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## Challenges and Reforms in the Palestinian Authority

Hiba I. Hussein<sup>\*</sup>

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Hiba I. Husseini

## Abstract

This Article looks at the legal structure of the agreements signed between the Palestine Liberation Organization (“PLO”) and Israel from 1993 to 1995 (the “Agreements”). They consist of the Declaration of Principles signed in 1993 (“DOP”), the Agreement on the Gaza Strip and the Jericho Area signed in 1994 (“Gaza-Jericho Agreement”), the Protocol on Economic Relations signed in 1994 (“Paris Protocol”), and the Interim Agreement on the West Bank and Gaza Strip signed in 1995 (“Interim Agreement”). The Article examines the impact of the Agreements on the Palestinian economy and the development of a viable private sector. The Article also addresses the political factors affecting the implementation of the Agreements. The Article illustrates how the nature of the signed Agreements, premised on functional and quasi-territorial jurisdiction without any territorial integrity between the PA areas, as allocated under the Interim Agreement, limited Palestinian ability to engage in effective economic planning and institutional development. This Article concludes with a look at the recently introduced Palestinian Reforms, which, in light of the deteriorated state of affairs and mutual distrust between the Palestinians and the Israelis since the stalled Camp David negotiations in July 2000, have become the newest dimension of the Palestinian struggle towards Statehood. The Palestinian Reform program, along with the speech of the President of the United States, George W. Bush, Jr., who, on June 24, 2002 articulated the U.S. vision for the establishment of a Palestinian State in 2005, have injected the ailing peace process with much-needed optimism.

# CHALLENGES AND REFORMS IN THE PALESTINIAN AUTHORITY

*Hiba I. Hussein\**

## INTRODUCTION

This Article looks at the legal structure of the agreements signed between the Palestine Liberation Organization ("PLO") and Israel from 1993 to 1995 (the "Agreements"). They consist of the Declaration of Principles signed in 1993 ("DOP"),<sup>1</sup> the Agreement on the Gaza Strip and the Jericho Area signed in 1994 ("Gaza-Jericho Agreement"),<sup>2</sup> the Protocol on Economic Relations signed in 1994 ("Paris Protocol"),<sup>3</sup> and the Interim Agreement on the West Bank and Gaza Strip signed in 1995 ("Interim Agreement").<sup>4</sup> The Article examines the impact of the Agreements on the Palestinian economy and the development of a viable private sector. The Article also addresses the political factors affecting the implementation of the Agreements.

The Agreements launched the historical peace process between Palestinians and Israelis and set in motion a series of private and public investments. In this respect, the Article examines the framework and the scope of the Agreements as to the territorial, functional, and personal jurisdiction of the Palestinian Authority ("PA"). It looks at the powers and the authorities

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\* Hiba I. Hussein is the founder and Managing Partner of Hussein & Dajani, a law firm in Ramallah, West Bank. Ms. Hussein has served as legal advisor and member of the Palestinian Negotiations Team since 1994. She has been involved in a number of discussions on Palestinian-Israeli economic relations. Ms. Hussein serves on the boards of various local non-profit and professional associations and is the Vice Chairman of the Palestine Securities Exchange since 1996. She has numerous publications. Ms. Hussein received her J.D. from Georgetown University in 1992.

1. Declaration of Principles on Interim Self-Government Arrangements, Sept. 13, 1993, PLO-Isr. [hereinafter DOP].

2. Agreement on the Gaza Strip and the Jericho Area, May 4, 1994, PLO-Isr. [hereinafter Gaza-Jericho Agreement].

3. Protocol on Economic Relations between the Government of Israel and the PLO, Apr. 29, 1994, PLO-Isr. [hereinafter Paris Protocol].

4. The Israel-Palestinian Interim Agreement on the West Bank and Gaza Strip, Sept. 28, 1995, PLO-Isr. [hereinafter Interim Agreement]. The Interim Agreement was witnessed by the United States of America, the Russian Federation, the Arab Republic of Egypt, the Hashemite Kingdom of Jordan, the Kingdom of Norway, and the European Union ("EU").

transferred by Israel, and the structure of the Paris Protocol in terms of its effect on the shaping of the present Palestinian-Israeli relationship and its impact on the Palestinian economy.

The Article illustrates how the nature of the signed Agreements, premised on functional and quasi-territorial jurisdiction without any territorial integrity between the PA areas, as allocated under the Interim Agreement, limited Palestinian ability to engage in effective economic planning and institutional development. By operation of the Agreements, Israel unilaterally benefited from the peace process and particularly, the end of the long Arab boycott.<sup>5</sup> While the greatest downturn of the Palestinian economy came on the heels of the events of September 28, 2000, the PA economy had been experiencing major setbacks and deterioration from 1994 to 1999. A process of “de-development” persisted.<sup>6</sup> The average Palestinian did not experience the much-anticipated peace dividends. The periods from 1996 to 1998,<sup>7</sup> and the fourth quarter of 2000 to the present, witnessed a policy of tight closures<sup>8</sup> in the areas of Gaza and the West Bank, and within the West Bank. During the first period,

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5. Since the War of 1948 and the subsequent Declaration of the State of Israel in 1948, no Arab country has recognized Israel. On September 17, 1978, Egypt signed the Camp David Accords with Israel. See Camp David Accords, Sept. 17, 1978, Isr.-Egypt. Only the launch of peace between the Palestinians and the Israelis resulted in some form of new *rapprochement* between Arab States and Israel. In 1994, Jordan signed a Peace Treaty with Israel. See Treaty of Peace between the State of Israel and the Hashemite Kingdom of Jordan, Oct. 26, 1994, Isr.-Jordan. Qatar and Morocco normalized relations and established representative offices in Israel. Syria and Lebanon entered negotiations with Israel, but no agreement has been reached. Israel has deemed the Palestinian-Israeli peace process a process that has brought the country out of isolation in the Middle East, a step of major significant regional and international impact, especially because the peace with Egypt had remained a cold peace.

6. Sara Roy, *De-Development Revisited: Palestinian Economy and Society since Oslo*, 28(3) J. OF PALESTINE STUD. 64 (1999).

7. The policies of the Israeli Prime Minister of the Likud Party, Benjamin Netanyahu, resulted in digging a tunnel under the al-Aqsa Mosque. Palestinians protested and the Netanyahu government imposed the 1996-1998 closures.

8. Israel instituted a policy of physically closing the Palestinian territories and imposing curfews as a security measure. The articulated Israeli government position on closures is that closures deter Palestinian violence and fight terror. It is not the aim of this Article to discuss closures; however, it is important to point out that the closure policy was first initiated in 1991 — well before the peace process and the Palestinian acts of violence. The first Palestinian suicide bombing occurred in 1993. See Amira Hass, *Israel's Closure Policy: An Ineffective Strategy of Containment and Repression*, 31(3) J. OF PALESTINE STUD. 5, 13 (2002). At the same time, the closure policy institutionalized by Israel has been the most detrimental element in the downturn of the Palestinian economy. A combination of closures and curfews was imposed on the city of Nablus, in the

movement was authorized for certain categories (VIPs and businesses) and by permit only. The closure policies obstructed the Palestinian economy and resulted in the first set of disappointments for the private sector and investors. The second period witnessed an expansion of the imposed closure policies and curfews. Villages, towns, cities, and refugee camps became totally cut off. Palestinians were denied access to, from, and within their own areas,<sup>9</sup> while prolonged curfews were imposed in major cities like Nablus, Ramallah, Hebron, and Bethlehem, resulting in paralysis and a collapse of the economy.<sup>10</sup> The potential socio-economic development did not occur, which further deepened grassroots disillusionment.

The peace equation for the Palestinians has meant two things: an end to thirty-five years of occupation,<sup>11</sup> and economic sustainable growth. Thus, peace was as much about achieving development and prosperity, as it was about realizing the Palestinian aspiration for Statehood and independence.

The political dimensions, as they evolved within the respective Palestinian and Israeli internal political equation, marginalized the development of a viable business environment. Israeli and Palestinian derogations from the terms of the Interim Agreement and the Paris Protocol were a major factor. At the same time, certain Israeli and Palestinian politicians became involved in major businesses and created alliances.<sup>12</sup> Consequently, the business community became increasingly disenchanted as it realized that the peace dividends would not materialize.

Notwithstanding the derogations from the Interim Agree-

north of the West Bank, for two and a half months. During that period, the Palestine Securities Exchange, located in Nablus, was forced to suspend trading.

9. Today, there are eighty-four military road blocks and thirty-eight permanent check points in the West Bank. The Gaza Strip has eleven permanent check points and twelve military road blocks.

10. Today, humanitarian aid from the international community keeps over 60% of Palestinians from starvation. Palestinians are earning less than US\$2.00 per day, the World Bank figure for those living under the poverty line. *Humanitarian Crisis in the West Bank/Gaza Strip*, PALESTINIAN MONITOR, July 29, 2002, at 1.

11. The first step in implementing the Palestinian legitimate rights is enunciated in the U.N. Security Council Resolution 242 (Concerning Principles for a Just and Lasting Peace in the Middle East), U.N. Doc. S/RES/242 (1967).

12. MA'ARIV SHABAT (FBIS/WNC, Dec. 6, 2002) (author's trans.) (on file with author). According to MA'ARIV, Palestinians and Israelis paid and received commissions and kickbacks. These transactions were not transparent.

ment and the Paris Protocol, the letter of the Agreements proved dysfunctional in the areas of economic growth and development. The arrangements, as articulated in the Agreements, engulfed the Palestinian economy in its Israeli larger, richer, and more advanced counterpart. This was the effect of the customs envelope created by the Paris Protocol. Although trade volume was large between the two sides, it was strictly one-way: from Israel to the PA. Palestinians remained dependent on Israel for raw materials, imports, exports, standards, tariff structure, and customs duties. The mechanism for having Israel collect taxes on behalf of the Palestinian treasury became largely ineffective, as it became an instrument of Israeli political pressure. The same applied to the issue of Palestinian labor working in Israel. Labor was denied movement in the PA areas and access to Israel. Thus, selective implementation of the Agreements, coupled with tight closure policies, resulted in a severe decline of the economy.<sup>13</sup>

This Article concludes with a look at the recently introduced Palestinian Reforms, which, in light of the deteriorated state of affairs and mutual distrust between the Palestinians and the Israelis since the stalled Camp David negotiations in July 2000, have become the newest dimension of the Palestinian struggle towards Statehood.<sup>14</sup> The Palestinian Reform program, along with the speech of the President of the United States, George W. Bush, Jr., who, on June 24, 2002 articulated the U.S. vision for the establishment of a Palestinian State in 2005,<sup>15</sup> have injected the ailing peace process with much-needed optimism.

## I. ESTABLISHMENT AND POWERS OF THE PALESTINIAN AUTHORITY

### A. *Peace Agreements*

The PA was established in conjunction with the historic

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13. See generally DESSUS, S. J. ET AL., LONG-TERM POLICY OPTIONS FOR THE PALESTINIAN ECONOMY (2002) (on file with author). See also *infra* part II.

14. The PLO declared Statehood in November 1988, and the PA reiterated the declaration in 1998. Today, 134 countries worldwide have recognized Palestine as a State. The major countries of the Western world have not, but are moving toward that recognition, as articulated by President George Bush, Jr. on June 24, 2002. See President George W. Bush, Address at the White House Rose Garden on Calls for New Palestinian Leadership (June 24, 2002).

15. *Id.*

DOP between the PLO<sup>16</sup> and the Government of Israel, on September 19, 1993.<sup>17</sup> The DOP states:

The aim of the Israeli-Palestinian negotiations within the current Middle East peace process is . . . to establish a Palestinian Interim Self-Government Authority . . . for the Palestinian people in the West Bank and the Gaza Strip leading to permanent settlement for a transitional period not exceeding five years . . .<sup>18</sup>

Accordingly, the DOP calls for a two-staged agreement for the political process: an interim period of five years, followed by a permanent status settlement based on Security Council Resolutions 242 and 338.<sup>19</sup> To this effect, Article V(4) of the DOP recognizes that an interim period and an interim self-government will neither prejudice permanent Statehood, nor preempt it.<sup>20</sup>

The DOP calls for an interim agreement. Article VII of the DOP states: “[t]he Israeli and Palestinian delegations will negotiate an agreement on the interim period.”<sup>21</sup> Thus, the DOP set the stage for the establishment of a Palestinian self-government for a transitional period, pending permanent settlement. This interim self-government was inaugurated pursuant to the Gaza-Jericho Agreement. Under the Gaza-Jericho Agreement, the PA assumed the powers and authorities in civil matters, which were transferred by Israel.<sup>22</sup> Later, in 1995, the Interim Agreement incorporated the Gaza-Jericho Agreement.<sup>23</sup>

Chapter 1, Article I(1) of the Interim Agreement calls for the establishment of the Palestinian Council. According to the

16. The PLO, in its internationally-recognized capacity as the sole legitimate representative of all Palestinian people in the occupied territories, the Diaspora, and refugee camps in the Arab countries (Lebanon, Syria, and Jordan), signed the DOP and subsequent agreements with Israel. The PLO authorized the creation of the Palestinian Authority (“PA”). The PLO continues to maintain foreign relations and to sign international agreements on behalf of the PA.

17. This was the first time that the PLO and the Government of Israel negotiated directly with one another.

18. DOP, *supra* n.1, art. I.

19. *Id.*

20. When the government of Prime Minister Ariel Sharon took office and immediately declared that the peace process was over and that the signed Agreements were no longer binding, the impact on the Palestinian people was severe. The announcement was translated into a negation of the people’s right to Statehood, agreed to in the DOP and the Interim Agreement.

21. DOP, *supra* n.1, art. VII.

22. Interim Agreement, *supra* n.4, art. I(2).

23. *Id.* arts. XXXI(2)-(3).

Article, this Council shall assume the powers, responsibilities, and liabilities of the PA. Paragraph (2) of the Article states: "The term 'Council' throughout this Agreement shall, pending the inauguration of the Council, be construed as meaning the Palestinian Authority."<sup>24</sup> To date, however, the term "Palestinian Authority" remains operative and the term "Council" was never replaced.<sup>25</sup>

The PA was vested with the executive, legislative,<sup>26</sup> and judicial powers. The Palestinian legislature was named the "Palestinian Legislative Council" ("PLC"). The President of the PA was elected in January 1996 and members of the PLC were elected two months later.<sup>27</sup> The members of the PLC elected the Speaker. The Interim Agreement expressly excluded the following from its scope: Jerusalem, refugees, settlements, security arrangement, borders, and other issues of common interest.<sup>28</sup> These issues were reserved for the permanent agreement.<sup>29</sup>

#### B. *Limitations on the Powers of the Palestinian Authority*

Under the Agreements, the PA functions as an interim, semi-autonomous self-government.<sup>30</sup> However, by operation of the permanent exclusions enumerated in Article XXXI of the Interim Agreement, the PA cannot have clearly-defined "final" borders or contiguous geographical areas.<sup>31</sup> Therefore, it cannot effectively control the external or internal movement of its

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24. *Id.* arts. III(2) and XVIII.

25. Gaza-Jericho Agreement, *supra* n.2. It seems that the Palestinians, the Israelis, and the rest of the world, remained comfortable using the term "Palestinian Authority."

26. The PLC has a Speaker and eighty-eight members. Two of these members are deceased, one has resigned, and one is detained by Israel. The PLC also has various specialized committees.

27. The Interim Agreement along with Annex II, "Protocol on Election," call for the election of the President and the legislature. See Interim Agreement, *supra* n.4, art. II and Annex II. Among the first laws promulgated by the PA, was the Elections Law of 1995. See Palestinian Elections Law, Law No. 15 of 1995, issued in Gaza on Dec. 7, 1995.

28. Interim Agreement, *supra* n.4, art. XXXI(5).

29. *Id.*

30. The PA has a population of 3,298,951 people in the West Bank and Gaza.

31. There is wide-ranging academic debate, however, as to whether Palestine meets the international requirements for Statehood. Some have argued that the PA meets the criteria for Statehood under international law. Under these criteria, a State must possess a defined territory and a permanent population under the control of an authority exercising governmental functions and capable of conducting foreign relations. LOUIS HENKIN ET AL., INTERNATIONAL LAW CASES AND MATERIALS 229 (2d ed. 1980).



people, goods, services, and trade, or its scarce and limited natural resources.<sup>32</sup> Although this is a recognized critical shortcoming of the Interim Agreement, the Palestinians understood that it would be short-lived. Had a final agreement been reached by the end of the fifth year of the Interim Agreement, as intended by the DOP and the Interim Agreement, the adverse consequences that the PA experienced in the exercise of its rights and obligations, may have been less aggravated and more palatable. Yet, when these shortcomings combined with derogations and Israel's policy of closures, the PA private sector could no longer operate and the PA economy collapsed.<sup>33</sup>

The key to further understanding the shortcomings of the PA lies in the nature and the scope of the implicit limitations inherent in the Interim Agreement, especially with respect to the powers and authorities of the PA. In order to appreciate these implicit limitations, however, it is important to remember that the Palestinian-Israeli negotiations from Madrid in 1991, to the Interim Agreement in 1995, were conducted in the framework of Occupied Territories, where Israel exercised jurisdiction and administrative functions.<sup>34</sup> Accordingly, Israel was the source of the PA authority and, in that capacity, it conferred powers on the PA. Thus, the grant of powers and responsibilities was in Israel's discretion.<sup>35</sup> In its negotiations with the PLO, Israel also distinguished among functional, territorial, and personal jurisdiction. As a result, Israel was in a position to reserve many powers for itself and to make significant exceptions. Israel was further successful in narrowing the grant of powers between the DOP and the Interim Agreement.<sup>36</sup>

The Palestinian negotiators were able to extract written commitments. Effective control, due to the nature of the Agreements, had limitations. Article I(1) of the Interim Agreement states: "Israel shall transfer powers and responsibilities . . . to the

32. See discussion *infra* Part I.B.1-3.

33. See discussion *infra* Part II.

34. All facets of daily life in the Occupied Territories were under Israel's administrative and jurisdictional control, including civil, criminal, educational, judicial, and economic matters.

35. Israel insisted on interim, gradual, and protracted transfer of authority instead of a full comprehensive peace treaty, as was signed with Egypt in 1978 and with Jordan in 1994. See Egypt-Israel Peace Treaty, *supra* n.5; see also, Jordan-Israel Peace Treaty, *supra* n.5.

36. See discussion *infra* Part II.

Council [PA] . . .”<sup>37</sup> The Interim Agreement further adds that once the PA is inaugurated, the Israeli Civil Administration will be dissolved.<sup>38</sup> However, Article I(1) states that “Israel shall continue to exercise powers and responsibilities not so transferred.”<sup>39</sup> This means that some powers and responsibilities are residual and are retained by Israel.<sup>40</sup> The Israeli Civil Administration was not dissolved, but lay dormant. Israel controlled movement between Gaza and the West Bank by a system of permits, in spite of the express language of Article IX(2)(a) of Annex I of the Interim Agreement, which states: “[M]ovement of people, vehicles and goods in the West Bank, among cities, towns, villages and refugee camps, will be free and normal, and shall not be effected through checkpoints or roadblocks.”<sup>41</sup> In practical terms, the rules were relaxed, but the Israeli Civil Administration maintained its presence and imposed restrictions. Today, during the present political crisis,<sup>42</sup> Israel reemphasized the role of the Civil Administration. No permits are issued, except for humanitarian cases; limited numbers of permits are issued to the Palestinian medical and emergency personnel. Even entry of emergency food supplies and humanitarian assistance is subject to the permit policy. The free flow of commerce has come to near paralysis, businesses default on loans, banks limit extension of credit, and the productive capacity of the economy has come to a halt.

### 1. Territorial Jurisdiction

A look at the DOP and the Interim Agreement illustrates the limitations on PA’s territorial jurisdiction. In the Interim Agreement, Israel successfully limited the scope of PA’s territorial jurisdiction, narrowing it even more than did the DOP. Accordingly, a close reading of Article XVII of the Interim Agreement shows that it excluded from PA’s jurisdiction more than it included.

The PA’s jurisdiction articulated in the DOP included the

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37. Interim Agreement, *supra* n.4, art. I(1).

38. *Id.* art. I(5).

39. *Id.* art. I(1).

40. *Id.* art. I(5)(b)(i).

41. *Id.* Annex I, Protocol Concerning Redeployment and Security Arrangements [hereinafter Annex I].

42. *See* discussion *infra* nn.62-77 and accompanying text.

“West Bank and Gaza Strip territory.”<sup>43</sup> Under the Interim Agreement, the authority of the PA “encompasses all matters that fall within its territorial, functional and personal jurisdiction.”<sup>44</sup> In other words, the Interim Agreement qualified the territorial jurisdiction of the West Bank and Gaza, excluded the settlements and military installations areas, and further limited this territorial jurisdiction in the West Bank by making the withdrawal of Israeli military forces gradual.

Israel divided the West Bank into three territorial jurisdictional areas: A, B, and C.<sup>45</sup> Under this arrangement, the territorial jurisdiction of the PA consisted of areas A and B. Area A was made up of eight Arab cities in the West, where the PA exercised both civil and security jurisdiction, without interference by the Israeli army.<sup>46</sup> Area B consisted of the smaller towns and villages, where the PA exercised civil jurisdiction only; Israel exercised security control.<sup>47</sup> In Area C of the West Bank, which also included Israeli settlements with large areas around them, Israel exercised both civil and security jurisdiction.<sup>48</sup>

The withdrawal or redeployment of Israeli military forces from the West Bank and Gaza was to be carried out in a phased process.<sup>49</sup> The first phase was to include withdrawal from the populated areas of the West Bank (cities, towns, villages, refugee camps, and hamlets) and would be concluded twenty-two days prior to the Palestinian elections,<sup>50</sup> which would be held in January 1996. Eighteen months after the Palestinian elections, around the middle of 1997, the second redeployment was to be completed.<sup>51</sup> The Palestinian police was to be deployed and to assume the responsibility for public order and internal security.<sup>52</sup> The third and final redeployment was scheduled to begin in mid-1997 and to end before the end of 1997.<sup>53</sup>

Israeli redeployment is significant because of the size of the

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43. DOP, *supra* n.1, art. IV.

44. Interim Agreement, *supra* n.4, art. XVII.

45. *Id.* art. XI(3).

46. *Id.* art. XI(2) and maps in appendix A, available at [www.arij.org](http://www.arij.org).

47. *Id.* art. XI(2) and maps in appendix A, available at [www.arij.org](http://www.arij.org).

48. *Id.* art. XI(2) and maps in appendix A, available at [www.arij.org](http://www.arij.org).

49. *Id.* art. X.

50. *Id.* art. X(1).

51. *Id.* art. X(2).

52. *Id.* art. X(3).

53. *Id.* art. XI(2)(d).

area that would have come under direct and sole Palestinian control. The first redeployment from area A comprised 1% of the West Bank and the second redeployment from area B comprised 27% of the West Bank. Excluding settlements and military locations, the remaining area C comprised 72% of the West Bank.<sup>54</sup> According to the foregoing schedule, all withdrawals were to take place within three years. The PA was to exercise full territorial jurisdiction over its area by the time the final status discussions commenced.<sup>55</sup> Settlements and military location would be settled in permanent discussions.

Yet, phases two and three did not take place as scheduled.<sup>56</sup> On January 15, 1997, Israel made one reconciliatory attempt for not having redeployed from the West Bank city of Hebron<sup>57</sup> — it signed the Hebron Protocol.<sup>58</sup>

The PA never exercised jurisdiction over its areas because the Israeli military forces did not redeploy pursuant to the stipulations in the Interim Agreement. The Israeli breach of the Interim Agreement terms on redeployment had tremendous impact on the economy and the movement of people in the West Bank and Gaza. Annex I, Article I(2) of the Interim Agreement states:

In order to maintain the territorial integrity of the West Bank and the Gaza Strip as a single territorial unit, and to promote their economic growth and the demographic and geographical links between them, both sides shall implement the provisions of this Annex, while respecting and preserving without obstacles, normal and smooth movement of people, vehicles, and goods within the West Bank, and between the West Bank

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54. *Id.* art. XI(3) and maps in appendix A, available at [www.arij.org](http://www.arij.org), (showing the size of the area).

55. Israel insisted on interim, gradual, and protracted transfer of authority, instead of a full, comprehensive peace treaty, as was signed with Egypt in 1978 and Jordan in 1994. See Egypt-Israel Peace Treaty, *supra* n.5. See also Jordan-Israel Peace Treaty, *supra* n.5.

56. See Annex I, *supra* n.41.

57. *Id.* art. VII(1)(a). Special guidelines were agreed upon regarding the City of Hebron (known as "Area H-1"). Article VII(1)(b) states that "redemption will be completed not later than six months after the signing of this Agreement." *Id.*

58. Protocol Concerning the Redeployment in Hebron (Jan. 17 1977), available at <http://www.mfa.gov.il>. The separate Protocol illustrates Israeli backing from the terms of the Interim Agreement regarding the city of Hebron. Days before redeployment, Israel announced suspension of withdrawal. *Id.*

and the Gaza Strip.<sup>59</sup>

The breach lies in the fact that “normal and smooth movement of people, vehicles and goods within the West Bank” was not achieved. Moreover, the integrity of the West Bank and Gaza and the normal movement of people did not occur. Annex I, Article I(4) of the Interim Agreement states:

After the inauguration of the Palestinian Council [PA], the unity and integrity of the Palestinian people in the West Bank and the Gaza Strip shall be maintained and respected. All Palestinian people residing in the West Bank and the Gaza Strip will be accountable to the Palestinian Council [PA] only, unless otherwise provided in this Agreement.<sup>60</sup>

Notwithstanding the foregoing, Annex I, Article I(7) of the Interim Agreement states: “Nothing in this Article shall derogate from Israel’s security powers and responsibilities in accordance with this Agreement.”<sup>61</sup> Thus, the inconsistent language of the Interim Agreement, as demonstrated in paragraph 4(2) of Article I, played in favor of Israel and confirmed that even after the initial withdrawal, Israel retained overriding responsibilities.

By retaining these significant responsibilities, Israel confirmed that it did not intend to dissolve the Military Administration over the West Bank and the Gaza Strip. To this effect, Israel maintained its legal standing on the so-called “security offenses” — defined and administrative detentions imposed prior to 1993. In other words, Israeli security forces could continue the process of arresting, trial, and detention of Palestinians in areas where the PA had “full” jurisdiction (areas A and B) and “joint” jurisdiction (area C).<sup>62</sup>

Palestinian use of its own airspace and waters on the coast of Gaza did not fall under the PA jurisdiction either.<sup>63</sup> By contrast,

59. Annex I, *supra* n.41, art. I(2).

60. *Id.* art. I(4).

61. *Id.* art I(7).

62. *Id.* art. XVII.

63. *Id.* art. XIII(1). According to Annex I, Article XIII(1) of the Interim Agreement, the PA may use its airspace for three purposes only: (1) two transport helicopters may be used for VIP transportation within and between the West Bank and the Gaza Strip; (2) a maximum of three helicopters may be used for the purpose of transport missions to approved landing pads; and (3) three fixed-wing transport aircraft with up to thirty-five person capacity may be used for transporting persons between the West Bank and the Gaza Strip. Pursuant to paragraph (4) of this Article, all aviation activity is subject to the Israeli approval and Israeli air traffic control. Paragraph (3) authorizes

Israeli use of the PA airspace and coastal waters, civil or military, was not subject to any limitation. The sea off the coast of the Gaza Strip was divided into three Maritime Activity Zones: K, L, and M.<sup>64</sup> These zones hindered the fishing industry — an economic lifeline for Gazans. Only zone L was open for fishing.<sup>65</sup> Zones K and M were closed areas; navigation was restricted to the Israeli Navy. The area off zone L extended twenty nautical miles into the sea from the coast.<sup>66</sup> Fishing was not permitted in the open sea.<sup>67</sup> Further, the DOP called for the establishment of a Gaza seaport.<sup>68</sup> Construction began but was halted, especially after Israel destroyed the first phases of the construction during its incursions into Gaza in the early 2002.

These limitations could not have paved the way for decreasing dependence on economic activity on the Israeli side. By its careful drafting of the provisions and the exclusions — explicitly or implicitly — Israel ensured that it would have the upper hand in the implementation and the interpretation of the breadth of PA's territorial and functional jurisdictions. As a result, economic activity suffered a downturn.

## 2. Functional Jurisdiction

The Interim Agreement transferred functional jurisdiction and authority to the PA. Article XVII(2)(b) of the Interim Agreement sets out the scope of the transferred powers and responsibilities.<sup>69</sup> Although the powers and the responsibilities were clearly enumerated in this Agreement, there were two sets

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the PA to establish an airstrip in Gaza. Paragraph (13) mentions the commercial use of the Gaza airstrip for passenger flights. This paragraph talks about service between Gaza and Cairo only, whereby two fixed-wings aircraft, with a maximum of fifty passengers, are allowed. Effectively, the airstrip, completely destroyed by the Israeli air force during the March 29, 2002 military incursions known as "Operation Defensive Shield," was not available for commercial/cargo operation and thus, could not substitute for the Israeli ports (sea and air) with respect to commercial/cargo aviation. This paragraph expressly precludes the PA from having air service with countries that do not have bilateral relations with Israel. *Id.*

64. *Id.* art. XIV.

65. *Id.* art. XIV(1)(a)(2)(b).

66. *Id.* art. XIV(1)(a)(2)(a).

67. *Id.* art. XIV(1)(a)(2)(b)(i).

68. DOP, *supra* n.1, art. VII(4).

69. Interim Agreement, *supra* n.4, Annex III, App. I [hereinafter Annex III] (describing the powers and the responsibilities transferred to the PA). Examples include health, education, local government, land registration, commercial register, agriculture, and parks. *Id.*

of exceptions. The first exception set out the areas where the Israeli military<sup>70</sup> retained authority — those areas that did not come under the functional jurisdiction of the PA. Here, the powers and the responsibilities were not transferred to the PA and Palestinian personal jurisdiction over Israelis residing in the Palestinian areas was limited. The second exception involved the powers and the authorities which were transferred to the PA, but were not comprehensive. The numerous spheres where the transfer was not complete include agriculture; health; archeology; land; planning and zoning; environment; labor; electricity; gas; fuel; nature reserves; tourism; quarries; electromagnetic sphere; and international telecommunications.

In addition to the exceptions of final status, Annex III of the Interim Agreement enumerates items such as airspace and water resources.<sup>71</sup> Article XVII(2)(d) gives the PA functional jurisdiction over area C, whose territorial jurisdiction remains with Israel. This means that the PA has civil jurisdiction over Palestinians in its areas, but Israel's military government continues to exercise the powers and the responsibilities related to security, public order, and other non-transferred spheres.

### 3. Personal Jurisdiction

The third type of limitation embodied in the Interim Agreement relates to the nature of the transferred personal jurisdiction. Article XVII(2)(c) excludes Israelis living in areas under PA's jurisdiction, unless they consent to the jurisdiction of a Palestinian court in civil matters. In criminal matters, the PA is precluded from exercising any jurisdiction over Israelis.<sup>72</sup> By contrast, Palestinians are subject to Israeli jurisdiction. In fact, the line of distinction between civil and security matters is blurry. For example, no Palestinian travel document,<sup>73</sup> personal identifi-

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70. The Israeli military government was not dissolved. Article XVII(4)(b) of the Interim Agreement states that "the Israeli military government shall retain the necessary legislative, judicial and executive powers and responsibilities . . ." Interim Agreement, *supra* n.4, art. XVII(4)(b). In fact, the government did not stop issuing military orders and Orders 1433-1441 were issued in the first four months of 1996. A number of regulations were also issued.

71. *Id.*

72. These exclusions are not reciprocal, since Palestinians are subject to the civil and criminal jurisdiction of Israel.

73. The PA cannot issue passports to its citizens unilaterally. The Israeli civil authorities retain overriding powers in this sphere.

cation number, or residency card may be issued without a prior approval by Israel.<sup>74</sup>

By operation of rules guiding personal jurisdiction, the Israelis have lodged thousands of complaints against the Palestinians since 1994. The Israeli courts have ruled *ex parte* whenever a Palestinian was not properly served with process.<sup>75</sup> Moreover, numerous Palestinians have not been granted permits to enter Israel<sup>76</sup> to appeal their cases after an unfavorable judgment by an Israeli court. Additionally, the Israeli Military Administration executed monetary awards by deducting the award from the PA tax revenues collected by the Israeli side.<sup>77</sup>

These practices have impacted the ability of Palestinian businesses to bring legal action on commercial breaches, and limited the power of the Palestinians courts. Moreover, the private sector felt precluded from obtaining redress.

### C. *Temporal and Transitional Impact of the Interim Agreement*

The Interim Agreement had temporal limits. It was to end five years from execution, i.e., in May 1999, as declared in the DOP. The transitional nature and the open-ended framework of the Interim Agreement generated uncertainty and anxiety about Statehood. A series of disappointments replaced the high hopes and a much-anticipated peace treaty. Article XXXI(5) of the Interim Agreement states that the “[P]ermanent status negotiations will commence . . . not later than May 4, 1996.” Paragraph

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74. Palestinians in the West Bank and Gaza Strip are residents until sovereign issues are determined regarding their permanent status.

75. Service of process between Israel and the PA is to be effected through the PA in the case of Palestinian defendants and through the Israeli Military Forces (“IMF”) in the case of Israeli defendants. See Interim Agreement, *supra* n.4, Annex IV, Protocol Concerning Legal Affairs, art. II(9)(a)(2). In fact, on security grounds, the Israeli side through its Military Forces has not effected any service of process made by the Palestinian side against Israeli defendants in civil cases. The PA has often argued that the prospective monetary awards are held in trust or escrow by Israel pursuant to the Interim Agreement and thus, Israel is precluded from making unilateral decisions.

76. Note that the West Bank and Gaza citizens are not allowed entry into Israel, except as specified by Israel. See Annex I, *supra* n.41, art. IX.

77. See AL-QUDS, Dec. 12, 2002 (author’s trans.) (on file with author). This leading Arabic daily newspaper reported an Israeli court decision to award a multimillion judgment to an Israeli supplier. The damages were deducted from the PA revenues held in Israel. *Id.* See also AL-QUDS, Dec. 28, 2002 (author’s trans.) (on file with author) (reporting that a Tel Aviv District Court rendered judgment *ex parte* in favor of the Israeli bus company, Eggid, for damages sustained in acts of violence). The Court also fined the PA and President Yasir Arafat for not appearing.



(6) of this Article states that permanent status negotiations will be “conducted pursuant to the DOP.” The DOP, Article I, speaks about U.N. Security Council Resolutions 242 of 1967 and 338 of 1973.<sup>78</sup> Under Article X of the Interim Agreement, Israel was to redeploy from the West Bank. The three scheduled redeployments during the five-year term of the interim period did not fully materialize.<sup>79</sup> The physical movement required to turn the engine of the economy was stifled; the territorial integrity of the West Bank and Gaza was not achieved.

Final status negotiations between the Palestinians and the Israelis were to commence three years prior to the lapse of the Interim Agreement. In effect, by May 2000, Israel continued to exercise full control over 71% of the West Bank and 30% of the Gaza Strip, as the agreed upon redeployment did not fully materialize. The movement of people and goods within the West Bank and between the West Bank and Gaza remained under the control of Israel. The PA retained a quasi-territorial and semi-functional authority at best.

These were the prevailing conditions at the time of the Camp David Summit of 2000. At the Summit, the Palestinian side had serious misgivings. Both parties, in their own ways, were not ready for an end of conflict agreement — i.e. a peace treaty.

#### *D. PA Accomplishments from 1994 to 2000*

When the PA assumed responsibilities, conditions were adverse and difficult. It faced a highly complex subset of arrangements in the face of considerable post-conflict issues, responsibilities, and dilemmas. Under the Interim Agreement, the PA became responsible for a multitude of functions, including elections; security and public order; economic matters; civil affairs;

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78. U.N. Resolution 242, *supra* n.11, para. 1(i) (promising “[W]ithdrawal of Israel armed forces from territories occupied in recent conflict”). See also U.N. Resolution 338 (Concerning the October War), U.N. Doc. S/RES/338 (1973).

79. One redeployment took place when Israel withdrew from Jericho and parts of Gaza in May 1994, and another very limited one under Netanyahu, namely, along the lines of the Hebron Protocol. Barak refused to carry out the third redeployment that he himself had renegotiated under the Sharm al-Sheikh Agreement in September 1999. He insisted on moving to the final status negotiations directly. It is often overlooked that Barak, as Minister of Interior under the Rabin government, had actually voted against the Interim Agreement, at a time when the peace process was at its peak.

the judiciary and the court system — all without institutional capacity or skilled public civil servants.

Against the limitations set out in the Interim Agreement as described above, the PA started the discourse of building institutions and exercising its limited authorities. The PA was thus expected to build public institutions capable of promoting good governance, a democratic political system, a pluralist civil society, and a free market economy. In the best of circumstances, the process would have been difficult. Yet, with limited and semi-autonomous control, the PA came a long way. The President and the legislature were democratically elected; public service began to operate; pluralism began to emerge; the rule of law began to function; and the economy began to develop.

Despite the lack of political stability, the PA succeeded in establishing a functioning government with a national mandate, which was able to create much of the needed institutional and regulatory framework for improving living conditions and stimulating economic growth in the Palestinian territory. The PA was able to accomplish this even though it did not have exclusive jurisdiction over the legal and the administrative systems that served its people, and it lacked access to external markets. By the same token, the PA had limited control over its natural resources such as land and water. A large share of its operating budget and fiscal accounts was dependent on transfers of taxes and duties collected by Israel.<sup>80</sup>

The PA established a Ministerial Cabinet, delivered education and health care, administered tax collection, improved road and transportation infrastructure, and built a power generation plant<sup>81</sup> in the Gaza Strip. It established a modern Securities Ex-

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80. See WORLD BANK, FIFTEEN MONTHS — INTIFADA, CLOSURES AND PALESTINIAN ECONOMIC CRISIS, AN ASSESSMENT (2002) [hereinafter FIFTEEN MONTHS — INTIFADA]. According to this report, PA revenue fell from a monthly average of US\$91 million in March of 2000, to US\$21 million by April of 2001. The PA also accumulated US\$340 million in arrears. These arrears had a major impact on the Palestinian private sector. There were acute liquidity shortages, rising non-performing loans in the banking system, and increasing cases of insolvency. *Id.*

81. Strategic partners were brought in to build and operate the power plant. The delivery of electricity in Gaza was unreliable and power shortages and blackouts were regular occurrences. Israel did not develop the electricity grids for Gaza, as required under the Interim Agreement. See Annex III, *supra* n.69, App. I, art. 10. The West Bank fared better. Although the PA was able to establish an independent Palestinian electricity supply system, it purchased electricity from the Israel Electric Company pursuant to a commercial agreement.

change<sup>82</sup> and a state-of-the-art telecommunications network, fixed and cellular.<sup>83</sup> Its legislature enacted and is in the process of enacting numerous laws to support the development of the economy<sup>84</sup> and to modernize the laws. Its Cabinet presented the PLC with a general budget.<sup>85</sup>

However, the PA faced significant challenges. Its performance suffered from

- inefficient delivery of services;
- lack of inter-ministerial coordination and information systems necessary for coherent planning;
- a large number of public institutions;
- an inflated number of civil servants;
- high public service administration;
- limited vision and policy planning;
- lack of a full governmental financial information system;
- a limited delegation of authorities and responsibilities from the Executive to its ministries and agencies;
- an overlap in powers and authorities of ministries and official agencies;
- a limited role of local government;
- a limited oversight by the PLC over the Executive;
- an absence of a clear line of authority between the Executive and the judiciary;
- an absence of a uniform administrative system between the West Bank and the Gaza Strip;
- a lack of a system for accountability and transparency;
- a limited expertise of top and middle level civil servants base;
- highly complex and unstructured judiciary and court systems;
- an absence of a constitutional base for the PA; and

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82. The Stock Exchange is also operated under a license by a private investment entity.

83. The PA awarded a license to a private investment enterprise to operate the telecommunications sector. Note, however, that under Article 36 of Annex III of the Protocol Concerning Civil Affairs, the delivery of international telecommunications remained vested with the Israeli side pending final status, but at present, is subject to commercial arrangements. See Annex III, *supra* n.69, App. I, art.36.

84. These include relevant laws in the following areas: arbitration, banking, civil and criminal procedure, commercial, competition/antitrust, corporations, environmental, intellectual property, investment, labor, securities, taxation, telecommunications, and trade.

85. There were, however, problems with timely delivery and the breakdown of budget items.

- a lack of long-term strategic policy formulation.<sup>86</sup>

The impact of these challenges on the economic and private spheres was adverse. It discouraged investors and created high risk and uncertainty. It also jeopardized the investment of foreign capital and created PA monopolies and interference in the operation of the free market economy.<sup>87</sup>

#### *E. Camp David and the Events of September 28, 2000*

The political climate on the eve of the Camp David Summit, held in July 2000 at the invitation of the President of the United States, was charged and plagued with five years of disappointments and setbacks. There was bitterness and mistrust. Israel continued to build settlements, confiscate land settlements, and bypass roads. Actions that were of “irreversible” nature and in breach of the Interim Agreement took place.<sup>88</sup> Israel had not fully redeployed from the West Bank and Gaza, as explained above. Effectively, the PA entered the Camp David Summit with only 18% under its full control in area A and 24% under partial control in area B. This was contrary to the original understanding that the Israeli withdrawal from the vast majority of the West Bank would be completed during the interim period.<sup>89</sup>

On the economic level, there was slight recovery from the recession experienced from 1996 to 1998<sup>90</sup> — closures were infrequent, Palestinian labor in Israel was bringing in remittances,

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86. See generally COUNCIL OF FOREIGN RELATIONS, TASK FORCE REPORT: STRENGTHENING PALESTINIAN PUBLIC INSTITUTIONS (1999). See also, Victoria Wagner, *Palestinian Judiciary and the Rule of Law in the Autonomous Areas*, PASSIA (2000); FIFTEEN MONTHS — INTIFADA, *supra* n.80.

87. See FIAS, *Enhancing Prospects for Foreign Direct Investment in the West Bank and Gaza* (Aug. 2001). According to this study, the private sector cited the following factors: weak legal and regulatory environment (78%); corruption/PA involvement in the economy (47%); lack of information on the economy (47%); lack of infrastructure and facilities (26%); and weak law enforcement and court systems (16%). *Id.* See also World Bank, *Governance and the Business Environment in the West Bank/Gaza* (Working Paper No. 23, 2001).

88. See Interim Agreement, *supra* n.4, art. XXXI(7) (stating that neither side shall initiate or take any step that will change the status of the West Bank and the Gaza Strip, pending the outcome of the permanent status negotiations); see also W. Thomas Mallison & Sally V. Mallison, *The Palestine Problem in International Law and World Order* (1986) (discussing the legal status of settlements in the Occupied Territories under international law).

89. See Rema Hammami & Salim Tamari, *The Second Uprising: End or New Beginnings*, 30(2) J. OF PALESTINE STUD. 5, 7 (2001).

90. FIFTEEN MONTHS — INTIFADA, *supra* n.80.

transaction costs fell, and private sector capital investment increased.<sup>91</sup> Israel was experiencing an economic boom and the Palestinian economy benefited as labor opportunities and exports were enhanced.<sup>92</sup> Yet, the productivity of the Palestinian economy was on decline. Overall growth prospects were limited — sustained progress was not on the horizon and employment in the PA was saturated. According to the World Bank, real Gross Domestic Product (“GDP”) was projected to grow at a rate of 4%-5% with real per capita income stagnant and unemployment and poverty on the rise. For these reasons, the Palestinian economy was vulnerable, especially to external shocks, like closures. Economic structural reforms were required to sustain private sector activity.<sup>93</sup>

At the same time, Camp David was the American effort to create a summit environment that would bring about the elusive final status agreement. Prior to Camp David, in October 1999, the former President Bill Clinton invited Arafat and Netanyahu to the Wye River Plantation. After days of haggling and no success, ex-President Clinton threw in his weight and the result was the Wye River Memorandum,<sup>94</sup> signed on October 23, 1998.<sup>95</sup> In May 1999, Prime Minister Ehud Barak was elected. As the term of ex-President Clinton’s presidency was nearing the end, he was encouraged by Barak’s election and made his last bid for a final status agreement. He called for the Camp David Summit. At the Summit, Barak maintained the following Israeli official policy on final status: Israel would neither withdraw to the June 4, 1967 border; remove all settlements erected after 1967; withdraw from parts of East Jerusalem occupied in 1967; nor grant rights of return to the Palestinian refugees. President Arafat articulated the Palestinian position in the following terms: Israel should withdraw to the 1967 border, including all parts of East

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91. *Id.*

92. *Id.*

93. See Rosa A. Valdivieso et al., *West Bank and Gaza, Economic Performance, Prospects and Policies* (Int’l Monetary Fund 2001).

94. See David Makovsky, *A Wye Diary*, HA’ARETZ, Oct. 25, 1998 (author’s trans.) (on file with author).

95. Netanyahu turned over a small area in the north of the West Bank but refused to turn over other agreed-on parts on security grounds. This was in spite of the calm experienced in 1998-1999. In fact, former U.S. President Clinton, in a gesture of good will, visited the Gaza Strip and landed at the Gaza airstrip. This marked the first time a U.S. President visited the PA.

Jerusalem occupied in 1967; Palestinian refugees should have the right of return with compensation; and a Palestinian State with East Jerusalem as its capital should be established.<sup>96</sup>

Although Camp David was ground-breaking in that thorny and difficult issues were brought to the table — including Jerusalem, borders, refugees, and settlement — the two sides were not ready for final concessions and time was short. During Camp David, the Palestinians were alarmed at the prospect of having to re-concede the already negotiated withdrawals. Palestinian leadership was making a sharp distinction between final concessions and the interim concessions they had made only to reach an interim arrangement. The interim concessions included border control, bypass roads, movement, and water. At Camp David, the Palestinian leadership set out its “red lines.” It made clear that the concessions on movement and water were limited to an interim phase and made for an interim period only.

By most accounts in the United States and Israel, the negotiations were dubbed a failure. This was the official Israeli view echoed by the Clinton administration because the Palestinians “rejected” Barak’s “generous” offer. A close examination of the talks reveals that major disagreement centered on Jerusalem and the Israeli demand for sovereignty over the Haram al-Sharif.<sup>97</sup> Indeed, the Palestinian leadership rejected this demand for Israeli sovereignty over the third holiest place in Islam.<sup>98</sup> Various opinions have been expressed since the end of Camp David. These opinions are divided about what had happened at Camp David. Recent analyses about the content of the Israeli offer explained where the talks had ended.<sup>99</sup>

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96. See generally William B. Quandt, *Clinton and the Arab-Israeli Conflict*, 30(2) J. OF PALESTINE STUD. 26-40 (2001). See also Akaram Hanieh, *The Camp David Papers*, 30(2) J. OF PALESTINE STUD. 75, 94-95 (2001).

97. It is known to the West and Israel as “the Temple Mount.”

98. In the history of Zionism and since its first Congress in 1897, never has a Zionist leader made a demand for al-Haram al-Sharif. To have Barak, a secular Socialist, demand sovereignty over it and to have ex-President Clinton, a liberal secular Democrat, endorse the demand, was a call for ending the negotiations. See Walid Khalidi, *Speech Upon Receiving the Arab League Educational, Cultural and Scientific Organization’s Prize of Distinction in Cultural Achievement in the Arab World at Brunei Gallery*, SOAS (Oct. 8, 2002).

99. The Israelis and the Palestinians agreed that the complexities of the final status negotiations that led to ending the talks inhered in three main issues. These were: (1) the Israeli proposal to have sovereignty over the Haram al-Sharif/Temple Mount area where the Muslims would control the ground level and the Israelis would control the

Despite the setback at Camp David, the former President Clinton made the last effort in December 2000. He proposed the creation of a Palestinian State on 95% of the West Bank and Gaza Strip. The Palestinian State would have sovereignty over certain Palestinian neighborhoods in East Jerusalem. Refugees would return but be restricted to the Palestinian State itself. Further, an international monitoring force would be brought in at the Palestinian-Israeli borders. Arafat and Barak agreed that this proposal was the basis for further discussions.<sup>100</sup>

In the meantime, the present Prime Minister of Israel, Mr. Ariel Sharon, then Head of the Likud Party, entered the Muslim Holy site of al-Aqsa Mosque on September 28, 2000. Thousands of Palestinian demonstrators took the streets the next day. The Israeli Defense Forces ("IDF") shot to death several demonstrators. This sparked the al-Aqsa Intifada.<sup>101</sup> However, looking beyond mere sparks, the entire climate had become charged by then. Palestinians were sending a very loud message to ending the status quo of unfulfilled promises and unending occupation.

Notwithstanding the setbacks, Arafat and Barak held a series of meetings at the Egyptian resort town of Taba on the Red Sea from January 21 through January 27, 2001. At Taba, only the Palestinians and the Israelis participated. This was in contrast to

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area below the surface — the so-called "vertically divided" sovereignty; (2) the Palestinian request to have full sovereignty over all Palestinian areas of East Jerusalem; and (3) the Israeli request for an "end of conflict" clause that would release Israel from all further claims on any of the final status issues. The implication was that the Israeli responsibility for Palestinian refugees would end forever. See Susan Akram, *Palestinian Refugees and Their Legal Status: Rights, Politics and Implications for a Just Solution*, 31(3) *J. OF PALESTINE STUD.* 36-51 (2002). The proposed arrangement at Camp David included a fifteen-year offer to return a few thousands of refugee families and to compensate the rest. For this, the Palestinian leadership was to sign an "end of conflict" clause. The offer was rejected. To have a few thousand out of a total of 2,193,200 refugees return, would drive a wedge between Arafat and the Diaspora Palestinians. According to United Nations Refugees Works Agency ("UNRWA"), Palestinian refugees registered with it are present in Jordan (1,463,064 people), Lebanon (364,551 people), and Syria (365,605 people). *Id.*

100. Quandt, *supra* n.96.

101. Heavy clashes ensued between Palestinian stone throwers and the Israeli police. The al-Aqsa Intifada spread to all cities, towns, villages, and refugee camps of the West Bank and Gaza. Clinton tried to call calm and indeed held a small summit meeting in October at Sharm al-Skeikh in Egypt. The meeting was attended by Yasir Arafat, Ehud Barak, Hosni Mubarak, and Kofi Annan. Clinton announced that the parties agreed to hold off violence and conduct an inquiry into the crisis. However, the cycle of violence continued and the conflict became militarized with Israel resorting to excessive use of force including fighter jets and tanks in Operation Defensive Shield.

the Camp David Summit, where Americans played a high profile role.<sup>102</sup> In a joint statement made on January 27, the two sides acknowledged engaging in “deep and practical talks.”<sup>103</sup> Yet, time constraints precluded the parties from “reach[ing] understandings on all issues.”<sup>104</sup>

Thus, final status negotiations were replaced by mutual distrust and violence. Facing these dilemmas, the PA immediately went into a state of internal and external crisis. Domestically, it faced a crisis on the economic, institutional, and development levels. On the international level, it struggled with its standing and credibility.

## II. ECONOMY

### A. *Optimism and Peace Dividends*

General optimism characterized the period following the DOP and the signing of the Paris Protocol. The Israelis and the Palestinians saw the potential mutual benefits inherent in economic cooperation. The prevailing notion was that the peace process, on the political level, could be strengthened through economic “spill-over effects.” The main incentive for investors consisted of cashing in on the “peace dividends,” while adhering to the “principles of mutual respect for each other’s economic interests, reciprocity, equity and fairness,” as stated in the Preamble of the Paris Protocol.<sup>105</sup> The Paris Protocol, after all, was based on the establishment of a “contractual”<sup>106</sup> agreement on economic relations between the two sides.

From this optimistic perspective, Palestinian investors, and to a certain extent foreign investors, neither anticipating the security issues, nor realizing the limiting functional aspects of the Paris Protocol, launched multi-million investments. Before the

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102. The Taba Talks were attended by the EU Special Envoy to the Middle East, Miguel Moratinos. See Michael Moratinos, *Nonpaper on the Taba Negotiations, Summer 2001*, 31(3) J. OF PALESTINE STUD. 79, 79-80 (2002).

103. The negotiations were called off by Prime Minister Ehud Barak on January 27, as Israel was preparing for an election on February 6, 2001. Ehud Barak lost the election; Ariel Sharon was elected Prime Minister.

104. See *infra* n.108.

105. Paris Protocol, *supra* n.3, Preamble.

106. None of the other agreements between the Israelis and the Palestinians, whether signed before or after the Paris Protocol, included references to contractual language. Perhaps the intent was to make derogation more difficult legally. The intent of the drafters, however, is not clear.



events of September 2002, the Palestinian private sector provided 75% of total employment in the West Bank and Gaza.<sup>107</sup> Regional cooperation, also a function of the peace process, was launched. A series of regional economic summits were held from 1994 to 1997.<sup>108</sup> These summits underscored that peace carried with it the prospect of dividends, as well as provided a meeting forum for investors.

### B. *Background on the Economy*

The Palestinian economy is small and poor compared to its Israeli neighbor. It is, nevertheless, an open market economy. During the period of Israeli occupation from 1967 to 1993, the Palestinian economy was closely integrated with its Israeli neighbor. The Palestinian import and export market was completely dependent on the Israeli goods.<sup>109</sup> Effectively, the larger, more advanced, and richer Israeli economy, absorbed the neighboring smaller Palestinian economy.<sup>110</sup> Israeli economic, trade, and labor policies shaped the economic and trade activity between the Palestinian economy and the Israeli economy. Such total integration precluded the development of independent policies for private sector growth and industrial development. Unskilled and semiskilled labor constituted the main export to the Israeli market and was, by far, the most significant contributor to the Palestinian Gross National Product ("GNP"). Despite the lack of capital investment in the Palestinian economy, GDP grew by three-fold, but great disparities and inequalities existed.

Because the Palestinian economy was small and integrated into the Israeli economy, it is important to understand the dynamics and polemics. During the first ten years after 1967, the smaller Palestinian economy underwent a convergence with the

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107. Palestinian Bureau of Statistics (on file with author).

108. Realizing a vision for regional economic cooperation, the United States, the EU, and the World Economic Forum sponsored the Middle East and North Africa Economic Summits. These took place in Casablanca in 1994; Amman in 1995; Cairo in 1996; and Doha in 1997. The PA did not participate in the fourth conference held in Doha as a result of the tight closure policy imposed by Israel from 1996 to 1997.

109. 90% of West Bank imports came from Israel, while Israel absorbed about 50% of the West Bank exports. Almost all Gaza imports came from Israel, while Israel absorbed about 82% of the Gaza exports.

110. The Israeli economy was thirty times bigger than the Palestinian economy in terms of its Gross National Product ("GNP").

Israeli economy.<sup>111</sup> As a result, from 1968 to 1981, the Palestinian GDP grew from 9% to 15% of that of Israel.<sup>112</sup> Yet, the convergence had both positive and negative effects. On the positive side, as a result of employment in and trade with Israel, a “spread effect” occurred — income and economic activity increased.<sup>113</sup> The negative aspect, or “polarization effect,” diminished the “spread effect.” This was the consequence of the Israeli policy practices and restrictions on the Palestinian use of natural resources and productive economic activity, as well as neglect of the creation of a Palestinian public sector.<sup>114</sup> The two economies continued to diverge during the 1994 to 2000 period under the Interim Agreement and thereafter. The Palestinian economy could not overcome years of dependence on Israel’s economy. Gaps in resources, labor market imbalances, sectoral distortions, and infrastructure exist to this day.<sup>115</sup>

### C. *The Palestinian Economy and the Operation of the Paris Protocol*

The peace process between the Palestinians and the Israelis brought about the Paris Protocol. The Paris Protocol was designed to promote Palestinian economic growth and reduce the gaps and distortions connected to Israel’s economy experienced from 1967 to 1993. The Interim Agreement transferred certain authorities to the PA, a development that helped to directly promote business activity. The PA was in charge of licensing and supervising industrial and commercial activity.<sup>116</sup> It also supervised the commercial register and the register of companies.<sup>117</sup> Palestinians no longer needed permits from the Israeli Civil Administration. A Palestinian treasury was established.<sup>118</sup> Palestinian banks were set up and Arab banks that had been closed since

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111. In 1967, the Israeli economy was ten times larger than the Palestinian economy. That year, Israel created a Customs Union with the West Bank and Gaza and increased tariffs. The increase in tariffs and the creation of non-tariff barriers resulted in diversion of the Palestinian economy from the economies of Arab and other foreign markets. Meanwhile, a convergence with the Israeli economy took place. See Fadle M. Naqib, *Economic Relations Between Palestine and Israel During Occupation and Limited Self-rule*, ECONOMIC RESEARCH FORUM 2015 (Working Paper, 2000).

112. *Id.* at 7.

113. *Id.* at 7.

114. *Id.* at 8-12.

115. *Id.*

116. Interim Agreement *supra* n.4, art.9(2).

117. *Id.* art. 23(3).

118. *Id.* art. 39.

occupation, reopened their old locations and opened new branches.<sup>119</sup> Under the Paris Protocol, a Palestinian Monetary Authority (a central bank) was established,<sup>120</sup> even though the PA could not issue its own currency. Legal tender consisted of three currencies: the U.S. Dollar, the Israeli Shekel, and the Jordanian Dinar.<sup>121</sup>

Notwithstanding the improvements brought about by the Interim Agreement and the Paris Protocol, the practical implementation of the Paris Protocol and the customs envelope created within its scope, increased the potential to close the gap. However, this gap reduction or elimination halted due to the deteriorating security situation and closure policy. In fact, the gap widened. Movement of people, vehicles, and goods became more restricted.

With a wider gap between the two economies and the transfer of quasi-functional authority to the PA, no viable development of the Palestinian economy was feasible. Illustrative of the limitations on authority are the following:

- predetermined nature and scope of Palestinian exports, with a specific list of goods and destinations (Egypt and Jordan only) as guide;<sup>122</sup>
- revenue-sharing through Israeli tax collection;<sup>123</sup>
- coordination of VAT and other indirect tax rates;<sup>124</sup>
- continued access of Palestinian labor to the Israeli market;<sup>125</sup> and
- certain arrangements relating to agriculture,<sup>126</sup> industry,<sup>127</sup> and tourism.<sup>128</sup>

The arrangements under the Paris Protocol gave Palestinians some administrative autonomy over public service delivery, and room for the formulation of policies of economic coopera-

119. *Id.* art. 4.

120. Paris Protocol, *supra* n.3, art. IV.

121. The absence of currency rendered monetary policy ineffective and affected long-term lending policies. Because of mismatching, banks were discouraged from extending long-terms loans. This had a negative impact on investment and growth.

122. Paris Protocol, *supra* n.3, art. III.

123. *Id.* art. V.

124. *Id.* art. VI.

125. *Id.* art. VII.

126. *Id.* art. VIII.

127. *Id.* art. IX.

128. *Id.* art. X.

tion. However, the grant of power and authority was not complete. In the areas of agriculture, monetary matters, tourism, standards, goods classification, valuation, and customs procedures, Israel retained many facets of the powers. The limited grant to the PA precluded better development of economic planning. The Paris Protocol was therefore limiting in relation to exchange of goods, fiscal policy, currency arrangements, and labor services, which continued to constitute part of Israeli economic policies because the Paris Protocol was not premised on Palestinian economic growth. The language of the Paris Protocol was designed to permit the integration of the two economies for the purpose of developing the Palestinian economy by close integration, while allowing Israel to maintain effective control over critical resources, such as electricity, international communications, land, and water. This precluded "reciprocity, equity and fairness." Moreover, the Paris Protocol kept imports under Israeli control and the collection of import taxes remained with the customs authorities. The import taxes were transferred to the PA after a deduction of an agreed-upon fee, as set out in Article III(15). These taxes became a major source of revenue for the PA.

The limitations of the Paris Protocol and the peculiar territorial division under the Interim Agreement — whereby Gaza and the West Bank were not contiguous, while the West Bank was divided into the areas A, B and C, each with distinct rules, a legal status, and jurisdiction — burdened the Palestinian economy. The vagueness of Article IV of the Interim Agreement was part of the problem. The Article states: "[T]he two sides view the West Bank and the Gaza Strip as a single territorial unit, whose integrity will be preserved during the interim period."<sup>129</sup> The word "view," as used in the Article, carries a different meaning for the Palestinians and for the Israelis. The presence of settlements between the West Bank and Gaza and the nature of the link between the two areas, made it impossible for the West Bank and Gaza territories to remain without alterations.

The absence of progress on the political front with respect to final status negotiations, prolonged the shortcomings of the Paris Protocol. The transition period, designed to be short under the Interim Agreement, never materialized. Thus, the

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129. Interim Agreement, *supra* n.4, art. IV.

permanent status economic arrangements were not made. Recurrent border closures, delays in opening the Gaza seaport on the Mediterranean, restrictions, and intermittent operations of the airport in Gaza, eroded sustained economic growth, resulting in increased vulnerability to external shocks.<sup>130</sup>

Hence, an adverse economic environment with a high degree of risk, for both public and private investment, developed. To this may be added the unpredictability in production, trade under closure, and high transaction costs generated by the complex procedures governing the transport of Palestinian trade across the main borders with Jordan, Egypt, and Israel. Furthermore, PA's restricted jurisdiction over land and water resulted in a scarcity of natural resources essential for productive development.

#### D. *Trade Regime and Other Constraints Under the Paris Protocol*

The Palestinian trade regime, as envisioned in the Paris Protocol, did not provide an adequate basis for efficient Palestinian economic growth.<sup>131</sup> It included policies that were better suited to the commercial interests of the much larger and stronger Israeli economy.<sup>132</sup> The operation of the customs envelope, as set out in the Paris Protocol, was the only available option for the Palestinians, considering their insistence on continued access to the Israeli market, and Israel's insistence on having no borders.<sup>133</sup>

Thus, external tariff rates, excise tax rates, quality, and safety measures were all decided by Israel.<sup>134</sup> In addition to maintaining the range of subsidies, indirect taxes on certain imports, and non-tariff barriers applied by Israel to protect its industries without enabling the PA to exercise similar policies, the Protocol adopted Israeli regulations for imports from most third

130. See generally UNESCO, REPORT ON THE PALESTINIAN ECONOMY (Gaza 2001).

131. One of the Side Letters to the Paris Protocol states that the two sides will discuss "the prevention of Trade Restrictions."

132. See UNCTAD, *The Palestinian economy and prospects for regional cooperation*, UNCTAD/GDS/SEU/2 (June 30, 1998). See also UNCTAD, *Cooperation between the Palestinian Authority, Egypt and Jordan to Enhance Subregional Trade-Related Services*, UNCTAD/GDS/SEU/3 (Feb. 14, 2000); UNCTAD, *The Palestinian Economy: Achievements of the Interim Period and Tasks for the Future*, UNCTAD/GDS/APP/1 (Jan. 19, 2001).

133. Ephrim Kleiman, *The Economic Provisions of the Agreement Between Israel and the PLO*, 23 ISRAEL L. REV. 347-73 (1994).

134. Valdisvieso, *supra* n.93, at 93.

parties.<sup>135</sup> Except for a limited group of products of specific quantities to which the PA could apply its own rates, Palestinian imports had to be subjected to a minimum of Israeli rates.<sup>136</sup> This rendered trade policies effectively identical to those of Israel, making it impossible for the PA, in most cases, to bring taxes upward or downward.

The Palestinian economy, by virtue of its association with the Israeli trade regime, had to bear all the costs of trade liberalization inherent in the World Trade Organization (“WTO”) membership, while having access to few of the benefits of liberalization and WTO accession. Notwithstanding these shortcomings, the Paris Protocol was intended to provide Palestinians with opportunities to reap some benefits in the form of expanded trade. However, border closures from 1996 to 1997, and from 2000 on, undermined such opportunities, and by so doing, effectively set limits to the development possibilities of the Palestinian economy. Not to mention, the preferential or free trade agreements between the PA and regional and international partners (Canada, Egypt, European Union (“EU”), Jordan, United States of America, and countries of the Arab League) remain largely dormant. Market access conditions have precluded their exploitation.<sup>137</sup>

The Paris Protocol failed to include a clear mechanism for its implementation. It called for the creation of the Joint Economic Committee,<sup>138</sup> but was silent on the Committee’s powers and authorities. The Paris Protocol did not include an arbitration mechanism for dispute settlement, nor did it provide for a third party intervenor who would arbitrate disputes.

There are additional constraints that are self-imposed by the PA. They have compounded the limitations of the Paris Protocol and worked to preclude economic development. The PA did not rehabilitate the infrastructure and public services in a reasonable amount of time to provide an adequate foundation for economic development. During the term of the Interim Agree-

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135. *Id.*

136. Paris Protocol, *supra* n.3, art. III(2).

137. In effect, from 1993 to 1998, lost opportunities amounted to US\$3 billion in direct cumulative income. It should be remembered that in 1998, the real GNP in the PA was US\$ 3.96 billion and the real GDP was US\$3.32 billion. Palestinian private investment slowed down and reflected declined sales and competitiveness.

138. Paris Protocol, *supra* n.3, art. II.

ment, the PA did not formulate a vision for economic development and the special needs associated with it. Nor did it set clear economic priorities or set up a capable public sector to support the private sector. Instead, the PA permitted members of its public sector to compete with the private sector, thereby establishing PA's own commercial activity with little accountability or transparency. These practices affected the economic priorities of the PA and prevented the development of a central and focused vision for rehabilitation and development.<sup>139</sup>

*E. Political Crises (1996-1998 and 2000-Present) and Impact on the Economy*

The deteriorated security situation and the imposition of closures by Israel from 1996 to 1998 and from September 2000 on, resulted in a severe deterioration of the Palestinian economy. When Israel lifted closures as a security measure, the Palestinian economy showed some expansion, as reflected in the PA revenues, bank deposits, and bank credit. In fact, in 1999, the PA requested that the International Monetary Fund ("IMF") assist in preparing and monitoring a comprehensive medium-term economic policy framework.<sup>140</sup> The objective of this program would be to enhance economic policy formulation to overcome the challenges facing the Palestinian economy. During the initial phase of the program, the focus was on enhancing fiscal management and governance; improving banking supervision; strengthening the legal and regulatory framework; limiting the uncontrolled expansion of the public employment; controlling revenue diversion;<sup>141</sup> and improving overall conditions for private sector investment.<sup>142</sup>

As the PA embarked on new measures for sustained development, the political situation took a turn for the worse. In parallel with the Palestinian al-Aqsa Intifada, Israel started to take measures for gradual unilateral separation. The most significant step associated with separation was the replacement of Palestin-

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139. See generally Fadel Naqib & Nasser Atiani, *The Present and Future Prospects with the Israeli Economy* (Palestine Economic Research Inst., Ramallah, West Bank 2002) (draft for discussion) (author's trans.) (on file with author).

140. Valdivieso, *supra* n.93, at 12.

141. *Id.* at 13.

142. *Id.*

ian labor working in Israel with foreign labor.<sup>143</sup> Other measures that have had an adverse impact include: (1) tighter restrictions on the movement of goods within and through Israel and among cities in the West Bank and Gaza; (2) tougher arrangements concerning imports and exports that authorize truck passage at certain military checkpoints, subject to the process of downloading and a subsequent re-loading onto local trucks before proceeding to the final destination; and (3) a tighter system of permits for controlling the movement of Palestinians within the West Bank and Israel.

These measures posed an immediate challenge to the Palestinian economy and its future recovery. They were particularly relevant to the development of policy-making and implementation at the Palestinian level. The Palestinian economy experienced a decline in employment, trade, and investment, and an increase in transactional and transportation costs.<sup>144</sup> The GDP declined by 6% in the year 2000, despite growth in the first three quarters of that year. It declined by an additional 12% in the year 2001, and is expected to decline by another 15% by the end of this year.<sup>145</sup> The Gross National Index ("GNI") declined by 15% in 2001.<sup>146</sup>

However, the adverse economic situation does not negate the potential for setting the Palestinian economy on the path of sustained recovery and future growth. It is granted that political and social stability must be attained, but short-medium term steps to recovery require the PA to:

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143. The Palestinian labor force working in Israel, which accounted for a quarter of the total Palestinian work force, specialized in low-productivity construction and agriculture sector jobs. See Basim Makhool, *Economic growth and employment in the West Bank and Gaza Strip*, 27 ARAB ECON. J. 11 (2002).

144. The continuation of these measures will certainly aggravate the already precarious humanitarian crisis, since the economy's coping strategies have been effectively overwhelmed by poverty. This will render attempts to address development needs particularly difficult, while emergency humanitarian needs will still be evident, even after the attainment of stability. The experiences of other war-torn economies also show that food aid can result in the suppression of food prices and, henceforth, act as a disincentive for local farmers. At the same time, aid may increase the profitability of non-productive activities, such as commerce and construction. These are easier arenas for the private sector expansion than are export activities. Hence, the risk lies in the breeding of aid dependency as a coping mechanism at the household level, as well as in the further aggravation of the economy's structural weaknesses.

145. DESSUS, *supra* n.13, at 6-7.

146. Interim Agreement, *supra* n.4, art. XXXI(5).



- prepare an economic and policy strategy to halt the decline in output and income;
- restore confidence and growth;
- restore open access to foreign markets;
- focus on improving education;
- build a human resource base with solid technological skills;
- improve technology based-production;
- make the Gaza airport and seaport operational;
- establish warehouses at Palestinian ports; and
- create procedures to implement the recently signed preferential or free trade agreements with regional or international partners.

In the long-term, the PA, following recovery and reconstruction, needs to make the Palestinian economy viable. Thus, future policies must focus on turning the Palestinian economy into an export market.

### III. *PALESTINIAN REFORM*

The PA faces challenges on the political and economic levels and also, increasingly, on the security and credibility levels. In the meantime, in its march toward Statehood, it has been working to deepen the principles of democracy, separation of powers, the rule of law, and free market. However, domestic and international pressures for achieving reform have been mounting.

#### A. *Challenges Facing Palestinian Reform*

With the highly pronounced pressure for reform ever since the establishment of the PA in 1994, it is difficult not to acknowledge the notable achievements of the PA in building its administrative and institutional capacities, and in introducing regulatory reforms. The PA made certain leaps forward, which lent it credibility and provided grounds for confidence in its readiness and potential to assume national government functions. Prior to the current political crisis, the PA showed a commitment to strengthening and improving the performance of public institutions. In 1999, the PA established an Inter-Ministerial Committee to develop public institutions and in 2000, it introduced a range of

improvements in public finance management.<sup>147</sup> Its goals, by the year 2000, were the consolidation of all public revenues under one account; the modernization of tax collection and customs procedures to adhere to international standards; and the divesting of the PA assets held in private enterprises, estimated at US\$345 million.<sup>148</sup> These efforts were supported by measures to set the stage for a private sector-led development, including involvement of the private sector in policy-making, and a reform of the legal framework.<sup>149</sup>

The PA built institutions and capacity against a legacy of institutions and administrative practices that it inherited from the Israeli Civil Administration.<sup>150</sup> It faced a dilapidated public service infrastructure, and collapsed judiciary and legal systems.<sup>151</sup> It also had to cope with a severed West Bank and Gaza, border closures, and a denial of free access to markets. All of this had an adverse effect on the PA's institutional capacity. The Israeli-imposed restrictions on movement resulted in the creation of a redundant structure of PA institutions and established a "quasi" PA in Gaza and the West Bank, thus increasing the burden on the PA budget and creating inefficiencies.<sup>152</sup>

Between its achievements and inheritance, the PA's performance record shows that there remains room for improvement,<sup>153</sup> especially since recent political developments strained

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147. Paris Protocol, *supra* n.3, art. VIII.

148. President Arafat issued a decree to consolidate PA commercial investment. The mechanism was established in August 2002. The Palestine Investment Fund ("PIF") was established. The PIF has a board of private and public sector members who oversee the commercial investments of the PA. It conducts itself with transparency and accountability. The process of consolidation of accounts, contracts, and investments domestically, regionally, and internationally is subject to board oversight and planning.

149. In 1999, the PA launched the "National Economic Dialogue" on such issues as the identification of the development interests of the private sector, and the recognition of the policies needed to enhance the role of the private sector in economic development. The PA also developed a strategic framework for guiding legal reform, entitled "Rule of Law Strategic Development Plan." By mid-2000, the PA enforced forty laws with direct bearing on the economic or business spheres. See UNESCO, *RULE OF LAW DEVELOPMENT IN THE WEST BANK AND GAZA STRIP: SURVEY AND STATE OF THE DEVELOPMENT EFFORT* (Gaza, 1999).

150. See Annex III, *supra* n.69, Protocol Concerning Civil Affairs.

151. COUNCIL OF FOREIGN RELATIONS, *supra* n.86.

152. Ministries and official agencies have parallel structures and staff in the West Bank and Gaza because staff cannot move between territorial jurisdictions. Ministers and heads of agencies have to obtain permission from the Israeli side to travel between their offices.

153. See UNCTAD, *The Palestinian economy: achievements of the interim period and*

and challenged PA's capacity to govern, and exposed its major weaknesses. At the economic and social planning levels, the PA has yet to elaborate on a clear development vision and strategy — other than a general commitment to trade and financial liberalization — as well as the creation of enabling environments for the private sector and for export-led development. With the capacity to go further than headlines and a drive to verbalize in the public and the private sectors an in-depth, systematic development plan rooted in actual needs and interests, the PA can go far. Yet, some of the policies reflected in legal and regulatory arrangements are development policies that are not operational. Their objectives are stated in generic terms and are not well connected with particular programs, projects, or short-range policy measures.

At the implementation level, the impact of the development programs is undermined by differential competence levels within and among ministries; weak executive capacity in translating priorities and goals into coherent action; and weaknesses in the budgetary process, especially with regard to the consolidation of fiscal accounts. All of the above problems cause fiscal leakage and delays in service delivery. Over and above these challenges, the size of the public sector is estimated to have reached 115,000<sup>154</sup> employees by the year 2000.

The highly charged external and internal, political and economic contexts affect the performance of the PA and the efficiency of its institutions. The Palestinian public opinion, the civil society, and the PLC have articulated the need for self-assessment and institutional reform.<sup>155</sup> They stressed the need to examine PA's track record on governance, accountability, transparency, responsiveness, and efficiency of public services. There is strong pressure to achieve the following:

- establish a more efficient justice system;

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*tasks, for the future*, UNCTAD/GDS/APPU/1 (Jan. 19, 2001); see also WORLD BANK, WEST BANK AND GAZA: STRENGTHENING PUBLIC SECTOR MANAGEMENT (West Bank and Gaza Resident Mission, 1999).

154. This number of employees is equivalent to around 20% of the labor force, with a wage bill representing almost 15% of the PA's GDP. The annual population growth rate of 5.1% will generate a continually high demand for public services in the future. This has to be factored into the planning of civil service restructuring of the PA. For the moment, this is manifested in a freeze in PA employees and a 4% cut in the nominal wage bill.

155. *Id.*

- improve performance of ministries;
- reassess public sector employment policies concerning inflated numbers of civil servants and their qualifications and merits;
- create a more democratic decision-making process;
- set mechanisms for effective participation in the policy-making process; and
- uproot corrupt practices.

### B. *Reform Agenda*

Wide domestic and international consensus has established the need for reform in the PA.<sup>156</sup> The call for reform comes at a time when the PA falls short on various levels: rule of law and regulatory framework, political accountability, and efficient public administration and functions. The Palestinian courts and judiciary rank the lowest among PA services. Security Court had weakened the independence and effectiveness of the judiciary, as Palestinians often resolve disputes through appeals to security personnel instead of the Civil Court. The executive, legislative, and judicial powers of the PA must be separated. The PA needs to promote a strong financial system; reduce anti-competitive practices; increase the accountability of the public sector; improve PA revenue administration; and raise the efficiency of the public sector by allowing the private sector to compete in service delivery.<sup>157</sup> The lack of a well-developed capacity, a well-trained civil service base, and a well-planned organizational structure of the PA institutions, detract from the PA's capacity to carry out the functions of development.<sup>158</sup>

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156. See generally World Bank Group, West Bank and Gaza Office, *West Bank and Gaza Update* (2002).

157. See Palestinian Legislative Council, Statement Towards Development and Reform of the PNA Institutions (May 16, 2002), available at <http://www.pal-plc.org> [hereinafter Statement].

158. Certain key social and economic indicators did show an upward trend. Most notable were the 76% increase in the GDP since the inception of the PA, in spite of continued volatility; improvement in per capita GDP from US\$1,274 in 1994 to US\$1,652 in 1999; reduction in the poverty rate from 27% in 1996 to 23% in 1998; continued increase in net enrollment ratio in primary and secondary education; and significant improvement in health, public utility, and other human and social development indicators.

### 1. PLC Reform of the PA Statement

Against this background, during a regular session on May 15-16, the PLC issued a groundbreaking statement entitled "Statement Towards Development and Reform of the PNA Institutions" ("Statement").<sup>159</sup> The Statement followed a seminal speech delivered by President Yasir Arafat. The speech included a frank and strong call for administrative and financial reform. In turn, the PLC conducted a comprehensive assessment of the PA's past performance. Since the inception of the PA in 1994, no self-assessment of the kind had been conducted and the need for one had now become urgent. The PLC's Statement affirmed the President's speech and articulated the fundamental principles required for reform, especially in the areas of expenditure measures, planning, aid coordination for the "current" emergency, and policy, institutional, and structural measures. The detailed PLC agenda included:

- enactment of the Basic Law and the Law on the Independence of the Judiciary;
- establishment of a Constitutional Court;
- abolition of the Security Court;<sup>160</sup>
- institution of regular general elections (legislative, local government, and presidential);
- institution of safeguards of public freedoms;
- restructuring of the offices of the executive branch and the Cabinet;
- assurance of transparency on public expenditures and financials of the PA;
- restructuring of the security forces and the Public Accountant's Office;
- restructuring of local government and municipalities;
- improvement of performance of the civil service and reduction in the number of civil servants;
- improvement of performance of the judicial and court systems;

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159. See Statement, *supra* n.157.

160. President Arafat issued an order on December 27, 2002, abolishing the Security Court and merging functions in the criminal court system. This was a very significant step because it eliminated the lack of transparency and accountability associated with the Security Court procedures.

- maintenance of the separation of powers and the independence of the judiciary; and
- creation of the High Judicial Council.<sup>161</sup>

This Statement gained major momentum and provided the impetus for the adoption of the 100 Day Plan of the Palestinian government less than a month later.<sup>162</sup> The Statement was hailed as “forward looking” and recognised as a much-needed policy agenda to invigorate public and private sectors. It was deemed a renewal of hope.

## 2. 100 Day Plan

As the PLC and the President’s Office committed themselves to reform, President Arafat appointed a Ministerial Reform Committee to produce the national agenda for reform.

On June 23, 2002, the PA issued the 100 Day Plan. The Plan describes how the PA intends to become “more efficient and effective in the service of the national good.”<sup>163</sup> The Preamble of the 100 Day Plan states: “[T]he Government has thus sought to meet the requirements and demands posed by the current situation, well recognized by all zealous citizens, PLC members and officials, for whom the national good is paramount.”<sup>164</sup>

The 100 Day Plan sets out the following agenda: a. General Domain; b. Public Security Domain; c. Fiscal Domain; d. Judicial Domain; and e. Other Domains. The details of these domains are outlined below.

### a. General Domain

In this domain, the focus is on the separation of powers among the three branches. The 100 Day Plan calls for:

- promotion of the rule of law;
- restructuring of ministries and official agencies;
- creation of modern and effective civil service;
- maintenance of efficient and effective institutions to better serve citizens of the PA;
- institution of municipal, legislative, and presidential elections;

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161. See Statement, *supra* n.157.

162. See Palestine News Agency, *100 Day Plan*, available at [www.wafa.pna.net](http://www.wafa.pna.net).

163. *Id.*

164. *Id.* Preamble.

- implementation of enacted legislation;
- an attempt at creation of alternative employment opportunities, especially for the increasing pool of workers who can no longer access Israeli markets;
- reconstruction of the infrastructure that was destroyed during the latest Israeli military incursions into the West Bank and Gaza; and
- assistance to families of the wounded, imprisoned, and the martyrs who lost their lives in the incursions.<sup>165</sup>

#### b. Public Security Domain

In the public security domain, the 100 Day Plan calls for the following:

- restructuring of the Ministry of Interior;
- consolidation of the various police and security arms of the PA under the umbrella of the Ministry of Interior;
- activation of the role of the Ministry of Interior in law enforcement;
- re-establishment of law and public order;
- assurance that the various members of the various security services are disciplined in and respect the rule of law;
- reinforcement of national loyalty among security forces; and
- awareness-building among the public regarding its rights.<sup>166</sup>

#### c. Fiscal Domain

In the fiscal domain, the 100 Day Plan outlines the following:

- reform of the operations of the Ministry of Finance and re-establishment of the credibility of the PA internally and externally;
- establishment and consolidation of all PA accounts into a single treasury account from all sources (fees; foreign aid and loans; investment activities; profits from commercial operations; and taxes) and the creation of an effective system of management of this public account;
- reorganization of the commercial and investment opera-

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165. *Id.*

166. *Id.*

tions of the PA and the creation of the Palestinian Investment Fund to consolidate and manage these operations. In this way, the Fund may be subject to stringent auditing and disclosure standards;

- limitation of the expansion of public employment;
- unification of the administration of public payroll along with the placement of this administration under the supervision of the Ministry of Finance;
- completion of the creation of the modern pension system;
- activation and development of an internal public audit system along with appointment of financial auditors and external auditors;
- enhancement of the independence of the office of the General Auditor, including via a system of periodic reporting to the President and the PLC;
- development of an enhanced process for preparing the general budget;
- creation of clear lines for the different budget items;
- preparation of monthly expenditure budgets for the rest of the year 2002;
- commencement of preparation of the 2003 budget, so as to complete it in a timely manner; and
- reconciliation of the budgets of the local and national governments.<sup>167</sup>

#### d. Judicial Domain

In the judicial domain, the 100 Day Plan articulates the following:

- assurance that the role of the judiciary is properly and independently carried out;
- appointment of an adequate number of judges;
- erection of the required physical structures for court-houses, administrative, and district attorney offices in different districts;
- construction of modern prisons;
- implementation of the Law on the Independence of the Judiciary;
- establishment of the Court of Cassation;

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167. *Id.*



- establishment of a Department for Judicial Inspections;
- overall modernization and development of the court system; and
- creation of systems necessary to enforce and implement the Basic Law, including a mechanism for resolving disputes to which the PA is party.<sup>168</sup>

#### e. Other Domains

A number of policies and programs are enunciated under this final domain of the 100 Day Plan. These include:

- efforts to reinforce national values, which stress that the Palestine holds the Holy Land in trust for the entire world;
- renunciation of all forms of fanaticism in education and elsewhere;
- spread of the spirit of democracy, enlightenment, and liberalism;
- activation of the role of the Ministry of *Awqaf* (Religious Affairs) in creating national cohesion that serves national interests;
- resolution of chronic financial problems of universities, schools, and hospitals;
- assurance that the processes of operation of official agencies and ministries with similar powers are streamlined to increase efficiency and public administration;
- institution of an end to the interference of the security forces in civil life and assurance that these forces conduct themselves within bounds of law;
- unification of all official institutions that provide services to the investor community in an effort to streamline the delivery of such services in an efficient manner;
- provision of training to the PA human resource base and reinforcement of a proper work ethic;
- coordination of the delivery of foreign affairs services with the Political Department of the PLO to increase the effectiveness of the diplomatic corps and to introduce the necessary changes;
- assessment of the structures of the various official agencies' boards and institution of necessary changes, includ-

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168. *Id.*

ing the appointment of a Governor to Palestinian Monetary Authority to replace the President of the PA;

- payment of close attention to issues related to environmental pollution; and
- institution of safeguards against Israeli practices of transporting toxic wastes for burial in the PA areas.

### 3. Timetable of the 100 Day Plan

The 100 Day Plan established a timetable for carrying out the agenda enumerated above. It is well recognized that 100 days are just the beginning. Some of the tasks outlined in the Plan will take years to complete. Where immediate steps were possible, the PA took them — namely, in the promulgation of the Basic Law<sup>169</sup> and the Law on the Independence of the Judiciary.<sup>170</sup> The PA has already embarked on a financial and administrative restructuring of public institutions that goes beyond downsizing of the civil service. In addition to the Economic Policy Framework of 2000, and the recent measures referred to above, in June 2002, the new PA Cabinet presented an integrated program for government action. This program suggested appropriate reform measures, including the process of streamlining the civil service payroll and new guidelines for modernizing ministries. The PA made significant changes at the ministerial level in June, and again, in October 2002. These changes entailed a merger of the Ministry of Economy and Trade with the Ministry of Industry, and the appointment of new Ministers of Education, Finance, Justice, Labor, Natural Resources, Interior, and Tourism. The recent adoption of the Basic Law and the Law on the Independence of the Judiciary, as well as the planned finalization of other laws — such as the Capital Markets Authority Law, Competition Law, and Companies Law — will help to improve the regulatory environment. In addition, the PA is currently working on a comprehensive privatization plan.

Certain other steps that are contingent on Israeli cooperation, such as the holding of elections scheduled for January 16, 2003, were postponed as a result of the continued closure policy, which paralyzes movement essential for casting votes. Other

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169. Basic Law (May 29, 2002).

170. Law on the Independence of the Judiciary (May 14, 2002) (author's trans.) (on file with author).

steps require capital investment, which the PA does not have because of its deteriorated economy. Considering the magnitude of the challenges ahead, the key to enabling the PA to promote sustained recovery is restoration of its capacity to manage the economy in all its facets, and to maintain basic social and public services. Needless to say, the ability of PA institutions to operate without Israeli intervention in areas under the PA jurisdiction, is a prerequisite for mounting any sustained development effort.

### C. *International Task Force on Palestinian Reform*

To solidify and assist the PA in implementing the 100 Day Plan and its overall reform agenda, the international donor community established the International Task Force on Palestinian Reform ("Task Force"). The Task Force is comprised of the so-called "Quartet" (the EU, Russia, the U.N., and the United States), and Japan, Norway, the IMF, and the World Bank.<sup>171</sup> To date, the Task Force has met four times: in London on July 10; in Paris on August 22 and 23; in Amman on November 15 and 16; and in Washington, D.C. on December 19 and 20.

The Task Force divides the reform agenda into seven Reform Support Groups. They are comprised of: 1. Civil Society; 2. Elections; 3. Financial Accountability; 4. Judiciary/Rule of Law; 5. Local Government; 6. Market Economy; and 7. Ministerial and Civil Service Reform. The role of these Groups is to monitor progress, assess obstacles, prepare key actions, establish benchmarks, and provide technical assistance to the PA to ensure that the reform is carried out in a timely and sustainable manner. In some areas, the reform is realized and has progressed better than in other areas.<sup>172</sup> The Task Force focuses on the areas where the Israeli and the Palestinian actions are required in order to facilitate the process of reform. It receives reports from the seven Reform Support Groups. Since its inception on July 10, 2002, the Task Force has worked with the PA to develop the details of the 100 Day Reform Program. The core of the PA reform lies in the building of a foundation of Palestinian Statehood and a rebuilding of trust, which jointly pave the way for the resumption of political negotiations.

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171. *West Bank and Gaza Update*, *supra* n.156.

172. Reports on progress are limited and are not available in the public domain.

D. *Basic Law, Law on the Independence of the Judiciary, and  
Vote of No Confidence*

Among the main highlights of the Reform Program was the promulgation of the Basic Law and the Law on the Independence of the Judiciary. Also crucial was the exercise of the vote of no confidence by the PLC. The significance of these three steps lies in the introduction of the concept of separation of powers among the three branches of government; the establishment of the independence of the judicial branch; and the first exercise by the PLC of its right to object on issues related to the formation of the presidential proposal for the Cabinet.

1. Basic Law

The PA is empowered by the PLO, acting on behalf of the Palestinian people within and without the West Bank and Gaza, and by the authorities transferred to it under the DOP, the Paris Protocol, and the Interim Agreement.<sup>173</sup> As demonstrated above, these authorities are limited and inconsistent, and have precluded the PA from exercising full powers in creating a democratic regime with institutions that are accountable and efficient. The promulgation of the Basic Law on May 29, 2002<sup>174</sup> gave the PA a "constitutional" basis for its powers. The Basic Law underwent a series of drafts over a period of years. The work started in 1993 by the PLO's Executive Committee.<sup>175</sup> The changes in the geopolitical conditions, the Oslo process, the first Palestinian elections in 1996, and the formation of the PLC, impacted the shape of the present Basic Law and its operations.<sup>176</sup>

Thus, the entry into force of the Basic Law was a turning point for the PA on an internal level. The Basic Law provides for a parliamentary democracy<sup>177</sup> based on the rule of law,<sup>178</sup> and for separation of powers.<sup>179</sup> It calls for a free market as the basis of the Palestinian economy.<sup>180</sup> It calls for freedom of speech,<sup>181</sup>

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173. Annex III, *supra* n.69, app. I.

174. See Basic Law, *supra* n.169.

175. See GREGORY S. MAHLER, CONSTITUTIONALISM AND THE PALESTINIAN CONSTITUTIONAL DEVELOPMENT 127-30 (PASSIA, Jerusalem, 1996) (on file with author).

176. *Id.*

177. Basic Law, *supra* n.169, art. 5.

178. *Id.* art. 6.

179. *Id.* art. 2.

180. *Id.* art. 21.

guaranteed personal freedom,<sup>182</sup> and freedom of religion.<sup>183</sup> It upholds the independence of the judiciary.<sup>184</sup> It calls for the establishment of a Constitutional Court<sup>185</sup> and provides for judicial review.<sup>186</sup> The Basic Law grants the function of judicial review to the Supreme Court.<sup>187</sup> Moreover, the Basic Law grants the PLC the power to hold the Executive accountable for his actions and vice versa.<sup>188</sup> In other words, a system of checks and balances is created. The Basic Law empowers the PLC to launch an investigation into conduct of members of the executive branch.<sup>189</sup>

However, the Basic Law is an interim law and leaves many gaps and ambiguities. Most of these hinge on the scope of sovereign powers and the need for a clearer separation of powers. Under the Basic Law, the President of the PA and the Cabinet maintain expansive control over the legislative process.<sup>190</sup> Additionally, the President has veto power over legislation.<sup>191</sup> Moreover, the President and the Cabinet are not accountable to the PLC as far as their policy-making activities, which include policy formulation, implementation, and assessment.<sup>192</sup> In these respects, the Basic Law marginalizes the legislature and the judiciary.

The promulgation of the Basic Law constitutes a step forward at the internal Palestinian level. Yet, the Basic Law remains an interim law so long as the PA is an interim government. The Basic Law does not rise to a full constitutional law, nor does it allocate sovereign powers fully. In the meantime, the PA has established a Constitutional Law Committee charged with drafting the Palestinian Constitution. It is a work in progress.

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181. *Id.* art. 19.

182. *Id.* art. 10(1).

183. *Id.* art. 18.

184. *Id.* art. 88.

185. *Id.* art. 94(1).

186. *Id.* arts. 94(1)(a) and (b).

187. *Id.* art. 95.

188. *Id.* arts. 68 and 69.

189. *Id.* art. 45.

190. *Id.* art. 57(1).

191. *Id.*

192. *Id.* arts. 72-74.

## 2. Palestinian Judiciary and the Law on the Independence of the Judiciary

After seven years of Palestinian self-rule, the Palestinian judiciary has not succeeded in formulating the required stepping-stones needed to establish a strong notion of the rule of law in the PA. The principle is often discussed, and the PA organs call for it. The Basic Law expressly provides for it. Upon close examination, certain historical reasons come to the fore. These reasons are embedded in historical fact and the legacies of Ottoman, British, Egyptian, Jordanian, and Israeli occupations.<sup>193</sup> Other reasons include the different legal heritage of the West Bank and Gaza.<sup>194</sup> The most salient factor, however, inheres in the structure of the PA, since separation of powers was not achieved when the PA was first created. At that time, the executive branch, its Cabinet, ministries and agencies were established. In addition, the PLC was elected and its various committees set up.

By contrast, the Palestinian judiciary has a depilated legacy of inconsistent legislation, dysfunctional organs, and a human resource base of limited skills. As such, the judiciary has been unable to regroup or to rehabilitate. A movement for establishing an independent and functional judiciary began only during the present reform period. The same is true of the revamping of standards of the legal profession and membership in the Bar. Thus, the significance in the promulgation of the Law on the Independence of the Judiciary, which came into force on May 14, 2002,<sup>195</sup> was tremendous. This step was important because it confirmed the separation of powers issue articulated in the Basic Law and established an independent judiciary. This Law created the High Independent Judicial Council and empowered the judiciary to maintain its independence from interferences by the Executive, be it the Ministry of Justice,<sup>196</sup> the security apparatuses, or the President's Office. For years, court decisions had been subject to such influences and the independence of judges had been tarred.

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193. See generally RAJA SHEHADEH, OCCUPIERS LAW: ISRAEL AND THE WEST BANK (1988). See also Wagner *supra* n.86.

194. Wagner, *supra* n.86.

195. See Law on the Independence of the Judiciary, *supra* n.170.

196. Prior to the enactment of this Law, the Minister of Justice had oversight over the judiciary.

The Law on the Independence of the Judiciary specifies the types of courts and the scope of their jurisdictions. There are religious courts for personal status matters; a Constitutional Court; a Supreme Court; and three levels of lower courts that have varied personal and subject matter jurisdiction.<sup>197</sup> The appointment and promotion of judges is independent. The High Judicial Council recommends, and the President confirms, nominees.<sup>198</sup> Judges cannot be removed except for cause, as specified in the Law.<sup>199</sup> The High Judicial Council is in charge of their promotion.<sup>200</sup> The critical aspect of the Law is the creation of an independent judicial organ, charged with the administrative oversight and training of judges.<sup>201</sup> This is a major departure from the vacuum that existed prior to the promulgation of this Law and a shift away from the concentration of powers in the hands of the Executive. The President is no longer in charge of the judiciary. He only has so-called "confirmation power." Furthermore, the newly promulgated Basic Law and the Law on the Independence of the Judiciary will help to clear the blurred power distinctions among the Minister of Justice, the Chief Justice, and the Attorney General. For years, the Minister of Justice and the Chief Justice believed that they held the same responsibilities relevant to appointment of judges, maintenance of the composition of the Judicial Council, and a number of other administrative judicial issues.<sup>202</sup>

### 3. Vote of No Confidence

As the Reform Program took root, democratic practices were being tested. The first exercise was the potential vote of no confidence by the PLC in the existing Cabinet.<sup>203</sup> The composition of this Cabinet came under increasing challenge by the

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197. Law on the Independence of the Judiciary, *supra* n.170, arts. 6 and 14.

198. *Id.* art. 18.

199. *Id.* art. 27.

200. *Id.* arts. 6 and 14.

201. *Id.* arts. 37-43.

202. The problem is two-fold. First, Gaza and the West Bank follow different legal traditions (Anglo-Saxon in Gaza and Continental in the West Bank). Thus, the source of authority, as derived from existing laws, empowers the Minister of Justice and Chief Justice differently. The second, is the separation of powers issue. The problems are gradually being addressed, especially after the promulgation of the Basic Law and the Law on the Independence of the Judiciary.

203. See PLC Minutes of the September and October Sessions, 2002 (author's trans.) (on file with author). See also Basic Law, *supra* n.169, art. 44.

PLC. Pressure mounted on the President to reshuffle his Cabinet on the grounds of incompetence, corruption, and general lack of confidence in its ability to perform its duties. Members of the Cabinet were quick to submit letters of resignation to avoid the vote of no confidence.

In reaction, the President of the PA proposed a new composition for his Cabinet on September 11, 2002. The PLC debated and the vote of no confidence was about to be cast when the Cabinet resigned. The threat was averted, but the message was clear. The President reshuffled a second time and submitted a different composition. After much debate, the PLC gave its vote of confidence on October 29, 2002. The vote included fifty-six in favour and eighteen opposed.<sup>204</sup>

The significance of the vote of no confidence lies in the clear departure from the restrictions imposed by the executive branch on the legislature. This step has set the precedent for change in the relationship between these two branches, and created a new order of checks and balances, long sought and called for by the PLC. This step will lead to greater protection and enforcement of civil and political rights.

### CONCLUSIONS

When Israel is asked to explain its military actions against Palestinian civilians, it always responds by stating that it has little choice but to defend itself. When Palestinians are asked why they persist in confronting Israeli soldiers, the answer is that they are fighting to end Israeli occupation.

Central to the peace process between the Israelis and the Palestinians is the end of occupation. The Israelis and the Palestinians recognize that fact. The initial series of Agreements signed by the two sides, namely the DOP, the Paris Protocol, and the Interim Agreement, were designed to result in an end to occupation and economic development, pending permanent peace. The Agreements had a time frame of five years. When the time for their implementation lapsed, Palestinians started to lose hope and frustration escalated.

From 1995 until the Camp David Accords in 2000, a series of side agreements were signed. These agreements include the Agreement on Hebron of January 1996, the Wye River Memo-

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204. See PLC Minutes, *supra* n.203.



randum of October 1998, and the Sharam al Sheikh Agreement of September 1999. This second series of agreements also failed to bring about concrete results for implementing the existing Agreements. In July 2000, the U.S.-brokered final status discussions at Camp David broke down; in January 2001, Taba negotiations were held; in April 2001, the Mitchell Report was published.<sup>205</sup> Nevertheless the conflict escalated. In June 2002, President George W. Bush articulated a two-State solution by 2005;<sup>206</sup> and in November 2002, the U.S. Road Map was proposed. These numerous agreements, meetings, discussions, speeches, and negotiations have not yielded the desired peace for both sides. Transitional arrangements outside the scope of a concrete, final status framework, have proved ineffective.

The Palestinians have to free themselves from occupation to create free and democratic institutions. The Reform Program and its initial results are steps in the right direction. It is a recognized fact that the political-economic order established from 1994 to 2000 contributed to undermining the stability of the PA's rule. The PA could not, due to internal and external factors, induce sustainable growth. The majority of Palestinians and their businesses found themselves marginalized and deprived of the benefits of the peace process. The visit of Sharon to the al-Aqsa Mosque, the stalled Camp David, and the events of September 2000, had major consequences for both sides. Israel militarized the conflict, the PA ability to mitigate the unrest came under question, and the Palestinian economy collapsed.

The PA reform efforts focused on rebuilding the PA's institutional capacity and the rule of law in order to strengthen democratic principles, will be an important factor in finding a solution. The answer, though, lies in a negotiated settlement based on sovereign principles and a permanent peace treaty — not in functional, political, and economic interim arrangements. To be sure, Israel and Palestine, as two States existing side-by-side, will have some degree of economic interdependence. A true peace built on mutual respect, sovereign rights, and reciprocity, will grant their respective economies and the entire region, long overdue recovery and sustained growth.

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205. A copy of the Mitchell Report is *available at* <http://usinfo.state.gov/regional/nea/mitchell.htm>.

206. *See supra* n.14 and accompanying text.