEVIS, *supra* note 244, at 94.

See supra note 193 and accompanying text.

See supra notes 176-81 and accompanying text.

The following discussion of Israel's obligations for the interim period of the international law of human rights would appear to support such a conclusion.

Israel must also continue to be held responsible under its human rights conventional and customary obligations in the Occupied Territories to the extent that it continues to exercise jurisdiction in the Occupied Territories. Application of this principle to specific issues may be difficult. If for instance, Israel agrees to grant control over health matters to Palestinians, this arguably releases Israel from responsibility on the international plane for health conditions in the Occupied Territories. However, if Israel retains a veto over re-

at this stage of the process given that the Oslo II Agreement only permits Israel to request clarification concerning Palestinian legislation during the interim period.

Lastly, Al-Haq has taken the position that the PA, since it is not a state, does not have the necessary legal personality to commit itself to respect international human rights standards.²⁵⁹ The human rights organization maintains that this restriction on the PA's legal faculties, together with the fact that for the interim period Israel continues to occupy the Palestinian population in the West Bank and Gaza Strip²⁶⁰ should also be considered in assessing which side should bear the ultimate responsibility on the international plane for human rights violations perpetrated by the PA.²⁶¹

b. *B'Tselem*

B'Tselem is a local Israeli human rights organization whose monitoring activities have focused mainly on violations of human rights perpetrated in areas under the authority of the IDF. Since its inception in 1989, the organization has monitored and frequently reported on instances in which Palestinian residents of the West Bank and Gaza Strip were victims of human rights abuses.²⁶² Nearly all of its dozens of re-

view of health legislation and other relevant military orders, and retains control over health-related matters such as planning territory-wide infrastructure and water sanitation and supplies, it can hardly be said that Israel no longer exercises jurisdiction over health in the Occupied Territories.

BEVIS, *supra* note 244, at 94.

259. BEVIS, *supra* note 244, at 95-96.

260. According to Al-Haq:

The legal status of the West Bank and Gaza Strip continues to be that of occupied territories, and Israel the Occupying Power because Israel will continue to hold all authority regarding external security, border control, and internal security and order concerning Israelis and Israeli settlers, as well as holding partial authority in the many areas controlled by joint cooperative committees. Therefore, the Fourth Geneva Convention will continue to apply. . . .

AL-HAQ, *supra* note 150, at 9.

261. BEVIS, *supra* note 244, at 96-97.

262. B'TSELEM, THE INTERROGATION OF PALESTINIANS DURING THE INTIFADA: ILL-TREATMENT, "MODERATE PHYSICAL PRESSURE" OR TORTURE? (1991); B'TSELEM, DETAINED WITHOUT TRIAL: ADMINISTRATIVE DETENTION IN THE OCCUPIED TERRITORIES SINCE THE BEGINNING OF THE INTIFADA (1992);

ports have been critical of the Israeli authorities.²⁶³ The authorities have, in response, accused B'Tselem of having "political connections" and many of its reports have been met by sharp rebukes by Israeli government officials, who have accused them of "inaccuracy" and "lack of objectivity."²⁶⁴ In 1995, B'Tselem published a report critical of the Palestinian Secret Service for, inter alia, shooting, torturing, unlawfully abducting, and arresting without warrants Palestinian residents of the West Bank who live in regions that remain subject to exclusive Israel criminal jurisdiction under the Cairo Agreement.²⁶⁵ The acts are not:

[R]are acts committed by a few individuals; they are the result of PA policy. The large number of human rights violations support this conclusion. Furthermore, despite repeated complaints about these acts, there is not even one report of the PA in Jericho taking legal measures against any of those responsible.²⁶⁶

In the aftermath of the signing of the Cairo Agreement and the IDF's subsequent partial withdrawal from Gaza and Jericho, the question arose whether B'Tselem would, during

B'TSELEM, DEPORTATION OF PALESTINIANS FROM THE OCCUPIED TERRITORIES AND THE MASS DEPORTATION OF DECEMBER 1992 (1993).

263. One report, however, focused on the intrafada killings by Palestinians. B'TSELEM, COLLABORATORS IN THE OCCUPIED TERRITORIES: HUMAN RIGHTS ABUSES AND VIOLATIONS (1994).

264. AMIT-KOHN ET AL., *supra* note 39, at 238-39.

265. B'TSELEM, *supra* note 220. In the aftermath of this B'Tselem report, the organization's Palestinian field worker, Bassem 'Eid was publicly threatened by the head of the Palestinian Preventive Security Service and accused of "collaborating" with Israel. See Nitzan Horovitz, "Reporters Without Frontiers: Rajoub's Declarations Endanger B'Tselem Researcher's Life, HA'ARETZ, Aug. 27, 1995, at A4.

266. B'TSELEM, *supra* note 220, at 30. The report goes on to point out that:

The ability of PSS [Palestinian Preventive Security Service] agents to blatantly violate human rights with almost total impunity is particularly worrisome since the PA will, according to the peace talks currently in process, be given broad powers in the rest of the West Bank, including control over internal security. If the PA does not act now to end the present trend of human rights abuses, a pattern of systematic violations and institutional repression will emerge in the autonomous areas under its control.

B'TSELEM, *supra* note 220, at 30.

the interim period of the peace negotiations, continue its monitoring activities in these regions. Pursuant to a decision taken by the organization's board, it was established that "as an Israeli organization, B'Tselem would continue to focus its attention solely on the obligations [to ensure the protection of human rights] of the Israeli authorities,"²⁶⁷ and that "[w]hen human rights abuses occur in spheres in which the Palestinian Authority has sole control, B'Tselem will leave the monitoring and documentation to local Palestinian human rights organizations."²⁶⁸ However, it was also decided that where the Cairo Agreement maintains the Israeli military's responsibility for specific spheres of activity in Gaza and Jericho, such as external security and the protection of Jewish settlements, the organization will continue to monitor any human rights violations which may occur in the exercise of the Israeli military's prerogatives.²⁶⁹

The decision adopted by the B'Tselem board restricting the organization's monitoring activities to those areas in the West Bank and Gaza Strip that remain under the direct authority of the Israeli military would appear to indicate that B'Tselem considers the PA ultimately accountable on the international plane, for violations of human rights perpetrated in those areas for which it obtains authority under the Agreements.²⁷⁰ The Israeli human rights organization's position on this subject is, however, ambiguous. Thus, one finds in a report issued by the organization an endorsement of the view espoused by the then Legal Advisor of the Israeli Ministry of Foreign Affairs, Joel Singer,²⁷¹ that the West Bank and Gaza

267. B'TSELEM, *B'Tselem and the Autonomous Areas*, THE B'TSELEM HUMAN RIGHTS REPORT 9 (1995) (emphasis added).

268. *Id.* Recently the B'Tselem board decided to broaden the scope of its inquiries. Interview with Eitan Felner, Deputy to the Executive Director of B'Tselem (Sept. 27, 1996).

269. B'TSELEM, *supra* note 267.

270. B'Tselem has written:

Since the Palestinian Authority is not a state, it cannot be a party to international human rights conventions. Nevertheless, in B'Tselem's view, the PA is obligated to act according to the norms of customary international law, [footnote omitted] since the authority has the indubitable markings of a government, including police force, courts, limited legislative powers, etc.

B'TSELEM, *supra* note 220.

271. See Singer, *supra* note 2, at 6; *supra* text accompanying note 176.

Strip remain subject to the authority of the Israeli military government for the interim period, and therefore constitute "occupied territories."²⁷² B'Tselem has affirmed that the Fourth Geneva Convention will continue to apply to the West Bank and Gaza Strip,²⁷³ thereby implying that the latter should still be considered as subject to Israeli occupation under international law. Lastly, B'Tselem expressed its view that Israel is "the ultimate responsible party for protecting Palestinians under its control"²⁷⁴ and criticized Israel for its failure to do so.²⁷⁵ What precisely does the organization purport to say when it asserts that Israel is "the ultimate responsible party for protecting Palestinians under its control?"²⁷⁶ Israel certainly continues to be responsible under international law for Palestinians residing in those areas in the West Bank and Gaza Strip for which authority has yet to be transferred to the PA.²⁷⁷ The issue, however, is whether it should also be held responsible for human rights violations perpetrated by the PA in the Gaza Strip and areas of the West Bank for which it obtains local authority during the interim period. Are the Palestinian residents of these areas also to be considered as under the control of the Israeli military government? To the author's regret, it appears that B'Tselem's response simply begs the question.

c. *The Palestinian Independent Commission for Citizen's Rights*

The Palestinian Independent Commission for Citizen's Rights²⁷⁸ [PICCR] was established at the behest of Yassir

272. B'TSELEM, *A Year and a Half After Oslo: Israeli Voices on Human Rights in the Occupied Territories*, THE B'TSELEM HUMAN RIGHTS REPORT 1, 14 (1995).

273. *Id.*

274. *Id.*

275. B'TSELEM, *supra* note 220, at 31.

276. B'TSELEM, *supra* note 220, at 31 (emphasis added).

277. B'Tselem has complained that "Israel has almost totally refrained from taking any measures to prevent human rights violations and trying those responsible, even though in most cases the identity of the perpetrator is known." B'TSELEM, *supra* note 220, at 31.

278. It is revealing that the organization uses the term "citizen's rights" rather than "human rights" or just "rights" in its title. It appears to the author that the PICCR, like all other entities directly or indirectly affiliated with the PLO and PA, utilize this misnomer, or the misnomer "national", to maintain a fiction that a state of Palestine already exists.

Arafat²⁷⁹ although its funding comes primarily from European sources.²⁸⁰ Its initial Commissioner General, Dr. Hanan Ashrawi, made a name for herself as the urbane and articulate spokesperson for the Palestinian delegation to the Madrid peace talks.²⁸¹ Although her background as a professor of English did not equip her to address human rights matters, Ashrawi's intelligence and communication skills served her and her cause well in gaining media coverage for frequent public criticism of Israel's policies during the occupation.²⁸²

During her tenure as Commissioner General of the PICCR, Ashrawi preferred 'interventions' over the public criticism of the PA. Indeed, during its first year of operation the PICCR published only three protests concerning the conduct of the PA, although it was in regular confidential communication on matters and cases involving human rights issues.²⁸³ According to a senior official of the International Committee of the Red Cross [ICRC], the PICCR lacks credibility because, although it claims to be independent of the PA, it is, in actuality, an organ of Arafat's administration. Further exacerbating this situation, Dr. Ashrawi whitewashed the problems in the PA's prisons in a widely publicized speech.

Dr. Eyad Sarraj, Ashrawi's successor, has been more aggressive in monitoring the PA's violations of human rights. His efforts, however, have been of no avail. After being detained for ten hours by PA police for publicly denouncing the PA's human rights abuses, he declared in a public address that although he had sent "more than 400 messages" to Palestinian Attorney General Khalid al-Qidrah in order to discuss the PA's poor record on human rights, he had yet to receive a re-

279. The Commission was established on the basis of a presidential decree by Chairman Yasser Arafat, which was published on September 30, 1993. See *Arafat's Address to UN Human Rights Commission in Geneva*, BBC Short Wave Broadcast, Feb. 4, 1994 (ME/1913, MED/12).

280. *General Information*, The Palestinian Independent Commission for Citizens' Rights, June 8, 1994.

281. BARBARA VICTOR, *A VOICE OF REASON: HANAN ASHRAWI AND PEACE IN THE MIDDLE EAST* 216-18 (1994).

282. *Id.*

283. AMNESTY INTERNATIONAL, *ISRAEL AND THE OCCUPIED TERRITORIES INCLUDING THE AREA UNDER THE JURISDICTION OF THE PALESTINE AUTHORITY: HUMAN RIGHTS: A YEAR OF SHATTERED HOPES* 28 (1995).

sponse.²⁸⁴ Sarraj was later arrested on two occasions, apparently on account of his criticism of the human rights practices of the PA.²⁸⁵ During his most recent arrest, Sarraj claimed he was beaten, tortured, and threatened with trumped-up drug charges.²⁸⁶

On the issue of attribution of the PA's violations, the PICCR takes the view that the PA is independent and sovereign. For this reason the PICCR refers to it as the "Palestinian National Authority" or "PNA."²⁸⁷ Thus it does not attribute misconduct by the PA to Israel.²⁸⁸

d. *Palestinian Human Rights Information Campaign*

The Palestinian Human Rights Information Campaign [PHRIC] was founded in 1986. PHRIC's longtime Director Jan Abu Shakrah resigned on October 3, 1994 following policy disputes with Faisal Al Hussein, a Minister in the Cabinet of Yasser Arafat. Abu Shakrah complained in her resignation letter that Al Hussein was not willing to permit PHRIC to be independent of the Arab Studies Society²⁸⁹ and that "the credibility of the Center as a human rights institution and the reality as well as the perception of independence in its human rights mandate" were undermined by its continued dependence upon and affiliation with the Arab Studies Society.²⁹⁰ Apparently the Arab Studies Society had withdrawn much of

284. See The Palestinian Independent Commission For Citizens' Rights, Press Statement: Palestinian Security Forces Detain PICCR Commissioner General Dr. Eyad Sarraj For Interrogation, Dec. 8, 1995; Jon Immanuel, *PA Arrests Noted Civil Rights Activist*, JERUSALEM POST, Dec. 10, 1995, at 2.

285. Interview with Anita Khoury, Coordinator for Special Projects, Palestinian Independent Commission for Citizen's Rights (Mar. 20, 1995).

286. Interview with Nisreen Zghair-Sa'deh, Administrative Assistant, Palestinian Independent Commission for Citizen's Rights (June 26, 1996).

287. Interview with Anita Khoury, *supra* note 285.

288. Interview with Anita Khoury, *supra* note 285.

289. Al Hussein is President of the Arab Studies Society. Palestinian Academic Society for the Study of International Affairs, *PASSIA Diary 1995* (1995).

290. Letter of Resignation from Jan Abu Shakrah, PHRIC Director, to All PHRIC Employees, Oct. 3, 1994 (on file with author).

PHRIC's interim financing²⁹¹ when PHRIC contemplated criticizing the PA.²⁹²

Following Abu Shakrah's resignation, this previously prolific organization that had regularly issued reports condemning various aspects of Israeli policy began operating at a much reduced level.²⁹³ During this period the author frequently had difficulty contacting anyone at PHRIC as the telephones were not being answered or were answered by someone who said that the employees of the organization were "on strike." In an interview with the author, PHRIC's Research Director was evasive regarding his organization's failure to issue any substantive criticisms of the PA's conduct.²⁹⁴ He also begged the question of whether under international law, Israel or the PA should be held responsible for human rights violations by the Palestinian Police, security services, courts or prisons.

e. *Raji Sourani and the Gaza Center for Rights & Law*

Established in 1985, the Gaza Center for Rights & Law [GCRL], engaged in the research and documentation of human rights law and issues as well as procuring representation for Palestinians in Israeli Military Courts.²⁹⁵ When the organization attempted to plan a human rights seminar on the Palestinian State Security Courts in Gaza, the PA police chief intervened and canceled the activity.²⁹⁶ Moreover, the former Head of the GCRL, Raji Sourani, was arrested by the Palestinian Police following his criticism of the PA's closure of an Arabic language newspaper that published an article critical of

291. Interview with Awad Mansour, Researcher and Database Coordinator, Palestinian Human Rights Information Center in Jerusalem (Mar. 20, 1995).

292. Shakrah, Letter of Resignation, *supra* note 290.

293. Interview with Awad Mansour, *supra* note 291.

294. Since the interview was conducted, however, PHRIC did issue a public condemnation of the detention by PA police of the noted civil rights activist, Dr. Eyad Sarraj. Press Release from the Palestine Human Rights Information Center, *Condemnation of Arrest of Dr. Eyad Sarraj* Dec. 14, 1995 (on file with the author).

295. Palestinian Academic Society for the Study of International Affairs, *PASSIA Diary* 1995 39 (1995).

296. Jon Immanuel, *Gaza Police Chief Cancels Human Rights Seminar*, JERUSALEM POST, Mar. 23, 1995, at 2.

Arafat's administration.²⁹⁷ Sourani's arrest brought a chorus of protests²⁹⁸ and shortly thereafter he was fired from his position.²⁹⁹ Since then he has obtained the necessary license from the PA to open a new human rights organization which has been critical of the PA.³⁰⁰ Although the GCRL was a frequent and vociferous critic of Israel's human rights conduct, it has not published any substantive criticism of the human rights practices of the PA or given any indication of whether it views Israel legally responsible for the PA's misconduct.

2. *International Human Rights Organizations*

a. *Human Rights Watch Middle East*

Human Rights Watch Middle East [HRWME] was established in 1989 to "monitor and promote the observance of internationally recognized human rights in the Middle East and North Africa." Based in New York and Washington, the organization has issued several reports criticizing Israel for violating the human rights of the Palestinians.³⁰¹ One of these reports was issued amidst considerable controversy as two of the three delegates that the organization sent to conduct an on-site inspection of Israeli prisons issued their own report³⁰² after accusing HRWME of repeated delays in issuing their findings because they were insufficiently critical. This controversy, which included an effort by HRWME to damage the professional reputation of Professor Rita Simon, the author of the independent report who, based on her experience and expertise, had originally been selected by HRWME to head the delegation and write its draft report, backfired to the detriment of HRWME's reputation.³⁰³

297. See John Tyler & Karen Farrell, *Gaza Center Firing Threatens Human Rights Community*, BILADI JERUSALEM TIMES, April 7, 1995, at 1.

298. See, e.g., Palestinian Independent Commission for Citizens' Rights, *Detention of Advocate Raji Sourani Director of Gaza Center for Rights and Law*, Statement, Feb. 15, 1995.

299. See Tyler & Farrell, *supra* note 297, at 1.

300. Amira Has, *Palestinian Authority Authorizes New Human Rights Center*, HA'ARETZ, July 23, 1995.

301. *Id.*

302. RITA J. SIMON & JUDITH D. SIMON, *INSIDE ISRAELI PRISONS: AN EYEWITNESS REPORT* (1992).

303. See, e.g., Mona Charen, *Hidden Agenda of Middle East Watch?*, WASH. TIMES, Feb. 2, 1991, at G3.

Thus far HRWME is the sole human rights organization that has extensively addressed the issue of attributing international legal responsibility for human rights violations perpetrated by the PA during the interim period of the peace process.³⁰⁴ In a report issued approximately half a year after the PA's assumption of authority in Gaza and Jericho, the human rights organization expressed its views on a number of critical questions bearing upon the protection of human rights in the region.

First, HRWME has adopted the view that for the interim period, all of the West Bank and Gaza Strip continue to be under the occupation of the Israeli military government. According to HRWME's understanding, the partial transfer of authority to the PA does not alter this:

The unusual characteristics of the Israeli-Palestinian agreements, and the dramatic changes they have produced do not, in our view, alter the overall legal framework applicable to Israel's relations with the Palestinians in the Gaza Strip and Jericho, or elsewhere in the West Bank. The occupation is not over. The agreements are, by their own definition, interim ones, with a final agreement to be reached within five years, according to the Declaration of Principles. During this interim period, Israel remains an occupying power, bound by the provisions of the Hague Regulations as well as the IV Geneva Convention.³⁰⁵

Thus, Israel continues to be bound by international humanitarian law in its relations with the Palestinian residents of those areas for which local authority has been transferred to the PA. According to HRWME, it follows that to the extent that Israel retains significant control over the autonomous areas and its actions affect, directly or indirectly, the residents of these areas, it must act in conformity with its humanitarian obligations under the law of armed conflict.³⁰⁶ Thus, HRWME maintains, for instance, that where Israel decides, for purposes of internal security, to impose a closure on the Gaza Strip in order to prevent terrorist attacks, it must do so in accordance

304. See HUMAN RIGHTS WATCH MIDDLE EAST, *supra* note 214.

305. HUMAN RIGHTS WATCH MIDDLE EAST, *supra* note 214, at 12.

306. HUMAN RIGHTS WATCH MIDDLE EAST, *supra* note 214, at 12, 30-37.

with its duty to attend to the general welfare of the occupied population.³⁰⁷

Concerning the PA and its exercise of authority in the self-governing areas, HRWME has conveyed its view that the PA, although a non-state entity, must comply with international humanitarian and customary human rights standards, and that it may be held directly accountable where human rights abuses take place under its jurisdiction: "[T]he PA must abide by both humanitarian and customary human rights norms. These norms are applicable even though the Palestinian entity is not a state and is therefore ineligible to become a party to international treaties. In the realm of internal security, the PA exercises state-like powers. It operates a large police force, a judiciary, and a penal system."³⁰⁸

Thus, HRWME advocates a legal-functional allocation of responsibility for humanitarian and human rights violations perpetrated during the interim period in the Gaza Strip and areas of the West Bank for which authority has been transferred to the PA that is based upon the distribution of authority for these areas that is set forth in the Agreements. The West Bank and Gaza Strip continue to be under the occupation of the Israel military government; therefore, Israel must act in conformity with its humanitarian obligations in its exercise of authority towards all the residents of the region, including those areas for which the PA has obtained authority under the Agreements. However, given the fact that, following the Agreements, significant powers have been transferred to the PA for certain regions of the West Bank and Gaza Strip, the latter must also respect international humanitarian and human rights norms where exercising its authority in these areas as well.

b. *Amnesty International*

Amnesty International [AI], the world's largest private human rights organization, has not taken any position on the issue of attribution of responsibility under international law for human rights violations perpetrated in those areas for which authority has been transferred to the PA. In its only significant report on point issued since the establishment of the

307. HUMAN RIGHTS WATCH MIDDLE EAST, *supra* note 214, at 37-47.

308. HUMAN RIGHTS WATCH MIDDLE EAST, *supra* note 214, at 13.

PA which was entitled "Human Rights: A Year of Shattered Hopes,"³⁰⁹ AI called upon Israel and the PA to respect international human rights norms.³¹⁰ AI did not, however, enter into the legal intricacies of who should bear responsibility, on the international plane, for human rights abuses committed against residents of the Palestinian self-governing areas during the interim period.

The report accused the PA of large scale arbitrary arrest and detention without any formal access to lawyers and family and without any judicial review.³¹¹ It also claimed that two people had died in circumstances "where torture may have caused or hastened their death"³¹² and that no effective investigations into these abuses have been carried out by PA authorities.³¹³ The following extract from the report's introduction conveys AI's general outlook:

In opposing human rights abuses by governments and political non-governmental entities, including armed opposition groups, Amnesty International takes no political position. Its concerns are with the victims and potential victims and its aim is to promote the observance of international human rights standards and principles of international humanitarian law. It is for this reason that the organization is raising its concerns over detention procedures and torture and calling for respect for human rights to be strongly affirmed and clearly implemented in the peace process.³¹⁴

In late 1993, following a meeting in Tunis with a delegation from AI's International Secretariat, Chairman Arafat pledged to incorporate all internationally recognized human rights standards into Palestinian legislation.³¹⁵ Thus far, this promise has not been fulfilled.

Arafat has, however, entered into an agreement with the ICRC similar to that previously entered into between Israel

and the ICRC³¹⁶ under which access to the PA prisons was promised to this Swiss based human rights organization. The ICRC generally does not publicize its activities or agreements, but in a confidential conversation, a senior ICRC official suggested that their delegates had not been given full access to meet with prisoners and that some uncertainty as to the structure of command made working with the PA rather frustrating. Recent reports indicate that access to PA prisons has been barred to ICRC officials since the summer of 1995, in contravention with the understanding previously reached with the PA.³¹⁷

A fair assessment indicates that the human rights organizations have not been very attentive to the status of human rights in the self-governing areas since local authority was assumed by the PA. This inaction, despite whatever reasons lay behind it, adds to the urgency for some form of independent judicial oversight over the conduct of the PA, such as by the highly respected Israeli Supreme Court sitting as the High Court of Justice.

VII. HYPOTHETICAL HUMAN RIGHTS DILEMMAS DURING THE INTERIM PERIOD

So far, the Israeli Supreme Court sitting as the High Court of Justice has not heard any challenges regarding the policies of the PA. It is possible to envision, however, that this period of grace will end soon. In particular, the broad jurisdiction of the Supreme Court sitting as the High Court of Justice may provide a venue to challenge the legality of human rights abuses, which according to media reports, are regularly committed by members of the Palestinian Police and security apparatus against suspected collaborators with Israel³¹⁸ and persons suspected of fundamentalist Islamic involvement.³¹⁹ This section will consider a number of hypotheticals involving

309. AMNESTY INTERNATIONAL, *supra* note 283, at 23.

310. AMNESTY INTERNATIONAL, *supra* note 283, at 30.

311. AMNESTY INTERNATIONAL, *supra* note 283, at 22-32.

312. AMNESTY INTERNATIONAL, *supra* note 283, at 30.

313. AMNESTY INTERNATIONAL, *supra* note 283, at 30.

314. AMNESTY INTERNATIONAL, *supra* note 283, at 4.

315. AMNESTY INTERNATIONAL, *supra* note 283, at 4.

316. "Israel also deserves credit for cooperating with the International Committee of the Red Cross, which has played an important role in the occupied territories by performing a wide range of tasks, including, in particular, monitoring conditions of detention." Roberts, *supra* note 18, at 63.

317. See Amira Has, *An Israeli Whip, a Palestinian Stick and the Block of Fear*, HA'ARETZ, Feb. 29, 1996, at B2.

318. See *infra* text accompanying note 349.

319. AMNESTY INTERNATIONAL, *supra* note 283, at 21.

challenges to human rights where the Supreme Court of Israel sitting as the High Court of Justice may be called to intervene. Most of these hypotheticals are based on one or more actual instances in which human rights were allegedly violated in the manner described.

It should be noted that the recently signed Oslo II Agreement foresees that once the Palestinian Council is inaugurated, it will "have an independent judicial system composed of independent Palestinian courts and tribunals."³²⁰ Thus far, however, the courts have shown few indications of being independent and the political echelon has gone so far as to ignore court rulings³²¹ and even dismiss judges who issued them.³²² Moreover, the Agreement specifically provides for the establishment of a "Palestinian Court of Justice" whose powers of review closely resemble, in certain respects, those of the Israeli High Court of Justice: "Any person or organization affected by an act or decision of the Ra'ees [Chairman] of the Executive Authority of the Council or of any member of the Executive Authority, who believes that such act or decision exceeds the authority of the Ra'ees or of such member, or is otherwise incorrect in law or procedure, may apply to the relevant Palestinian Court of Justice for a review of such activity or decision."³²³

Given the fact that the Oslo II Agreement institutes a mechanism for judicial review in those areas of the West Bank and Gaza Strip that come under Palestinian autonomy during the interim period, a viable argument could be made that the Palestinian Court of Justice is *solely* empowered under the Agreement to consider petitions contesting actions taken by agents of the PA. It is the author's conviction, however, that such an argument must be rejected. Indeed, in light of the PA's gross manipulation of the judicial system in the self-gov-

320. Oslo II Agreement, *supra* note 2, art. IX. sec. 6.

321. Letter from Nigel Parry to the Editor, *Campaign of Defamation?* BILADI JERUSALEM TIMES, Sept. 6, 1996, at 5.

322. Recently Chairman Arafat dismissed the President of the Palestinian High Court for ordering the release of ten university students who had been held without charge for five months. *Palestinian Supreme Court President Fired*, BILADI JERUSALEM TIMES, Sept. 5, 1996, at 2.

323. Oslo II Agreement, *supra* note 2, art. VIII.

erned areas,³²⁴ there is little reason to believe that the likely Chairman of the Palestinian Council, Yasser Arafat, will willfully submit the acts of his administration to the scrutiny of an impartial panel of judges. The most likely outcome will be a judicial body whose membership counts officials appointed as a result of Arafat's nepotism that are compelled to provide nothing more than a rubber stamp for the Chairman's unlawful policies. Among the pernicious effects of this practice will undoubtedly be the lack of institutional safeguards for the human rights of the inhabitants of areas subject to Palestinian autonomy for the interim period. This eventuality only adds to the necessity for some form of independent judicial review, such as has been afforded by the Israeli Supreme Court sitting as the High Court of Justice.

The effort here is to identify some of the myriad of situations that may arise during the interim period of the peace process and out of which petitions to the High Court of Justice, by either Israelis or Palestinians, may eventuate. To this end, four hypotheticals, including some with various permutations, will be used to aid in this analysis. For each set of circumstances, the prospects as concerns the willingness of the court to consider the petition on the merits, as well as the various substantive law arguments to be invoked by the parties, will be examined.

324. According to Amnesty International's report, the judges and prosecutors of the Military Courts set up by the PA in Gaza and Jericho were all PLO military officers directly appointed by Arafat. As well, the international human rights organization asserted that "in the first cases held by the court, pre-trial and trial procedures fell far short of international standards for fair trial." AMNESTY INTERNATIONAL, *supra* note 283, at 23. The human rights organization also protested the institution of the courts since it "conflicts with the PLO's declared commitment to international treaties and conventions related to human rights that ensure the accused a fair trial." *Palestinian Independent Commission for Citizens' Rights, Statement on the Formation and the Functioning of a High State Security Court in Gaza*, Amnesty International Press Release, May 8, 1995. Al-Haq's then Director General, Fateh Azzam, also publicly denounced the establishment of the State Security Courts. Myles Crawford, *Al-Haq and the New Authority*, BILADI JERUSALEM TIMES, April 15, 1995, at 8 (according to Azzam, "[d]efendants at recent trials were held incommunicado for up to a month, appointed counsel at the last hour, and tried in the middle of the night without notice to their families. There is no right of appeal, and the decisions of the court are subject only to ratification by the executive authority"). See also Hilary Appleman, *Palestinians See "No Logic, No Law,"* JERUSALEM POST, May 17, 1995, at 5.

The Israeli Supreme Court sitting as the High Court of Justice has, since 1967, extended the right to petition, previously available only to Israeli citizens, to the Palestinians. This extension of jurisdiction is unprecedented in the international practice of occupation.³²⁵ Palestinians have made frequent use of this right by availing themselves of this forum that has been opened to them. At one point during the intifada some thirty to thirty-five percent of all petitions before the High Court were made by or on behalf of Palestinians.³²⁶ Although their use of this forum declined after the signing of the DOP, this author believes that, at least in certain circumstances, Palestinians residing in the areas under the PA's administration will again resort to this avenue of redress.

Having considered the role assumed by the High Court of Justice in maintaining respect for the rule of law and human rights in Israel, the West Bank and Gaza Strip prior to the transfer of authority to the PA in the self-governing areas,³²⁷ the hypotheticals raise questions regarding the possible role of the court in ensuring the protection of human rights for the interim period in those areas for which authority has been transferred to the PA. The urgency of such an inquiry stems from the Agreements' virtual silence regarding the standards and mechanisms for the protection of human rights in the areas under the local autonomy of the PA and from the anticipated extended duration of the interim period. The government of Israel maintains that the Agreements do not alter Israel's rights as the military occupant of the West Bank and Gaza Strip.³²⁸ This view has been advanced by the former Legal Advisor of the Foreign Ministry of Israel, Joel Singer, in testimony before the Knesset.³²⁹ It is fully supported by the

325. See Cohen, *supra* note 47, at 473.

326. This observation was made by the author who in July 1990 examined the docket books available in the office of the State's Attorney. This estimate correlates with that of Colonel David Yahav, head of the International Law Department of the IDF.

327. See *supra* notes 28-38 and accompanying text.

328. See *supra* text accompanying note 21.

329. See Gideon Alon, *Legal Committee Discusses the Declaration of Principles Between Israel and the PLO; Legal Advisor to the Foreign Ministry: " Hamas Victory at Elections in the Territories Would Not Constitute a Violation of the Agreement,"* HA'ARETZ, Dec. 12, 1993, at A4.

texts of the Agreements.³³⁰ It should follow that Israel's obligations as an occupant have not been affected either.

Hence, the Supreme Court sitting as the High Court of Justice would appear constrained to accept petitions challenging the conduct of the personnel or instrumentalities of the PA.³³¹ In addition, Israel may be held vicariously accountable by the court for the PA's conduct. Although lacking direct operative control over the policies or practices of the Palestinian Police, Israel could nevertheless serve as a forum for human rights complaints arising therefrom.

A. Hypothetical 1

A Palestinian resident of the Gaza Strip is arrested and held in detention by an agent of the PA Security Services. The PA claims that the resident is a member of an Islamic fundamentalist group opposed to the peace process and is being questioned regarding allegations of conspiracy to perpetrate actions against the public order and harm the peace process. The detainee appears before a Judge in a Palestinian Military Court for the extension of his remand. He appeared badly bruised and his attorney claimed that he had been tortured and threatened with death. Despite this, the Judge extends the detainee's remand for an additional 30 days. Fears exist that, like at least six other similar cases of persons accused of cooperating with Israel, the detainee will be tortured to death.³³² His lawyer and family, expressing doubts that appeals to the PA head Arafat or a higher Palestinian court will have any effect, file a petition with the Israeli Supreme Court sitting as the High Court of Justice. The petition argues that the Agreements, by their own terms, do not change the legal status quo; i.e., Israel remains the belligerent occupant of all the territories captured in the Six Day War. The appeal avers [and since the PA assumed the functions of local law enforcement as delegated by Israel] that the Is-

330. Singer, *supra* note 2.

331. It could be argued that a Palestinian who petitioned the High Court would be perceived by other Palestinians as someone who is cooperating with Israel. Further, many Palestinians doubt the objectivity of the court. Nevertheless it is important to point out that *nobody* is forced to petition the Supreme Court sitting as the High Court of Justice. If a Palestinian under torture whose life was in danger saw it as a possible channel to survive, why should the court not grant jurisdiction?

332. See Jon Immanuel, *US Pressing PA for Full Probe of American's Death in Detention*, JERUSALEM POST, Oct. 1, 1995, at 1.

raeli Supreme Court must hear this petition in the interest of protecting the rule of law and fundamental human rights.

ANALYSIS

The first issue is whether the High Court, under Israeli law, has jurisdiction to hear a petition presented during the interim period by a resident of Gaza against acts undertaken by agents of the PA in violation of his human rights.³³³ Once again, it must be stressed that the court's jurisdiction to consider petitions on behalf of residents of the West Bank and Gaza Strip stems *not* from a territorial basis but rather from the court's authority over the Military Commander as a member of the executive branch fulfilling a public duty under Israeli Law. For the court to assume jurisdiction in the circumstances of this hypothetical, it would have to accept the position taken by the Israeli government to the effect that the self-governing areas remain under Israeli occupation during the interim period and that the PA is "operating under a grant of power delegated by the Israeli occupation administration."³³⁴

Certainly, a decision by the court adopting this line of reasoning would be extremely embarrassing politically for PA head Arafat since it would imply that the PA merely functions as the "long arm"³³⁵ of Israel in those areas where local law enforcement authority has been transferred. The Islamic opposition organizations Hamas and Islamic Jihad would probably consider this evidence in support of their allegation that the PA is a collaborationist regime that acts in Israel's interests. Arafat would likely deny that the court has jurisdiction and refuse to cooperate with the proceedings. This would not impede the holding of an initial hearing, however, as initially all petitions to the Supreme Court sitting as the High Court of Justice are conducted *ex parte*.³³⁶ Arafat might, however, feel impelled to prove his independence from Israel by a demonstrative act or statement. This would likely precipitate an an-

333. As discussed above there is no doubt that if such allegations were leveled against Israeli Security Service interrogators it would be heard by the court regardless of where the claimed violations took place.

334. Benvenisti, *supra* note 146, at 299.

335. Benvenisti, *supra* note 146, at 299.

336. See Cohen, *supra* note 47, at 480.

gry response from the Israeli government with the danger of inflicting a mortal wound on the fragile peace process.

It should be remembered that, from the standpoint of Israeli law, the transfer of authority to the PA pursuant to the Cairo and Erez Agreements was accomplished in full accordance with the internal law of the Israeli military government, i.e., by proclamation of the Military Commander.³³⁷ This procedure of legislative enactment clearly stems from the Israeli government's view that the West Bank and Gaza Strip remain subject to the Israeli military government throughout the interim period of the peace process. It ensues therefrom that for the interim period, any entity that is to assume a governmental function in the West Bank and Gaza Strip, such as the PA, must draw its authority from the military government.

In this vein, a viable argument could be made that since the PA, following the proclamations enacted by the Military Commander, is but an agent of the Israeli military government in the self-governing areas, its actions should be considered as those of any body "carrying out public functions under law" and, as such, be subject to review by the High Court of Justice just like any other actions taken by the IDF in the West Bank and Gaza Strip. Thus, the court should, as it has in the past³³⁸ in alleged cases of human rights violations against Palestinians perpetrated by agents of either the IDF or the Israeli General Security Services, hear the petition and examine on the merits the legality and reasonableness of the challenged conduct of the PA agents.

A second issue that will have to be addressed by the court is the justiciability of the petition. Indeed, it may be claimed that the subject of the petition is not justiciable because it challenges, albeit indirectly, the policy of the government to transfer certain functions to the PA. It would follow that disputes relating to the PA's conduct in violation of the Agreements and international human rights standards constitute an issue of foreign relations that is to be reserved for the executive

337. See Cairo Agreement, *supra* note 2; Erez Agreement, *supra* note 2.

338. See, e.g., H.C. 253/88, 323/8842, Sejedia v. Minister of Defence, (3) P.D. 801 (administrative detention); H.C. 785/87, 845/87, 27/8842, Affo v. IDF Commander of Judea and Samaria, 42(2) P.D. 4 (deportation of individual Palestinian inhabitants); H.C. 358/88, Association for Civil Rights in Israel v. IDF Commanders of the Central and Southern Commands, A43(2) P.D. 529 (demolition of houses).

branch of government. Indeed, on several prior occasions the court has refused to examine on the merits petitions touching upon the government's policy in the realm of foreign relations.³³⁹

Conversely, an equally persuasive argument stands that the question under consideration is not one of foreign relations but rather one that pertains to the legality of actions taken by an entity of the military government. The PA, as an entity created by the Cairo Agreement to which authority has been granted by the Israeli military government for the interim period, must be subject to the court's supervision similar to any other entity operating under official sanction in the West Bank and Gaza Strip.

As for the substantive law to be applied by the court in hearing such a petition, it could be submitted that since the PA has been entrusted with an official role, it should be held by the court to the same legal standard as the IDF in its actions in the West Bank and Gaza Strip. These comprise, *inter alia*, the rules of customary international law, Israeli administrative law and the Military Justice Code. These authorities clearly forbid the use of torture,³⁴⁰ and thus forbid the conduct which is complained of by the Palestinian resident of Gaza in the hypothetical.

Furthermore, the torture of detainees is a violation of both the Cairo and Oslo II Agreements which provide that the PA is to exercise its power and responsibilities "with due regard to internationally-accepted norms and principles of human rights."³⁴¹ Since the transfer of partial local authority by the Israeli military government to the PA, provided for by the Proclamations enacted by the Military Commander, and done in accordance with the Agreements, it follows that according to the principles of administrative law the PA may not overstep its mandate. Such an allegation of unlawful action would appear to constitute legitimate grounds for judicial intervention, *i.e.*, by Israel's High Court exercising its powers

339. See H.C. 4481/91, *Gabriel Bargil v. The Government of Israel; Temple Mount & Eretz Israel Movement v. The Prime Minister of Israel*, 47(1) P.D. 37; H.C. 4400/92, *Local Council of Kiryat Arba v. The Prime Minister of Israel*.

340. See Penal Law, sec. 277, 1977, L.S.I. Special Volume; Military Justice Law, sec. 65, 1955, 9 L.S.I. 184.

341. See Cairo Agreement, *supra* note 2; Oslo II Agreement, *supra* note 2.

and responsibilities, and, in the hypothetical under discussion, would justify an order by the court "for the release of persons unlawfully detained or imprisoned."³⁴²

1. Hypothetical 1a

After the conclusion of the Cairo Agreement a Palestinian resident of Gaza who has furnished intelligence data to the Israeli authorities is issued Israeli citizenship. This is done at the behest of the Israeli General Security Service in the belief that his new status will protect him from arrest and abuse by the PA. The 'collaborator' subsequently visits his old neighborhood in the Gaza Strip, is arrested by the Palestinian Police and charged with collaboration. The remainder of the facts are as in Hypothetical 1.

ANALYSIS

The Agreements clearly provide for the protection of Palestinians who in the past cooperated with Israeli security authorities. Thus, Article XX.4 of the Cairo Agreement states that the PA is "not to prosecute these Palestinians or to harm them in any way."³⁴³ In addition, the detention of an Israeli citizen by a member of the Palestinian Police force is forbidden under the Agreements.³⁴⁴ Consequently, the arrest or tor-

342. Basic Law: Judiciary, *supra* note 28, sec. 15(d)(1). An argument could also be made that those responsible for the torture should be tried and punished by an Israeli court notwithstanding the obvious political and practical difficulties that would ensue.

343. Cairo Agreement, *supra* note 2, art. XX.4. The Oslo II Agreement is even more categorical in its prohibition of violence against so-called 'collaborators.' It sets out that:

Palestinians who have maintained contact with the Israeli authorities will not be subjected to acts of harassment, violence, retribution or prosecution. Appropriate ongoing measures will be taken, in coordination with Israel, in order to ensure their protection.

Oslo II Agreement, *supra* note 2, art. XVI.2.

344. Article II.2.c. of Annex IV of the Oslo II Agreement sets forth the procedure to be followed in cases where an Israeli citizen is suspected of committing an offense in the territorial jurisdiction of the PA. It reads:

The Palestinian authorities shall not arrest Israelis or place them in custody. Israelis can identify themselves by presenting Israeli documentation. However, where an Israeli commits a crime against a person or property in the Territory [Gaza, Jericho, and other areas of the West Bank], the Palestinian Police, upon arrival at the scene of the offense shall, if necessary, until the arrival of the Israeli mili-

ture of the individual in Hypothetical 1a would constitute a violation of the Agreements. Therefore, the Israeli High Court of Justice, for the reasons set out above in the analysis of Hypothetical 1, should hear a petition by such a detainee and adjudicate the case on the merits.

It might be argued that the detainee has been taken into custody on suspicion of perpetrating a criminal offense under the municipal law of the self-governing areas. Such an argument would likely be rejected since by virtue of Article I.2.b. of Annex IV of the Oslo II Agreement, Israel enjoys sole criminal jurisdiction over offenses committed by Israelis in the self-governing areas.³⁴⁵

The term "Israelis" used in the Oslo II Agreement is not defined, with Article XX.5 adding only that it "shall also include Israeli statutory agencies and corporations registered in Israel."³⁴⁶ Similarly, the term "Palestinians" is not given any specific meaning by the Agreements, although it may be reasonably presumed to comprise only those Palestinians residing in areas of local authority of the PA, and not those residing in the remaining areas of the West Bank still under the full authority of the Israeli Military Government.³⁴⁷ Thus, the PA could argue that at the time the 'offenses' were allegedly committed, the detainee was not an Israeli citizen but a resident of Gaza.

Important questions of criminal jurisdiction may arise in this hypothetical petition. Should the detainee be considered a Palestinian resident of the self-governing areas that are sub-

tary forces, detain the suspect in place while ensuring his protection and the protection of those involved, prevent interference with the scene of the offense, collect the necessary evidence and conduct preliminary questioning, and in any case shall immediately notify the Israeli authorities through the relevant DCO.

Oslo II Agreement, *supra* note 2, Annex IV, art. II.2.c; see Cairo Agreement, *supra* note 2, Annex III, art. II.2.c.

345. The Israeli law implementing the Cairo Agreement amends the Emergency Regulations so as to extend Israeli legislative and judicial criminal jurisdiction over Israelis in Gaza and Jericho. Therefore, only Israeli domestic criminal law will be applicable to Israelis for any offenses committed in those areas subject to the authority of the PA. See Celia Wasserstein Fassberg, *Israel and the Palestinian Authority: Jurisdiction and Legal Assistance*, 28 ISR. L. REV. 318, 336 (1994).

346. Oslo II Agreement, *supra* note 2, art. XX.5.

347. See Wasserstein Fassberg, *supra* note 345, at 319, 326.

ject to the criminal jurisdiction of the PA? Or should he rather be granted the same immunity from arrest and prosecution as life long Israeli citizens?

The Agreements do not supply any answers to these questions. Yet, it is the author's view that in light of the numerous provisions in the Agreements that ensure exclusive Israeli jurisdiction over Israelis in the self-governing areas,³⁴⁸ it is only logical that prior residents of Gaza and Jericho that have been granted Israeli citizenship should fall under Israel's criminal jurisdiction and not the PA's, even for offenses perpetrated within the latter's territorial jurisdiction.³⁴⁹

2. Hypothetical 1b

A Palestinian is living in part of West Bank which is still under Israeli administration following the Oslo II Agreement. Palestinian secret service agents kidnap him from his home and forcibly transport him to Jericho,³⁵⁰ within the PA's jurisdiction, where he is tortured under interrogation. The remainder of the facts are as in Hypothetical 1.

ANALYSIS

As provided for by the Oslo II Agreement, the PA's criminal jurisdiction, the exercise of which involves, inter alia, "the power . . . to investigate, arrest, bring to trial and punish offenders,"³⁵¹ is limited to those areas under its territorial jurisdiction.³⁵² Therefore, the kidnapping of a 'collaborator,' from his place of residence in the West Bank, outside of the PA's territorial jurisdiction, indubitably constitutes a violation of the Agreements, and may, for the reasons set out above, justify the High Court of Justice's examining the petition on the merits.

348. Oslo II Agreement, *supra* note 2, arts. XII.1, XVII.1.a, XVII.2.c, and XVII.4.a.

349. It is interesting to note that while the Oslo II Agreement grants Palestinian residents of East Jerusalem the right to vote in the upcoming Palestinian Council elections, it explicitly denies the right to those Palestinians that have Israeli citizenship. See Oslo II Agreement, *supra* note 2, Annex II, art. II.1.f.

350. Many such kidnappings have taken place. The motivation for them appears to be varied. See generally B'TSELEM, *supra* note 220.

351. Oslo II Agreement, *supra* note 2, Annex IV, art. I.3.

352. Oslo II Agreement, *supra* note 2, Annex IV, art. I.3.

B. Hypothetical 2

A Jewish citizen of Israel was tortured and killed in 1992 (before the signing of the DOP) following his kidnapping by Hamas in southern Israel. The victim's family members recognize the person who they believe to be responsible for the crime when he appears on television in the entourage of PA Head Yasser Arafat. They learn that this individual has been appointed to a high position in one of Arafat's security services. They request their government to demand that the individual be sought pursuant to the transfer provisions in the Oslo II Agreement so that he may face trial in Israel. The Israeli Government requests this individual's transfer pursuant to the Oslo II Agreement³⁵³ but it is denied by the PA which states that its interpretation of the Agreement regarding transfers does not apply to offenses alleged to have taken place prior to the signing of the DOP. The family in question turns to the Israeli Supreme Court sitting as the Israeli High Court of Justice requesting an order against both the Israeli Government and the PA.³⁵⁴

ANALYSIS

The procedure for the transfer of suspects and defendants between Israel and the PA is set forth in Article II.7.a. and b. of Annex IV of the Oslo II Agreement.³⁵⁵ Under these provisions, Israel may request the transfer of an individual suspected of committing an offense "that falls within Israeli criminal jurisdiction."

353. Oslo II Agreement, *supra* note 2, Annex IV, art. I.3.

354. The author wishes to express his thanks to Mordechai Haller for his assistance in the formulation and analysis of this hypothetical.

355. Sub-paragraphs II.7.a. and b. of Annex IV of the Oslo II Agreement provide that:

- a. Where a non-Israeli suspected of, charged with, or convicted of an offense that falls within Palestinian criminal jurisdiction is present in Israel, the Council [PA] may request Israel to arrest and transfer the individual to the Council.
- b. Where an individual suspected of, charged with, or convicted of an offense that falls within Israeli criminal jurisdiction, is present in the Territory [self-governing areas], Israel may request the Council to arrest and transfer the individual to Israel.

Oslo II Agreement, *supra* note 2, Annex IV, arts II.7.a., b. Where the transfer is requested by Israel from the PA, there must be a reasonable evidentiary basis and the individual must be suspected of committing an offense punishable by more than seven years imprisonment. Oslo II Agreement, *supra* note 2, Annex IV, art. II.7.d.

nal jurisdiction."³⁵⁶ The perpetration of a terrorist attack which has resulted in the death of an Israeli citizen constitutes an act of murder under Israeli criminal law.³⁵⁷ Given that Israel clearly has jurisdiction to prosecute those responsible for the perpetration of terrorist attacks against Israeli targets both prior to and subsequent to the signing of the Agreements, it is evident that the PA's refusal to transfer those individuals constitutes a violation of the Oslo II Agreement.³⁵⁸

The PA's reading of the Cairo and Oslo II Agreements to the effect that a general amnesty has been implicitly granted to those responsible for the perpetration of attacks committed prior to the signing of the DOP is undermined by Article XVI.3 of the Oslo II Agreement. It establishes that "Palestinians from abroad whose entry into the West Bank and Gaza Strip is approved," are immune from prosecution for offenses committed prior to the signing of the DOP. Thus, it could be argued, *a contrario*, that the transfer of Palestinians from areas under Palestinian autonomy, i.e., not "from abroad", for offenses committed prior to the signing of the DOP was unequivocally provided for by the Oslo II Agreement. In fact, were the PA's interpretation of the Agreements accepted, Article XVI.3 of the Oslo II Agreement would be rendered meaningless since despite its stipulation, all perpetrators of terrorist acts carried out prior to the signing of the DOP would be immune from prosecution.³⁵⁹

Given that the PA's refusal to transfer those individuals suspected of perpetrating attacks against Israeli targets consti-

356. Oslo II Agreement, *supra* note 2.

357. Penal Law, sec. 300, 1977, L.S.I. Special Volume.

358. The PA's interpretation of the Cairo Agreement on the subject of transfer of suspects has been criticized by the impartial Peace Watch organization as a violation of the Cairo Agreement. Peace Watch, *Transfer of Suspects in Criminal and Terrorist Acts Between Israel and the Palestinian Authority* (Dec. 6, 1994).

359. The concluding paragraph of Article I, Annex IV of the Oslo II Agreement also appears to negate the validity of the PA's interpretation. It reads:

Without prejudice to the criminal jurisdiction of the Council . . . Israel has, in addition to the above provisions of this Article, criminal jurisdiction in accordance with its domestic laws over offenses committed in the Territory [Gaza, Jericho, and other areas of the West Bank] against Israel or an Israeli.

Oslo II Agreement, *supra* note 2, Annex IV, art. I.7.

tutes a violation of the Agreements, it could, for the reasons set out above in the analysis of Hypothetical 1, constitute legitimate grounds for intervention on the part of the Israeli High Court of Justice and warrant the hearing of the petition on the merits. Should the court accept the petitioner's arguments, the question then arises as to which remedies it could grant for the benefit of the petitioner. Certainly the argument could be made that no judicial order should be given in this instance since it would never be complied with by the PA. Indeed, it may be reasonably presumed that the PA would ignore any order given by the Israeli High Court of Justice calling for the transfer of individuals suspected of perpetrating terrorist attacks against Israeli targets prior to the signing of the DOP. As for the second respondent of this petition, the Israeli government, it could claim that it has done all that is in its power under the Agreements to obtain the transfer of the suspects and that no order should be issued against it by the court.

As for the first argument, i.e., that any order given by the Israeli High Court of Justice would fall on deaf ears in the PA, the counter-argument could be advanced that no court, if the rule of law is to be preserved, can allow itself to be deterred from taking judicial action against a respondent simply because there is reason to doubt whether its ruling can be enforced.³⁶⁰ Regarding the second argument, i.e., that the Israeli government has exhausted all possible courses of action, a number of alternatives remain. The court could order the government of Israel not to release any additional Palestinian prisoners until the PA responds to its request.³⁶¹ Another option would be to instruct the government to cease all financial

360. Indeed, the Israeli High Court of Justice has on several occasions in the past granted petitions despite the respondent's demonstrated resoluteness in defying the court's orders. For instance, despite the Israeli Rabbinate's obstinate refusal to grant Kosher certificates to particular restaurants for reasons deemed illegitimate by the court, it has not restrained itself from issuing the requested judicial orders. See H.C. 465/8942, Riskin v. The Religious Council of Jerusalem, (2) P.D. 673; H.C. 509/88, Makhlouf Brothers v. Chief Rabbinic Council of Israel, 42(4) P.D. 617; H.C. 22/91, Orli 1985 Inc. v. Chief Rabbi Libna, 45(3) P.D. 817.

361. Both the then Israeli Minister of Justice and the Attorney General of Israel favored such a policy. See Nadav Shargai et al., *Ben-Yair Proposed That Release of Palestinian Prisoners be Conditioned Upon Transfer of Murderers From Gaza*, HA'ARETZ, June 6, 1995, at A1; Liba'i: *No Terrorist Extraditions, No Release of Palestinian Prisoners*, JERUSALEM POST, Sep. 10, 1995.

aid to the PA until it fulfills its commitments under the Agreements.

1. Hypothetical 2a

Having failed to obtain the transfer of the suspected terrorist by the PA, the Jewish family decides to pursue a civil law alternative. They proceed by lodging a tort claim in an Israeli court against the Palestinian official they believe is responsible for the death of their son. The remainder of the facts are as in Hypothetical 2.

ANALYSIS

Under the Cairo Agreement, PA courts and judicial authorities are denied jurisdiction over civil actions in which an Israeli is a party, apart from five specific instances, which do not include an action for damages against a Palestinian resident of the self-governing areas subject to PA authority.³⁶² As for Israeli civil jurisdiction, it is not discussed to any significant extent by the Agreements. Therefore, the rules that were applicable in this respect prior to the Agreements, even with regard to residents of those areas for which authority has been transferred to the PA, remain in effect.³⁶³

According to Israeli rules of jurisdiction, an Israeli court has jurisdiction over a case if the summons has been served on the defendant. The very service of the summons on the defendant establishes the court's jurisdiction.³⁶⁴ In addition, Israeli law provides for the service of documents issued by an Israeli court, including the service of summons upon the defendant, in the West Bank and Gaza Strip as if they were part of Israel.³⁶⁵ A question arises as to the applicability of this procedural extension to those areas for which authority has been transferred to the PA.

According to the Israeli Rules of Civil Procedure,³⁶⁶ the extension applies to the "area" which in turn is defined as "any

362. Oslo II Agreement, *supra* note 2, Annex IV, art. III.2

363. Wasserstein Fassberg, *supra* note 345, at 334.

364. See Yoel Sussman, *The Law of Civil Procedure* 34-41 (7th ed. 1994).

365. *Rules of Civil Procedure (Service of Documents in the Administered Territories)*, 5730-1969, Kovetz Takanot 2482 (1989); see also Wasserstein Fassberg, *supra* note 345, at 322; EYAL BENVENISTI, *LEGAL DUALISM: THE ABSORPTION OF THE OCCUPIED TERRITORIES IN ISRAEL* 23-27 (1990).

366. Rules of Civil Procedure, 1984, K.T. 2220.

territory held by the Israel Defence Forces."³⁶⁷ In light of the view elaborated above that for the interim period the legal status of the areas under the PA's local administration remain unchanged and hence under the occupation of the Israeli military government, a viable argument could be made that under Israeli law documents could still be served there automatically. Otherwise, leave would have to be obtained from an Israeli court to serve the documents on people located in those areas for which authority has been transferred to the PA.³⁶⁸

In that event, the PA would be responsible for the service of documents to the defendant in areas subject to its authority, as provided for by the Oslo II Agreement.³⁶⁹ The substantive law applicable to the action, given the involvement of an Israeli citizen, would be Israeli law.³⁷⁰ The enforcement of the final judgement would be entrusted to the PA.³⁷¹

C. Hypothetical 3

A petition against the Israeli government's imposition of a closure for security reasons on the Gaza Strip is presented to the Israeli Supreme Court sitting as the High Court of Justice. The government's exercise of its residual powers under the Agreements is contested for allegedly being in violation of Israel's humanitarian obligations towards the Palestinian population in the Gaza Strip. Specifically, a Palestinian residing in the Gaza Strip challenges Israel's closure of the checkpoints between the Gaza Strip and Israel which makes it impossible for him to travel to his job in Israel and earn a living there. Indeed, it is argued that for the interim period the Gaza Strip is still under the occupation of Israel, and that accordingly, it must act in accordance with the law of armed conflict.

ANALYSIS

The general rules with respect to the entry of Palestinian residents from the self-governing areas into Israel are set forth

367. See generally Wasserstein Fassberg, *supra* note 345.

368. By virtue of Rule 500 of the Rules of Civil Procedure, leave must be obtained by the Court in order to serve documents on people situated outside Israel. See Rules of Civil Procedure, *supra* note 366.

369. Oslo II Agreement, *supra* note 2, Annex IV, art. IV.1.a.

370. BENVENISTI, *supra* note 143, at 29-31.

371. Oslo II Agreement, *supra* note 2, Annex IV, art. IV.3.a.

in Article IX of Annex I of the Oslo II Agreement. The relevant paragraphs provide that:

c. Entry of persons from the West Bank and Gaza Strip to Israel shall be subject to Israeli laws and procedures regulating entry into Israel

d. The provisions of this Agreement shall not prejudice Israel's right, for security and safety considerations, to close the crossing points to Israel and to prohibit or limit the entry into Israel of persons and of vehicles from the West Bank and the Gaza Strip.³⁷² In addition, it is foreseen by the Cairo Agreement that "[b]oth sides will attempt to maintain the normality of movement of labor between them, subject to each side's right to determine from time to time the extent and conditions of the labor movement into its area."³⁷³

Since the West Bank and Gaza Strip are still considered under the authority of the Israeli military government following the Agreements, Israeli policy for the region, including the imposition of a closure, must continue to be in compliance with the international law of armed conflict. Indeed, Article 47 of the Fourth Geneva Convention would disallow any argument to the contrary.³⁷⁴ Furthermore, in the event where the refusal of entry into Israel to a Palestinian resident of the West Bank and Gaza Strip contravenes customary international law or Israeli administrative law, the individual would definitely have recourse to the Israeli High Court of Justice. In fact, the Israeli Ministry of Foreign Affairs officially assured an international human rights organization that: "Any individual may petition the Supreme [High] Court of Justice. It is immaterial whether the petitioner is an Israeli citizen or not. Therefore there is nothing to bar residents of the areas governed by the Jericho-Gaza [Cairo] Agreement from submitting a petition to the Supreme [High] Court of Justice."³⁷⁵

372. Oslo II Agreement, *supra* note 2, Annex I, art. IX.1.c. and d.

373. Oslo II Agreement, *supra* note 2, Annex V, art. VII.1.

374. See *supra* note 254, where Article 47 is cited in full.

375. Letter from Yael Ronen, Department of Human Rights, Ministry of Foreign Affairs, to Human Rights Watch, Sept. 12, 1994, quoted in HUMAN RIGHTS WATCH MIDDLE EAST, *supra* note 214, at 38.

By virtue of Article 43 of the Hague Regulations, it is incumbent upon the occupier to maintain the economic survival of the occupied territory.³⁷⁶ A more general obligation which derives from this provision is that of balancing the measures taken to ensure the security needs of the occupier against the general obligation to safeguard the welfare of the population under occupation.³⁷⁷ Moreover, Article 27 of the Fourth Geneva Convention permits the occupier to "take such measures of control and security in regard to protected persons as may be necessary as a result of the war."³⁷⁸

It is the author's view that, despite its devastating economic consequences for the inhabitants of the region, Israel's imposition of a stiff closure on the West Bank and Gaza Strip does not prevent the economic survival of these areas. Indeed, it should be borne in mind that numerous acts of terror perpetrated by Islamic fundamentalists, which resulted in many Israeli deaths and injuries, impelled the Israeli authorities to impose the closure. Given that the security of Israel's forces,³⁷⁹ as well as that of its citizens, was seriously threatened by the large inflow of Palestinians into Israel from the West Bank and Gaza Strip, it had little choice but to close its borders for a temporary period. It is therefore likely that were it to rule on the merits of Hypothetical 3, the High Court would hold that

376. MYRES S. McDOUGALL & FLORENTINO P. FELICIANO, *THE INTERNATIONAL LAW OF WAR* 739-40 (1994).

377. BENVENISTI, *supra* note 143, at 12-13.

378. Fourth Geneva Convention, *supra* note 17, art. 27. The authoritative commentary, edited by Jean S. Pictet, adds:

So far as the local population is concerned, the freedom of movement of civilians of enemy nationality may certainly be restricted, or even temporarily suppressed, if circumstances so require. The right is not, therefore, included among other absolute rights laid down in the Convention, but that in no way means that it is suspended in a general manner.

OSCAR M. UHLER ET AL., *COMMENTARY, IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR* 202 (Jean S. Pictet ed., 1958).

379. See Peace Watch, *supra* note 157 ("The military necessity which community policy authorizes the occupant to promote and prosecute relates, in the first place, to the security of the occupation forces from hostile acts on the part of the inhabitants.").

the closure is in conformity with the prevailing standard of the international law of armed conflicts.³⁸⁰

CONCLUSIONS AND OUTLOOK

The peace process boosted the Palestinians' aspirations for economic progress and political liberation. Regrettably, three years after the DOP was signed on the White House lawn, the Palestinians are experiencing widespread disillusionment due primarily to their lingering economic crisis and the torturous pace of the peace talks.³⁸¹ No less disappointing for many Palestinians, however, has been the PA's failure to inaugurate a new era of political freedom and respect for human rights.

Israeli expectations that the peace process would usher in a dramatically improved security situation³⁸² have also not thus far been met. In fact, the number of Israelis killed in terrorist attacks during the three years following the signing of the DOP has increased dramatically.³⁸³ It appears that Chairman Arafat is encountering difficulties simultaneously by honoring his commitments to Israel and reaching out to the supporters of the rejectionist groups.³⁸⁴ The use of suicide bombers by Hamas and Islamic Jihad to inflict crippling casualties on Israel and irreversible damage to the peace process will likely prove an irresistible invitation to further carnage. It is unclear

380. See, e.g., *The Law of Land Warfare*, Department of the U.S. Army, 143 FM 27-10, para. 375 (1956); *London, Manual of Military Law, Being Part III of the Manual of Military Law* 148, N.O. Code No. 12333, para. 535 (1958).

381. See, e.g., Derek Brown, *Disillusion Sours Gazan Hopes*, *THE GUARDIAN*, Nov. 22, 1994, at 16. The financial aid promised by donors from the international community has been very slow in coming. See generally Peace Watch, *Why Has the International Monetary Assistance for the Palestinians Not Arrived?* (Nov. 27, 1994). Unemployment figures for the Gaza Strip have reached astronomic proportions, fostering hatred and anger.

382. In the 1992 national elections Yitzhak Rabin campaigned on the theme that he would make Israel safer from the perspective of internal security. SLATER, *supra* note 148, at 444.

383. See Peace Watch, *supra* note 157.

384. One early indication of his dilemma was his statement, in a BBC television interview immediately after the White House ceremony on September 13, 1993, describing the DOP as the "first step" in the 1974 plan—known by all Arabs as the "plan of phases for the destruction of Israel." (BBC Short Wave Broadcast), Jordanian TV, Amman, Sept. 13, 1993 (ME/1794, MED/8).

just how many more such attacks the peace process can endure.

A dire possibility, but one not to be ignored, is that violations of human rights (by acts of omission or commission) by the Palestinian Police or security services will precipitate a military reaction by Israel. Such a reaction would likely place not only human rights but the entire peace process in jeopardy. Chairman Arafat might feel justified in scrapping his undertakings in the DOP, Cairo and Oslo II Agreements. He could then, with the support of rejectionist Palestinians as well as many others who have become disenchanted with the peace process, simply declare a Palestinian state. Israel would then be faced with an unprecedented dilemma—whether to intervene militarily at enormous political and significant military cost, or to seek yet another framework for salvaging the peace in light of this new reality.

On the other hand, if the Palestinian Authority adopts sound human rights policies and practices, this will contribute immeasurably to the peace process. Although Chairman Arafat's commitment to these values in the Agreements are vague at best, and international law offers no ready standard, the Palestinians' expectations regarding an improvement in their personal liberty³⁸⁵ deserves to be met, and not only in issues of pride or prestige.

The willingness of varied political and religious groups and individuals to use force to frustrate the current political course will sorely test all law enforcement agencies. Given the intermingled Palestinian and Israeli populations living in the shadow of decades of bloodshed and animosity,³⁸⁶ prodigious efforts will be necessary to prevent minor incidents from pre-

385. See generally FIRST INTERNATIONAL CONFERENCE ON HUMAN RIGHTS IN JERUSALEM: DEC. 9-11, 1993 (1994) (available at Land and Water Establishment for Studies and Legal Services, Jerusalem). See AL-HAQ, *supra* note 150, at 9-10.

386. The dangers are augmented by the PLO's demand for the release of all convicted Palestinians serving sentences in Israeli prisons—even premeditated murderers affiliated with Hamas. More than 5,000 have already been released since the DOP was signed. Israelis who would not object to releasing prisoners convicted for acts that are no longer criminal (e.g., flying a PLO flag) do object to releasing prisoners who have committed serious acts of violence, particularly if they are affiliated with an organization opposed to the peace process. In any event, it is not clear where political offenses end and criminal activities begin.

cipitating major confrontations between Israelis and Palestinians, or even between the IDF and the Palestinian Police.

Pursuant to the timetable in the DOP, talks on the final status arrangements began May 5, 1996. Yet it appears most unlikely that a final agreement will be reached by the 1999 deadline and perhaps for many years thereafter. If one extrapolates from the delays that have plagued the interim negotiations, it is possible that instead of being completed in no more than six years (from the signing of the DOP), that twelve, eighteen, or more years will pass before the final status agreement goes into effect. Another possibility, not to be discounted given the general instability of the Middle East and the political vulnerability of both the Israeli governing coalition and PLO Chairman Arafat, is that the process will become deadlocked. While it is difficult to forecast the timing of the demise of this much heralded process, each of the highly contentious issues that have been relegated to the final status talks has the potential to scuttle the entire endeavor. Even if the process successfully navigates the numerous obstacles ahead, the level of protection afforded human rights during the interim period in the Palestinian autonomous areas may be a considered a harbinger for what will eventuate after the final settlement.

The Supreme Court sitting as the High Court of Justice is respected as scholarly and politically independent. It has for more than twenty-five years heard and decided petitions by residents of the West Bank and Gaza Strip offering definitive, affordable, and expeditious justice to Palestinians and Israelis. Even critics of Israel's human rights policies vis-a-vis the Palestinians recognize the ameliorative effect that the High Court has had on Israeli human rights policy, and in particular on the conduct of the IDF. Aggrieved Palestinians, initially reluctant to place their faith in the judicial system of the occupier, found an accessible and effective forum for the litigation of their claims. During this period the court has become increasingly activist and focused on human rights and the rule of law. It has not hidden behind the doctrines of act of state, justiciability, and standing to avoid hearing controversial matters. The author is unaware of any other existing or planned judicial institution that serves these functions. Leaving the court's role unfilled, or attempting to replace it with the fledgling Pal-

estinian appeals court, would perhaps be politically expedient but would not be in the best interests of safeguarding justice.

While it would be fraught with political dangers for both the PA head Arafat and the Israeli coalition government of Prime Minister Netanyahu (and possibly for the court itself which could have its jurisdiction curtailed by Knesset legislation),³⁸⁷ cogent interpretations of local and international law (in particular the occupant's obligation to "ensure . . . public order and safety" in Article 43 of the Hague Regulations)³⁸⁸ and the Cairo and Oslo II Agreements (to "exercise their powers and responsibilities . . . with due regard to internationally accepted norms and principles of human rights")³⁸⁹ support an active role of the Israeli Supreme Court sitting as the High Court of Justice in protecting human rights so long as Israel remains in occupation of the West Bank and Gaza Strip. It would be strange indeed, if having established a unique system of judicial oversight to protect the rule of law, the court were willing to scrap its efforts where no sovereign or independent court system exists to assume its role.

It must be recognized that, whatever its aspirations, the PA's authority over the autonomous areas is *presently not* that of a sovereign entity. It ensues that the body of international human rights law does not formally apply to the PA's conduct. This follows from the general understanding that it normally binds only *states* which have either ratified or are otherwise bound (i.e., by customary law) to comply with certain strictures.³⁹⁰ Moreover, if the territories that are subject to local PA authority are no longer occupied by Israel, then humanita-

387. The religious factions in the Knesset have on many occasions suggested curtailing the Supreme Court's jurisdiction in response to the activist and liberal interpretations of Justices like Barak. See, e.g., Hirschberg, *supra* note 70, at 12. Were the court to entertain appeals pertaining the conduct of the PA or the relations between Israel and the PA it might alienate members of Knesset who support the peace process. If the religious right and the pro-peace process left were to come together on this one issue the Court might find its jurisdiction legislatively curbed.

388. Hague Regulations, *supra* note 16, art. 43.

389. See Cairo Agreement, *supra* note 2; Oslo II Agreement, *supra* note 2.

390. Interestingly, the International Committee of the Red Cross continues to operate in Gaza and Jericho on a vague basis of "international principles" according to the presentation given by Dr. Palwanka, its Legal Advisor at a conference on torture given at the Hebrew University Law Faculty on June 9, 1995 (transcript on file with author).

rian law, which is a subset of the law of war, does 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 uncertainty, during which human rights are in limbo, would be a dangerous precedent for the Palestinian entity that will likely emerge.

The late Israeli Prime Minister Rabin stated three years ago that human rights was of secondary importance to attaining peace. He reasoned that many of the circumstances in which Israel is accused of violating human rights would be eliminated if peace is attained.³⁹¹ Ultimately his assessment may prove accurate. At the very least, however, it appears to be quite premature, even in light of the duration of the interim period specified in the DOP. Yet, it is doubtful that he could have foreseen the immense difficulties that have emerged in the subsequent negotiations and the delays that they would create in the DOP's timetable.

Although human rights *during* the Israeli-Palestinian peace process should be a fundamental concern for all parties, it has thus far been largely ignored. While this is perhaps understandable given the ambitious political change that has been embarked upon, it could result in tragedy. In the view of the author, the failure to think through the issues addressed in this article and devise procedures to protect human rights will imperil not only the lives and well-being of individuals, but ultimately the prospects for amity between the Israeli and Palestinian peoples and the peace process itself.

391. See SLATER, *supra* note 148, at 437.