

The Biggest Peace: The Structure of the
Palestinian Legislative Council and the Politics
of Separation

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Abstract

Part I of this Note summarizes the background leading up to the signing of the Oslo Accords. Part II details the overall structure and responsibilities laid out in Oslo II, with specific emphasis on the legal. Also, Part II presents for comparison the semi-autonomy arrangement devised and implemented in the Transkei of South Africa in the early 1960s. Part II concludes by examining the extent to which both of these arrangements were successful in satisfying the parties involved and makes some more general comparisons to similar reactions in Northern Ireland following the Good Friday Agreement. Part III attempts to draw conclusions on the effectiveness of limited autonomy to deal with the competing rhetoric of self-determination and the administration of viable political entities.

COMMENT

THE BIGGEST PEACE: THE STRUCTURE OF THE PALESTINIAN LEGISLATIVE COUNCIL AND THE POLITICS OF SEPARATION

*Michel Paradis**

INTRODUCTION

The Israeli-Palestinian flirtation through the 1990s with non-State autonomy for the Occupied Territories culminated in a second uprising, more bloody than the first.¹ The 1995 Israeli-Palestinian Interim Agreement on the West Bank and Gaza Strip ("Oslo II")² set down the framework both for the Palestinian autonomous governing body, the Palestinian Council,³ and the scheme by which land would be redeployed in all agreements

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1. See Chris Hedges, *West Bank Clashes Kill 3 Soldiers and 1 Militant*, N.Y. TIMES, Aug. 7, 1993, at 3 (listing numbers killed in first six-year *Intifada* at 144 Israelis and more than 1,700 Palestinians); Cf. Christian Chaise, *Palestinians Lost the War, but Israel has not Won it Yet*, AGENCE FR. PRESSE, Sept. 25, 2002 (listing over 1,850 Palestinians and 600 Israelis killed during first two years of second *Intifada*). See also Don Radlauer, *The "al-Aqsa Intifada" — An Engineered Tragedy*, INSTITUTE FOR COUNTER TERRORISM, June 20, 2002 (citing 1900 Palestinians and 700 Israelis killed in second *Intifada*); *Israeli Occupation Policies 1*, available at www.passia.org (listing 173 Israelis and 1024 Palestinians killed in first *Intifada*).

2. See The Israeli-Palestinian Interim Agreement on the West Bank and Gaza Strip, Sept. 28, 1995, Isr.-Palestinian Liberation Organization ("PLO") [hereinafter Oslo II]; GEOFFREY R. WATSON, *THE OSLO ACCORDS: INTERNATIONAL LAW AND THE ISRAELI-PALESTINIAN PEACE AGREEMENTS (2000)* (providing summary of main points of Oslo Accords, examining Israeli-Palestinian compliance and debating their classification as international documents).

3. See Oslo II, *supra* n.2, art. I. Article I of Oslo II reads, in relevant part: Israel shall transfer powers and responsibilities as specified in this Agreement from the Israeli military government and its Civil Administration to the Council in accordance with this Agreement. Israel shall continue to exercise powers and responsibilities not so transferred.

Id.; See Oslo II, *supra* n.2, art III, Sec. 1. Section 1 of Article III of Oslo II reads: The Palestinian Council and the Ra'ees of the Executive Authority of the Council constitute the Palestinian Interim Self-Government Authority, which will be elected by the Palestinian people of the West Bank, Jerusalem and the Gaza Strip for the transitional period agreed in Article I of the [Declaration of Principles (DOP)].

that followed.⁴ This Note will examine the framework developed in Oslo II and the degree to which it accomplished the mutual objectives of self-determination, security and the end to an exhausting conflict.⁵

Part I of this Note summarizes the background leading up to the signing of Oslo. Part II details the overall structure and responsibilities laid out in Oslo II, with specific emphasis on the legal. Also, Part II presents for comparison the semi-autonomy arrangement devised and implemented in the Transkei of South Africa in the early 1960s. Part II concludes by examining the extent to which both of these arrangements were successful in satisfying the parties involved and makes some more general

Id.; See also WATSON, *supra* n.2, at 44-45 (describing Oslo II's importance in establishing "important organs of Palestinian self-government" and Palestinian Council structure).

4. See, e.g., Oslo II, *supra* n.2, art. XI, Sec. 3(c). Article XI, Sec. 3(c) provides, in relevant part:

"Area C" means areas of the West Bank outside Areas A and B, which, except for the issues that will be negotiated in the permanent status negotiations, will be gradually transferred to Palestinian jurisdiction in accordance with this Agreement.

Id. See also WATSON, *supra* n.2, at 45 (describing Oslo II's redeployment arrangements).

5. See Declaration of Principles on Interim Self-Government Arrangements, Sept. 13, 1993, Israel-PLO, pmbl. [hereinafter Declaration of Principles]. The Preamble of Declaration of Principles states, in relevant part:

[I]t is time to put an end to decades of confrontation and conflict, recognize their mutual legitimate and political rights, and strive to live in peaceful coexistence and mutual dignity and security and achieve a just, lasting and comprehensive peace settlement and historic reconciliation through the agreed political process.

...

RECOGNIZING that the aim of the Israeli-Palestinian negotiations within the current Middle East peace process is, among other things, to establish a Palestinian Interim Self-Government Authority, i.e. the elected Council (hereinafter "the Council" or "the Palestinian Council"), and the elected Ra'ees of the Executive Authority, for the Palestinian people in the West Bank and the Gaza Strip, for a transitional period not exceeding five years from the date of signing the Agreement on the Gaza Strip and the Jericho Area (hereinafter "the Gaza-Jericho Agreement") on May 4, 1994, leading to a permanent settlement based on Security Council Resolutions 242 and 338;

Id.; Agreement on the Gaza Strip and the Jericho Area, May 4, 1994, Israel-PLO, pmbl. [hereinafter Oslo I]. The Preamble of Agreement on the Gaza Strip and the Jericho Area states, in relevant part:

Reaffirming their understanding that the interim self-government arrangements, including the arrangements to apply in the Gaza Strip and the Jericho Area contained in this Agreement, are an integral part of the whole peace process and that the negotiations on the permanent status will lead to the implementation of Security Council Resolutions 242 and 338.

Id.

comparisons to similar reactions in Northern Ireland following the Good Friday Agreement. Part III attempts to draw conclusions on the effectiveness of limited autonomy to deal with the competing rhetoric of self-determination and the administration of viable political entities.

I. THE RAGE OF COMMUNITIES

After years of violent conflict over land and authority, the Palestinian Liberation Organization⁶ ("PLO") and Israeli leaders began a process of rapprochement in the late 1980s and early 1990s.⁷ Through a series of public statements and preliminary accords, Israeli and Palestinian negotiators set into motion a process of negotiations directed at reaching a final settlement.⁸ These overtures and compromises resultantly sparked fierce criticism and resistance from their respective nationalist blocs that would carry through the negotiation and signing of Oslo II.⁹

6. See CHERYL A. RUBENBERG, THE STRUCTURAL AND POLITICAL CONTEXT OF THE PLO'S CHANGING OBJECTIVES IN THE POST-1967 PERIOD, in THE ARAB ISRAELI CONFLICT, 95-98 (Westview Press 1988) (describing PLO as nationalist organization committed to self-determination in historic Palestine and PLO movement from guerrilla warfare to diplomacy in late 1980s); U.N. SCOR, Palestine Question — League of Arab States Declaration/Rights of the Arabs of Palestine/Letter to the President of the SecCo, U.N. Doc. S/6003 (1964) (stating establishment of Palestinian Liberation Organization and authorizing creation of its army); BENNY MORRIS, RIGHTEOUS VICTIMS 364-66 (2001) (examining founding of PLO and its taking of recruits largely from refugee camps and students); GÉRARD CHALIAND, THE PALESTINIAN RESISTANCE 56-58 (Pelican 1972) (describing founding of PLO in 1964 at Arab summit meeting in Alexandria and PLO's firm connection to Arab governments).

7. See Statement by Yasir Arafat, Dec. 14, 1988, available at http://www.brook.edu/dybdocroot/press/appendix/appen_k.htm. See also YOSSI BEILIN, TOUCHING PEACE: FROM THE OSLO ACCORD TO A FINAL AGREEMENT 19-20 (1999) (describing Arafat's remarks in Geneva as changed PLO position, accepting U.N. Security Council Resolutions 242 and 338, which affirm self-determination of Palestinian and Israeli people as grounds for permanent peace, as grounds for negotiation and renouncing terrorism). See also *Id.* Israeli Peace Plan, May 14, 1989 [hereinafter IPP] (outlining Likud proposals and vision for peace settlements with Palestinians). See generally EDWARD SAID, PEACE AND ITS DISCONTENTS (1996) (presenting Palestinian perspective on Oslo); WATSON, *supra* n.2 (analyzing Oslo and Palestinian-Israeli compliance).

8. See Declaration of Principles, *supra* n.5 (stating goal of Palestinian self-rule); Agreement on the Gaza Strip and Jericho Area, May 4, 1994 Israel-PLO [hereinafter Oslo I] (implementing Palestinian self-rule over Gaza and Jericho).

9. See, e.g., Benjamin Netanyahu, *There are Two Kinds of Peace*, JERUSALEM POST, May 28, 1993 (arguing peace process must not compromise Israeli security); SAID, *Facts, Facts and More Facts in PEACE AND ITS DISCONTENTS*, *supra* n.7, 26-28 (expressing high suspicion of early Peace Process and its aim of limited autonomy).

A. *Tying the Gordian Knot*

The late nineteenth and early twentieth centuries saw a wave of intense Jewish immigration from predominantly Europe into the Palestine region.¹⁰ The area had been under the umbrella of the Ottoman Empire,¹¹ and as a result of the First World War, the mandate authority of Britain, who had committed to the establishment of a Jewish homeland.¹² In 1947, responding to ethnic hostilities between the Arab and Jewish populations, the United Nations adopted a partition of the area into two Arab and three Jewish areas that were to become their respective states.¹³ A civil war broke out¹⁴ that expanded into a

10. See TOM SEGEV, *ONE PALESTINE COMPLETE* 2, 16, 225-31, 459 (Metropolitan Books 2000) (1999) (documenting waves of Jewish immigration, largely from Eastern and Central Europe, to Palestine area first under Ottoman rule, for which many immigrants adopted Ottoman citizenship to avoid deportation, then following British Balfour Declaration in 1920s-1930s and then during and following World War II); MORRIS, *supra* n.6, at 18-20, 25, 163-64 (describing first disparate Zionist immigration movements from Europe to Palestine, obtaining 200 thousand dunams by 1900, second wave following Russian pogroms soon after 1900, third period of rapid growth in 1920s, and tumultuous period of illegal immigration in 1930s and during World War II/Holocaust); AMOS PERLMUTTER, *ISRAEL: THE PARTITION STATE* 27 (1985) (describing two waves of Jewish immigration to Palestine first in 1882 and then in 1905 following Russian pogroms).

11. HOWARD M. SACHAR, *A HISTORY OF ISRAEL* 22-23 (1979) (characterizing Ottoman rule over Palestine area as one of neglect, administratively disorganized and having Jewish population of five to six thousand at start of nineteenth century and seventeen thousand by mid-century); MORRIS, *supra* n.6, at 8-13, 32 (briefly describing Ottoman Empire and second-class status of small Jewish minority within empire and collapse of Ottoman empire during World War I and fall of Jerusalem to British in December 1917).

12. See *Mandate for Palestine*, League of Nations Doc. C.529.m.314 (1922). The *Mandate for Palestine* reads, in relevant part:

The Mandatory shall be responsible for placing the country under such political, administrative and economic conditions as will secure the establishment of the Jewish national home, as laid down in the preamble, and the development of self-governing institutions, and also for safeguarding the civil and religious rights of all the inhabitants of Palestine, irrespective of race and religion.

Id. at art. II. See also SEGEV, *supra* n.10, at 116 (describing establishment of British mandate over Palestine through division of former Ottoman territories at Versailles Conference). Segev credits scholar, statesman and first Israeli President Dr. Chaim Weizmann with the diplomatic savvy to accomplish this transfer. *Id.*; MORRIS, *supra* n.6, at 103-04 (describing White Paper issued by British Prime Minister Bonar-Law as more evenhanded than Balfour Declaration and ratification of British mandate authority by League of Nations in 1922).

13. See U.N. GAOR, Resolution 181, U.N. Doc. A/RES/181(II) (A+B) (1947) (partitioning Palestine region into three areas for independent Jewish State and two areas comprising independent Arab State); SEGEV, *supra* n.10, at 496-497 (describing proposed partition before United Nations and its passage on Nov. 29, 1947). Segev argues

regional war following the British withdrawal and the declaration of an independent Jewish State in May 1948.¹⁵

Following 1948 and subsequent wars, Israel found itself administrator of a substantial non-Israeli Palestinian-Arab population.¹⁶ In December 1987, a car accident between an Israeli truck and vans of Palestinian day laborers sparked a riot in the Jabalya Refugee Camp in the Gaza Strip.¹⁷ Responding to rocks and Molotov cocktails thrown by Palestinian protestors, Israeli soldiers fired into a crowd.¹⁸ Mohammed Hatem Abu Sisi, a seventeen-year-old high school student, was shot and killed and the

the Arab refusal to recognize the partition, which provided for a Jewish region twice as large as the British partition proposals from ten years before, was a fundamental tactical error that prevented them from being adequately prepared for the ensuing war. *Id.*

14. See BENNY MORRIS, *THE BIRTH OF THE PALESTINIAN REFUGEE PROBLEM, 1947-1949* 29-36, 41-57 (1987) (accounting months of war between Jewish and Palestinian Arab militants from announcement of U.N. Partition and April 1948 and success of Jewish fighters); SEGEV, *supra* n.10, at 500-509 (accounting first months of skirmishes and raids by Palestinian Arab and Jewish commandos on cities and villages following passage of Partition Plan). Segev describes the Arab forces as under-funded and disorganized. *Id.* at 508-09.

15. See MORRIS, *supra* n.6, at 218-23 (depicting Arab invasion following declaration of independence and their low morale and disorganization); YOAV GELBER, *PALESTINE 1948* 138, 180-184, 256-260 (2001) (describing invasion by Arab states surrounding Israel following its declaration of Independence on May 14, 1948 and following months of war resolving on "Green Line" borders with Jordan assuming responsibility over West Bank and Egypt claiming authority over Gaza Strip). See generally J. BOWYER BELL, *THE LONG WAR: ISRAEL AND THE ARABS SINCE 1946* (1969) (providing Israeli military history of 1948 wars).

16. See, e.g., MORRIS, *supra* n.6, at 329, 559 (generally depicting Israel's heightened stature after Six Day War and consequence of responsibility over large Palestinian population and difficult occupation of Southern Lebanon after Lebanese War); SACHAR, *supra* n.11, at 669-73 (describing events following Six Day War as Israel took martial authority over one million Arabs in Occupied Territories); EDWARD SAID, *THE POLITICS OF DISPOSSESSION* 9-10 (1994) (characterizing Israeli-Palestinian relations since Six Day War as one of regular (Israeli) verses irregular (Palestinian) militarism over self-determination and heavy emotional investment in nationalism).

17. See *Palestinians' Protest Continue in Gaza Strip, West Bank*, XINHUA NEWS AGENCY, Dec. 10, 1987 (reporting on car accident in Jabalya Refugee Camp and student protest in responses); Gail Pressberg, *The Uprising: Causes and Consequences*, 67 J. PALESTINIAN STUD. 38, 38-39 (1988) (attributing triggering event of *Intifada* to car accident in Gaza and rumors the accident was deliberate); Hannah Siniora, *An Analysis of the Current Revolt*, 67 J. PALESTINIAN STUD. 3, 4-5 (describing factors sparking *Intifada* and citing car accident in Gaza that killed four Palestinian day laborers).

18. See Masha Hamilton, *Israeli Soldiers Kill Two Palestinians, Wound 18*, ASSOCIATED PRESS, Dec. 9, 1987 (reporting on Israeli firing into Palestinian protestors in Jabalya); *Palestinians' Protest Continue in Gaza Strip, West Bank*, XINHUA NEWS AGENCY, Dec 10, 1987 (reporting on Israeli soldiers firing into Palestinian protestors at Jabalya Refugee Camp).

protests spread to Gaza City.¹⁹ Amid teargas and smoke from burning tires, Israeli soldiers fired into a crowd of seventy-five teenagers, also throwing rocks, wounding eighteen and killing twenty-year-old Raed Shehadeh who was shot in the mouth.²⁰

The next day, despite curfews placed on refugee camps, Palestinians demonstrated throughout the Occupied Territories.²¹ Three thousand Palestinians marched through the southern Gaza city of Rafiah.²² In Nablus, on the West Bank, a group of Palestinian protestors besieged an army vehicle and nineteen-year-old Ibrahim al-Aqleeq was shot and killed.²³ In the Gaza city of Khan Yunis, Israeli soldiers fired into a crowd of protestors throwing Molotov cocktails, killing an eleven-year-old boy.²⁴

19. See Masha Hamilton, *Israeli Soldiers Kill Two Palestinians, Wound 18*, ASSOCIATED PRESS, Dec. 9, 1987 (reporting Mohammed Hatem Abu Sisi as being shot by Israeli soldiers during protests in refugee camp sparking movement of protests to Gaza City where tires were burned); G.G. LaBelle, *The 'Intifadeh' after One Year: No End in Sight*, ASSOCIATED PRESS, Dec. 3, 1988 (recapping one year after *Intifada* began and citing Mohammed Hatem Abu Sisi as first killed).

20. See *Two Killed as Israelis Open Fire on Arabs*, TORONTO STAR, Dec. 10, 1987 at A3 (reporting protests and opening fire by Israeli army, killing two, aged seventeen and twenty respectively); Masha Hamilton, *Israeli Soldiers Kill Two Palestinians, Wound 18*, ASSOC. PRESS, Dec. 9, 1987 (reporting death of Raed Shehadeh during Gaza City protest after being shot in mouth).

21. See Ian Black, *Palestinian youth killed in escalating violence*, GUARDIAN, Dec. 11, 1987 (reporting on two days of protest and imposition of curfew over occupied territory); *Palestinians' Protest Continue in Gaza Strip, West Bank*, XINHUA NEWS AGENCY, Dec. 10, 1987; Dan Izenberg, *Two Palestinians Killed, 16 Wounded in Scattered Protests*, ASSOC. PRESS, Dec. 10, 1987 (reporting on second day of protests in Occupied Territories, killing two Palestinians, wounding sixteen and wounding six Israeli soldiers). While some may contest the title "Occupied Territories," this is the proper name employed by the United Nations. See domino.un.org (providing United Nations website on Question of Palestine).

22. See Dan Izenberg, *Two Palestinians Killed, 16 Wounded in Scattered Protests*, ASSOC. PRESS, Dec. 10, 1987 (reporting protest of 3,000 in Southern Gaza town of Rafia); *Palestinians' Protest Continue in Gaza Strip, West Bank*, XINHUA GENERAL OVERSEAS NEWS SERVICE, Dec. 10, 1987 (reporting on march through Rafiah of three-thousand carrying Palestinian flags and pictures of Yassir Arafat); *Palestinian Killed, Seven Wounded in Arab-Israeli Unrest*, ASSOC. PRESS, Dec. 10, 1987 (citing Palestinian report of parade through Rafiah).

23. See *Palestinian Killed, Seven Wounded in Arab-Israeli Unrest*, ASSOC. PRESS, Dec. 10, 1987 (reporting on protests in Nablus and death of Ibrahim al-Aqleeq); Dan Izenberg, *Two Palestinians Killed, 16 Wounded in Scattered Protests*, ASSOCIATED PRESS, Dec. 10, 1987 (reporting death of Ibrahim al-Aqleeq in Nablus protest after being shot in chest); Sini-ora, *supra* n.17, at 5 (citing Israeli soldiers shooting of protestors in Nablus as source of *Intifada*).

24. See *Unrest in Israel-Occupied Lands Goes On*, TASS, Dec. 11, 1987 (reporting on shooting of eleven-year-old boy in Khan Yunis); *Israelis kill 2 Arabs in occupied zones*, TORONTO STAR, Dec. 11, 1987, at A16 (reporting shooting into protestors and killing of

The rioting escalated into the *Intifada* (“uprising” or “revolt”).²⁵ By January 1988, the Unified National Leadership for the Uprising (“UNLU”), a coalition of local Palestinian political factions, had formed and would go on to organize strikes, demonstrations and attacks on Israeli targets over the next six years.²⁶ Within the year, from the UNLU had formed the *Intifada* Political Committee to put an international public and academic face on the *Intifada*.²⁷ On November 15, 1988, the Palestinian National Council²⁸ unilaterally declared a Palestinian state

eleven year old boy in Khan Yunis); Dan Izenberg, *Two Palestinians Killed, 16 Wounded in Scattered Protests*, ASSOCIATED PRESS, Dec 10, 1987 (reporting on death of eleven-year-old boy after Israeli soldiers fired into crowd in Khan Yunis).

25. See HANAN ASHRAWI, *THIS SIDE OF PEACE* 39-45 (1995) (describing her experience during first days of *Intifada*, her fury and frustration with Israeli army’s shutting down Birzeit University and her sense of exhilaration from participating in spontaneous, large-scale popular uprising). Ashrawi discusses how the *Intifada* played a significant role in moving forward the Palestinian women’s movement. *Id.* at 47; ANDREW BUCHANAN, *PEACE WITH JUSTICE* 3-4 (2000) (describing Palestinian uprising as demonstration of Israeli inability to contain Palestinians but ultimately unsustainable and necessary precondition for Oslo Process to begin); Yin Bian, *Palestinian Uprising Surging*, XINHUA NEWS AGENCY, Dec 8, 1989 (reporting on two years of protests, strikes and clashes between Palestinian and Israeli military); *Thousands Participate in Peace Rally Around Jerusalem*, XINHUA NEWS AGENCY, Dec. 30, 1989 (reporting Jerusalem inter-ethnic peace march to end *Intifada*); Dan Petreanu, *Kollek Agrees with Likud. Right-Wing Parties Attack Peace Now Demonstration*, JERUSALEM POST, Dec. 31, 1989 (reporting on right wing crack-down of peace march). See also Andrew Rigby, *The Possibilities and Limitations of Nonviolence: the Palestinian Intifada 1987-1991*, available at www.svenska-freds.se/konflikthantering/ (describing Palestinian tactics throughout *Intifada*).

26. See Pressberg, *supra* n.17, at 44-45 (describing Unified National Leadership for the Uprising’s (UNLU) coordination of strikes and demonstrations across Occupied Territories as well as providing aid to communities and organizational bulletins); ASHRAWI, *supra* n.25, at 48-49 (describing meeting between various political factions of UNLU and herself to organize public reaction); MORRIS, *supra* n.6, at 575-76 (depicting establishment of UNLU and PLO’s coercive co-opting leadership role and bankrolling UNLU activities during *Intifada*); Daoud Kuttab, *The Palestinian Uprising: The Second Phase, Self-Sufficiency*, 68 J. PALESTINIAN STUD. 36, 37 (stating founding of UNLU on January 4, 1988 to organize and direct *Intifada*).

27. See ASHRAWI, *supra* n.25, at 50-51 (describing formation of Political Committee to receive diplomats, journalists, activists and politicians visiting Occupied territories and organization of coherent information campaign that would have credible academics as spokespersons).

28. See MORRIS, *supra* n.6, at 364 (depicting establishment of Palestinian National Council (PNC) as Palestinian parliament in exile coming out of 1964 Arab Summit Meeting that created PLO). See also THE PALESTINIAN NATIONAL CHARTER: RESOLUTIONS OF THE PALESTINE NATIONAL COUNCIL (Palestine National Council 1968). The Palestinian National Charter reads, in relevant part:

ARTICLE 24: The Palestinian people believe in the principles of justice, freedom, sovereignty, self-determination, human dignity, and in the right of all peoples to exercise them.

in the Occupied Territories.²⁹

In its first two years, the uprising was largely waged through boycotts, civil disobedience and "unarmed" clashes with Israeli defense forces.³⁰ Then Prime Minister Shamir mournfully re-

ARTICLE 25: For the realization of the goals of this Charter and its principles, the Palestine Liberation Organization will perform its role in the liberation of Palestine in accordance with the Constitution of this Organization.

ARTICLE 26: The Palestine Liberation Organization, representative of the Palestinian revolutionary forces, is responsible for the Palestinian Arab people's movement in its struggle - to retrieve its homeland, liberate and return to it and exercise the right to self-determination in it - in all military, political, and financial fields and also for whatever may be required by the Palestine case on the inter-Arab and international levels.

Id. arts. 24-26.

29. See PALESTINIAN DECLARATION OF INDEPENDENCE (Palestinian National Council 1988). Paragraphs twenty-two to twenty-six of the PALESTINIAN DECLARATION OF INDEPENDENCE read as follows:

Whereas the Palestinian people reaffirms most definitively its inalienable rights in the land of its patrimony:

Now by virtue of natural, historical and legal rights, and the sacrifices of successive generations who gave of themselves in defense of the freedom and independence of their homeland;

In pursuance of Resolutions adopted by Arab Summit Conferences and relying on the authority bestowed by international legitimacy as embodied in the Resolutions of the United Nations Organization since 1947;

And in exercise by the Palestinian Arab people of its rights to self-determination, political independence and sovereignty over its territory,

The Palestine National Council, in the name of God, and in the name of the Palestinian Arab people, hereby proclaims the establishment of the State of Palestine on our Palestinian territory with its capital Jerusalem (Al-Quds Ash-Sharif).

Id. at paras. 22-26; ASHRAWI, *supra* n.25, at 52-53 (describing Palestine National Council meeting in November 1988 accepting a "two-state" solution and announcement of DECLARATION OF INDEPENDENCE as poignant moment for Palestinians); David Hirst, *Tears and Mixed Emotions Greet the Great Gamble on the New State of Palestine*, GUARDIAN, Nov. 16, 1988 (describing reaction to DECLARATION OF INDEPENDENCE as solemn as Palestinians, by recognizing U.N. Resolutions 181 and 242, forwent their claim to 70% of land to which they believed themselves entitled); Ian Black, *Israelis Reject Algiers Blueprint as 'Double-Talk'*, GUARDIAN, Nov. 16, 1988 (reporting Labor's Peres and Likud's Shamir equally rejecting declaration of Palestinian State). The United Nations nominally recognized Palestine but did not change its position within the United Nations. See U.N. GAOR, Resolution 643/177, U.N. Doc. A/RES/43/177 (1988) (changing reference to "Palestinian Liberation Organization" to "Palestine" for U.N. documentation purposes).

30. See MORRIS, *supra* n.6, at 580 (asserting UNLU forbid use of firearms and advocated use of rocks and slingshots instead); Kuttab, *supra* n.26, at 39-42 (describing Palestinian strikes and establishment of Palestinian farms, gardens and home schools to sustain boycott of Israeli goods and response to closure of schools); Siniora, *supra* n.17, at 6-7 (articulating *Intifada* strategy of boycotts of Israeli goods and refusal to pay taxes); Yin Bian, *Palestinian Uprising Surging*, XINHUA NEWS AGENCY, Dec 8, 1989 (describing

flects on this period and the deaths and woundings suffered by Israeli soldiers confronted with rocks, Molotov cocktails, chains and pipes.³¹ As the costs of the *Intifada* took their toll on Palestinian civil life and as casualties mounted, methods became more violent and Israeli reprisals more harsh.³² In May of 1990, Palestinian Islamic Jihad³³ detonated a bomb in the Mahane Yehuda market district of Jerusalem, killing seventy-two year old Shimon Cohen and wounding nine others.³⁴ The Israeli militant group Kach responded after the funeral by stoning the cars Arab motorists.³⁵ Two months later, in July, Hamas planted a bomb

first two years of *Intifada* as largely characterized by clashes with Israeli soldiers and civil disobedience); Rigby, *supra* n.25, at 2-4 (distinguishing between “unarmed” conflict as waged with rocks, Molotov cocktails, etc. rather than firearms, explosives, etc.). See generally Gene Sharp, *The Intifadah and Nonviolent Struggle*, 73 J. PALESTINIAN STUD. 3 (1989) (advocating and balancing considerations for non-violence in *Intifada*).

31. See YITZHAK SHAMIR, *SUMMING UP: AN AUTOBIOGRAPHY 179-80* (1994) (criticizing media coverage of *Intifada* that failed to show Israeli military casualties). Cf. DAVID HOROVITZ, *SHALOM FRIEND: THE LIFE AND LEGACY OF YITZHAK RABIN 118-19* (commenting on then Defense Minister Rabin’s reactions to fighting *Intifada*). Amram Mitzna, head of the Central Command for the Occupied Territories during the *Intifada* and recent candidate for Israeli Prime Minister, reflects on an incident when he and Rabin caught three politically unaffiliated Palestinians in Jericho who were planning to throw Molotov cocktails. *Id.* at 119. Mitzna said it was at this moment that Rabin realized that “you can’t punish everyone” and that a political solution would be ultimately necessary. *Id.*

32. See Kuttab, *supra* n.26, at 43 (describing lack of weapons and fear of blowback if armed struggle was undertaken but noted that possibility of armed struggle loomed); Rigby, *supra* n.25, at 6-7 (describing frustration over ineffectiveness of non-violence as causing shift toward escalating violence).

33. See *Indictment, United States v. Sami Amin al-Arian, et. al.* (M.D.Fla. 2003) (8:03-CR-77-T-30TBM) para. 2-27 [hereinafter al-Arian Indictment] (listing Palestinian Islamic Jihad (PIJ) members and structure of PIJ who was engaged in criminal enterprise); PALESTINIAN ISLAMIC JIHAD (PIJ) at <http://www.ict.org.il/> (describing PIJ’s formation during *Intifada* as radical alternative to Hamas). See generally al-Arian Indictment (chronicalling activities of PIJ and its American affiliates from 1988-2002).

34. See Karin Laub, *One Killed, Nine Wounded in Marketplace Bomb Blast*, ASSOC. PRESS, May 28 1990 (reporting on bomb set off in Jerusalem market and its killing of Shimon Cohen); *U.N. Chief Deplores Bombing in Jerusalem*, XINHUA GENERAL OVERSEAS NEWS SERVICE, May 29 1990 (reporting on condemnation of Islamic Jihad bombing in Jerusalem marketplace); Margo Dudkevitch, *Tensions High After Blast*, JERUSALEM POST, June 1, 1990 (reporting on sense of Israeli fear resulting from Islamic Jihad bombing of Jerusalem marketplace).

35. See *Angry Crowd Stones Arab Cars*, UNITED PRESS INT’L, May 29, 1990 (reporting on Kach led stoning of Arab cars by Israeli youths); Arie O’Sullivan, *Israelis Stone Arab Cars After Funeral of Bombing Victim*, ASSOC. PRESS, May 29, 1990 (describing Kach led stoning of Arab cars following funeral of Shimon Cohen); Ian Black, *Funeral Sparks Bombing Protest* (reporting on protest following funeral of Shimon Cohen and attacks on Arab passers-by), GUARDIAN, May 30, 1990; Ron Kampeas, *Kach Stones Cars*, JERUSALEM POST, May 31, 1990 (reporting on Kach protest and attacks on Arab cars).

on a Tel Aviv beach that wounded fifteen and killed seventeen-year-old Canadian tourist Marnie Kimmelman.³⁶ In response, the Likud³⁷ government stepped up its policy of deportations and mass arrests, garnering sharp condemnation from the Security Council.³⁸ From 1990 to 1993, the numbers of Palestinians killed almost doubled and the number of Israelis killed almost tripled.³⁹

36. See Ann Peters, *Canadian Dies after Israeli Explosion*, UNITED PRESS INT'L, July 29, 1990 (reporting on bomb blast killing Marnie Kimmelman on Tel-Aviv beach); Arieh O'Sullivan, *Official Says Bombing Should Not Scare Tourists from Israel*, ASSOC. PRESS, July 29, 1990 (reporting on Hamas' bombing of Tel-Aviv beach); *Eight Palestinians Detained in Israeli Beach Bombing*, TORONTO STAR, July 30, 1990, at A3 (reporting on arrests of Hamas members implicated in Tel-Aviv beach bombing).

37. See The Likud Party in JEWISH VIRTUAL LIBRARY at www.us-israel.org (providing brief description of Likud as forming in 1973 from Free Center, Laam and Gahal and standing as Israel's leading conservative party); DON PERETZ, *ISRAELI POLICIES TOWARD THE ARAB STATES AND THE PALESTINIANS SINCE 1967*, in *ARAB-ISRAELI CONFLICT*, *supra* n.6, at 31-32 (describing Likud party as right-wing opposition to Labor) Likud first took majority power with the election of Menachem Begin in late 1970s. *Id.*; BEILIN, *supra* n.7, at 23-24 (expressing his opinion of Likud as opposed to peace process and cynical in its dealings).

38. See UN SCOR, Resolution 605, UN Doc. S/RES/605 (1988) (recalling Fourth Geneva Convention obligations calls upon Israel to refrain from announced policy of deporting Palestinian civilians with United States abstaining); UN SCOR, Resolution 636, UN Doc. S/RES/636 (1989) (recalling Fourth Geneva Convention obligations deeply regrets Israel's policy of deporting Palestinian civilians and calls upon Israel to ensure safe return for those deported with United States abstaining); UN SCOR, Resolution 641, UN Doc. S/RES/641 (1990) (citing *de jure* applicability of Fourth Geneva Convention deplores Israeli deportation of Palestinian civilians, urges Israel to recognize its obligations under Fourth Geneva Convention and calls upon high contracting parties to Fourth Geneva convention to ensure Israel's compliance unanimously); UN SCOR, Resolution 681, UN Doc. S/RES/681 (1990) (deploring Israeli policy of deporting Palestinian civilians, urges Israel to accept *de jure* applicability of Fourth Geneva convention, calls upon Israel to abide by its obligations and requests Secretary General to develop meeting with International Red Cross to devise policy for implementing Fourth Geneva Convention unanimously); UN SCOR, Resolution 694, UN Doc. S/RES/694 (1991) (deploring Israeli policy of deportation of Palestinian civilians and declaring policy as violating Fourth Geneva Convention unanimously); UN SCOR, Resolution 726, UN Doc. S/RES/726 (1992) (deploring strongly Israeli policy of deporting Palestinian civilians and reaffirming applicability of Fourth Geneva Convention unanimously); UN SCOR, Resolution 799, UN Doc. S/RES/799 (1992) (condemning strongly deportation of hundreds of Palestinian civilians by Israel, reaffirming applicability of Fourth Geneva Convention and demanding Israel abide by its Fourth Geneva Convention obligations unanimously). See also MORRIS, *supra* n.6, at 602-03 (citing U.N. condemnation of Israeli policy of deporting Palestinians to quell *Intifada*).

39. See *Israel plans to deport Palestinians*, XINHUA GENERAL OVERSEAS NEWS SERVICE, Sept. 24, 1990 (putting number of Israelis killed in *Intifada* at forty-eight), Chris Hedges, *West Bank Clashes Kill 3 Soldiers and 1 Militant*, N.Y. TIMES, Aug. 7, 1993, at 3 (putting Israeli casualties at over 150 and Palestinian at close to 2000); *Israeli Occupation*

B. *Saying the Unsayable*

In December 1988, the PLO's leader Yasir Arafat⁴⁰ released a statement both recognizing Israel's right to exist and renouncing terrorism.⁴¹ Following this concession and four Security Council Resolutions very critical of Israel's handling of the *Intifada*,⁴² Likud Prime Minister Shamir⁴³ released the Israeli

Policies supra n.1, at 1 (listing over 500 Palestinians killed between 1990-93 and 173 total Israeli deaths during first *Intifada*).

40. See MORRIS, *supra* n.6, at 364-65, (dating Arafat's start in resistance to student days as head of Palestinian Students' Union in Cairo and as early operative of PLO). Arafat became chairman of the PLO in 1969. *Id.*; BEILIN, *supra* n.7, at 143-44 (describing Arafat as symbol of Israel's enemies and reporting that Arafat stressed in 1993 meeting release of prisoners, repatriation of exiles, lifting of closure of Jerusalem and release of Sheikh Yassin (founder of Hamas)). Beilin discusses his first meeting with Arafat and their mutual recognition that the democratic problem of convincing their respective peoples of the credibility of negotiations and the need to restrain provocative gestures. *Id.* At one point, Beilin remarks that they felt as if they were behind a barricade together, despite their long history of violent opposition to one another, "confronting the enemies of peace." *Id.*; ASHRAWI, *supra* n.25, at 27-28 (accounting first meeting with Arafat and her impression of him as down-to-earth and human in contrast to his Western image).

41. See Statement by Yasir Arafat, Dec. 14, 1988, available at http://www.brook.edu/dybdocroot/press/appendix/appen_k.htm, which reads, in relevant part:

Our statehood provides salvation to the Palestinians and peace to both Palestinians and Israelis. Self-determination means survival for the Palestinians. And our survival does not destroy the survival of the Israelis as their rulers claim.

...

As for terrorism, I renounced it yesterday in no uncertain terms, and yet I repeat for the record that we totally and absolutely renounce all forms of terrorism, including individual, group and State terrorism. Between Geneva and Algiers, we have made our position crystal clear.

Any more talk such as the Palestinians should give more—you remember the slogan, the Palestinians should give it more—or it is not enough, or the Palestinians are engaging in propaganda games and public relations exercise will be damaging and counterproductive.

Enough is enough. Enough is enough. Enough is enough. All remaining matters should be discussed around the table and within the international conference.

Id.; See also *The Most Elusive Peace*, ECONOMIST, Dec. 24, 1988 (citing Arafat's remarks in context of future and past peace hopes); Robin Greene, *Peres Has Hope for U.S.—Israeli talks*, UNITED PRESS INT'L, Dec. 18, 1988 (describing Arafat's remarks as possibly initiating Israeli-Palestinian rapprochement); David Hirst, *The Lockerbie Disaster: Shadow of Sabotage Suspicion Falls on Rival Groups in the Middle East*, GUARDIAN, Dec. 23, 1988 (referencing Arafat's remarks in context of Western suspicion of Arab militant organizations).

42. See U.N. SCOR, Resolution 605, U.N. Doc. S/RES/605 (1987) (criticizing Israel for soldiers' opening fire on Palestinian protestors with United States abstaining); U.N. SCOR, Resolution 607, U.N. Doc. S/RES/607 (1988) (criticizing Israel for deporting Palestinian civilians unanimously); U.N. SCOR, Resolution 608, U.N. Doc. S/RES/

Peace Plan to start a process for achieving peace with the Palestinians.⁴⁴ The initiative explicitly refused negotiations with the PLO,⁴⁵ the founding of a Palestinian State⁴⁶ and any change in status of the West Bank.⁴⁷

In an address to Congress, President Bush announced his intentions to push for a comprehensive Israeli/Palestinian peace, echoing Arafat's call for the affirmation of Security Council Resolutions 242 and 338 and grounded in a policy of "territory for peace."⁴⁸ Seven months later, the United States and the Soviet Union jointly coordinated the Madrid Peace Conference to begin a process of negotiations with the objective of "real peace."⁴⁹ Joined by the PLO, Prime Minister Shamir repeated

608 (1988) (reaffirming Resolution 607 with United States abstaining); U.N. SCOR, Resolution 611, U.N. Doc. S/RES/611 (1988) (criticizing Israeli attack on Sidi Bou Said, Tunisia and assassination of former PLO member and nationalist Khalil Al-Wazir with United States abstaining); *See also* Adam Roberts, *Prolonged Military Occupation: The Israeli-Occupied Territories since 1967*, 84 *AMER. J. INT'L L.* 44, 85, 101 (1990) (discussing Israel's troubled relationship with United Nations and history of friction and conflict with U.N. initiatives affecting Israel); Justus R. Weiner, *Hard Facts Meet Soft Law—The Israel-PLO Declaration of Principles and the Prospects for Peace: A Response to Katherine W. Meighan*, 35 *VA. J. INT'L L.* 931, 961 (1995) (saying U.N. Resolutions on Israel are often one-sided and fail to account for Israel's security concerns).

43. *See* Yitzhak Shamir in *JEWISH VIRTUAL LIBRARY* at www.us-israel.org (providing brief biography of Shamir and dating his ascendancy to Prime Minister in 1983 following Menachem Begin); BEILIN, *supra* n.7, at 51-52 (stating Beilin's opinion through working with Shamir, Shamir was strongly opposed to peace with Palestinians).

44. IPP, *supra* n.7, Sec. 3(a). Section 3(a) of IPP reads, "Israel years for peace and the continuation of the political process by means of direct negotiations based on the principles of the Camp David Accords." *Id.*

45. IPP, *supra* n.7, Sec. 3(c). Section 3(c) of IPP states, "Israel will not conduct negotiations with the PLO." *Id.*

46. IPP, *supra* n.7, Sec. 3(b). Section 3(b) of IPP provides, "Israel opposes the establishment of an additional Palestinian state in the Gaza district and in the area between Israel and Jordan." *Id.*

47. IPP, *supra* n.7, Sec. 3(d). Section 3(d) of IPP provides, "There will be no change in the status of Judea, Samaria and Gaza other than in accordance with the basic guidelines of the Government." *Id.*

48. Speech Delivered by George Bush before Congress, Mar. 6, 1991, *available*, at http://www.brook.edu/dybdocroot/press/appendix/appen_1.htm (expressing satisfaction generally with outcome of war against Iraq and stating intention to take opportunity to achieve Middle East Peace); *See also* Terence Hunt, *Bush Tells Congress: Time to End the Arab-Israeli Conflict*, ASSOC. PRESS, Mar. 6, 1991 (discussing relevance of Bush's State of the Union to Israeli-Palestinian peace).

49. *See* Letter of Invitation to the Madrid Peace Conference (Oct. 30, 1991) (offering invitation to Israel and Arab nations to join Soviet Union and United States for talks to begin negotiation process) for details of the conference *see* Israeli Ministry of Foreign Affairs, *The Madrid Framework*, *available*, at <http://www.mfa.gov.il/> (putting Madrid Conference in context of bilateral and multilateral negotiations designed to resolve historic

his refusal to negotiate land in his opening remarks.⁵⁰ Despite Shamir's stance, his appearance with Arafat prompted the ultra-nationalists within his government to leave; Shamir's coalition fell apart and elections were called.⁵¹ Though polls leading up to the election showed the race between Shamir and Yitzhak Rabin to be very close,⁵² Rabin's Labor Party⁵³ won a thirteen-seat majority over Likud on a platform of making peace with the Palestinians.⁵⁴

C. Doing the Undoable

In September 1993, Israeli Foreign Minister Peres and Mahmud Abbas⁵⁵ for the PLO signed the Declaration of Principles

Israeli-Arab tensions); Robert Fisk, *Middle East Conference: Allah and Jehovah has His work cut out*, INDEPENDENT, Nov. 1, 1991, at 10 (providing general overview of Madrid Conference and reactions to speeches and prospects of parties). See Comment, Afif Safieh, *On the Madrid Peace Conference*, Nov. 12, 1991, available at <http://www.palestinianuk.org/madrid.asp> (outlining speaker's personal history with PLO and peace process beginning, at Madrid resulting from Cold War's end, *Intifada* and Gulf War).

50. See Prime Minister Yitzhak Shamir Opening Address to the Madrid Peace Conference, Oct. 31, 1991, available at <http://www.mfa.gov.il/> (stating outright that discussions of territory would be "the quickest way to an impasse"); *Mideast Talks Turn Frosty: Hard-line speeches accent differences*, FIN. POST, Nov. 1, 1991, at 6 (reporting on Shamir's speech and its hostile reception by Arab participants); Alfred Hermida, *Arafat decries speech*, TIMES (U.K.), Nov. 2, 1991 (reporting Arafat's criticism of Shamir's speech).

51. See *Shamir Loses Knesset Majority as Far-right Quits*, AGENCE FR. PRESSE, Jan. 19, 1992 (reporting right wing Knesset Cabinet members leaving coalition government). See also *Israel: Storm Warning*, ECONOMIST, Feb. 8, 1992, at 38 (reporting Shamir's difficulty in keeping coalition government together).

52. See *Battle for "Don't Knows" in Photo-finish to Israeli Elections*, AGENCE FR. PRESSE, June 22, 1992 (reporting on polls anticipating close election results); *Israel's Choice*, ECONOMIST, June 20, 1992, at 16 (reporting on 1992 election generally and highlighting close poll numbers).

53. See Labor Party in JEWISH VIRTUAL LIBRARY at www.us-israel.org (describing Labor as social-democratic party rooted in ideals of Jewish labor movement); History of Israel's Labor Party at http://www.laborzionist.org/labor_history.html (giving brief history of Labor Party as formed in 1968 through combining Mapai, Rafi, and Ahdut Ha'avodah parties); PERLMUTTER, *supra* n.10, at 202 (describing formation of Israel Labor Party in 1968 as union of three labor parties).

54. See Clyde Haberman, *Israel's Labor Party Wins Clear Victory in Election*, N.Y. TIMES, June 24, 1992, at A1 (reporting 1992 Israeli election victory for Labor); Richard Beeston, *Labour Claims Big Victory in Israel Election*, TIMES, June 24, 1992 (reporting surprise victory for Labor); BEILIN, *supra* n.7, at 2 (describing 1992 Labor win as "accidental victory for the peace camp").

55. See Fiona Symon, *Profile: Mahmoud Abbas*, BBC, Mar. 7, 2001 (describing Abbas as co-founder of Fatah and, next to Arafat, senior most leader of PLO); ASHRAWI, *supra* n.25, at 183 (describing Abbas' backchannel negotiations between Madrid and the signing of Declaration of Principles). Ashrawi describes Abbas as initially open to negotiations and flexible on policy positions during negotiations with U.S. negotiating team

designed to begin a five-year process by which Palestinian Arabs would administer Palestinian affairs in pursuit of a permanent status settlement based on Security Council Resolutions 242 and 338.⁵⁶ The “Oslo Process”⁵⁷ began in May of 1994 with the signing of the Gaza-Jericho Accords (“Oslo I”) that gave the Palestinian Authority the autonomy laid out in the Declaration of Principles over the Jericho region in the West Bank and the Gaza Strip, excluding military installations and Israeli settlements.⁵⁸ It also promised the construction of a safe-passage between Gaza

but shifting to Arafat’s harder line in order to stifle negotiations with U.S. team to push for direct negotiations with Israel. *Id.*; BEILIN, *supra* n.7, at 167-70 (describing impressions of Abbas and giving brief background). Beilin describes Abbas as fundamentally a pragmatic but who, despite being chief negotiator, sought no position in the Palestinian Council and was uncomfortable with the shift from exile to political governance. *Id.*

56. Declaration of Principles, *supra* n.5, art. I. Article I of Declaration of Principles, entitled “Aim of the Negotiations,” reads:

The aim of the Israeli-Palestinian negotiations within the current Middle East peace process is, among other things, to establish a Palestinian Interim Self-Government Authority, the elected Council (the “Council”), for the Palestinian people in the West Bank and the Gaza Strip, for a transitional period not exceeding five years, leading to a permanent settlement based on Security Council Resolutions 242 and 338.

It is understood that the interim arrangements are an integral part of the whole peace process and that the negotiations on the permanent status will lead to the implementation of Security Council Resolutions 242 and 338.

Id.

57. *See* BEILIN, *supra* n.7, at 3 (describing “Oslo Process” as attempt to achieve working negotiations that ballooned into major peace initiative); WATSON, *supra* n.2, at 265 (describing goal of Oslo Accords as achieving a comprehensive settlement on permanent status and historically problematic issues).

58. Oslo I, *supra* n.8, art. I, III. Article I of Oslo I references maps of Gaza and Jericho borders and defines “Settlements,” “Military Installation Area” and “Israelis.” *Id.* Article III of Oslo I provides, in relevant part:

Israel shall transfer authority as specified in this Agreement from the Israeli military government and its Civil Administration to the Palestinian Authority, hereby established, in accordance with Article V of this Agreement, except for the authority that Israel shall continue to exercise as specified in this Agreement.

Id.; Oslo I, *supra* n.8, art. V. Article V of Oslo I reads, in relevant part:

1. The authority of the Palestinian Authority encompasses all matters that fall within its territorial, functional and personal jurisdiction, as follows:

a. The territorial jurisdiction covers the Gaza Strip and the Jericho Area territory, as defined in Article I, except for Settlements and the Military Installation Area.

Territorial jurisdiction shall include land, subsoil and territorial waters, in accordance with the provisions of this Agreement.

b. The functional jurisdiction encompasses all powers and responsibilities as specified in this Agreement. This jurisdiction does not include foreign

and the West Bank.⁵⁹

D. *Hearing the Unhearable*

Many in the Palestinian territories, particularly those who had led the UNLU during the *Intifada*, were wary of the return of Arafat from exile.⁶⁰ Arafat has classically lacked support from Palestinian intellectuals⁶¹ and, because of his embrace of Saddam Hussein,⁶² many potential benefactors in the Gulf.⁶³ To

relations, internal security and public order of Settlements and the Military Installation Area and Israelis, and external security.

c. The personal jurisdiction extends to all persons within the territorial jurisdiction referred to above, except for Israelis, unless otherwise provided in this Agreement.

Id.

59. Oslo I, *supra* n.8, art. XI. Article XI of Oslo I provides, "Arrangements for safe passage of persons and transportation between the Gaza Strip and the Jericho Area are set out in Annex I, Article IX." *Id.* Oslo I, *supra* n.8, Annex I, art IX. Article IX of Annex I of Oslo I provides, in relevant part:

a. There shall be safe passage between the Gaza Strip and the Jericho Area for residents of the Gaza Strip and the Jericho Area and visitors to these areas from abroad, as detailed in this Article.

b. Israel will ensure safe passage during daylight hours (from sunrise to sunset) for persons and transportation.

c. Safe passage will be effected via the following designated crossing points:

1. the Erez crossing point; and
2. the Vered Yericho crossing point.

d. Israel will make safe passage available through one or more of the routes delineated on attached map No. 3.

Id. Cf. Ben Lynfield, *Safe passage officially opens*, JERUSALEM POST, Oct 26, 1999, at 3 (reporting opening of safe passage in 1999).

60. See al-Arian Indictment, *supra* n.33, at para. 76 (referencing spring 1994 discussions between Islamic Jihad members over disagreements between Hamas and PLO-linked Fatah); *Id.*, at para. 111 (referencing Islamic Jihad fax denouncing Arafat and PLO for actions in Gaza Strip and Jericho). See also KHALIL SHIKAKI, ENDING THE CONFLICT: CAN THE PARTIES AFFORD IT?, in THE ISRAELI PALESTINIAN PEACE PROCESS 41 (2002) (commenting on Palestinian Authority legitimacy gap particularly with Islamist groups); Said, *THE PLO'S BARGAIN*, in PEACE AND ITS DISCONTENTS, *supra* n.7, at 5 (writing in the fall of 1993, characterizing Arafat as "an autocrat" and calling Arafat's handling of finances a "disaster" and unaccountable). Further, the author criticizes Arafat as bereft of knowledge of civil society, as alienated by Palestinians and causing life in Occupied Territories to only get worse. *Id.*

61. See *The Battle for Palestinian Democracy Begins*, JERUSALEM POST, Dec 10, 1993, at 3B (reporting on history of Palestinian frictions with Yasir Arafat particularly in 1970s); William Orme, *Seven Palestinians Arrested For Criticism Of Arafat*, N.Y. TIMES, Nov. 29, 1999, at A7. (reporting on P.A. arrest of seven signatories to open letter critical of Arafat); SAID, DECOLONIZING THE MIND, in PEACE AND ITS DISCONTENTS, *supra* n.7, at 99 (criticizing Arafat and his policy of embracing Israel in context of Arab history as "ignorant," "incompetent" and reflecting "a total absence of self-knowledge").

62. See Kathy Evans, *Crisis in the Gulf: Arafat stance puts Palestinians on edge*, GUARD-

many, he was little more than a foreigner⁶⁴ and, fearing his authoritarian reputation, they demanded democratic institutions for collective decision-making and not a colonial governor or warden of a “Fakhani State.”⁶⁵ In the summer of 1995, the militant nationalist group Hamas⁶⁶ threatened to declare civil war

IAN, Aug. 15, 1990 (reporting on Gulf-Palestinian panic over Arafat’s support for Saddam as jeopardizing their livelihoods); Jacob Wirtschafter, *Arafat Persona Non Grata in Gulf States*, JERUSALEM POST, Aug. 16, 1990, at 1 (describing Arafat’s embrace for Saddam Hussein and resultant ostracism by Gulf States hostile to Saddam); Michael Theodoulou, *Arafat Searches Anxiously for Diplomatic Loophole*, TIMES (U.K.), Aug. 21, 1990 (describing Arafat’s connections with Saddam Hussein as disastrous for Palestinian interest).

63. See *Gulf states; Kiss Now, Pay Later*, ECONOMIST, Oct. 30, 1993, at 45 (reporting Gulf States reluctance to support Arafat). See also MANUEL HASSASSIAN, WHY DID OSLO FAIL? LESSONS FOR THE FUTURE, in THE ISRAELI PALESTINIAN PEACE PROCESS, *supra* n.60, at 117-18 (commenting on strained relationship between Gulf-States and Arafat following Arafat’s embrace of Saddam Hussein and the resultant lack of Arab allies for Palestinian Authority).

64. See EDWARD SAID, *On Visiting Wadie*, in THE END OF THE PEACE PROCESS 85 (2000) (describing discussions with young Palestinians criticism of Arafat of filling his police force with old cronies from his time abroad in exile). See also HASSASSIAN, *supra* n.63, at 117 (describing PLO history as revolutionary organization unfamiliar with civil society and resultantly lacking in strong national base).

65. See Jon Immanuel, *The Battle for Palestinian Democracy Begins*, JERUSALEM POST, Dec 10, 1993, at 3B (reporting local Palestinian suspicion of Arafat’s return and fears of “Fakhani State,” named for Lebanese refugee camp synonymous with corruption). It could be said that is what they got. See HASSASSIAN, *supra* n.63, at 118 (describing Arafat’s cronyism and authoritarianism). In November 1999, twenty prominent Palestinians, including Council members, released *The Homeland Calls Us* saying,

The people have been divided into two groupings: the select who rule and steal, and the majority which complains and searches for someone to save it. . . . the Palestinian Authority has followed a horrifying policy of corruption, humiliation and exploitation of the Palestinian people, as though the Oslo agreement was a trading of the homeland for the affluence of the corrupted in the Palestinian Authority. The president of the PNA has widely opened the doors for opportunists to spread corruption throughout the Palestinian community. Economic conditions have deteriorated, community relations have weakened and moral and ethical standards have loosened. Health, education and judiciary institutions have been brought to ruin.”

Dr. Abdul Sattar Qassem, *et. al.*, *The Homeland Calls Us*, Nov. 27, 1999, available at <http://www.zoo.co.uk/~z8001063/International-Socialist-Group/isgpub/ISGP%20PSI%2019.htm> and Al-Haq, Press Release, available at http://www.alhaq.org/releases/pr_991129.html (providing alternate translation of “Call from the Homeland”). Arafat had seven or eight signatories summarily arrested. See *supra* Al-Haq, Press Release; William Orme, *Seven Palestinians Arrested For Criticism Of Arafat*, N.Y. TIMES, Nov. 29, 1999, at A7 (reporting on P.A. arrest of seven signatories). See also Jamie Tarabay, *Barghouti Calls for Change in Palestinian Leadership*, JERUSALEM POST, Dec. 4, 2002, at 1 (quoting imprisoned Fatah leader Marwan Barghouti as calling on Palestinian leadership to relinquish power after failing Palestinians “in this decisive battle”).

66. See BEILIN, *supra* n.7, at 275 (describing founding of Hamas by Sheikh Ahmed

and openly called for Arafat's assassination.⁶⁷

Likewise, on the Israeli side, nationalist opposition was fierce.⁶⁸ Ariel Sharon⁶⁹ accused Rabin's government of "hat[ing] everything Jewish."⁷⁰ Leading right-wing rabbis, albeit unsuccessfully, called on soldiers to defy orders to evacuate army

Yassin during first *Intifada* and Hamas' policy to destroy Israel by any means). *See also* Covenant of the Islamic Resistance Movement ("Hamas"), art. VII, Aug. 18, 1988 [hereinafter *HAMAS COVENANT*]. Article VII of *HAMAS COVENANT* provides, in relevant part:

The Islamic Resistance Movement is one of the links in the chain of the struggle against the Zionist invaders. It goes back to 1939, to the emergence of the martyr Izz al Din al Kissam and his brethren the fighters, members of Moslem Brotherhood. It goes on to reach out and become one with another chain that includes the struggle of the Palestinians and Moslem Brotherhood in the 1948 war and the Jihad operations of the Moslem Brotherhood in 1968 and after.

Id.; *HAMAS COVENANT*, art. XI. Article XI of *HAMAS COVENANT* provides, in relevant part:

The Islamic Resistance Movement believes that the land of Palestine is an Islamic Waqf consecrated for future Moslem generations until Judgement Day. It, or any part of it, should not be squandered: it, or any part of it, should not be given up. Neither a single Arab country nor all Arab countries, neither any king or president, nor all the kings and presidents, neither any organization nor all of them, be they Palestinian or Arab, possess the right to do that. Palestine is an Islamic Waqf land consecrated for Moslem generations until Judgement Day.

Id.

67. *See* Jon Immanuel, *PA Advises Hamas to Replace Violence with Political Action*, JERUSALEM POST, Sept. 4, 1995, at 2 (reporting Hamas' threats of civil war and history of internal violence within Occupied Territories); *Hamas Agrees with Iranian Proposal to Assassinate Arafat*, JERUSALEM POST, Sept. 10, 1995, at 1 (reporting Hamas' call for Arafat's assassination).

68. *See Rabin: Likud started war of words. No-confidence Bid Fails After Vicious Debate*, JERUSALEM POST, March 28, 1995, at 1 (quoting nationalist Knesset members as critical of Rabin's concessions and negotiations with PLO); *Israeli Leaders Wage War of Words*, UNITED PRESS INT'L, Mar. 26, 1995 (reporting on protracted and public criticism between Likud and Labor over proper relationship and strategies with Palestinians); *Former Israeli Chief Rabbi Calls on Soldiers to Refuse West Bank Evacuation*, XINHUA NEWS AGENCY, July 12, 1995 (reporting on religious order signed by fifty rabbis calling on Israeli soldiers to follow their religious duty to defy orders to redeploy West Bank regions); *Rabin, Ministers Warned of Likely Attempts on their Lives by the Ultra-Right*, MIDEAST MIRROR, Aug. 30, 1995 (reporting on heightened security measures taken by Israeli Cabinet members in response to ultra-nationalist threats of violence against Rabin government).

69. *See* Ariel Sharon in American Friends of Likud at www.thelikud.org (providing biography of Ariel Sharon from his membership in Haganah (pre-Israel Zionist army) to election as Prime Minister in 2001); SACHAR, *supra* n.11, 496-97, 637 (describing Sharon as instrumental military commander in Suez and 1967 War).

70. *See* Evelyn Gordon, *Rabin: Likud Started War of Words. No-Confidence Bid Fails After Vicious Debate*, JERUSALEM POST, Mar. 28, 1995, at 1 (reporting Sharon's criticism of Rabin); *Peres looks to Jordanestine and No Berlin Wall in Jerusalem*, MIDEAST MIRROR, Mar. 28, 1995 (reporting Sharon as saying Rabin's government hates everything Jewish).

bases in the West Bank.⁷¹ Only months before Oslo II would be signed, Likud's Netanyahu,⁷² leading Rabin in opinion polls,⁷³ accused Rabin of conducting a policy of capitulation to Arafat.⁷⁴

II. ANXIETY SEPARATION

Oslo II laid out a detailed framework for Palestinian self-rule but ultimately failed to achieve autonomy or peace.⁷⁵ South Africa in the early 1960s attempted a similar arrangement by devolving limited governing authority to the Transkei region, which equally met with little success and was disbanded with after the reintegration of South Africa.⁷⁶ These types of limited autonomy arrangements have yet to show sustained success and,

71. See *Former Israeli Chief Rabbi Calls on Soldiers to Refuse West Bank Evacuation*, XINHUA NEWS AGENCY, July 12, 1995 (reporting former Israeli chief rabbi Avraham Shapira's religious ruling signed by fifty rabbis forbidding soldiers from evacuating West Bank); Peter Hirschberg, *Soldiers Ignore Rabbis' Ban on West Bank Pullout*, JERUSALEM R., Jan. 25, 1996 (reporting on Israeli soldiers ignoring rabbi call to resist redeployment).

72. See *Benjamin Netanyahu* in JEWISH VIRTUAL LIBRARY at www.us-israel.org (providing biography of Netanyahu and citing him as Chairman of Likud party since 1993 and author of many books). Cf. Laura Drake, *A Netanyahu Primer*, 101 J. PALESTINIAN STUD. 58 (1996) (describing Netanyahu as savvy political leader with vision of Israel as world economic power-player and firm belief that Jewish people are source of Israel's power).

73. See Paul Shindman, *Israeli Leaders Wage War of Words*, UNITED PRESS INT'L, Mar. 26, 1995 (citing poll numbers of 60% for Netanyahu and 40% for Rabin); Sarah Honig, *Poll Shows Netanyahu Leading Rabin*, JERUSALEM POST, July 11, 1995, at 1 (citing spring 1995 Gallup Poll numbers of 44% for Netanyahu and 37.1% for Rabin).

74. See Evelyn Gordon, *Netanyahu: Gov't Unable to Refuse Arafat*, JERUSALEM POST, Jul. 13, 1995, at 2 (reporting Netanyahu's criticism that Rabin's policy is to accept whatever Arafat would agree to); Drake, *supra* n.72, at 59 (describing Netanyahu as ideologically opposed to Palestinian self-determination as jeopardizing Israel and fundamentally illegitimate).

75. See Oslo II, *supra* n.2, pmb. Preamble of Oslo II states:

DESIROUS of putting into effect the Declaration of Principles on Interim Self-Government Arrangements signed, at Washington, D.C. on September 13, 1993, and the Agreed Minutes thereto (hereinafter "the DOP") and in particular Article III and Annex I concerning the holding of direct, free and general political elections for the Council and the Ra'ees of the Executive Authority in order that the Palestinian people in the West Bank, Jerusalem and the Gaza Strip may

Id.; MORRIS, *supra* n.6, at 693 (reflecting on new violence in middle east and skeptical of near-term peace settlement).

76. See ROGER SOUTHAL, *SOUTH AFRICA'S TRANSKEI* 302-303 (1983) (very critical South African model of limited devolution and argues motivation based largely on white security concerns). See generally *Id.* (tracing Transkeian political economy through "independence" in 1976); ED. RITA M. BYRNES, *SOUTH AFRICA: A COUNTRY STUDY* (1997) (detailing history of South Africa through apartheid); GWENDOLEN CARTER, ET. AL., *SOUTH AFRICA'S TRANSKEI* (1967) (studying establishment of Transkei in context of colonialism in Africa); CHIEF KAIZER D. MATANZIMA, *INDEPENDENCE MY WAY* (Foreign

as was equally the case with Northern Ireland, fail to satisfy the political aspirations they are designed to meet.⁷⁷

A. Oslo II

Israel and the PLO signed Oslo II in September 1995,⁷⁸ which, while making no reference to “self-determination,” stated its aim of Palestinian democratic rule and the development of Palestinian civil institutions.⁷⁹ It expanded Palestinian self-rule⁸⁰ and laid out a coordinated Israeli-Palestinian framework to manage infrastructure,⁸¹ security,⁸² economic policy⁸³ and exercises

Affairs 1976) (Chief of Transkei account of Transkei history and argues for Transkei independence).

77. See, e.g., Dr. Ian R.K. Paisley, MP, MEP, *Peace Agreement – or Last Piece in a Sellout Agreement?*, 22 *FORDHAM INT’L L. J.* 1273 (1999) (opposing GOOD FRIDAY AGREEMENTS as selling-out Northern Protestants); Gerry Adams, *To Cherish a Just and Lasting Peace*, 22 *FORDHAM INT’L L. J.* 1179, 1180 (1999) (stating continued commitment to Irish Republicanism).

78. See Oslo II, *supra* n.2 (dating signing, at Sept. 28, 1995).

79. See Oslo II, *supra* n.2, pmbl. Preamble of Oslo II states:

DESIROUS of putting into effect the Declaration of Principles on Interim Self-Government Arrangements signed at Washington, D.C. on September 13, 1993, and the Agreed Minutes thereto (hereinafter “the DOP”) and in particular Article III and Annex I concerning the holding of direct, free and general political elections for the Council and the Ra’ees of the Executive Authority in order that the Palestinian people in the West Bank, Jerusalem and the Gaza Strip may democratically elect accountable representatives;

RECOGNIZING that these elections will constitute a significant interim preparatory step toward the realization of the legitimate rights of the Palestinian people and their just requirements and will provide a democratic basis for the establishment of Palestinian institutions

Id. See generally WATSON, *supra* n.2 (describing provisions of Oslo process and foundation of Palestinian political institutions); Justus R. Weiner, *Co-Existence Without Conflict: The Implementation of Legal Structures for Israeli-Palestinian Cooperation Pursuant to the Interim Peace Agreements*, 26 *BROOKLYN J. INT’L L.* 591 (2000) (outlining and analyzing degree of cooperation through joint committees under Oslo process); George E. Bisharat, *Peace and the Political Imperative of Legal Reform in Palestine*, 31 *CASE W. RES. J. INT’L L.* 253 (1999) (calling for broad legal reform and commenting on Palestinian pessimism toward Oslo process).

80. See, e.g., Oslo II, *supra* n.2, art. I. Article One of Oslo II lays out the general framework for the transfer of authority and creation of Joint Israeli-Palestinian administrative committees with reference to the remaining provisions of the Agreement. *Id.*

81. See, e.g., Oslo II, *supra* n.2, Annex III. Annex III of Oslo II lays out the parameters for Joint Liaison and Coordination Committee for civil affairs and covers areas of administration from archeology to social welfare to agriculture. *Id.*

82. See, e.g., Oslo II, *supra* n.2, Annex I, arts. II-XIV. Articles II-XIV of Annex I of Oslo II lay out various security arrangements from the Joint Security Coordination and Cooperation Committee to the degree of control transferred to the Palestinian Council over various regions in the Occupied Territories. *Id.*

of jurisdiction.⁸⁴

1. General Framework

Though many provisions were preserved from previous agreements,⁸⁵ Oslo II considerably developed Oslo I's twenty-four-member Palestinian Authority⁸⁶ with the substantial, eighty-two-member Palestinian Council.⁸⁷ The Council would have limited jurisdiction over delineated and religious (*al Waqf*)⁸⁸ regions in the Occupied Territories.⁸⁹ Its operations under the

83. Oslo II, *supra* n.2, Annex V. Annex V of Oslo II lays out the economic powers of the Palestinian Council and the shared areas of cooperation and control. *Id.*

84. Oslo II, *supra* n.2, Annex IV. Annex IV of Oslo II articulates the breadth of Palestinian jurisdiction in the Occupied territories, the arrangements for cooperation and extradition and the extent of sovereign immunity in the Occupied Territories. *Id.*

85. *See, e.g.*, Oslo II, *supra* n.2, pmb. The Preamble of Oslo II states, in relevant part:

FOLLOWING the Gaza-Jericho Agreement; the Agreement on Preparatory Transfer of Powers and Responsibilities signed, at Erez on August 29, 1994 (hereinafter "the Preparatory Transfer Agreement"); and the Protocol on Further Transfer of Powers and Responsibilities signed, at Cairo on August 27, 1995 (hereinafter "the Further Transfer Protocol"); which three agreements will be superseded by this Agreement

Id.; Oslo II, *supra* n.2, Annex V (incorporating Oslo I Annex IV Protocol on Economic Relations).

86. *See* Oslo I, *supra* n.8, art. IV (providing for twenty-four member body to administer and establish agencies to fulfill delegated responsibilities with membership subject to Israeli oversight).

87. *See* Oslo II, *supra* n.2, art. IV. Article IV of Oslo II provides:

The Palestinian Council shall be composed of 82 representatives and the Ra'ees of the Executive Authority, who will be directly and simultaneously elected by the Palestinian people of the West Bank, Jerusalem and the Gaza Strip.

Id.

88. *See* Oslo II, *supra* n.2, art. XI, Sec. 2(a). Article XI, Sec. 2(a) of Oslo II provides, "Land in populated areas (Areas A and B), including government and Al Waqf land, will come under the jurisdiction of the Council during the first phase of redeployment."

Id.

89. *See* Oslo II, *supra* n.2, art. XVII. Article XVII of Oslo II provides, in relevant part:

Territorial jurisdiction includes land, subsoil and territorial waters, in accordance with the provisions of this Agreement.

b. The functional jurisdiction of the Council extends to all powers and responsibilities transferred to the Council, as specified in this Agreement or in any future agreements that may be reached between the Parties during the interim period.

c. The territorial and functional jurisdiction of the Council will apply to all persons, except for Israelis, unless otherwise provided in this Agreement.

Id.

Agreement would be in coordination with the Joint Israeli-Palestinian Liaison and Cooperation Committees⁹⁰ to administer civil affairs,⁹¹ security⁹² and shared holy sites.⁹³ Likewise, the agreement elaborated the economic ties between Israel and the autonomous Palestinian regions.⁹⁴

2. Area of Authority

Oslo II transferred to the Palestinians civil and security autonomy in nine discrete districts throughout the West Bank (Jericho, Tulkarem, Nablus, Qalqilya, Jenin, Bethlehem, Ramallah, Salfit and Hebron)⁹⁵ to be administered by the parochial legislative body, the Palestinian Council.⁹⁶ The Council was to be democratically elected⁹⁷ by Palestinians in Gaza, the West

90. See Weiner, *supra* n.79, at pt. III (describing in some length numerous joint committees and liaisons and their role in Palestinian institutions as joint councils comprised of Palestinian and Israeli representatives and headed by Israel to devise policies for areas of mutual concern and other areas, such as security and economic policy, for which Oslo II creates joint committees).

91. See Oslo II, *supra* n.2, art. XXVI. Article XXVI of Oslo II provides in relevant part:

The Liaison Committee established pursuant to Article X of the DOP shall ensure the smooth implementation of this Agreement. It shall deal with issues requiring coordination, other issues of common interest and disputes.; See Oslo II, *supra* n.2, Annex VI. Annex VI of Oslo II details the administrative affairs to be handled by the Joint Liaison Committee.

Id.

92. See Oslo II, *supra* n.2, Annex I, art. II-VI. Articles II-VI of Annex I of Oslo II provides generally:

Both sides will, in accordance with this Agreement, act to ensure the immediate, efficient and effective handling of any incident involving a threat or act of terrorism, violence or incitement, whether committed by Palestinians or Israelis. To this end, they will cooperate in the exchange of information and coordinate policies and activities.

Id.

93. See Oslo II, *supra* n.2, Annex I, art. V, Sec. 2(b) (listing Jewish Holy Sites that would fall under Palestinian jurisdiction and providing for Joint Military Unit ("JMU") security authority as well as Israeli measures, such as plain clothes Israeli guards, to ensure safe Israeli access).

94. See Oslo II, *supra* n.2, Annex V (expressly adopting and elaborating "Protocol on Economic Relations" from Oslo I, Annex IV, which details joint economic responsibilities and procedures).

95. See Oslo II, *supra* n.2, Annex I, art. V, Sec. 1 (listing eight locations for District Coordinating Offices ("DCO")). See also Oslo II, *supra* n.2, Annex I, app. 6 (listing nine districts in which Area B hamlets are located: Tulkarm, Nablus, Salfit, Jericho, Qalqilya, Jenin, Hebron, Ramallah and Bethlehem).

96. See Oslo II, *supra* n.2, art. I. For relevant text of Article I of Oslo II see *supra* n.3.

97. See Oslo II, *supra* n.2, art. II. Article II of Oslo II mandates, in relevant part:

Bank and Jerusalem.⁹⁸ It would have an independent subcommittee, the Executive Authority,⁹⁹ with a *Ra'ees* ("President") standing *ex officio*¹⁰⁰ with the power to appoint 20% of the Executive Authority's membership.¹⁰¹ While the Council was granted general executive and legislative authority, the Agreement specifically removed foreign relations from its authority,¹⁰² except-

In order that the Palestinian people of the West Bank and the Gaza Strip may govern themselves according to democratic principles, direct, free and general political elections will be held for the Council and the Ra'ees of the Executive Authority of the Council in accordance with the provisions set out in the Protocol concerning Elections attached as Annex II to this Agreement (hereinafter "Annex II").

Id.

98. See Oslo II, *supra* n.2, art. III. Article III of Oslo II provides, in relevant part: The Palestinian Council and the Ra'ees of the Executive Authority of the Council constitute the Palestinian Interim Self-Government Authority, which will be elected by the Palestinian people of the West Bank, Jerusalem and the Gaza Strip for the transitional period agreed in Article I of the DOP.

Id.

99. See Oslo II, *supra* n.2, art. V, Secs. 1-2. Sections 1-2 of Article V of Oslo II reads:

1. The Council will have a committee that will exercise the executive authority of the Council, formed in accordance with paragraph 4 below (hereinafter "the Executive Authority").

2. The Executive Authority shall be bestowed with the executive authority of the Council and will exercise it on behalf of the Council. It shall determine its own internal procedures and decision making processes.

Id.

100. See Oslo II, *supra* n.2, art. V, Sec. 4(a). Section 4(a) of Article V of Oslo II provides, "The Ra'ees of the Executive Authority shall be an *ex officio* member of the Executive Authority." *Id.*

101. See Oslo II, *supra* n.2, art. V, Sec. 4(c). Section 4(c) of Article V of Oslo II reads:

The Ra'ees of the Executive Authority shall have the right to appoint some persons, in number not exceeding twenty percent of the total membership of the Executive Authority, who are not members of the Council, to exercise executive authority and participate in government tasks. Such appointed members may not vote in meetings of the Council.

Id.

102. See Oslo II, *supra* n.2, art. IX, Sec. 5. Section 5 of Article IX of Oslo II provides, in relevant part:

In accordance with the DOP, the Council will not have powers and responsibilities in the sphere of foreign relations, which sphere includes the establishment abroad of embassies, consulates or other types of foreign missions and posts or permitting their establishment in the West Bank or the Gaza Strip, the appointment of or admission of diplomatic and consular staff, and the exercise of diplomatic functions.

Id.

ing cultural exchange,¹⁰³ import¹⁰⁴ and economic aid agreements.¹⁰⁵ The Israeli prerogative over foreign affairs also extended to the Israeli administration of the Jordanian and Egyptian borders.¹⁰⁶

Another legislative limitation granted Israel a “veto” over legislation it felt inconsistent with the Declaration of Principles, the Agreement or any future agreements.¹⁰⁷ The operating pro-

103. See Oslo II, *supra* n.2, art IX, Sec. 5(b)(4). Section 5(b)(4) of Article IX of Oslo II reads:

[Negotiations are allowed only for] cultural, scientific and educational agreements. Dealings between the Council and representatives of foreign states and international organizations, as well as the establishment in the West Bank and the Gaza Strip of representative offices other than those described in subparagraph 5.a above, for the purpose of implementing the agreements referred to in subparagraph 5.b above, shall not be considered foreign relations.

Id.

104. Oslo I, *supra* n.8, Annex IV, art. III. Article III of Annex IV of Oslo I reads, in relevant part:

The Palestinian Authority will have all powers and responsibilities in the sphere of import and customs policy and procedures with regard to the following:

1. Goods on List A1, attached hereto as Appendix I locally-produced in Jordan and in Egypt particularly and in the other Arab countries, which the Palestinians will be able to import in quantities agreed upon by the two sides up to the Palestinian market needs as estimated according to para 3 below.
2. Goods on List A2, attached hereto as Appendix II, from the Arab, Islamic and other countries, which the Palestinians will be able to import in quantities agreed upon by the two sides up to the Palestinian market needs as estimated according to para 3 below.

Id.

105. See Oslo II, *supra* n.2, art. IX, Sec. 5(b)(2). Section 5(b)(2) of Article IX of Oslo II reads, “[Negotiations are allowed only for] agreements with donor countries for the purpose of implementing arrangements for the provision of assistance to the Council.” *Id.*

106. See Oslo II, *supra* n.2, art XII, Sec. 1. Section 1 of Article XII of Oslo II reads:

In order to guarantee public order and internal security for the Palestinians of the West Bank and the Gaza Strip, the Council shall establish a strong police force as set out in Article XIV below. Israel shall continue to carry the responsibility for defense against external threats, including the responsibility for protecting the Egyptian and Jordanian borders, and for defense against external threats from the sea and from the air, as well as the responsibility for overall security of Israelis and Settlements, for the purpose of safeguarding their internal security and public order, and will have all the powers to take the steps necessary to meet this responsibility.

Id.

107. See Oslo II, *supra* n.2, art. XVIII, Secs. 4-6. Sections 4-6 of Article XVIII of Oslo II requires:

4. a. Legislation, including legislation which amends or abrogates existing laws or military orders, which exceeds the jurisdiction of the Council or

cedure for this veto required all legislation to be vetted through the Israeli side of the Joint Legal Committee¹⁰⁸ and if the Israeli side deemed the legislation as failing to comply, negotiations would follow to adjust its provisions into compliance if possible.¹⁰⁹ Alternatively, the legislation would be deemed *ab initio* void.¹¹⁰

The extent of the Council's jurisdiction in the West Bank, specifically excluding Jerusalem, settlements, refugees, borders, and military locations,¹¹¹ was determined by the classification of a given location as part of Area A, B or C.¹¹² In Area A, following the Israeli military redeployment, the Council would have the greatest autonomy, extending to authority over both internal security and public order,¹¹³ excluding the Jewish holy sites of Jo-

which is otherwise inconsistent with the provisions of the DOP, this Agreement, or of any other agreement that may be reached between the two sides during the interim period, shall have no effect and shall be void *ab initio*.

b. The Ra'ees of the Executive Authority of the Council shall not promulgate legislation adopted by the Council if such legislation falls under the provisions of this paragraph.

5. All legislation shall be communicated to the Israeli side of the Legal Committee.

6. Without derogating from the provisions of paragraph 4 above, the Israeli side of the Legal Committee may refer for the attention of the Committee any legislation regarding which Israel considers the provisions of paragraph 4 apply, in order to discuss issues arising from such legislation. The Legal Committee will consider the legislation referred to it, at the earliest opportunity.

Id.

108. See Oslo II, *supra* n.2, art. XVIII, Sec. 5. For text of, Sec. 5 of Article XVIII of Oslo II see *supra* n.107.

109. See Oslo II, *supra* n.2, art. XVIII, Sec. 6. For text of, Sec. 6 of Article XVIII of Oslo II see *supra* n.107.

110. See Oslo II, *supra* n.2, art. XVIII, Sec. 4(a). For text of, Sec. 4(a) of Article XVIII of Oslo II see *supra* n.107.

111. See Oslo II, *supra* n.2, art. XVII, Sec. 1(a) (Sec. 1(b) also excluded undelegated powers and responsibilities). Section 1 of Article XVII of Oslo II reads:

1. In accordance with the DOP, the jurisdiction of the Council will cover West Bank and Gaza Strip territory as a single territorial unit, except for:

a. issues that will be negotiated in the permanent status negotiations: Jerusalem, settlements, specified military locations, Palestinian refugees, borders, foreign relations and Israelis; and

b. powers and responsibilities not transferred to the Council.

Id.

112. See Oslo II, *supra* n.2, Annex I, art. V, Secs. (1)-(3). For text of sections (1)-(3), see *supra* n.95.

113. See Oslo II, *supra* n.2, Annex I, art. V, Sec. 2(a). Section 2(a) of Article V of Annex I of Oslo II reads:

The Council will, upon completion of the redeployment of Israeli military

seph's Tomb in Nablus and the Shalom Al Israel synagogue in Jericho.¹¹⁴ Likewise, Rachel's Tomb in Bethlehem would remain under full Israeli civil and security control.¹¹⁵ Geographically, Area A comprised the discrete urban centers of Nablus, Tulkarem, Qalqilya, Jenin, Ramallah, Bethlehem and the whole of Jericho.¹¹⁶

Area B, on the other hand, comprised the environs of the Area A districts¹¹⁷ and scattered "hamlets" throughout the West Bank.¹¹⁸ The Israeli military would fully redeploy but Council authority would only extend to "public order."¹¹⁹ Israel would

forces it each district, as set out in Appendix 1 to this Annex, assume the powers and responsibilities for internal security and public order in Area A in that district.

Id.

114. See Oslo II, *supra* n.2, Annex I, app. 4. Appendix 4 of Annex I of Oslo II reads:

Pursuant to Article V of this Annex the Jewish Holy Sites are as follows:

1. Joseph's Tomb (Nablus)
2. Shalom Al Israel synagogue (Jericho)

Id.

115. See Oslo II, *supra* n.2, Annex I, art. V, Sec. 7. Section 7 of Article V of Annex I of Oslo II reads:

7. Rachel's Tomb

a. Without derogating from Palestinian security responsibility in the City of Bethlehem, the two sides hereby agree on the following security arrangements regarding Rachel's Tomb which will be considered a special case during the Interim Period:

(1) While the Tomb, as well as the main road leading from Jerusalem to the Tomb, as indicated on map No. 1, will be under the security responsibility of Israel, the free movement of Palestinians on the main road will continue.

(2) For the purpose of protecting the Tomb, three Israeli guard posts may be located in the Tomb, the roof of the Waqf building, and the parking lot.

b. The present situation and existing practices in the Tomb shall be preserved.

Id.

116. See Oslo II, *supra* n.2, art. XI, Sec. 3(a). Section 3(a) of Article XI of Oslo II reads, "Area A" means the populated areas delineated by a red line and shaded in [black] on attached map No. 1." *Id.*

117. See Oslo II, *supra* n.2, art. XI, Sec. 3(b). Section 3(b) of Article XI of Oslo II reads, "'Area B' means the populated areas delineated by a [black] line and shaded in [grey] on attached map No. 1, and the built-up area of the hamlets listed in Appendix 6 to Annex I." *Id.*

118. See Oslo II, *supra* n.2, Annex I, app. 6. For text of Appendix 6 of Annex I of See Oslo II, *supra* n.2, see *supra* n.95.

119. See Oslo II, *supra* n.2, art. XIII, Sec. 2(a). Section 2(a) of Article XIII of Oslo II reads:

maintain overriding security authority¹²⁰ and joint Israeli-Palestinian patrols under Israeli command would assume police duties.¹²¹ Under a separate classification, but functionally within the parameters of Area B, Council control would extend to select areas of Hebron, excluding Areas of Israeli settlement for which Israel would maintain full jurisdictional and security control.¹²² Finally, all areas not specifically enumerated in Areas A and B would fall into Area C,¹²³ where the Council would have nominal jurisdiction over Palestinian inhabitants,¹²⁴ who would

There will be a complete redeployment of Israeli military forces from Area B. Israel will transfer to the Council and the Council will assume responsibility for public order for Palestinians. Israel shall have the overriding responsibility for security for the purpose of protecting Israelis and confronting the threat of terrorism.

Id.

120. See Oslo II, *supra* n.2, art. XIII, Sec. 2(a). Section 2(a) of Article XIII of Oslo II reads, in relevant part, "Israel shall have the overriding responsibility for security for the purpose of protecting Israelis and confronting the threat of terrorism." *Id.*

121. See Oslo II, *supra* n.2, Annex I, art. V, Sec. 5(a). Section 5(a) of Article V of Annex I of Oslo II reads:

Joint Mobile Units will operate in Area B and will be led by the Israeli vehicle.

Three such Joint Mobile Units shall be located, at each DCO. One will be on alert 24 hours a day. The two others will perform missions as directed by the DCO during daylight hours.

Id.

122. See Oslo II, *supra* n.2, Annex I, art. VII. Article VII of Annex I of Oslo II reads, in relevant part:

2 d. The Palestinian Police shall operate freely in Area H-I. Any activity or movement by it outside this area will be carried out after coordination and confirmation through the DCO established in paragraph 6 of this Article.

...

4 b. In Area H-2, the civil powers and responsibilities will be transferred to the Council; except for those relating to Israelis and their property which shall continue to be exercised by Israeli Military Government.

...

12. Hebron will continue to be one city, and the division of security responsibility will not divide the city.

Id.

123. See Oslo II, *supra* n.2, art. XI, Sec. 3(c). Section 3(c) of Article XI of Oslo II reads:

"Area C" means areas of the West Bank outside Areas A and B, which, except for the issues that will be negotiated in the permanent status negotiations, will be gradually transferred to Palestinian jurisdiction in accordance with this Agreement.

Id.

124. See Oslo II, *supra* n.2, art. XVII, Sec. 2(c)-(d). Section 2(c)-(d) of Article XVII of Oslo II reads:

c. The territorial and functional jurisdiction of the Council will apply to all persons, except for Israelis, unless otherwise provided in this Agreement.

nonetheless remain under Israeli martial law.¹²⁵

Gaza followed a similar scheme with the region within the Gaza Security Perimeter¹²⁶ functionally analogous to Area A.¹²⁷ A second class of areas, "Yellow Areas," were functionally analogous to Area B.¹²⁸ The only exception unique to the Gaza region was a fragmented five kilometer line of beach that would fall under the Council's civil authority.¹²⁹

d. Notwithstanding subparagraph a. above, the Council shall have functional jurisdiction in Area C, as detailed in Article IV of Annex III

Id.

125. See Oslo II, *supra* n.2, art. XVII, Sec. 4(a). Section 4(a) of Article XVII of Oslo II reads:

Israel, through its military government, has the authority over areas that are not under the territorial jurisdiction of the Council, powers and responsibilities not transferred to the Council and Israelis.

Id.

126. Oslo I, *supra* n.8, Annex I, art. IV, Sec. 2(a). Section 2(a) of Article IV of Annex I of Oslo I provides, "There will be a security perimeter along the Delimiting Line inside the Gaza Strip as delineated on attached map No. [2] by a [black] line (hereinafter "the Security Perimeter")." *Id.*

127. See Oslo II, *supra* n.2, Annex I, art. VI, Sec. 2. Section 2 of Article VI of Annex I of Oslo II reads, in relevant part:

Activities of the Palestinian Police inside the Security Perimeter will be coordinated through the relevant DCO. Security activities in Israel in the vicinity of the Delimiting Line that directly affect the other side will be coordinated with the Palestinian Police through the relevant DCO.

Id.

128. See Oslo II, *supra* n.2, Annex I, art. VI, Sec. 4(a). Section 4 of Article VI of Annex I of Oslo II reads:

In the areas delineated by a broken red line and shaded in yellow in attached map No. 2 (hereinafter "the Yellow Area"), and without derogating from Palestinian authority, responsibility will be shared as follows: the Israeli authorities will have the overriding responsibility and powers for security, and the Council will have the responsibility and powers for civil affairs, subject to this Agreement. In addition, with regard to the Yellow Area, cooperation and coordination in security matters, including Joint Patrols, as agreed, will be implemented.

Id.

129. See Oslo II, *supra* n.2, Annex I, art. VI, Sec. 5(c). Section 5(c) of Article VI of Annex I of Oslo II reads, in relevant part:

Notwithstanding Israeli authority over the Gush Katif settlement area, the Council may operate sections of the Mawasi beach page extending to the east up to the coast road, totaling, together with the Rafah and Khan Yunis wharves, five (5) kilometers. Israel has notified the Palestinian Authority of the locations of these sections.

Id.

3. Infrastructure

Infrastructure policy fell under the authority of the Joint Civil Affairs Coordination and Cooperation Committee (“CAC”),¹³⁰ comprised of equal numbers of Israeli and Palestinian representatives.¹³¹ The Palestinian Council reserved zoning powers¹³² but for a fifteen meter height limit on certain buildings in West Bank regions,¹³³ a 180 square meter, two-floor limit

130. See Oslo II, *supra* n.2, Annex III, art. I, Sec. 1(c). Section 1(c) of Article I of Annex III of Oslo II reads:

The [Joint Civil Affairs Coordination and Cooperation Committee] CAC will deal with the following matters:

- (1) Civil affairs, including issues concerning the transfer of civil powers and responsibilities from the Israeli military government and its Civil Administration to the Council.
- (2) Matters arising with regard to infrastructures, such as roads, water and sewage systems, power lines and telecommunication infrastructure, which require coordination according to this Agreement.
- (3) Questions regarding passage to and from the West Bank and the Gaza Strip, and safe passage between the West Bank and the Gaza Strip, including crossing points and international crossings.
- (4) The relations between the two sides in civil matters, in issues such as granting of permits.
- (5) Matters dealt with by the various professional subcommittees established in accordance with this Annex, which require further discussion or overall coordination.
- (6) Other matters of mutual interest.

Id.

131. See Oslo II, *supra* n.2, Annex III, art I, Sec. 4(b). Section 4(b) of Article I of Annex III of Oslo II reads:

The CAC and the [Regional CAC] RCACs shall be comprised of an equal number of representatives from Israel and from the Council.

Id.

132. See Oslo II, *supra* n.2, art. XI, Sec. 2(b). Section 2(b) of Article XI of Oslo II reads:

All civil powers and responsibilities, including planning and zoning, in Areas A and B, set out in Annex III, will be transferred to and assumed by the Council during the first phase of redeployment.

Id.; See Oslo II, *supra* n.2, Annex III, app. 1, art XXVII. Article XXVII of Appendix I of Annex III of Oslo II reads, in relevant part:

Powers and responsibilities in the sphere of Planning and Zoning in the West Bank and the Gaza Strip shall be transferred from the military government and its Civil Administration to the Palestinian side. This includes initiating, preparing, amending and abrogating Planning Schemes, and other legislation pertaining to issues regulated by Planning Schemes (hereinafter: “Planning Schemes”) issuing building permits and supervising and monitoring building activities.

Id.

133. See Oslo II, *supra* n.2, Annex I, art. XII, Sec. 2(c). Section 2(c) of Article XII

on buildings within a half kilometer from the security perimeter in Gaza,¹³⁴ as well as specific zoning provisions regulating construction projects' proximity to borders.¹³⁵ Violations of these zoning restrictions would result in the razing of the offending structure.¹³⁶ Further, if a proposed construction project potentially impinged on Israeli settlements or military locations, the

of Annex I of Oslo II reads, "In the areas shaded in purple on map No. 7, construction will be limited to a height of 15 meters." *Id.*

134. See Oslo II, *supra* n.2, Annex I, art. XII, Sec. 3(b)(2). Section 3(b)(2) of Article XII of Annex I of Oslo II reads:

[Within the next 500 meters of the Security Perimeter, and within the Yellow Area, buildings or installations may be constructed, provided that] such building or installation shall not exceed two floors, of a size not exceeding 180 sq. meters per floor.

Id.

135. See Oslo II, *supra* n.2, Annex I, art. XII, Secs. 2-3. Sections 2-3 of Article XII of Annex I of Oslo II reads:

2. Provisions regarding the West Bank

- a. Buildings or installations shall not be constructed or erected and natural and artificial culture shall not be altered, on either side of the roads delineated in blue on map No. 7 up to a distance of 50 meters from the center of these roads.
- b. Bridges or other structures will not be built which may prevent the movement on roads of vehicles of a height of up to 5.25 meters.
- c. In the areas shaded in purple on map No. 7, construction will be limited to a height of 15 meters.
- d. Any buildings or installations constructed or erected contrary to this paragraph shall be dismantled.

3. Provisions regarding the Gaza Strip

- a. The existing buildings, installations and natural and artificial culture in the Gaza Strip within a distance of 100 meters from the Delimiting Line shall remain as they are, at present.
- b. Within the next 500 meters of the Security Perimeter, and within the Yellow Area, buildings or installations may be constructed, provided that:
 - (1) one building or installation may be constructed on each plot, the size of which shall not be less than 25 dunams; and
 - (2) such building or installation shall not exceed two floors, of a size not exceeding 180 sq. meters per floor.

The Council shall maintain the predominantly agricultural character of the remaining areas of the Security Perimeter.

- c. Buildings or installations shall not be constructed on either side of the Lateral Roads up to a distance of 75 meters from the center of these Roads.
- d. For the purpose of enforcing this Article, the United States has provided both sides with satellite photographs of the Gaza Strip depicting the buildings, installations and natural and artificial culture existing, at the time of the signing of the Gaza-Jericho Agreement.

Id.

136. See Oslo II, *supra* n.2, Annex I, art. XII, Sec. 2(d). Section 2(d) of Article XII of Annex I of Oslo II reads, "Any buildings or installations constructed or erected contrary to this paragraph shall be dismantled." *Id.* See, e.g., *Israeli Forces Demolish Palestin-*

plan would have to be submitted to the CAC for approval prior to construction.¹³⁷ Israel granted rights to designated bands of the electromagnetic sphere for broadcast purposes¹³⁸ and, pending the establishment of independent Palestinian telecommunications channels, stipulated contracts between the Council and the Israel Telecommunications Corp. for the provision of telecommunication services.¹³⁹

4. Economics and Travel

Economic policy would be guided by the 1994 Protocol on

ian Shops, ASSOC. PRESS, Jan. 21, 2003 (detailing demolition of illegally zoned row of shops in West Bank town).

137. See Oslo II, *supra* n.2, Annex III, app. 1, art. XXVII, Sec. 3. Section 3 of Article XXVII of Annex III of Oslo II reads:

a. The Palestinian side shall ensure that no construction close to the Settlements and military locations will harm, damage or adversely affect them or the infrastructure serving them.

b. Accordingly, when the Palestinian side considers that a proposed Planning Scheme pertains to construction which may fall within subparagraph a. above (in particular: waste disposal sites; electric power stations and projects regarding sewage, hazardous materials or which may have a polluting impact), it shall provide the CAC with a copy of such a Planning Scheme prior to its entry into force.

A sub-committee established by the CAC shall, upon request by the Israeli side, discuss such Planning Scheme. Pending the decision of the committee, planning procedures shall not be concluded and no building activity shall be carried out pursuant to the said Planning Scheme.

Id.

138. See Oslo II, *supra* n.2, Annex III, app. 1, art. XXXVI, Sec. C(1). Section C(1) of Article XXXVI of Appendix 1 of Annex III of Oslo II reads:

The Palestinian side has the right to use the radio frequency spectrum in accordance with principles acceptable to both sides, for present and future needs, and frequencies assigned or reassigned within the West Bank and the Gaza Strip covering all its required services within the bands L.F., M.F., H.F., V.H.F., U.H.F., S.H.F. and E.H.F. In order to satisfy the present needs of the Palestinian side, the frequencies detailed in Schedule 5 are assigned for the use of the Palestinian side in the West Bank and the Gaza Strip.

Id.

139. See Oslo II, *supra* n.2, Annex III, app. 1, art. XXXVI, Sec. D(1). Section D(1) of Article XXXVI of Appendix 1 of Annex III of Oslo II reads:

Pending the establishment of an independent Palestinian telephone network, the Palestinian side shall enter into a commercial agreement with Bezeq — The Israel Telecommunications Corp. Ltd. (herein, “Bezeq”), regarding supply of certain services in the West Bank and the Gaza Strip. In the area of international telephony, commercial agreement(s) shall be concluded with Bezeq or other duly-licensed Israeli companies.

Id.

Economic Relations¹⁴⁰ from Oslo I.¹⁴¹ The Joint Economic Committee (“JEC”) would administer economic affairs¹⁴² with a structure similar to that of the CAC.¹⁴³ The Council could impose direct¹⁴⁴ and indirect taxes (i.e. sales tax, value added tax,

140. See Oslo II, *supra* n.2, Annex V. Annex V of Oslo II describes itself as “Supplement to the Protocol on Economic Relations.” See also Oren Gross, *Mending Walls The Economic Aspects of Israeli-Palestinian Peace*, 15 AM. U. INT’L L. REV. 1539, 1607 (2000) (describing Oslo II as adopting custom union model that treats Israel and Occupied Territories as one economic unit); Sharif S. Elmusa & Mahmud El-Jaafari, *Power and Trade: The Israeli-Palestinian Economic Protocol*, 24(2) J. PALESTINE STUD. 14 (1995) (analyzing protocol’s provisions and differences with prior economic relationship between Palestinians and Israel). Authors generally conclude that the Protocol was more aimed at serving Israeli economic interests and the failure of Palestinians to get certain concessions, water access, reciprocity measures for exports and Israel’s ability to control Palestinian labor market for example, as indicative of the Palestinians weak overall bargaining position. *Id.* at 29-30.

141. See Oslo I, *supra* n.8, Annex IV, pmb. The Preamble of Annex IV of Oslo I outlines its purpose:

The two parties view the economic domain as one of the cornerstone in their mutual relations with a view to enhance their interest in the achievement of a just, lasting and comprehensive peace. Both parties shall cooperate in this field in order to establish a sound economic base for these relations, which will be governed in various economic spheres by the principles of mutual respect of each other’s economic interests, reciprocity, equity and fairness.

This protocol lays the groundwork for strengthening the economic base of the Palestinian side and for exercising its right of economic decision making in accordance with its own development plan and priorities. The two parties recognise each other’s economic ties with other markets and the need to create a better economic environment for their peoples and individuals.

Id.

142. Oslo I, *supra* n.8, Annex IV, art. II, Secs. 1-2. Sections 1-2 of Article II of Annex IV of Oslo I read:

1. Both parties will establish a Palestinian-Israeli Joint Economic Committee (hereinafter — the JEC) to follow up the implementation of this Protocol and to decide on problems related to it that may arise from time to time. Each side may request the review of any issue related to this Agreement by the JEC.
2. The JEC will serve as the continuing committee for economic cooperation envisaged in Annex III of the Declaration of Principles.

Id.

143. Oslo I, *supra* n.8, Annex IV, art. II, Secs. 3-4. Sections 3-4 of Article II of Annex IV of Oslo I read:

3. The JEC will consist of an equal number of members from each side and may establish sub-committees specified in this Protocol.
A sub-committee may include experts as necessary.
4. The JEC and its sub-committees shall reach their decisions by agreement and shall determine their rules of procedure and operation, including the frequency and place or places of their meetings.

Id.

144. See Oslo II, *supra* n.2, Annex V, app. 1, Secs. 1-3. Sections 1-3 of Appendix 1 of Annex V of Oslo II provide:

etc.),¹⁴⁵ with revenue sharing provisions for Palestinian day laborers¹⁴⁶ and Israeli/Palestinian corporations.¹⁴⁷ While the Pal-

1. Israel and the Palestinian side will each determine and regulate independently its own tax policy in matters of direct taxation, including income tax on individuals and corporations, property taxes, municipal taxes and fees.
2. Each tax administration will have the right to levy the direct taxes generated by economic activities within the area under its tax responsibility.
3. Each tax administration may impose additional taxes on its residents (individuals and corporations) who conduct economic activities in areas under the tax responsibility of the other side.

Id.

145. See Oslo II, *supra* n.2, Annex V, app. 2, Secs. 1-2. Sections 1-2 of Appendix 2 of Annex V of Oslo II provide:

1. The Israel and the Palestinian tax administrations will levy and collect VAT and purchase taxes on local production, as well as any other indirect taxes, in their respective areas.
2. The purchase tax rates within the jurisdiction of each tax administration will be identical as regards locally produced and imported goods.

Id.

146. See Oslo II, *supra* n.2, Annex V, app. 1, Secs. 4, 9-10. Section 4 and, Secs. 9-10 of Appendix 1 of Annex V of Oslo II provide:

4. Israel will transfer to the Palestinian side a sum equal to:
 - a. 75% of the income taxes collected from Palestinians from the West Bank and the Gaza Strip employed in Israel.
 - b. The full amount of the income taxes collected from Palestinians from the West Bank and the Gaza Strip employed in the Settlements.

...

9. Each side will grant its residents a tax relief for income tax paid by them on income accrued in or derived in the areas under the tax responsibility of the other side.
10. Both sides agree that a special subcommittee will be established to finalize the arrangements and procedures regarding taxation issues (including issues concerning double taxation).

Id.

147. See Oslo II, *supra* n.2, Annex V, app. 2, Secs. 8-10. Sections 8-10 of Appendix 2 of Annex V of Oslo II provide, in relevant part:

8. There will be clearance of VAT revenues between the Israeli side and the Palestinian side according to [registered dealers who comply with specified procedures]
9. VAT paid on transactions made with dealers registered with the Israeli side by not-for-profit Palestinian organizations and institutions, or by financial institutions, which are registered with the Palestinian side, or by the Palestinian local authorities, or by the Palestinian side itself, will be remitted to the Palestinian side in accordance with the clearance system set out in paragraph 8 above.
10. VAT paid on transactions made with dealers registered with the Palestinian side by not-for-profit Israeli organizations and institutions, or by financial institutions, which are registered with the Israeli side, or by the Israeli local authorities, or by the Israeli side itself, will be remitted to the Israeli side in accordance with the clearance system set out in paragraph 8 above.

Id.

estonian Monetary Authority was established to administer the regulation and implementation of the monetary policies,¹⁴⁸ the currency was to remain the Israeli Sheqel with the possibility of a Palestinian currency left to future negotiations.¹⁴⁹

Israel retained authority over transportation routes through Area C and between Gaza and the West Bank.¹⁵⁰ Connecting roads throughout the West Bank came under the control of joint patrols under Israeli command¹⁵¹ and in Gaza, Israel maintained full security control over connecting roads,¹⁵² permitting some

148. See Oslo II, *supra* n.2, Annex III, app. 1, art. IV. Article IV of Appendix 1 of Annex III of Oslo II reads, in relevant part:

[The Palestinian Monetary Policy will have authority over] issues relating to foreign currency services, regulation, licensing, supervision and inspection of banking activities, and the regulation and supervision of capital activities, and powers and responsibilities relating to monetary policies, all as formulated in Annex V (Protocol on Economic Relations).

Id.

149. Oslo I, *supra* n.8, Annex IV, art. IV, Sec. 10. Section 10 of Article IV of Oslo I reads:

- a. The New Israeli Sheqel (NIS) will be one of the circulating currencies in the Areas and will legally serve there as means of payment for all purposes including official transactions. Any circulating currency, including the NIS, will be accepted by the Palestinian Authority and by all its institutions, local authorities and banks, when offered as a means of payment for any transaction.
- b. Both sides will continue to discuss, through the JEC, the possibility of introducing mutually agreed Palestinian currency or temporary alternative currency arrangements for the Palestinian Authority.

Id.

150. See Oslo II, *supra* n.2, Annex I, art. IX-X. Articles IX-X of Annex I of Oslo II provide generally:

Movement between the West Bank and Israel shall be governed by the applicable laws, regulations and rules regulating the movement of persons and vehicles between the West Bank and Israel, while respecting the importance of the economic and social life, development programs and projects, and emergency health care services of the Palestinian population.

...

There shall be a safe passage connecting the West Bank with the Gaza Strip for movement of persons, vehicles and goods, as detailed in this Article.

Id.

151. See Oslo II, *supra* n.2, Annex I, art. V, Sec. 3(b)(6). Section 3(b)(6) of Article V of Annex I of Oslo II reads, "The Palestinian Police and the Israeli military forces will conduct joint security activities on the main roads as set out in this Annex." *Id.*

152. See Oslo II, *supra* n.2, Annex I, art. VI, Sec. 7(a)(1). Section 7(a)(1) of Article VI of Annex I of Oslo II provides:

On the three lateral roads connecting the Israeli settlements in the Gaza Strip to Israel, namely the Kissufim — Gush Katif road; the Sufa — Gush Katif road; and the Karni — Netzarim road, as indicated by a light blue line on attached map No. 2, including the adjacent sides upon which the security of traffic

Israeli led joint patrols.¹⁵³ There was also to be checkpoint free travel throughout the West Bank¹⁵⁴ and a safe passage constructed to allow travel between the West Bank and Gaza for a minimum of ten hours per day.¹⁵⁵ Israel fully controlled the air-

along these roads is dependent (hereinafter "the Lateral Roads"), the Israeli authorities will have all necessary responsibilities and powers in order to conduct independent security activity, including Israeli patrols

Id.

153. See Oslo II, *supra* n.2, Annex I, art. VI, Sec. 7(a)(2). Section 7(a)(2) of Article VI of Annex I of Oslo II provides, "Joint Patrols will operate along the Lateral Roads. Such joint patrols will be led by the Israeli vehicle." *Id.*

154. See Oslo II, *supra* n.2, Annex I, art. IX, Sec. 2(a). Section 2(a) of Article IX of Annex I of Oslo II provides:

Without derogating from Israel's security powers and responsibilities in accordance with this Agreement, movement of people, vehicles and goods in the West Bank, between cities, towns, villages and refugee camps, will be free and normal, and shall not need to be effected through checkpoints or roadblocks.

Id. Responding to security concerns rooted in bombings in Israel by residents of Palestinian controlled areas, Israel maintained checkpoints and roadblocks throughout the 1990s, which put enormous strain on Palestinian economy and quality of life. See WATSON, *supra* n.2, at 164-66 (discussing Israeli practice of closure of West Bank and Gaza strip as legally justified for security purposes so long as temporary, extraordinary and performed in good-faith); HASSASSIAN, *supra* n.63, at 119 (describing Palestinian frustration with checkpoints and roadblocks as putting strain on Palestinian economy and freedom of movement). See also Jessica Berry, *Twin Babies Die in Israeli Siege*, *GUARDIAN*, Mar. 13, 1996, at 13 (reporting on waits in passing through checkpoints); Barry Schweid, *Emergency Plan to Ease Israeli Restrictions on Palestinians*, *ASSOC. PRESS*, Mar. 26, 1996 (reporting on proposals to implement free passage to ease Palestinian economic hardship); Daniel Sternoff, *Palestinians Claw Out of Depression*, *FIN. POST*, June 11, 1997, at 50 (reporting on economic hardship resulting from blockades and checkpoints); Khalil Abed Rabbo, *Hebron Pays Heavy Price as City Under Siege*, *AGENCE FR. PRESSE*, Jul. 9, 1997 (reporting on difficulty in transit through checkpoints to and from Hebron); David Watkins, *Letter: Ethics Check on the West Bank*, *GUARDIAN*, Mar. 14, 1998, at 22 (reporting on infrastructural hardship resulting from checkpoints and roadblocks); Samar Assad, *As Millennium Nears, Violence and Israel's Grip Cast Gloom over Bethlehem*, *ASSOCIATED PRESS*, Oct. 28, 1999 (reporting on difficulty in transit through checkpoints to and from Bethlehem).

155. See Oslo II, *supra* n.2, Annex I, art. X. Article X of Annex I of Oslo II reads, in relevant part:

- a. There shall be a safe passage connecting the West Bank with the Gaza Strip for movement of persons, vehicles and goods, as detailed in this Article.
- b. Israel will ensure safe passage for persons and transportation during daylight hours (from sunrise to sunset) or as otherwise agreed by the JSC, but in any event not less than 10 hours a day.

Id.

The safe passage was opened in 1999. See The Sharm el-Sheikh Memorandum on Implementation Timeline of Outstanding Commitments of Agreements Signed and the Resumption of Permanent Status Negotiations, Sept. 4, 1999, Israel-PLO, art. 5(a)-(b) [hereinafter Sharm al-Sheikh Agreement]. Section 5(a)-(b) of the Sharm al-Sheikh Agreement stipulated:

space,¹⁵⁶ limiting the Palestinians to five helicopters and three small aircraft for VIP transportation between the West Bank and Gaza.¹⁵⁷ Finally, Palestinians had access to coastal waters along Gaza for the use of low powered boats so long as they remained within a twenty nautical mile distance from shore between two restricted zones to its north and south.¹⁵⁸

5. Security

The Palestinian police stood as the only authorized security apparatus¹⁵⁹ composed of six distinct branches (Civil Police, Public Security, Preventative Security, Presidential Security, In-

a. The operation of the Southern Route of the Safe Passage for the movement of persons, vehicles, and goods will start on October 1, 1999 (Annex I, Article X, Interim Agreement) in accordance with the details of operation, which will be provided for in the Safe Passage Protocol that will be concluded by the two Sides not later than September 30, 1999;

b. The two Sides will agree on the specific location of the crossing point of the Northern Route of the Safe Passage as specified in Annex I, Article X, provision c-4, in the Interim Agreement not later than October 5, 1999.

Id. See also Lynfield, *supra* n.59 (reporting opening of safe passage in 1999).

156. See Oslo II, *supra* n.2, Annex I, art. XIII, Sec. 10(a). Section 10(a) of Article XIII of Annex I of Oslo II reads:

Aviation activity by Israel will continue to be operated above the West Bank and the Gaza Strip, with the same limitations applicable in Israel regarding civil and military flights over densely-populated areas.

Id.

157. See Oslo II, *supra* n.2, Annex I, art. XIII, Secs. 1(a)-(c). Sections 1(a)-(c) of Article XIII of Annex I of Oslo II provide as follows:

Operation of aircraft for the use of the Council in the West Bank and the Gaza Strip shall be initially as follows:

a. Two (2) transport helicopters for VIP transportation within and between the West Bank and the Gaza Strip.

b. Up to 3 helicopters for the purpose of transport missions to approved landing pads.

c. 3 fixed-wing transport aircraft with up to 35 persons capacity, for transporting persons between the West Bank and the Gaza Strip.

Id.

158. See Oslo II, *supra* n.2, Annex I, art. XIV. Article XIV of Annex I of Oslo II detailed the parameters of three zones: K, M and L. *Id.* Zones K (1.5 nautical mile wide) and M (1 nautical mile wide) were buffer zones, allowing no Palestinian water traffic, that extended twenty nautical miles from Gaza coast on northern and southern borders respectively. *Id.* In between, zone L extended 20 nautical mile from the Gaza coast in which low powered fishing and recreational boats could operate. *Id.*

159. See Oslo II, *supra* n.2, Annex I, art. II, Sec. 1(a). Section 1(a) of Article II of Annex I of Oslo II specified, "The Palestinian Police is the only Palestinian security authority." *Id.*

telligence and Emergency Services and Rescue),¹⁶⁰ as well as a coastal police in Gaza.¹⁶¹ The Agreement limited their deployment to 18,000 officers in Gaza and 12,000 in the West Bank¹⁶² and mandated local recruitment (excepting a limited number of Jordanians and registered Palestinians in Egypt).¹⁶³ They were to be lightly armed¹⁶⁴ and the import of any weapons was subject

160. See Oslo II, *supra* n.2, Annex I, art. IV, Sec. 2(a). Section 2(a) of Article IV of Annex I of Oslo II specifically provided:

The Palestinian Police shall consist of one integral unit under the control of the Council. It shall be composed of six branches:

- (1) Civil Police (Al Shurta);
- (2) Public Security;
- (3) Preventive Security;
- (4) Amn Al Ri'asah [Presidential Security];
- (5) Intelligence; and
- (6) Emergency Services and Rescue (Al Difa'a Al Madani).

In each district, all members of the six Police branches shall be subordinate to one central command.

Id.

161. See Oslo II, *supra* n.2, Annex I, art. XIV, Sec. 2(a). Section 2(b) of Article XIV of Annex I of Oslo II further provided, in relevant part:

The Palestinian Coastal police (hereinafter the "PCP") may function in Zone L, up to a distance of 6 nautical miles from the coast. In special cases, it may also exercise control over Palestinian fishing boats fishing in Zone L in an additional area of 6 nautical miles, up to the limit of 12 nautical miles from the coastline, after clearance and coordination through the MC.

Id.

162. See Oslo II, *supra* n.2, Annex I, art. IV, Sec. 3(a). Section 3(a) of Article IV of Annex I of Oslo II stipulated:

During the interim period, the total number of policemen of the Palestinian Police in all its branches in the West Bank and the Gaza Strip will be no more than 30,000 out of which up to 12,000 policemen may be deployed in the West Bank and up to 18,000 policemen in the Gaza Strip. These numbers may be changed by agreement, if necessary. The Palestinian side will notify Israel of the names of the policemen recruited to the Palestinian Police in the Gaza Strip.

Id.

163. See Oslo II, *supra* n.2, Annex I, art. IV, Sec. 4. Section 4 of Article IV of Annex I of Oslo II provided, in relevant part:

The Palestinian Police shall consist of policemen recruited locally, and from abroad (from among individuals holding Jordanian passports or Palestinian documents issued by Egypt). The number of Palestinian recruits from abroad shall not exceed 5,000 in the West Bank and 7,000 in the Gaza Strip.

Id.

164. See Oslo II, *supra* n.2, Annex I, art. IV, Sec. 5. Section 5 of Article IV of Annex I of Oslo II provided, in relevant part:

- a. In the West Bank and the Gaza Strip, uniformed policemen may carry arms, and plainclothes policemen on duty who hold special accreditation may carry

to Israeli oversight.¹⁶⁵ Operations, in all but Area A, were to be conducted by Israeli lead Joint Mobile Units (“JMU”), stationed at each of the eight West Bank Joint District Coordination Offices (“DCO”)¹⁶⁶ corresponding to the eight Area A districts, excluding Salfit.¹⁶⁷ The West Bank JMUs would be stationed at four junctions (Nissanit, Netzarim, Deir el-Ballah and Sufa-Morag)¹⁶⁸ and in Gaza, there would be DCOs at Khan Yunis and

personal light arms concealed in their clothing, in accordance with this Agreement.

b. In the West Bank, the Palestinian Police will possess the following arms and equipment:

- (1) up to 4,000 rifles;
- (2) up to 4,000 pistols;
- (3) up to 120 machine guns of 0.3” or 0.5” caliber; and
- (4) up to 15 light, unarmed riot vehicles of a type to be agreed on between the two sides in the JSC.

c. In the Gaza Strip, the Palestinian Police will possess the following arms and equipment:

- (1) 7,000 light personal weapons;
- (2) up to 120 machine guns of 0.3” or 0.5” caliber; and
- (3) up to 45 wheeled armored vehicles of a type to be agreed on between the two sides, and of which 22 will be deployed in protecting Council installations. The use of wheeled armored vehicles in the Security Perimeter, on the Lateral Roads and on their adjacent sides, or in the vicinity of the Settlements shall be approved through the relevant DCO. Movement of such vehicles along the central North-South road (Road No. (4) in the Gaza Strip may take place only after providing notification to the relevant DCO.

Id.

165. See Oslo II, *supra* n.2, Annex I, art. IV, Sec. 6. Section 6 of Article IV of Annex I of Oslo II requires:

- a. All foreign contributions and other forms of assistance to the Palestinian Police must comply with the provisions of this Agreement.
- b. The introduction of arms, ammunition or equipment intended for the Palestinian Police shall be coordinated through the JSC, in accordance with its established practices.

Id.

166. See Oslo II, *supra* n.2, Annex I, art. V, Sec. 5 (stating JMUs will operate out of DCOs in West Bank). For relevant text of, Section 5 of Article V of Annex I of Oslo II, see *supra* n.164.

167. See Oslo II, *supra* n.2, Annex I, art. V, Sec. 1 (listing locations of DCOs in West Bank). For relevant text of Section 1, Article V of Annex I of Oslo II, see *supra* n.95.

168. See Oslo II, *supra* n.2, Annex I, art. VI, Sec. 9. Section 9 of Article VI of Annex I of Oslo II reads:

a. Joint Mobile Units will be located, at the following junctions:

- (1) the Nissanit junction;
- (2) the Netzarim junction,
- (3) the Deir el-Ballah junction; and
- (4) the Sufa-Morag junction.

b., at the Netzarim junction, the Israeli side of this Joint Mobile Unit will

Erez respectively.¹⁶⁹

6. Jurisdiction

Israeli and Palestinian security officials agreed to cooperate to suppress terrorism,¹⁷⁰ ensure the mutual safety of citizens¹⁷¹ and secure infrastructure.¹⁷² Palestinian civilians could only possess registered handguns¹⁷³ and all other weapons and explosives

check Israeli vehicles, which will then be able to continue their journey without interference. This Joint Mobile Unit will also operate as a Joint Patrol between the Netzarim junction and Wadi Gaza under the direction of the relevant DCO.

Id.

169. See Oslo II, *supra* n.2, Annex I, art. VI, Sec. 10. Section 10 of Article VI of Annex I of Oslo II provides:

- a. Two DCOs will function in the Gaza Strip as follows: a. A DCO for the Gaza district, located, at the Erez crossing point with subordinate Joint Liaison Bureaus, at the Erez and Nahal Oz crossing points.
- b. A DCO for the Khan Yunis district, located, at the Nuriya Camp with subordinate Joint Liaison Bureaus, at the Sufa crossing points and, at the Rafah Terminal.

Id.

170. See Oslo II, *supra* n.2, Annex I, art. II, Sec. 2. Section 2 of Article II of Annex I of Oslo II reads:

Both sides will, in accordance with this Agreement, act to ensure the immediate, efficient and effective handling of any incident involving a threat or act of terrorism, violence or incitement, whether committed by Palestinians or Israelis. To this end, they will cooperate in the exchange of information and coordinate policies and activities. Each side shall immediately and effectively respond to the occurrence or anticipated occurrence of an act of terrorism, violence or incitement and shall take all necessary measures to prevent such an occurrence.

Id.

171. See Oslo II, *supra* n.2, Annex I, art. II, Sec. 3(a)-(c). Sections 3(a)-(c) of Article II of Annex I of Oslo II requires the Palestinian and Israeli sides to both:

- a. protect all residents of, and all other persons present in, these areas;
- b. actively prevent incitement to violence, including violence against the other side or persons under the authority of the other side;
- c. apprehend, investigate and prosecute perpetrators and all other persons directly or indirectly involved in acts of terrorism, violence and incitement

Id.

172. See Oslo II, *supra* n.2, Annex I, art. II, Sec. 3(d). Section 3(d) of Article II of Annex I of Oslo II likewise requires both sides to:

prevent and deal with any attempt to cause damage or harm to infrastructure serving the other side, including, inter alia, roads, water, electricity, telecommunications and sewage infrastructure.

Id.

173. See Oslo II, *supra* n.2, Annex I, art. XI, Secs. 2(a)-(e). Sections 2(a)-(e) of Article XI of Annex I of Oslo II provide:

- a. Each side shall enforce upon civilians, Palestinians or Israelis, in the West

were strictly prohibited.¹⁷⁴ The Council would administer the Criminal Law in Areas A and B and offenses against Palestinians outside the territory where Israel did not assert an interest.¹⁷⁵

Bank and the Gaza Strip, in accordance with their security responsibility, a prohibition on possession or carrying of weapons without a license.

b. The Palestinian Police may grant licenses to possess or carry pistols for civilian use. The modalities for granting such licenses, as well as categories of persons who may be granted such licenses, will be agreed upon in the JSC.

c. Upon the assumption of security responsibility, and in accordance with the Palestinian law, the Palestinian Police shall declare a period of grace of one month, during which period holders of unlicensed weapons will be required to declare that they hold such weapons and to apply for licenses. The Palestinian Police may grant such licenses in accordance with subparagraph b. above, and will enforce the Palestinian security policy set out in Article II, paragraph 1 of this Annex, against persons who hold unlicensed weapons.

d. Israelis may carry weapons licensed in accordance with subparagraph a. above.

e. The Palestinian Police will maintain an updated register of all weapons licensed by it.

Id.

174. *See* Oslo II, *supra* n.2, Annex I, art. X, Secs. 2(f)-(g). Sections 2(f)-(g) of Article X of Annex I of Oslo read:

f. The Palestinian Police will prevent the manufacture of weapons as well as the transfer of weapons to persons not licensed to possess them.

g. The use of explosives in quarries and for other civilian purposes will be only in accordance with modalities and procedures agreed upon in the JSC.

Id.

175. *See* Oslo II, *supra* n.2, Annex IV, art. I, Sec. 1. The first section of the first Article of Annex IV of Oslo II dictates the criminal jurisdiction of the Council:

1. a. The criminal jurisdiction of the Council covers all offenses committed by Palestinians and/or non-Israelis in the Territory, subject to the provisions of this Article.

For the purposes of this Annex, "Territory" means West Bank territory except for Area C which, except for the Settlements and the military locations, will be gradually transferred to the Palestinian side in accordance with this Agreement, and Gaza Strip territory except for the Settlements and the Military Installation Area.

b. In addition, the Council has criminal jurisdiction over Palestinians and their visitors who have committed offenses against Palestinians or their visitors in the West Bank and the Gaza Strip in areas outside the Territory, provided that the offense is not related to Israel's security interests.

c. Notwithstanding the provisions of subparagraph a. above, the criminal jurisdiction of each side over offenses committed in Area B shall be in accordance with the provisions of paragraph 2.a of Article XIII of this Agreement.

d. Individuals arrested by the Palestinian Police in Area B for public order and other reasons shall be tried before the Palestinian courts, provided that these courts have criminal jurisdiction.

Id. Cf. RIZIQ SHAQAIR, CRIMINAL JURISDICTION UNDER THE GAZA-JERICHO AGREEMENT 36-49 (1994) (explicating analogous reservations of jurisdiction in Oslo I and concluding

Israel reserved jurisdiction over any offenses committed by Israelis,¹⁷⁶ against Israelis¹⁷⁷ and involving the Israeli military.¹⁷⁸ Palestinian police were forbidden from stopping Israeli vehicles on roads¹⁷⁹ and arresting Israelis, but could detain them in place long enough to be taken by Israeli military authorities.¹⁸⁰ Extradition of non-Palestinian persons from Israel would only be granted upon a reasonable evidentiary showing of crimes pun-

Israel did not recognize Palestinian territorial jurisdiction but simply incorporated Palestinian elements into Israeli martial law).

176. See Oslo II, *supra* n.2, Annex IV, art. I, Sec. 2(b). Section 2(b) of Article I of Annex IV of Oslo II removes jurisdiction to Israel all "offenses committed in the Territory by Israelis." *Id.*

177. See Oslo II, *supra* n.2, Annex IV, art. I, Sec. 4(b), 7(a). Section 4(b) of Article I of Annex IV of Oslo II details requirements for exceptions to Council jurisdiction with, Sec. 7(a) of Article I of Annex IV of Oslo II providing:

Without prejudice to the criminal jurisdiction of the Council, and with due regard to the principle that no person can be tried twice for the same offense, Israel has, in addition to the above provisions of this Article, criminal jurisdiction in accordance with its domestic laws over offenses committed in the Territory against Israel or an Israeli.

Id.

178. See Oslo II, *supra* n.2, Annex IV, art. I, Sec. 7(b). Section 7(b) of Article I of Annex IV of Oslo II separately provides:

In exercising its criminal jurisdiction in accordance with subparagraph a. above, activities of the Israeli military forces related to subparagraph a. above shall be as set out in the Agreement and Annex I thereto.

Id.

179. See Oslo II, *supra* n.2, Annex 1, art. XI, Sec. 4(c). Section 4(c) of Article XI of Article I of Oslo II provides:

On other roads vehicles bearing Israeli license plates shall not be stopped by the Palestinian Police, except that such vehicles may be stopped in the Gaza Strip, in Area A or in places in Area B where there is a police station or post for the purpose of identification checks of the above-mentioned documentation.

Id.

180. See Oslo II, *supra* n.2, Annex IV, art. II, Sec. 2(c). Section 2(c) of Article II of Annex IV of Oslo II requires:

The Palestinian authorities shall not arrest Israelis or place them in custody. Israelis can identify themselves by presenting Israeli documentation.

However, when an Israeli commits a crime against a person or property in the Territory, the Palestinian Police, upon arrival, at the scene of the offense shall, if necessary, until the arrival of the Israeli military forces, detain the suspect in place while ensuring his protection and the protection of those involved, prevent interference with the scene of the offense, collect the necessary evidence and conduct preliminary questioning, and in any case shall immediately notify the Israeli authorities through the relevant DCO.

Id.

ishable by seven years or more.¹⁸¹

In civil matters, Article XX assigns to the Palestinian Council all Israeli liabilities “arising with regard to acts or omissions which occurred prior to [the transfer of authority].”¹⁸² Likewise, Israel exercised blanket sovereign immunity in Palestinian courts¹⁸³ though it would exercise parity in enforcing judgments¹⁸⁴ (though certain equitable remedies against Israeli citi-

181. See Oslo II, *supra* n.2, Annex IV, art. II, Secs. 7(d)-(e). Sections 7(d)-(e) of Article II of Annex IV of Oslo II requires for extradition from Israel to Territories:

d. Where the request is for the transfer of a suspect who is not a Palestinian requested by the Council;

(1) the arrest warrant shall only be issued pursuant to an application made by or on behalf of the Attorney-General, confirming that there is a reasonable evidentiary basis that the offense was committed by the suspect;

(2) the offense must be punishable by not less than 7 years imprisonment under the law of the requesting side.

e. (1) Individuals suspected of offenses punishable by less than 7 years' imprisonment shall be interrogated by the investigating side in a facility of the other side or, at an agreed location.

(2) Interrogation shall take place in the presence of a police officer of the other side.

(3) Upon the request of the investigating side the other side may detain the suspect in custody pending and during questioning. Where the presence of the suspect is required for an objective reason, such as confronting witnesses and identification of sites the suspect shall be transferred for that purpose only.

Id.

182. See Oslo II, *supra* n.2, art. XX, Secs. 1(a)-(b). Sections 1(a)-(b) of Article XX of Oslo II provide:

a. The transfer of powers and responsibilities from the Israeli military government and its civil administration to the Council, as detailed in Annex III, includes all related rights, liabilities and obligations arising with regard to acts or omissions which occurred prior to such transfer. Israel will cease to bear any financial responsibility regarding such acts or omissions and the Council will bear all financial responsibility for these and for its own functioning.

b. Any financial claim made in this regard against Israel will be referred to the Council.

Id.

183. See Oslo II, *supra* n.2, Annex IV, art. III, Sec. 3. Section 3 of Article III of Annex IV of Oslo II provides, “The jurisdiction of the Palestinian courts and judicial authorities does not cover actions against the State of Israel including its statutory entities, organs and agents.” *Id.*

184. See Oslo II, *supra* n.2, Annex IV, art. III, Sec. 4 (dealing specifically with judgments against Israelis by Palestinian Courts). Section 4 of Article III of Annex IV of Oslo II provides, in relevant part:

Israelis, including registered companies of Israelis, conducting commercial activity in the Territory are subject to the prevailing civil law in the Territory relating to that activity. Enforcement of judicial and administrative judgments

zens could only be issued by Israeli courts).¹⁸⁵ Further, Israelis were exempt from the jurisdiction of Palestinian courts unless the Israeli in question was a corporation conducting ongoing business in Palestinian jurisdiction,¹⁸⁶ the suit involved real property under Palestinian jurisdiction¹⁸⁷ or the defendant consented.¹⁸⁸ Israelis were free to bring cases as plaintiffs in Palestinian courts (unless against another Israeli, where the above exceptions applied).¹⁸⁹ Any disputes arising from the interpretation of the Agreement would be brought before the

and orders issued against Israelis and their property shall be effected by Israel, within a reasonable time, in coordination and cooperation with the Council
Id.; See Oslo II, *supra* n.2, Annex IV, art. IV, Sec. 3(a). Section 3(a) of Article IV of Annex IV of Oslo II provides:

Israel and the Council will enforce judgments rendered by the judicial organs under the responsibility of the other side, provided that the judicial organ concerned has the jurisdiction to render the judgment and further provided that the enforcement is not contrary to public policy. The execution offices under the responsibility of each side shall execute such judgments as if rendered by their own judicial organs.

Id.

185. See Oslo II, *supra* n.2, Annex IV, art. IV, Sec. 3(c). Section 3(c) of Article IV of Annex IV of Oslo II provides:

Without derogating from the civil jurisdiction of the Palestinian courts and judicial authorities in accordance with Article III, imprisonment orders against Israelis, and orders restraining Israelis from traveling abroad (excluding interim orders before a judgment was given), shall only be issued by Israeli execution offices and effected by the Israeli police.

Id.

186. See Oslo II, *supra* n.2, Annex IV, art. III, Sec. 2(a). Section 2(a) of Article III of Annex IV of Oslo II grants jurisdiction to the Palestinian Council when:

[T]he subject matter of the action is an ongoing Israeli business situated in the Territory (the registration of an Israeli company as a foreign company in the Territory being evidence of the fact that it has an ongoing business situated in the Territory).

Id.

187. See Oslo II, *supra* n.2, Annex IV, art. III, Sec. 2(b). , Sec. 2(b) of Article III of Annex IV of Oslo II grants jurisdiction to the Palestinian Council when "[T]he subject matter of the action is real property located in the Territory." *Id.*

188. See Oslo II, *supra* n.2, Annex IV, art. III, Secs. 2(c)-(d). Sections 2(c)-(d) of Article III of Annex IV of Oslo II grants jurisdiction to the Palestinian Council when:

- c. the Israeli party is a defendant in an action and has consented to such jurisdiction by notice in writing to the Palestinian court or judicial authority,
- d. the Israeli party is a defendant in an action, the subject matter of the action is a written agreement, and the Israeli party has consented to such jurisdiction by a specific provision in that agreement

Id.

189. See Oslo II, *supra* no.2, Annex IV, art. III, Sec. 2(e). Section 2(e) of Article III of Annex IV of Oslo II grants jurisdiction to the Palestinian Council when:

[T]he Israeli party is a plaintiff who has filed an action in a Palestinian court.

relevant Coordination Committee¹⁹⁰ and, failing success there, *ad hoc* arbitration arrangements.¹⁹¹

7. Oslo II's Reception

The agreement narrowly passed the Knesset.¹⁹² Forty-seven percent of the Israeli public were polled as "vehemently opposed"¹⁹³ to the Agreement and four hundred thousand Palestinian refugees in Lebanon mounted a general strike.¹⁹⁴ In Hebron, Palestinians, angry over their provisional status (exacer-

If the defendant in the action is an Israeli, his consent to such jurisdiction in accordance with subparagraphs c. or d. above shall be required

Id.

190. See Oslo II, *supra* n.2, art. XXI, Sec. 1. Section 1 of Article XXI of Oslo II provides:

Disputes arising out of the application or interpretation of this Agreement or any related agreements pertaining to the interim period shall be settled through the Liaison Committee.

Id.

191. See Oslo II, *supra* n.2, art. XXI, Secs. 2-3. Sections 2-3 of Article XXI of Oslo II provide:

2. Disputes which cannot be settled by negotiations may be settled by a mechanism of conciliation to be agreed between the Parties.
3. The Parties may agree to submit to arbitration disputes relating to the interim period, which cannot be settled through conciliation. To this end, upon the agreement of both Parties, the Parties will establish an Arbitration Committee.

Id.

192. See *Oslo 2 is Now in Force*, MIDEAST MIRROR, Oct. 6, 1995 (reporting Knesset approval vote of sixty-one to fifty-nine); Dafna Linzer, *Israel to Release 1,200 Palestinian Prisoners*, ASSOC. PRESS, Oct. 6, 1995 (reporting passage of Oslo II by sixty-one to fifty-nine and fifteen hour debate leading up to it); Dore Gold, *Oslo 2 Maps Lay Groundwork for Return to '67 Borders*, JERUSALEM POST, Oct. 6, 1995 (reporting Knesset vote and details of agreement as delineating path toward pre-1967 war borders).

193. *A Nation Divided on Path to Peace*, PRESS ASSN. LTD., Nov. 5, 1995 (reporting poll numbers showing Israeli disapproval of Oslo II); see also Deborah Horan, *Palestine-Israel: No Celebrations to Mark Oslo II Signing*, INTER PRESS SERVICE, Sept. 28, 1995 (reporting poll numbers of Israelis and Palestinians showing Israelis more critical of Oslo II); see also Laurie Copans, *Israel's right-wing blasts agreement*, UNITED PRESS INT'L, Sept. 28, 1995 (reporting strong opposition by Israeli right-wing political leaders).

194. See *Palestinian Refugees in Lebanon Protest Against PLO-Israeli Agreement*, XINHUA NEWS AGENCY, Sept. 28, 1995 (reporting general strike in Lebanon by Palestinian Refugees); *Arab, Israeli protesters demonstrate against Taba accord*, DEUTSCHE PRESSE-AGENTUR, Sept. 28, 1995 (reporting protests throughout Israeli and Palestinian populations including strikes in Lebanon by Palestinian Refugees and Hebron); *Israel, PLO Reach Accord on West Bank Military Pullout and Expanded Palestinian Self-Rule; Elections Set; Hebron Issue Resolved*, FACTS ON FILE WORLD NEWS DIGEST, Sept. 28, 1995 (reporting Democratic Front for the Liberation of Palestine and Popular Front for the Liberation of Palestine's call for general strike).

bated by remaining sensitivities over the al-Ibrahimi Mosque massacre by settler Baroch Goldstein a year and half before),¹⁹⁵ also called a general strike¹⁹⁶ and Israeli settlers flooded the streets in protest.¹⁹⁷ One thousand Zionist protesters picketed

195. See Clyde Haberman, *West Bank Massacre*, N.Y. TIMES, Feb. 26, 1994, at 1 (counting Baruch Goldstein's attack killing forty-fifty Muslims and its sparking violent protests in Jerusalem); *The Hebron Massacre*, TIMES (U.K.), Feb. 26, 1994 (describing attack by Baroch Goldstein and letter of revenge signed by Hamas and PLO); *Bloodbath in Hebron*, MIDEAST MIRROR, Feb. 25, 1994 (reporting Baroch Goldstein as settler who attacked on al-Ibrahim mosque);

196. See *Open Wound, at the Heart of Peace*, MANCHESTER GUARDIAN WEEKLY, Oct. 1, 1995, at 4 (reporting reaction in Hebron and lingering sensitivities over Goldstein attack); Jeffrey Bartholet, *City of Intolerance*, NEWSWEEK, Oct. 2, 1995, at 48 (reporting tensions in Hebron); Robert Mahoney, *Militants Bring Hebron to Halt in Protest, at Deal*, GUARDIAN, Sept. 29, 1995, at 14 (reporting on strike and street protests in Hebron); Martin Cohn, *Protests, Strike Divide Flashpoint City Jewish Settlers Take to Streets, Palestinians Stay Home to Defy Deal*, TORONTO STAR, Sept. 19, 1995, at A16 (reporting on strike and altercations between Israeli and Palestinian protestors). Hebron was not redeployed until almost two years later. See Protocol Concerning the Redeployment in Hebron, Sec 2(a)(2), Jan. 17, 1997, Israel-PLO [hereinafter Hebron Protocol] (implementing withdraw from most of Hebron but retaining Israeli control over H-2 Areas). Notice in the following reactions the emphasis on being "cheated." See, e.g., SAID, *The Real Meaning of the Hebron Agreement*, in THE END OF THE PEACE PROCESS, *supra* n.64, at 133. Edward Said said of the Hebron Protocol:

[The Hebron Protocol was a] formula for 'coexistence' in Hebron which gave about 450 people (no one knows the exact number) who sat there with the Israeli army guarding them the choicest 20 percent of the town's commercial center, whereas the 120,000 resident Palestinians were expected to be happy that they got an 80 percent that was so bogged won with conditions, reservations, and stipulations as to make it virtually a peripheral part of the Israeli enclave.

Id.; Hamas quoted in *The Middle East; Israeli-Palestinian Affairs*, BBC SUMMARY OF WORLD BROADCASTS, Jan. 20, 1997, at Part 4 (translated from Arabic newspaper 'Al-Urdun', 20 Jan 97). Hamas released a statement critical of the Hebron Protocol that read in relevant part:

The Hebron agreement granted the Netanyahu government more time to procrastinate and force realities, thanks to the ceaseless U.S. support and flagrant U.S. bias in favour of the Zionist enemy. . . . We within Hamas believe that Arafat and his authority took many steps backwards. For even leaders of the Zionist Labour Party demanded the evacuation of settlers from the heart of Hebron in the aftermath of the Ibrahimi Mosque massacre. This shows the authority's weakness, even though it has immense media capabilities that turn its political defeats into false accomplishments whose worthlessness have been proved for the last three years because of the confusion it has promoted and the failure it has experienced. All this has shown that the authority's policy and weakness before the enemy will lead us to nothing except the liquidation of the Palestine question.

Id.

197. See Martin Cohen, *Protests, strike divide flashpoint city Jewish settlers take to streets, Palestinians stay home to defy deal*, TORONTO STAR, Sept. 29, 1995, at A16 (reporting Israeli

outside the White House¹⁹⁸ and Benjamin Netanyahu decried the agreement as a slippery slope to losing Israel to the Arabs¹⁹⁹ and promised to annul the peace process begun by Rabin.²⁰⁰ West Bank settlers brandished guns and threatened to treat the institution of Arab security forces in the area as an “act of war”²⁰¹ and Palestinian-American intellectual Edward Said characterized Oslo as an “offense to the Palestinian spirit.”²⁰² Then, as the cul-

settler and Palestinian protests); Laurie Copans, *Israeli Police Break up Settler Blockade*, UNITED PRESS INT'L, Oct. 1, 1995 (reporting Israeli settler demonstration on Allenby Bridge between Israel and Jordan); *Arab, Israeli Protesters Demonstrate Against Taba Accord*, DEUTSCHE PRESSE-AGENTUR, Sept. 18, 1995 (reporting on Israeli protests after Oslo II signing); Joel Greenberg, *Settlers Protest in Hebron, Calling Israel Leaders Traitors*, N.Y. TIMES, Sept. 29, 1995, at A13 (chronicling settler protests in Hebron); *Settlers Block West Bank Bridge to Protest Autonomy Deal*, DEUTSCHE PRESSE-AGENTUR, Oct. 1, 1995 (reporting Israeli settler demonstration going into Jordan); Herb Keinon, *Zion Square Flooded with Oslo 2 Protesters*, JERUSALEM POST, Oct. 6, 1995, at 1 (estimating between 20,000-30,000 Israeli protestors opposing Oslo II).

198. See *Protesters Picket outside White House*, UNITED PRESS INT'L, Sept. 28, 1995 (reporting Zionist protest outside White House). Cf. Marilyn Henry, *PM's Remarks to U.S. Jews Could Alienate Friends*, JERUSALEM POST, Oct. 6, 1995, at 10 (reporting Pro-Israeli American lobbying against Oslo II).

199. Laurie Copans, *Israeli Parliament in Crucial Peace Vote*, UNITED PRESS INT'L, Oct. 5, 1995 (reporting Netanyahu's public remarks on Oslo II criticizing Rabin for giving ground that will encourage Palestinians to take more). See also Steve A. Yetiv, *Israeli Opinion and Peace*, CHRISTIAN SCIENCE MONITOR, Oct. 13, 1995, at 20 (describing Netanyahu's public opposition to Oslo II); Herb Keinon, *Zion Square Flooded with Oslo 2 Protesters*, JERUSALEM POST, Oct. 6, 1995, at 1 (quoting Netanyahu, as saying Israeli Zionists did not approve of Oslo II).

200. See Benjamin Netanyahu, *McCarthyism in Tel-Aviv*, N.Y. TIMES, Dec. 10, 1995, at A33 (stating his continued opposition to Oslo II); Christopher Walker, *Extremists on both sides pledge to sabotage deal*, TIMES (U.K.), Sept. 29, 1995 (reporting on Likud avowal to annul Oslo II); *A Nation Divided on Path to Peace*, PRESS ASSN. LTD., Nov. 5, 1995 (reporting Netanyahu's public remarks on Oslo II); *Israel Opposition Vows to Scuttle Talks*, UNITED PRESS INT'L, Dec. 17, 1995 (reporting Netanyahu as saying Oslo II opponents will do everything to prevent Oslo II's implementation).

201. See Christopher Walker, *Diehard Settlers Threaten to Wreck WestBank Deal*, TIMES (U.K.), Sept. 25, 1995 (reporting settler opposition in statements made while brandishing guns); *A Nation Divided on Path to Peace*, PRESS ASSN. LTD., Nov. 5, 1995 (reporting settler threats of violence); Leslie Susser, *Settler Leadership Threatens Widespread Civil Disobedience*, JERUSALEM REPORT, Oct. 19, 1995, at 4 (reporting settler plans to scuttle Oslo II implementation).

202. See Said, *The Campaign against "Islamic Terror,"* in *The End of the Peace Process*, *supra* n.64, at 45-46 (reporting Said's distaste for Oslo II as squandering Palestinian rights). Some argued Palestinians lost more than they gained. See also Said, *Where Negotiations Have Led*, in *THE END OF THE PEACE PROCESS*, *supra* n.64, at 14 (arguing Oslo II gave Palestinians nothing more than municipal responsibilities over unviable areas); HASSASSIAN, *supra* n.63, at 119 (describing how Palestinians before Oslo could travel freely throughout West Bank and between West Bank and Gaza and precipitous decline in quality of life being “confined to ghettos,” limited in capacity to travel and economically depressed). A U.S. Army report issued after the second Intifada cited the lack of

mination of the frenzy, Yigal Amir, a law student from Tel-Aviv, shot and killed Prime Minister Rabin as he left a peace rally, barely a month after the signing of Oslo II.²⁰³

8. The Knot Holds

Ultimately, the Peace Process dragged almost five years past May 4, 1996, when final status negotiations were to be commenced.²⁰⁴ The Hebron Protocol followed in 1997 to complete the redeployment of Hebron outlined in Oslo II,²⁰⁵ the Wye River Memorandum in 1998 to expand Areas A and B,²⁰⁶ and finally the 1999 Sharm al-Sheikh Agreement to implement the Wye River Memorandum.²⁰⁷ After the 2000 Camp David Accords²⁰⁸ and 2001 Taba Talks²⁰⁹ failed to reach an agreement

contiguity between Palestinian areas as inhibiting the authority and accountability of the central Palestinian Authority. Jarat Chopra & Jim McCallum, *Planning Considerations for International Involvement in the Israeli-Palestinian Conflict* 3 (2003) available at <http://www.carlisle.army.mil/usacsl> (outlining key difficulties in Occupied Territories and possible avenues for international intervention).

203. See Derek Brown, *Political Theater Ends in Tragedy*, *GUARDIAN*, Nov. 6, 1995, at 1 (reporting Rabin's assassination following rally when Yigal Amir approached and shot him before Rabin could enter his car); John Battersby, *World Honors a Shepherd of Peace, Players Vow to Keep Rabin's Legacy*, *THE CHRISTIAN SCI. MONITOR*, Nov. 6, 1995, at 1 (reporting Rabin's assassination and domestic and international shock).

204. See Oslo II art. XXXI, Sec. 5. Section 5 of Article XXXI of Oslo II provided: Permanent status negotiations will commence as soon as possible, but not later than May 4, 1996, between the Parties. It is understood that these negotiations shall cover remaining issues, including: Jerusalem, refugees, settlements, security arrangements, borders, relations and cooperation with other neighbors, and other issues of common interest.

Id. Consider the impact of this delay on the sizable Israeli and Palestinian youth populations. See CIA *WORLD FACTBOOK* 2002, Israel (27.1%), West Bank (44.4%) and Gaza Strip (49.7%).

205. Hebron Protocol (agreement to complete redeployment of Hebron, excepting H-2 areas retained by Israel).

206. The Wye River Memorandum, Oct. 23, 1998, Israel-PLO [hereinafter Wye River Memorandum] (agreement negotiated by Netanyahu government expanding Areas A and B but was not implemented until Sharm al-Sheikh Agreement).

207. Sharm al-Sheikh Agreement, *supra* n.152 (agreement to implement negotiated terms of Wye River Memorandum).

208. See Janine Zacharia, *Arafat was Afraid to Take Necessary Steps*, *JERUSALEM POST*, July 26, 2000 (reporting on breakup of Camp David Talks); *Barak: Some Things are not Negotiable*, *UNITED PRESS INT'L*, July 26, 2000 (reporting on Barak's reasons for Camp David Talks breakup); Suzanne Goldenberg, *Barak Rushes to Blame Unyielding Arafat*, *GUARDIAN* (London), July 26, 2000 (reporting Barak's problems with Arafat's negotiations); Larry Derfner, *Redrawing the Red Lines*, *JERUSALEM POST*, July 28, 2000 (reporting on Camp David Talks breakup); Saud Abu Ramadan, *Transitional Period Ends without Independent State*, *UNITED PRESS INT'L*, Sept. 13, 2000 (reporting on growing Palestinian frustration after no State was declared).

and the ensuing campaigns of violence that followed, further negotiations froze and the Peace Process was largely rolled back.²¹⁰ As of this writing, the only region of Palestinian Council jurisdiction under Oslo II not under Israeli occupation is Jericho.²¹¹

B. *Bantustans*

In 1962 South Africa, following the militarization of the African National Congress (“ANC”)²¹² and a sabotage campaign beginning the year before,²¹³ the South African government

209. See Israeli-Palestinian Joint Statement, Jan. 27, 2001 available at www.mfa.gov.il [hereinafter Taba Statement]. The Taba Statement read, in relevant part:

The negotiation teams discussed four main themes: refugees, security, borders and Jerusalem, with a goal to reach a permanent agreement that will bring an end to the conflict between them and provide peace to both people.

The two sides took into account the ideas suggested by President Clinton together with their respective qualifications and reservations.

On all these issues there was substantial progress in the understanding of the other side’s positions and in some of them the two sides grew closer.

As stated above, the political timetable prevented reaching an agreement on all the issues.

Id.; *Palestinians, Israel to Issue Statement on Peace Progress*, XINHUA NEWS AGENCY, Jan. 27, 2001 (reporting on progress in Taba Talks); Deborah Sontag, *Mideast Talks End With Gain But No Accord*, N.Y. Times, Jan. 28, 2001, at 1 (reporting on Taba Talks breakdown because of Barak and Arafat’s fears of nationalist opposition).

210. See Cabinet “Saves” New Gov’t from Clinton’s Proposals, HA’ARETZ, Feb. 12, 2001 (reporting Barak’s repudiation of Taba Talks); *Bush Won’t Push Peace, PM Pleased*, HA’ARETZ, Mar. 21, 2001 (reporting Sharon and Bush’s agreement to not pursue further talks).

211. See Lee Keath, *Israeli Forces Reoccupy Bethlehem in Retaliation for Suicide Bombing*, ASSOCIATED PRESS, Nov. 22, 2002 (reporting Bethlehem’s reoccupation and Jericho as only city not under occupation); *Israeli Troops Swoop into Bethlehem*, NEWSLETTER, Nov. 23, 2002 (reporting Bethlehem’s reoccupation and Jericho as only city not under occupation); *Israeli Closes Another Palestinian Office, Only Jericho Office Left Open*, BBC, Jan. 10, 2003 (reporting Jericho as only city not under occupation).

212. See NELSON MANDELA, *THE STRUGGLE IS MY LIFE* 24 (1986) (describing African National Congress’ (“ANC”) founding in 1912 as making end of tribal resistance into national movement); BYRNES, *supra* n.76, at 276 (1997) (ascribing founding of ANC to Durban attorney Dr. Pixley Ka Isaka Seme, its renaming in 1923 and establishment of its Youth League in 1943 to mobilize protest); LES SWITZER, *POWER AND RESISTANCE IN AN AFRICAN SOCIETY* 175, 243 (1993) (describing founding of South African Native national Congress (SANNC) in 1912 to represent African political interests in Union of South Africa and its name change to ANC in 1923). See also *MANIFESTO OF AFRICAN NATIONAL CONGRESS YOUTH LEAGUE* (1994), in MANDELA, at 13 (renouncing domination of whites over eighty-seven per cent of South African land). Cf. Said and Hamas quoted in *supra* n.196 (giving examples of Palestinian resentment of Israeli presence in Hebron).

213. See African National Congress, *New Forms of Struggle After Sharpeville and the Banning of Opposition Groups (1960-1969)* in STATEMENT TO THE TRUTH AND RECONCILIATION COMMISSION, Sec. 5.1, Aug. 1996 [hereinafter ANC STATEMENT] (pinpointing December 16, 1961 as starting date for adoption of armed struggle, employing guerrilla

committed itself to making the “Bantu Homelands” a viable local authority for “Bantu Inhabitants.”²¹⁴ South Africa disbanded with the policy and reintegrated the Transkei into South Africa following the election of the ANC to government in the early 1990s.²¹⁵

1. Background

Following South African independence in 1931²¹⁶ the nationalist Afrikaner minority, who retained political authority,²¹⁷ started a policy of separate-development (“apartheid”) for the nation’s various ethnic inhabitants, including travel, social and labor regulations of non-whites.²¹⁸ Part of this policy was the cre-

tactics in rural areas, sabotage of South African infrastructure and security targets as well as attacks on political targets and political agitation). ROBERT FATTON JR., *BLACK CONSCIOUSNESS IN SOUTH AFRICA*, 23-24 (1986) (describing creation of Unkhonto we Sizwe and POQO as two different armed struggle organizations with ANC committing to complimenting armed struggle with political action and greater commitment to violence by POQO); KENNETH GRUNDY, *CONFRONTATION AND ACCOMMODATION IN SOUTHERN AFRICA*, 187 (1973) (describing ANC bombing and sabotage campaign from 1961-1964 as “most intense form of organized anti-systemic violence” South Africa had seen); N.E. DAVIS, *A HISTORY OF SOUTHERN AFRICA* 164 (1978) (citing over 200 acts of sabotage committed between 1961 and 1963).

214. See ANNUAL SURVEY OF SOUTH AFRICAN LAW 1962, *SEPARATE DEVELOPMENT: BANTU NATIONAL HOMELANDS* 61 (1963) (documenting articulated intention of South African Parliament to implement semi-autonomous Transkei homeland).

215. See ANNUAL SURVEY OF SOUTH AFRICAN LAW 1994 100, 105 (1995) (stating South Africa repealed independence given to Transkei with 1993 Constitution, voluntarily reincorporated following Mandela’s election and passed enabling legislation to repeal former laws relating to independent Transkei); *Homomisa Hands over Transkei to Eastern Cape Premier*, BBC, May 19, 1994 (reporting turnover of control of Transkei after Mandela’s election); Bill Keller, *Mandela’s Party Grasps Firm Lead in Early Results*, N.Y. TIMES, May 2, 1994, at A1 (reporting ANC victory in first election since end of apartheid); Inigo Gilmore, *Partying Begins as Mandela Heads for Victory*, TIMES (LONDON), May 2, 1994 (reporting ANC victory and Mandela’s winning of South African leadership).

216. See BYRNES, *supra* n.76, at 253 (citing British Statute of Westminster in 1931 as granting effectively emancipating British dominions and passage of Status of Union Act of 1934 denying supremacy of British Parliament); DAVIS, *supra* n.213, at 128-29 (dating independence in 1931 during period of coalition government).

217. See ERIC WALKER, *A HISTORY OF SOUTHERN AFRICA* 637-38, 824 (1957) (describing development of Afrikaner nationalist parties and their consolidation of power following emancipation from Britain and fusion of Nationalist and Afrikaner party in 1950s as solidifying Afrikaner nationalist power); DAVIS, *supra* n.213, at 123-31 (chronicling formation of Nationalist Party in 1912 by Afrikaner (Boer) nationalist Hertzog and its development and retention of majority support into 1960s).

218. See BYRNES, *supra* n.76, at 54-56 (describing legislative implementation of apartheid aimed at separating populations and registering blacks); WALKER, *supra* n.217, at 753 (describing apartheid policy rooted in long history of segregation and

ation of ethnic townships (“homelands”) designed to accommodate the various tribal associations of the nation’s black population.²¹⁹

On March 21, 1960, gathering in the town of Sharpeville, the ANC organized twenty to fifty thousand people to protest the apartheid requirement that black South Africans carry special identification.²²⁰ A few thousand of the protestors besieged a police station in Sharpeville’s African Quarter.²²¹ To disperse the crowd, police opened fire, killing one protestor causing the demonstration to escalate into a riot as protestors began throwing rocks at the police.²²² The police released machine gun fire into the crowd, killing as many as sixty-seven.²²³

The violence brought strong international condemnation which provoked South Africa to reject the authority of the

expanding in 1940s); DAVIS, *supra* n.213, at 139-45 (chronicling establishment of apartheid, putting 1948 as watershed year, through laws politically disenfranchising blacks, taking land, resettling black populations, and limiting access to employment and education). See generally APARTHEID AND RACIAL DISCRIMINATION IN SOUTHERN AFRICA ch. 2 (1968) (detailing extensively apartheid policies in South Africa and some of its effects on black population).

219. See WALKER, *supra* n.217, at 753-55 (describing beginning of Bantu reserve policy and difficulty as diminished availability of land constrained growth); DAVIS, *supra* n.213, at 141-42, 145-47 (chronicling establishment of regional collections under tribal identifications to which blacks were deported from white areas with emphasis on Transkei)

220. See *50 Killed in South Africa as Police Fire on Rioters*, N.Y. TIMES, Mar. 22, 1960, at 1 (reporting on demonstration in protest of Pass laws as organized by Pan-African Congress (PAC), offshoot of ANC); SOUTHALL, *supra* n.76, at 48 (describing protest organized by PAC in protest of pass laws); RICHARD LAPCHICK & STEPHANIE URDANG, OPPRESSION AND RESISTANCE 146 (1982) (counting twenty-thousand protestors of pass laws at Sharpeville police station).

221. See SOUTHALL, *supra* n.76, at 48 (describing South African police losing control of riots outside Sharpeville police station); *50 Killed in South Africa as Police Fire on Rioters*, N.Y. TIMES, Mar. 22, 1960, at 1 (accounting riots in Sharpeville who besieged African Quarter police station with twenty-five police inside).

222. See *50 Killed in South Africa as Police Fire on Rioters*, N.Y. TIMES, Mar. 22, 1960, at 1 (reporting rioters throwing rocks at South African police after one was killed by shooting); Ambrose Reeves, *The Sharpeville Massacre – A Watershed in South Africa*, available at <http://www.anc.org.za/ancdocs/history> (accounting events of Sharpeville and admitting rock throwing precipitated police shooting). Cf. David M. Sibeko, *The Sharpeville Massacre*, available at <http://www.anc.org.za/ancdocs/history> (asserting police fired without warning and not in response to protestor violence).

223. See JAMES BARBER, SOUTH AFRICA’S FOREIGN POLICY 124 (1973) (reporting on sixty-seven casualties after police fired into Sharpeville crowds); PETER DREYER, MARTYRS AND FANATICS 174 (1980) (putting death toll at sixty-seven); *50 Killed in South Africa as Police Fire on Rioters*, N.Y. TIMES, Mar. 22, 1960, at 1 (reporting fifty-five killed after police opened fire with machine guns).

United Nations.²²⁴ Sharpeville radicalized the black resistance movement and became a rallying cry for the opposition to white South Africa.²²⁵ In response, the government banned the ANC²²⁶ and to mollify African nationalist sentiments, passed the Transkei Constitution Act in 1963.²²⁷ The Act established a “self-governing territory” for the remarkably economically depressed homeland of the Transkei²²⁸ on the eastern coast of the Cape of Good Hope.²²⁹

224. See Dana Adams Schmidt, *Police Violence in South Africa Criticized by U.S.*, N.Y. TIMES, Mar. 23, 1960, at 1 (reporting United States public expression of regret over violence and taken as rebuke to South Africa); Thomas Hamilton, *South Africa Quits Debate; Dispute U.N. Jurisdiction*, N.Y. TIMES, Mar. 31, 1960, at 1 (reporting on South African U.N. delegate Bernardus Gourie leaving Security Council debate, saying shootings were local disturbances, outside U.N. jurisdiction); BARBER, *supra* n.223, at 145-46 (reporting British support for General Assembly resolution opposing apartheid and increased international pressure against South Africa); DAVIS, *supra* n.213, at 190 (describing British and American condemnation of South Africa at United Nations).

225. See, e.g., MANDELA, *ANC Address at Pan-African Freedom Conference in supra* n.212, at 125 (employing Sharpeville as emblem of apartheid); BARBER, *supra* n.223, at 126 (accounting effect of Sharpeville on African nationalists as disillusioning them of power of peaceful resistance); SWITZER, *supra* n.212, at 286 (marking ANC shift toward violent struggle following Sharpeville); GRUNDY, *supra* n.213, at 187 (stating Sharpeville discouraged ANC from passive resistance).

226. See SOUTHALL, *supra* n.76, at 48 (saying in April, responding to protests and strikes, South Africa passed Unlawful Organizations Act to outlaw PAC and ANC); BARBER, *supra* n.223, at 125-26 (reporting South Africa as banning African nationalist parties); DREYER, *supra* n.223, at 174 (accounting South Africa's banning of ANC following Sharpeville).

227. TRANSKEI CONSTITUTION ACT, No. 48 (1963) pmbl. (S.Afr.). [hereinafter TRANSKEI CONSTITUTION ACT] (articulating Transkei autonomy in policy of Apartheid).

228. See DAVIS, *supra* n.213, at 148 (citing Tomlinson Report of 1956) (White Paper issued in May 1956 reporting Bantu reserves of which Transkei was one to be 30% “badly eroded”, 44% “moderately eroded,” and maintaining constant real income rate since 1936) The Tomlinson Report further stated that for independence to succeed 50,000 new jobs per year would be needed over five years and 100 urban townships would need to be created. *Id.* The project would cost £25 million of investment in the first five years and would have an overall cost of £100 million. *Id.* This degree of expense would only support 60% of Bantu population. *Id.*; RALPH HORWITZ, *THE POLITICAL ECONOMY OF SOUTH AFRICA*, 164 (1967) (describing poor agricultural capacity in Transkei and citing 1944 report as suggesting average annual income of less than £18 for a family of five); SOUTHALL, *supra* n.76, at 219 (citing 85% of Transkei households are below poverty line).

229. TRANSKEI CONSTITUTION ACT, pt. 1, Sec. 2. Section 2 of Part 1 of TRANSKEI CONSTITUTION ACT sets out nine Regional Authorities each comprising several Bantu areas in various districts. See also ANNUAL SURVEY OF SOUTH AFRICAN LAW 1963, SEPARATE DEVELOPMENT: THE ‘SELF-GOVERNING TERRITORY’ OF THE TRANSKEI, 56 (1964) [hereinafter ANNUAL SURVEY 1963] (documenting South African Parliament's establishment of ‘self-governing territory’ in Transkei).

2. The Transkeian Authority

The Transkeian Territorial Authority (“Transkeian Authority”) extended over nine distinct, mostly contiguous, political districts (defined as “Regional Authorities”) but excluded the adjacent waters of the Indian Ocean.²³⁰ The Transkeian Authority would be administered by a Cabinet and Assembly who would have the “trappings, pomp and ceremony of Parliament, in pastel shades,”²³¹ would hold “Nkosi Sikelel’i-Afrika” as its National Anthem²³² and would fly its own flag.²³³ The Assembly had the authority to tax at rates determined by the South African Legislative Assembly²³⁴ and, so long as consistent with its Constitution,²³⁵ amend or repeal certain Acts of Parliament as they ap-

230. TRANSKEI CONSTITUTION ACT, Sec. 2. Section 2 of Part 1 of TRANSKEI CONSTITUTION ACT sets out nine Regional Authorities each comprising several Bantu areas in various districts on East African coast. *Id.* See also ANNUAL SURVEY 1963, *supra* n.229, at 57 (documenting Transkei as consisting of ‘Bantu areas’ of existing regional authorities).

231. ANNUAL SURVEY 1963, *supra* n.229, at 63 (documenting ceremonial procedures provided in TRANSKEI CONSTITUTION ACT).

232. TRANSKEI CONSTITUTION ACT, Sec. 5. “Nkosi Sikelel’ i-Afrika” was a resistance song written in the Xhosa language. South Africa currently holds a hybrid of “Die Stem” (its former Anthem) and “Nkosi Sikelel’ i-Afrika” as its National Anthem. For its text, recording and its history, see Nkosi Sikelel’ iAfrika: South Africa’s National Anthem available at <http://www.polity.org.za/html/misc/nkosi.html?rebookmark=1>.

233. TRANSKEI CONSTITUTION ACT, Sec. 4. Section 4 of TRANSKEI CONSTITUTION ACT provides:

There shall be a Transkeian Flag, the design of which shall be approved by the Legislative Assembly and which shall be flown side by side with the National Flag of the Republic, at the buildings where the Legislative Assembly holds its sessions, at the principal administrative office and all main district offices of the Government of the Transkei, and, at such other places in the Transkei as the said Government may determine.

Id. See also ANNUAL SURVEY 1963, *supra* n.229, at 58 (describing Transkei flag design).

234. TRANSKEI CONSTITUTION ACT, sched. 1, pt. B, Sec. 1. Section 1 of Part B of First Schedule of TRANSKEI CONSTITUTION ACT provides:

[The Legislative Assembly shall have powers over] Direct taxation on citizens of the Transkei, whether resident within or outside the Transkei, and on property situated within the Transkei.

Id. See also ANNUAL SURVEY 1963, *supra* n.229, at 63 (describing Transkei economic authority).

235. TRANSKEI CONSTITUTION ACT, Sec. 37(1)(a). Section 37(1)(a) of TRANSKEI CONSTITUTION ACT provides:

Subject to the provisions of this Act the Legislative Assembly shall have the power-

(a) to make laws not inconsistent with this Act in relation to all matters appearing in part B of the First Schedule of this Act;

Id. See also ANNUAL SURVEY 1963, *supra* n.229, at 64 (documenting Transkei mandate to

plied solely to the Transkei both inside and outside its territory.²³⁶

This capacity to override acts of Parliament was a notably unique degree of autonomy, in that this power was denied both the provinces and South West Africa (Namibia).²³⁷ While this appears a rather broad grant of autonomy, a contemporary of the Act's passage describes it more as a "rule of construction of enactments of Parliament," though a "particularly strong rule of construction" at that.²³⁸ The powers of the Legislature were limited specifically to enumerated matters:²³⁹ civil administration,²⁴⁰

legislate consistently with TRANSKEI CONSTITUTION ACT). TRANSKEI CONSTITUTION ACT, sched. 1, pt. B (enumerating spheres of Transkeian authority). Part B of Schedule 1 of TRANSKEI CONSTITUTION ACT is titled "Matters falling within the classes of subjects in respect of which the Transkeian Legislative Assembly shall have power to make laws and referred to in section *thirty-seven* of this Act." (emphasis in original). *Id.*

236. TRANSKEI CONSTITUTION ACT, Sec. 37(1)(b). Section 37(1)(b) of TRANSKEI CONSTITUTION ACT provides:

Subject to the provisions of this Act the Legislative Assembly shall have the power- . . .

(b) to provide in any such law for the amendment or repeal of any law, including any Act of Parliament, in so far as it relates to any such matter and applies in the Transkei or to any citizen of the Transkei whether such citizen is or is resident within or outside the Transkei.

Id.; See also ANNUAL SURVEY 1963, *supra* n.229, at 65 (documenting Transkei legislative capacity to override South African legislation as applied to Transkei citizens).

237. See Ellison Kahn, *Some Thoughts on the Competency of the Transkeian Legislative Assembly and the Sovereignty of the South African Parliament*, 80 S. AFR. L. J. 471, 474 (1963) (describing this provision of Transkei constitution act as unique to Transkei where conflicting legislation from South West Africa and other provinces is *pro tanto* void); ANNUAL SURVEY 1963, *supra* n.229, at 65 (stating Transkei legislative capacity to annul Parliamentary acts within Transkei authority is denied to provincial councils and South West Africa (Namibia)).

238. Kahn, *supra* n.237, at 481 (depicting override provision as simple rule of construction).

239. TRANSKEI CONSTITUTION ACT, Sec. 37(1)(a). For text of section 37(1)(a), see *supra* n.235. Section 24 of Part B of First Schedule also leaves open possibility for areas of control to be delegated to the Transkei by Parliament. TRANSKEI CONSTITUTION ACT, sched. 1, pt. B, Sec. 24. Section 24 of Part B of Schedule 1 of TRANSKEI CONSTITUTION ACT provides for lawmaking power on, "Generally all matters which in the opinion of the State President and according to his written directions are of a merely local or private nature in the Transkei." *Id.*

240. TRANSKEI CONSTITUTION ACT, sched. 1, pt. B, Secs. 1-6, 8-9, 11-12, 14, 17. Sections 1-6, 8-9, 11-12, 14, and 17 of Part B of Schedule 1 of TRANSKEI CONSTITUTION ACT provide authority over:

1. Direct taxation on citizens of the Transkei, whether resident within or outside the Transkei, and on property situated within the Transkei
2. Bantu education in the districts mentioned in section *two* of this Act,

whether within or outside Bantu areas in any such district, but not within any area in the district of Matatiele or Port St. John's which is not a Bantu area.

3. Agriculture including soil and veld conservation, stock improvement, development, maintenance and conservation of water supplies, irrigation, forestry and veterinary services in the Transkei, but excluding control over the importation into and the exportation from the Republic of stock, exotic animals, poultry, birds, insects, agricultural or other products, plants, farm feeds, seeds, fertilizers, stock remedies, vaccines, biologicals or anything liable to spread disease or infection.

4. Subject to the provisions of sections *forty-eight* and *forty-nine* of this Act, the establishment, administration and control of inferior courts in any district mentioned in section *two* of this Act.

5. The appointment, powers, duties and functions of justices of the peace and commissioners of oaths in the Transkei.

6. The protection of life, persons and property and the prevention of cruelty to animals in the Transkei.

...

8. The administration of deceased estates, the execution of wills and matters relating to succession in respect of citizens of the Transkei resident in any of the districts mentioned in section *two* of this Act.

9. Land settlement, registration of deeds and surveys in the Transkei but excluding trigonometrical surveys.

...

11. (a) Municipal institutions, Bantu authorities referred to in section *forty-six* of this Act and other local institutions of a similar nature in the Transkei.

(b) Institutions or bodies in the Transkei other than such institutions as are referred to in paragraph (a) which have in respect of one or more areas (whether contiguous or not) outside the area of jurisdiction of any institution contemplated by that paragraph authority and functions similar to the authority and functions of any such last-mentioned institution or in respect of the preservation of public health in such area or areas, including any such body as is referred to in section seven of the Public Health Act, 1919 (Act No. 36 of 1919).

12. The regulation and control of road traffic, including the licensing and control of vehicles and drivers of vehicles in the Transkei, but excluding all matters dealt with in the Motor Carrier Transportation Act, 1930 (Act No. 39 of 1930), or the Motor Vehicle Insurance Act, 1942 (Act No. 29 of 1942).

...

14. Welfare services including child welfare and the administration of social benefit schemes for the aged, infirm or blind, as well as disability grants and pauper relief for citizens of the Transkei in the districts referred to in section *two* of this Act, but not within any area in the district of Matatiele or Port St. John's which is not a Bantu area.

...

17. The appointment, conditions of service, discipline, retirement, discharge and pensioning of public officers or employees of the Government of the Transkei and generally the administration and control of departments and matters assigned to that government.

delegated security powers,²⁴¹ public records,²⁴² construction of public works,²⁴³ economic policy²⁴⁴ and penal authority.²⁴⁵

241. TRANSKEI CONSTITUTION ACT, sched. 1, pt. B, Sec. 7. Section 7 of Part B of Schedule 1 of TRANSKEI CONSTITUTION ACT provides authority over:

The control, organization and administration of such personnel or such part of the Police Force stationed in the Transkei as may have been transferred to the government of the Transkei by the Minister of Justice of the Republic, and charged with the maintenance of law and order, the investigation of any offence or alleged offence, the enforcement of any law and the prevention of crime in the Transkei to the extent and subject to such conditions as may be determined by the said Minister.

Id.

242. TRANSKEI CONSTITUTION ACT, sched. 1, pt. B, Secs. 15-16. Sections 15-16 of Part B of Schedule 1 of TRANSKEI CONSTITUTION ACT provide authority over:

15. Births, deaths and marriages in respect of citizens of the Transkei in the districts mentioned in section *two* of this Act.

16. Registration of voters and the conduct of elections for the purposes of this Act and matters incidental thereto, including such registration and the conduct of such elections, at any place in the Republic outside the Transkei.

Id.

243. TRANSKEI CONSTITUTION ACT, sched. 1, pt. B, Sec. 10. Section 10 of Part B of Schedule 1 of TRANSKEI CONSTITUTION ACT provides authority over:

Public works and undertakings, roads, outspans, ponts, and bridges in the Transkei, excluding bridges between the Transkei and any other part of the Republic and roads which have been declared to be national roads.

Id.

244. TRANSKEI CONSTITUTION ACT, sched. 1, pt. B, Secs. 13, 19-22. Sections 13 and 19-22 of Part B of Schedule 1 of TRANSKEI CONSTITUTION ACT provide authority over:

13. Labour matters in the Transkei but excluding all matters dealt with in the Workmen's Compensation Act, 1941 (Act No. 30 of 1941), or the Unemployment Insurance Act, 1946 (Act No. 53 of 1946).

245. . . .

19. Markets and pounds in the Transkei.

20. Fish and game preservation in the Transkei subject to the provisions of section *fourteen* of the Sea Fisheries Act, 1940 (Act No. 10 of 1940).

21. The control and licensing of trading and business in the Transkei but excluding the licensing of dealings in arms and ammunition and explosives.

22. The collection of and the control over all revenue and income payable to the Government of the Transkei in terms of any law, or deriving from any other source, or specially assigned to the Government of the Transkei by the State President by Proclamation in the *Gazette*.

Id. TRANSKEI CONSTITUTION ACT, sched. 1, pt. B, Secs. 6, 18, 23. Sections 6, 18 and 23 of Part B of Schedule 1 of TRANSKEI CONSTITUTION ACT read:

6. The protection of life, persons and property and the prevention of cruelty to animals in the Transkei.

. . .

18. Intoxicating liquor in the Transkei.

. . .

23. The imposition of punishment for enforcing any law of the Legislative Assembly made in relation to any matter coming within any of the classes of subjects enumerated in this schedule.

Thus, to abrogate a Transkeian sphere of authority, this “rule of construction” would require an affirmative statement of applicability.²⁴⁶ He derives this narrowing from both the proposition that a national Legislature, as a rule, lacks the power to wholly devolve power to an inferior, intra-State body²⁴⁷ and South Africa’s relatively limited scope of judicial review.²⁴⁸ Thus, at most, it vested in the Transkei a right that could not be enforced.²⁴⁹

3. The Government of the Transkei

The Transkei would have no executive head²⁵⁰ but rather a Cabinet led by a “Chief (not Prime) Minister”²⁵¹ elected by the

Id.

246. Kahn, *supra* n.237, at 481 (articulating provision as rule of construction to require express intention to override Transkeian legislation).

247. *See id.*, at 481 (asserting as matter of legal theory State inability to fully divest itself of authority to inferior body); HON L.R. CANEY, Q.C., *STATUTE LAW AND SUBORDINATE LEGISLATION* 90-91 (1957) (articulating as basic principle of law that “delegating authority cannot delegate power of legislating wider than its own powers in that respect”). *Cf.* WATSON, *supra* n.2, at 100-101 (debating how States can enter into internationally binding agreements with non-State parties). Watson suggests a compelling contract law model where “intent” is manifested to enter into binding agreement. *Id.* This becomes complicated by the lack of any choice of law provision in the agreement. *Id.* Watson further suggests that the *Vienna Convention on the Law of Treaties* leaves open the possibility of the Palestinians being deemed “subjects of international law” as a basis for entering into binding international agreements with State party. *Id.*

248. *See* GEORGE WILLE, *PRINCIPLES OF SOUTH AFRICAN LAW* 40 (1961) (describing legislative supremacy in South Africa with Court’s having only power to declare laws invalid if not passed in conformity with South Africa Act). *See also* CANEY, *supra* n.247, at 109 (articulating *ultra vires* as those laws made by subordinate legislators as *pro tanto* void if in conflict with enabling or superior legislation).

249. Kahn, *supra* n.237, at 482 (claiming provision is inherently limited by limited judicial review of potential encroachments on provision). *See also* CANEY, *supra* n.247, at 109 (describing limited range of *ultra vires* judicial review to almost exclusively discriminatory legislation).

250. *See* ANNUAL SURVEY 1963, *supra* n.229, at 60 (describing Transkei executive as dyarchal in structure and lacking formal chief executive); CARTER, *supra* n.76, at 89-90 (describing power sharing between chiefs and headmen and fusion of democracy and classical tribal practices).

251. ANNUAL SURVEY 1963, *supra* n.229, at 60 (describing deliberate lacking of single executive head). *See also* TRANSKEI CONSTITUTION ACT, Secs. 9–10(1). Section 9-10(1) of TRANSKEI CONSTITUTION ACT provide:

9. The executive government of the Transkei in regard to all matters in respect of which the Legislative Assembly is empowered to make laws by virtue of the provisions of this Act shall vest in a Cabinet constituted as hereinafter prescribed.

10. (1) The Cabinet shall consist of a Chief Minister and five other Ministers who shall be responsible for the administration of the departments appearing in Part A of the First Schedule of this Act.

Assembly.²⁵² Its legislation was subject to a South African "veto"²⁵³ and its borders,²⁵⁴ its Constitution,²⁵⁵ its jurisdiction²⁵⁶

Id.

252. TRANSKEI CONSTITUTION ACT, Sec. 12. Section 12 of TRANSKEI CONSTITUTION ACT provides:

The Chief Minister and the other Ministers shall be elected by secret ballot by the members of the Legislative Assembly from among their number, at the first session of each Assembly after a general election: Provided that the election of such other Ministers shall take place, at a meeting of the Assembly held not earlier than one day after the date on which the Chief Minister is elected.

Id. See also ANNUAL SURVEY 1963, *supra* n.229, at 61 (documenting procedure by which executive Cabinet would be elected).

253. TRANSKEI CONSTITUTION ACT, Sec. 40(1). Section 40(1) of TRANSKEI CONSTITUTION ACT requires:

Every bill passed by the Legislative Assembly shall forthwith, after having passed, together with such explanatory observations as may be necessary to indicate the scope, effect and reasons for the passing thereof, be submitted through the office of the Commissioner-General to the Minister of Bantu Administration and Development for presentation to the State President for his assent.

Id. See also ANNUAL SURVEY 1963, *supra* n.229, at 66 (documenting retained South African veto over Transkei legislation).

254. TRANSKEI CONSTITUTION ACT, Sec. 3. Section 3 of TRANSKEI CONSTITUTION ACT provides:

The State President may, with approval, by resolution of the Senate and the House of Assembly and of the Legislative Assembly, by proclamation in the *Gazette* declare that any Bantu area shall be included in or be excised from the Transkei, and may, if authorized thereto in terms of the relevant resolution, provide that any area so excised shall cease to be a Bantu area or make such other provision in respect thereof as may be so authorized: Provided that were any Bantu area is excised from the Transkei other land of, at least equal value shall be substituted therefore.

Id. See also ANNUAL SURVEY 1963, *supra* n.229, at 58 (documenting Transkei legislative incapacity to control its borders).

255. TRANSKEI CONSTITUTION ACT, Sec. 39(j). Section 39(j) of TRANSKEI CONSTITUTION ACT provides:

[The Legislative Assembly shall have no power to make laws in relation to] the amendment, repeal or substitution of this Act.

Id. See also ANNUAL SURVEY 1963, *supra* n.229, at 66 (documenting Transkei legislative incapacity to alter its constitution).

256. TRANSKEI CONSTITUTION ACT, Sec. 48. Section 48 of TRANSKEI CONSTITUTION ACT provides, in relevant part:

(4) Nothing in this section contained shall be construed as preventing any minister or officer of the Republic from establishing or disestablishing a magistrate's court in terms of the Magistrates' Courts Act, 1944 (Act No. 32 of 1944), or a Bantu affairs commissioner's court in terms of the Native Administration Act, 1927 (Act No. 38 of 1927), in any of the districts mentioned in section *two* for the trial or hearing of cases of persons or between parties who are not citizens or any of whom is not a citizen of the Transkei or for any area not falling within the Transkei and any such court may notwithstanding any-

and the calling of early elections²⁵⁷ were the province of the South African national government. The Authority was expressly denied powers over military affairs, foreign relations, communications, transportation, currency and monetary policy, and customs and could not impede the operation of the South African police.²⁵⁸ As the territory had no foreign affairs capacity,²⁵⁹ they retained South African nationality and passports.²⁶⁰

thing contained in either of the said Acts be established in respect of any number of such areas whether or not constituting a single area.

(5) The jurisdiction of any court transferred to the Government of the Transkei in terms of sub-section (3) or established by any Minister or officer of the Transkei in terms of subsection (2) or in terms of any law of the Legislative Assembly shall in respect of persons and area be limited to the extent for which provision has been made in terms of sub-section (4).

Id. See also ANNUAL SURVEY 1963, *supra* n.229, at 64 (documenting Transkei legislative incapacity to alter bounds of its jurisdiction).

257. TRANSKEI CONSTITUTION ACT, SECS. 20, 30. Sections 20 and 30 of TRANSKEI CONSTITUTION ACT provide, in relevant part:

20. (1) The Legislative Assembly may for sound and cogent reasons by petition request the State President to remove any Cabinet or any member thereof and to order the election of a new Cabinet or another Minister for the remainder of the life of that Legislative Assembly, and the State President may if he deems fit accede to any such petition.

...

30. (1) Every Legislative Assembly shall continue for five years from the date of its first meeting and no longer, but may, at any time on the recommendation of the Cabinet or the Assembly be dissolved by the State President by proclamation in the *Gazette*.

Id. See also ANNUAL SURVEY 1963, *supra* n.229, at 61 (documenting Transkei legislative incapacity to alter its election timetable).

258. TRANSKEI CONSTITUTION ACT, Sec. 39(a), (d). Section 39(a) and (d) of TRANSKEI CONSTITUTION ACT provide:

[The Legislative Assembly shall have no power to make laws in relation to]

(a) the establishment, control, entry, movement or operation of any full-time or part-time military unit, quasi-military unit or organization of a military character, or of any unit, branch or service of any military organization within the Transkei or any other military matter of whatever nature;

...

(d) the control, organization, administration, powers, entry into and presence in the Transkei of any Police Force of the Republic charged with the maintenance of public peace and order and the preservation of internal security in and the safety of the Transkei and the Republic.

Id. See also ANNUAL SURVEY 1963, *supra* n.229, at 65-66 (documenting Transkei lack of authority over South African police and military actions within Transkei).

259. ANNUAL SURVEY 1963, *supra* n.229, at 60 (explaining Transkeian posture as internationally subordinate to South Africa). A collateral effect of this was Transkeian inability to obtain membership in international institutions. See U.N. CHARTER, art. 4, Sec. 1. Section 1 of Article 4 of U.N. CHARTER requires:

Membership in the United Nations is open to all other peace-loving states

Also part of the assignment of autonomy was the establishment of a Transkeian citizenship, which consequently disenfranchised Transkei from South African politics.²⁶¹ While they lacked civil participation in South Africa, they remained South African internationally²⁶² and this citizenship applied to every Bantu who either was born within the territory,²⁶³ resided there

which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations.

Id.; Statute of the International Court of Justice, Aug. 14, 1946, art. 34, Sec. 1, 3 Bevans 1153 [hereinafter ICJ STATUTE]. Sec. 1 of Article 34 of ICJ STATUTE requires "Only states may be parties in cases before the Court." *Id.*

260. TRANSKEI CONSTITUTION ACT, Sec. 7(3). Section 7(3) of TRANSKEI CONSTITUTION ACT provides:

The Republic shall not regard a citizen of the Transkei as an alien in the Republic and shall by virtue of his citizenship of a territory forming part of the Republic of South Africa regard him for all external purposes in terms of international law as a citizen of the Republic and afford him full protection according to international law.

Id. See also ANNUAL SURVEY 1963, *supra* n.229, at 60 (describing Transkeian retention of South African nationality and political "duties, responsibilities, rights privileges and benefits otherwise applicable").

261. TRANSKEI CONSTITUTION ACT, Sec. 7(1). Section 7(1) of TRANSKEI CONSTITUTION ACT provides:

There shall be a Transkeian citizenship and every person who is a citizen of the Transkei by virtue of the provisions of sub-section (2) shall, subject to the provisions of this Act, exercise franchise rights in the Transkei and enjoy all other rights, privileges and benefits and be subject to all the duties, obligations and responsibilities of citizenship in the Transkei as are accorded to or imposed upon him in terms of this Act.

Id. See also ANNUAL SURVEY 1963, *supra* n.229, at 60 (discussing difference between citizenship and nationality and explaining how Transkei retain South African "nationality"); CARTER, *supra* n.76, at 121 (1967) (describing qualifications for Transkei citizenship articulated in TRANSKEI CONSTITUTION ACT).

262. TRANSKEI CONSTITUTION ACT, Sec. 7(3). Section 7(3) of TRANSKEI CONSTITUTION ACT provides:

The Republic shall not regard a citizen of the Transkei as an alien in the Republic and shall by virtue of his citizenship of a territory forming part of the Republic of South Africa regard him for all external purposes in terms of international law as a citizen of the republic and afford him full protection according to international law.

Id. See also ANNUAL SURVEY 1963, *supra* n.229, at 60 (explaining how Transkeian citizens will retain South African passports and the necessity of Transkeian citizenship in further establishing Transkeian identity); CARTER, *supra* n.76, at 121 (stating that residents of Transkei were to be regarded as South African for international purposes).

263. TRANSKEI CONSTITUTION ACT, Sec. 7(2)(a). Section 7(2)(a) of TRANSKEI CONSTITUTION ACT provides:

[Citizens of the Transkei include] every Bantu person born in any of the districts mentioned in section two, either before or after the commencement of

for five years,²⁶⁴ spoke the Zulu-rooted Xhosa language²⁶⁵ and was not subject to any other jurisdiction,²⁶⁶ or to every Sotho-speaking Bantu in South Africa who could be linked to the Shoto tribes²⁶⁷ in the territory.²⁶⁸ The jurisdiction of the Transkeian courts was thus limited to Transkeian citizens²⁶⁹ while the

this Act, who is not a prohibited immigrant under any law relating to immigration then in force, at the place where he was born;

Id. See also ANNUAL SURVEY 1963, *supra* n.229, at 60 (documenting bounds of Transkeian citizenship as applying to all born within Transkeian borders).

264. TRANSKEI CONSTITUTION ACT, Sec. 7(2)(b). Section 7(2)(b) of TRANSKEI CONSTITUTION ACT provides:

[Citizens of the Transkei include] every Bantu person who has been domiciled for, at least five years in any of the said districts, if he is not a prohibited immigrant in the Republic or his entry into or residence in such district was not unlawful and he has not been lawfully admitted into that district for any temporary period or purpose only.

Id. See also ANNUAL SURVEY 1963, *supra* n.229, at 60 (documenting bounds of Transkeian citizenship as applying to five-year residents of Transkei).

265. See DAVIS, *supra* n.213, at 14-16 (describing Xhosa as tribal group a subgroup of Nguni); UCLA Language Materials Xhosa Language Profile, *available at* <http://www.lmp.ucla.edu/profiles> (advancing Xhosa is agglutinative in character and rooted in Nguni).

266. TRANSKEI CONSTITUTION ACT, Sec. 7(2)(c). Section 7(2)(c) of TRANSKEI CONSTITUTION ACT provides:

[Citizens of the Transkei include] every Xhosa-speaking Bantu person in the Republic, including every Bantu person belonging to any associated linguistic group who normally uses any dialects of the languages spoken by what is commonly known as the Cape Nguni, provided such person does not belong to any Bantu homeland other than the Transkei or fall under the jurisdiction of any other regional or territorial authority or council or any other self-governing territory.

Id. See also ANNUAL SURVEY 1963, *supra* n.229, at 60 (documenting bounds of Transkeian citizenship as applying to Xhosa speaking Bantu not registered in other jurisdiction of South Africa).

267. See DAVIS, *supra* n.213, at 15 (describing Sotho tribal group formed by migrants from Botswana in thirteenth and fourteenth centuries); MATANZIMA, *supra* n.76, at 24 (describing Sotho as speaking variation of Xhosa language and living predominantly in Matatiele and Mount Fletcher, South Africa).

268. TRANSKEI CONSTITUTION ACT, Sec. 7(2)(d). Section 7(2)(d) of TRANSKEI CONSTITUTION ACT provides:

[Citizens of the Transkei include] every Sotho-speaking Bantu person in the Republic who derives from or is generally regarded as a member of any of the Sotho-speaking tribes resident in any of the districts aforesaid.

Id. See also ANNUAL SURVEY 1963, *supra* n.229, at 60 (documenting bounds of Transkeian citizenship as applying to those Bantu who could be associated with Shoto tribes).

269. See ANNUAL SURVEY 1963, *supra* n.229, at 67 (stating power of State President to transfer power of established courts to Transkei removes Transkei jurisdiction over non-Transkeian unless specifically created with such jurisdiction by Minister of Justice); TRANSKEI CONSTITUTION ACT, Sec. 48(5). Section 48(5) of TRANSKEI CONSTITUTION ACT provides that the jurisdiction of any court in the Transkei is limited to the jurisdiction

Appellate Division of the Supreme Court of South Africa retained ultimate appellate review of Transkeian court decisions.²⁷⁰

4. Making the Case for Separation

Following the establishment of the Transkei homelands, the South African government released a pamphlet, *Progress through Separate Development: South Africa in Peaceful Transition*, to illustrate to the American public in particular²⁷¹ "a great new labora-

granted by provisions of the Act in so far as transferred in accordance with Section 48(4), which grants Ministers of the Republic exclusive power to create courts with jurisdiction over non-Transkeian citizens. *Id.*

270. TRANSKEI CONSTITUTION ACT, Sec. 50(3). Section 50(3) of TRANSKEI CONSTITUTION ACT provides:

The Appellate Division of the Supreme Court of South Africa shall have the same jurisdiction to hear and determine appeals from any decision of the High Court for the Transkei as it has in respect of any decisions of the courts of any provincial or local division of the Supreme Court, and the provisions of any law or rules of court applicable in connection with any appeal from the decision of any such provincial or local division shall *mutatis mutandis* apply with reference to any appeal from a decision of the said High Court.

Id. See also, ANNUAL SURVEY 1963, *supra* n.229, at 68 (stating Appellate Division continues to hear cases from Transkeian High court as with any other Supreme Court).

271. See, e.g., Alfred Avins, *Racial Separation and Public Accommodations: Some Comparative Notes Between South African and American Law*, 86 S. AFR. L.J. 53 (1969) (comparing public segregation techniques in South Africa, United States and Namibia). See also CANEY, *supra* n.247, at 109. There seems to have been some degree of identification with the United States in particular. South African Supreme Court Judge Caney describes exceptions to the general standard for *ultra vires* in remarkably close terms to *Plessy v. Ferguson*, 163 U.S. 537 (1896). See CANEY, *supra* n.247, at 109. He describes the parameters for discrimination based *ultra vires* as follows:

[S]ubordinate legislation which discriminates partially and unequally on grounds of race, colour, religion, class or other characteristic, is *ultra vires*, unless it be expressly or be by necessary implication be authorized by enabling legislation; but 'discrimination coupled with equality' in other facilities, and subject to equal duties and burdens, does not offend the rule.

Id. (emphasis added). Cf. *Plessy*, 163 U.S., at 544. The Supreme Court's analysis in *Plessy* that reconciled equality with separation read in relevant part:

The object of the [Fourteenth] amendment was undoubtedly to enforce the absolute equality of the two races before the law . . . Laws permitting, and even requiring, their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the State legislatures in the exercise of their police power.

Id. (emphasis added)

Notice the logic of "separate but not inferior" and "discrimination coupled with equality" as reconciling a Liberal deference to political equality with the *a priori* necessity of preserved and distinct cultural/biological identity..

tory of nation building.”²⁷² “Separate Development” was the “experiment.”²⁷³ In a chapter entitled “To Each His Own,” Minister of Bantu Administration and Development M.D.C. de Wet Nel explains the rationale behind the Transkei Constitution Act:

This Bill is the logical projection of the pattern and policy of the people of South Africa with regard to our multinational situation . . . It is founded on a simple but basic formula for personal happiness and human relations, namely that every person is at his happiest within his own family circle; that every family is at its happiest within its own community, and every community is at its happiest within its own national environment.²⁷⁴

The book concludes with a full-page photo and two-page biography of Kaizer Matanzima, the first Chief Minister of the Transkeian Territorial Authority, and describes his support for separate development and the autonomy of blacks in South Africa.²⁷⁵

5. Losing the Case for Separation

Throughout the remainder of the decade, seven more tribal-based authorities were established²⁷⁶ with varying degrees of autonomy.²⁷⁷ By 1970, the South African government made citi-

272. PROGRESS THROUGH SEPARATE DEVELOPMENT: SOUTH AFRICA IN PEACEFUL TRANSITION 4 (1965) (generally describing history of Afrikaner South Africa and their resolution of apartheid to dilemma of racial problems).

273. PROGRESS THROUGH SEPARATE DEVELOPMENT, *supra* n.272, at 4 (describing South Africa as racial laboratory and laboratory of nation building).

274. PROGRESS THROUGH SEPARATE DEVELOPMENT, *supra* n.272, at 55 (describing rationale for separate development and arguing that tribalism is anthropologically proven to be social structure of Bantu).

275. PROGRESS THROUGH SEPARATE DEVELOPMENT, *supra* n.272, at 102-04 (providing brief biography of Chief Minister Matanzima and his support for apartheid). *See also* MATANZIMA, *supra* n.76, at 45-50 (Chief Mantazima providing his own explication of TRANSKEI CONSTITUTION ACT).

276. *See* ANNUAL SURVEY OF SOUTH AFRICAN LAW 1968, SEPARATE DEVELOPMENT: ECONOMIC DEVELOPMENT OF THE BANTU HOMELANDS 34-40 (1969) (documenting establishment of Ciskeian (Xhosa) and Tswana Bantu Authorities); ANNUAL SURVEY OF SOUTH AFRICAN LAW 1969, SEPARATE DEVELOPMENT: SEPARATE DEVELOPMENT OF BANTU 40 (1970) [hereinafter ANNUAL SURVEY 1969] (documenting establishment of Basotho ba Borwa (South-Sotho), Matshanganga (Shangaans), Lebowa (North Sothos), Venda Authorities); ANNUAL SURVEY OF SOUTH AFRICAN LAW 1970, SEPARATE DEVELOPMENT: TERRITORIAL AUTHORITIES 53 (1971) [hereinafter ANNUAL SURVEY 1970] (documenting establishment of Zulu Authority).

277. *See* ANNUAL SURVEY 1969, *supra* n.276, at 41 (describing varying degrees of autonomy granted to Authorities subsequent to Transkei, which remained most autonomous); BYRNES, *supra* n.76, at 62-63 (stating that between 1963 and 1985, more home-

zenship in one of the authorities compulsory for Bantu, replacing South African citizenship with the territorial citizenship most appropriate to "racial associations."²⁷⁸ South Africa would de-

lands were established resulting in 3.5 million blacks being sent from "white areas" to Bantu homelands).

278. See ANNUAL SURVEY 1970, *supra* n.276, at 58 (describing structure and purpose of Bantu Homelands Citizenship Act as making Bantu citizenship broadly compulsory); Bantu Homelands Citizenship Act of 1970, No. 26, Secs. 2-4 (1970) (S.Afr.) [hereinafter BANTU HOMELANDS CITIZENSHIP ACT]. Sections 2-4 of BANTU HOMELANDS CITIZENSHIP ACT provides, in relevant part:

2. (1) There shall be citizenship of every territorial authority area.
- (2) Every Bantu person in the Republic shall, if he is not a citizen of any self-governing Bantu territory in the Republic and is not a prohibited immigrant in the Republic, be a citizen of one or other territorial authority area, in accordance with the provisions of section 3.
- ...
- (4) A citizen of a territorial authority area shall not be regarded as an alien in the Republic and shall, by virtue of his citizenship of a territory forming part of the Republic, remain for all purposes a citizen of the Republic and shall be accorded full protection according to international law by the Republic.
- ...
3. Subject to the provisions of section 2 (2), every person falling within any of the undermentioned classes of persons shall be a citizen of a particular territorial authority area, that is to say-
 - (a) every Bantu person born in that area, either before or after the commencement of this Act;
 - (b) every Bantu person who is domiciled in that area;
 - (c) every Bantu person in the Republic speaking any Bantu language used by the Bantu population of that area, including every Bantu person belonging to any associated linguistic group which normally uses any dialect of any such language;
 - (d) every other Bantu person in the Republic related to any member of the Bantu population of that area or who has identified himself with any part of such population or who is associated with any part of such population by virtue of his cultural or racial background.
4. A citizen of a territorial authority area who becomes a citizen of any other territorial authority area or of any self-governing Bantu territory in the Republic or a national of another country shall cease to be a citizen of such first-mentioned territorial authority area.

Id. In 1962 the South African Government changed the official term for black South Africans from "Native" to "Bantu." See *e.g.* The Native Laws Amendment Act, No. 46, Sec. 8(a) (1962) (S. Afr.). [hereinafter NATIVE LAWS AMENDMENT ACT]. Section 8(a) of NATIVE LAWS AMENDMENT ACT provides, "[Section nineteen of the principle Act is hereby amended] by the insertion after the definition of "assessing officer" of the following definition: "'Bantu' has the same meaning as 'native.'" *Id.* See also ANNUAL SURVEY OF SOUTH AFRICAN LAW 1962, *supra* n.214, at 62. Notice the subtle sarcasm in the reference to philologists as feigning what would be now termed "political correctness" in the following assessment of the name-change:

However philologists may object, the Government, refusing to use the word 'African' because of its possible innuendo that the Whites do not belong to

clare the Transkei "independent" in 1976,²⁷⁹ consequently stripping 1.3 million²⁸⁰ more Bantu living outside the Transkei of South African citizenship.²⁸¹

the Continent and because of the difficulty of translating the word into Afrikaans in such a way as to avoid confusion with 'Afrikaner', and finding 'Native' now to carry a sting, has resolutely promoted the use of 'Bantu' [changing] the names and official titles of numerous institutions and holders of office accordingly.

Id. One gets the sense from the statement, especially given the quasi-official nature of the source, that the concerted emphasis on the mutuality of ethnic division and tribal association by casting it in authoritative airs was ungainly artificial, and perhaps pretextual, even to its proponents. *Id.*

279. See Status of the Transkei Act, No. 100 pmb., Sec. 1 (1976) (S. Afr.). [hereinafter STATUS OF THE TRANSKEI ACT]. Preamble of STATUS OF THE TRANSKEI ACT states:

WHEREAS the Government of the Transkei is desirous that the Transkei should be an independent State;

AND WHEREAS the Government of the Republic of South Africa deems it expedient to grant independence to the Transkei;

BE IT THEREFORE ENACTED by the State President, the Senate and the House of Assembly of the Republic of South Africa, as follows:-

1. (1) The territory known as the Transkei and consisting of the districts mentioned in Schedule A, is hereby declared to be a sovereign and independent State and shall cease to be part of the Republic of South Africa.

(2) The Republic of South Africa shall cease to exercise any authority over the said territory.

Id. See also ANNUAL SURVEY OF SOUTH AFRICAN LAW 1976 17-19 (1977). [hereinafter ANNUAL SURVEY 1976] (describing legislation making Transkei independent and its constitutional structure). Transkei Legislative assembly retained South African Supreme Court as ultimate appellate authority over Supreme Court of Transkei. For purposes of citation, Republic of Transkei will be cited in the context of this note as the source of its legislation. See Republic of Transkei Constitution Act, No. 15, Sec. 54(1)(e) (1976) (R. Transkei). [hereinafter REPUBLIC OF TRANSKEI CONSTITUTION ACT]. Sec. 54(1)(e) of REPUBLIC OF TRANSKEI CONSTITUTION ACT provides:

The Appellate Division of the Supreme Court of South Africa shall have jurisdiction to hear and determine appeals from any decision of the Supreme Court of Transkei as if such last mentioned court were a provincial division of the Supreme Court of South Africa and the provisions of the law and rules of court applicable in connection with appeals form the decision of such a provincial division shall *mutates mutandis* apply with reference to any appeal from a decision of the Supreme Court of Transkei.

Id. See also ANNUAL SURVEY 1976, AT 19 (referencing provision of REPUBLIC OF TRANSKEI CONSTITUTION ACT making South African Supreme Court highest court of Transkei); South Africa was alone in recognizing Transkei nationhood. See DAVIS, *supra* n.213, at 149 (calling independence a "hollow victory" for Mantazima as it was not recognized by any State other than South Africa); BYRNES, *supra* n.76, at 107-08 (referencing lack of international recognition for Transkei nation).

280. See ANNUAL SURVEY 1976, at 19 (stating that by operation of law 3 million were divested of South African citizenship, 1.3 million being outside borders of Transkei)

281. STATUS OF THE TRANSKEI ACT, Sec. 6(1), sched. B, Secs. (f)-(g). Section 6(1) and corresponding, Secs. (f)-(g) of Schedule B of the STATUS OF THE TRANSKEI ACT provide:

The fruit of these policies bore out in the ANC's campaign of guerilla war throughout the countryside and the sabotage and bombings of civilian and military targets.²⁸² The growing militancy of the ANC through the 1980s can be seen in a pamphlet entitled "Take the Struggle to the White Areas," that called for the sabotage and disruption of factories, farms, mines, suburbs, energy networks, communication lines, transportation systems and other infrastructure along with police and security stations in white areas.²⁸³ During this period, the ANC has admitted to routinely bombing civilian areas and employing landmines.²⁸⁴

The conflict effectively ended in 1993, when a bitter debate ensued in Parliament over the introduction and passage of a constitution creating majority rule in South Africa.²⁸⁵ Having

6. (1) Every person falling in any of the categories of persons defined in Schedule B shall be a citizen of the Transkei and shall cease to be a South African citizen.

...

(f) [Persons who in terms of, Sec. 6 are citizens of the Transkei and cease to be South African citizens include] every South African citizen who is not a citizen of a territory within the Republic of South Africa, is not a citizen of the Transkei in terms of paragraph (a), (b), (c), (d) or (e), and speaks a language used by the Xhosa or Sotho speaking section of the population of the Transkei, including any dialect of any such language;

(g) [Persons who in terms of, Sec. 6 are citizens of the Transkei and cease to be South African citizens include] every South African citizen who is not a citizen of a territory within the Republic of South Africa, is not a citizen of the Transkei in terms of paragraph (a), (b), (c), (d), (e) or (f), and who is related to any member of the population contemplated in paragraph (f) or has identified himself with any part of such population or is culturally or otherwise associated with any member or part of such population. *Id.*

Id.

282. See ANC STATEMENT, Sec. 5.2 "A Changing Scenario and New Challenges (1969-1979)" (describing movement toward guerrilla warfare and bombing of targets and personnel of South African military and government including police stations, railway lines and Bantu Administration offices); BYRNES, *supra* n.76, at 70 (describing South African crackdown on ANC militant activities through 1970s).

283. See ANC, *Take the Struggle to the White Areas*, available at <http://www.anc.org.za/ancdocs/history/ug/pam8500.html> (urging South Africans to resist white dominance through assaults and labor strikes).

284. See ANC STATEMENT, Sec. 6.2.4 "Conduct of War and Civilian Casualties" (admitting to employing landmines in designated "military zones" and car bombing South African Air Force Headquarters in Pretoria).

285. See John Daniszewski, *South Africa's Parliament Restores Citizenship to Blacks*, AGENCE FR. PRESSE, Dec. 15, 1993 (reporting re-enfranchisement of blacks living in Bantu Homelands for April vote); Sahn Venter, *Parliament Begins Historic Debate on Non-Racial Constitution*, ASSOC. PRESS, Dec. 17, 1993 (reporting De Klerk's introduction of anti-apartheid constitution before Parliament); *Right Wing Claims Deal on White Homeland*, ASSOC. PRESS, Dec. 20, 1993 (reporting Parliamentary debates over anti-apartheid

lost the legislative battle to prevent the Bantu vote, the white nationalist Afrikaner Volksfront (“AFP”)²⁸⁶ called for a *Volkstaat*, an Afrikaner Homeland.²⁸⁷ In April 1994, the ANC won a majority in Parliament and its leader, Nelson Mandela, became President.²⁸⁸

C. Good Fences: The Politics of Separation and Rejection

In the past decade, the creation of semi-autonomous cantons and confederations has frequently been implemented and proposed to resolve violent ethnic divisions within countries.²⁸⁹

constitution); Karl Maier, *Afrikaner Accord with ANC Runs into Snags*, INDEPENDENT, Dec. 22, 1993, at 10 (reporting Parliamentary debates over anti-apartheid constitution); Michael Hamlyn, *South African Vote Buries Apartheid*, TIMES, Dec. 23, 1993 (reporting passage of anti-apartheid constitution after tumultuous debate); Kenneth Nobel, *South African Parliament Adopts New Constitution*, N.Y. TIMES, Dec. 23, 1993, at 1 (reporting passage of anti-apartheid constitution despite some Afrikaner opposition); John Battersby, *South African Parliament Raps Final Gavel on ‘Grand Apartheid’*, THE CHRISTIAN SCI. MONITOR, Dec. 23, 1993, at 1 (reporting passage of anti-apartheid constitution as ending history of apartheid).

286. See BYRNES, *supra* n.76, at 288-289 (documenting founding of Afrikaner Volksfront as founded by former chief of South African Defense Force Gen. Viljoen as alliance of right-wing Afrikaner parties with goal of establishing Afrikaner nation-state). See also Boer Nation Website, at <http://www.boer.co.za/> (providing general information on Afrikaners and Afrikaner Volksfront).

287. See *Neo-Nazis Claim Port Town as Part of a Whites-only Homeland*, AGENCE FR. PRESSE, Feb. 26, 1994 (reporting lobbying of Afrikaner Resistance Movement for white-homeland); *South African Rightwingers Stage Rally for ‘White Homeland,’* XINHUA NEWS AGENCY, Mar. 26, 1994 (reporting demonstration of Afrikaner for white-homeland); Inigo Gilmore, *Far Right Presses for Homeland Pledge before Joining Contest*, TIMES, Apr. 22, 1994 (reporting demonstration of Afrikaner for white-homeland); *S. Africa Plans to set up Three-party Forum on White State*, XINHUA NEWS AGENCY, May 31, 1994 (reporting demonstration of Afrikaner for white-homeland).

288. See Bill Keller, *Mandela’s Party Grasps Firm Lead in Early Results*, N.Y. TIMES, May 2, 1994, at A1 (reporting ANC victory in election following end of apartheid); Michael Collins, *Townships Wild with Joy on Mandela Win*, UNITED PRESS INT’L, May 2, 1994 (reporting widespread celebration following ANC win); Inigo Gilmore, *Partying Begins as Mandela Heads for Victory*, TIMES, May 2, 1994 (reporting ANC victory and Mandela’s election to South African leadership); John Daniszewski, *Mandela Claims Victory, De Klerk Concedes in Historic Election*, ASSOCIATED PRESS, May 2, 1994 (reporting ANC strong poll showing and De Klerk concession of election).

289. See, e.g., The Machakos Protocol, Jul. 20, 2002, Sudan- Sudan People’s Liberation Movement (“SPLM”), (Sudan); Agreement Reached in the Multi Party Negotiations, Apr. 10, 1998, Ulster Unionist Party-Sinn Féin, (Northern Ireland) [hereinafter Good Friday Agreement]; The Sudan Peace Agreement, Apr. 21, 1997, Sudan-United Democratic Salvation Front (UDSF), SPLM, South Sudan Independents Group (SSIG), Equatoria Defense Force (EDF) and the Union of Sudanese African Parties (USAP), (Sudan); Sri Lanka Peace Support Group, *A Framework for the Constitution of the Union of Ceylon*, available at http://www.sangam.org/FB_HIST_DOCS/UKProposal.htm (Sri

The Israeli/Palestinian “experiment” came to a long-delayed end²⁹⁰ with an ongoing civil war against mostly civilian popula-

Lanka); The Dayton Peace Accords on Bosnia, Dec. 14, 1995, Republic of Bosnia and Herzegovina-Republic of Croatia-Republic of Yugoslavia, (Yugoslavia). Some have criticized this movement, in particular, Israeli-Palestinian division. *See, e.g.*, Scott Anderson, *The Makeover*, N.Y. TIMES MAG., Jan. 19, 2003 (interviewing Libya’s Muammar Qaddafi who calls for united Israel and Palestine); I.F. Stone, *Holy War*, N.Y. REV. OF BOOKS, Aug. 3, 1967 (arguing for West Bank, Israeli, Jordanian confederation to create security buffer for Israel). Stone claims providing simply for Palestinian autonomy would be to create “a kind of Arab Bantustan” that would confine them to second-class status. *Id.*; Edward Said, *What can separation mean?*, AL-HAREM WKLY., Apr. 14, 2000 (arguing partition is remnant of “dying ideology of separation” expressed in Zionist and Palestinian nationalism, rooted in ancient problem of interpersonal “otherness”); Weiner, *supra* n.79 (suggesting confederation as final settlement). *Cf.* Oren Gross, *Mending Walls The Economic Aspects of Israeli-Palestinian Peace*, 15 AM. U. INT’L L. REV. 1539, 1609-26 (2000) (criticizing both economic autonomy and full integration). Gross proposes mutually independent trade policies coupled with cooperative labor access and revenue sharing consistent with already existing asymmetries in Israeli and Palestinian economic stature. *Id.* Historically divided Europe is even pushing through the tumult toward integration. *See generally* LARRY SIEDENTOP, *DEMOCRACY IN EUROPE* (2002) (arguing Europe’s move toward integration has been complicated by competing historic interests but nonetheless taking for granted its movement toward greater integration); WILLIAM HITCHCOCK, *STRUGGLE FOR EUROPE: THE TURBULENT HISTORY OF A DIVIDED CONTINENT, 1945-2002* (2003) (documenting history of European integration post-World War II and its success in doing so often as in opposition to superpowers of United States and Soviet Union). Argues continued historical divisions persist but further integration inevitable and historic in scale and character. *Id.* Consider that the momentum from the creation of a “national” State can overlook very real divisions within the “nationality.” For example, ethnic/economic resentments between Sindhis and Mohajirs in Pakistan, as well as other ethnic conflicts, have led some to even propose further division of Pakistan. *See* P. Sahadevan, *Ethnic Conflict in South Asia* (June 1999), at <http://www.ciaonet.org/wps/sap01> (describing five ethnic conflicts in Pakistan since decolonialization and others throughout South Asia). Three secessionist movements in Pakistan are cited (East Pakistan, Khalistan, and Eelam) and the Sindh/Mohajir conflict is described as arising from ethnic/political Sindh resentments against Mohajir status during colonialism prompting a purge of Mohajirs from former government posts and access. *Id.*; Gul A. Agha, *Should Pakistan be Broken Up?*, available at <http://www23.brinkster.com/pakterror/article15.htm> (arguing for further dissolution of Pakistan to return things to “their natural national and ethnic boundaries” with Pashtun areas attaching to Afghanistan, Kashmiri areas attaching to Kashmiri India with autonomous Pakistani areas). Likewise this trend has been noticed in Israel with young Israeli resentment toward orthodox students who enjoy exemption from military service. *See, e.g.*, *Jew against Jew is a Greater Threat than Anything from the Arab World*, DAILY TELEGRAPH, Dec. 14, 2001 (describing strong internal divisions within Israel between secular and religious Jews); *Conscripting the Haredim — An Attempt to Bridge the Secular Religious Divide*, World Jewish Congress Policy Dispatches, No. 36, Nov. 1998 (characterizing university student strike over special treatment for yeshiva students as indicative of division deeper and more troubling than that between Arabs and Israelis).

290. *See* SHIKAKI, *supra* n.60, at 40 (criticizing Oslo’s “open-ended nature” as postponing conflict resolution for almost six years and exacerbating uncertainty and non-commitment to peace process).

tions and a totalizing collapse of the economies of the West Bank and Gaza Strip.²⁹¹

Looking to a past example of separation through limited autonomy, regardless of what autonomy was granted the Bantu Homelands, the ANC remained committed to armed resistance against those who would deny their “self-determination,”²⁹² a position only emboldened by international sympathies.²⁹³ That the rightness of their cause appeared so self-evident, “engaged in a

291. See World Bank Social and Economic Development Group of the Middle East and North Africa Region, *Poverty in the West Bank and Gaza*, 13 (Jan. 2001) (describing Palestinian economy as limited and imbalanced with high unemployment and turbulent through 1990s and progressively more stagnant); Dr. Nabil Kukali, *A Poll Carried out by the Palestinian Center for Public Opinion (PCPO) 4* available at www.miftah.org/doc/polls/poll106.pdf (35.4% of Palestinians polled in November 2002 said they believed they could not “tolerate the economical consequences of the *Intifada*” for more than four months). Notice a consistent decade-long decline in both Real Growth and Per Capita GNP with a precipitous falling off since 2000. See CIA WORLD FACTBOOK 1995, Gaza (Per Capita GNP: US\$2,400 <1993 est.>, Real Growth: NA); CIA WORLD FACTBOOK 1995, West Bank (Per Capita GNP: US\$2,800 <1994 est.>, Real Growth: NA); CIA WORLD FACTBOOK 1996, Gaza (Per Capita GNP: US\$1,200 <1995 est.>, Real Growth: 3-4% <1995 est.>); CIA WORLD FACTBOOK 1996, West Bank (Per Capita GNP: US\$2,500 <1995 est.>, Real Growth: 3-4% <1995 est.>); CIA WORLD FACTBOOK 1997 Gaza (Per Capita GDP: US\$1,100 <1996 est.>, Real Growth: -1-2% <1996 est.>); CIA WORLD FACTBOOK 1997 West Bank (Per Capita GDP: US\$1,600 <1996 est.>, Real Growth: -1-2% <1996 est.>); CIA WORLD FACTBOOK 1998 Gaza (Per Capita GDP: US\$1,100 <1996 est.>, Real Growth: -6.9% <1996 est.>); CIA WORLD FACTBOOK 1998 West Bank (Per Capita GDP: US\$1,600 <1996 est.>, Real Growth: -6.9% <1996 est.>); CIA WORLD FACTBOOK 1999 Gaza (Per Capita GDP: US\$1,000 <1999 est.>, Real Growth: 2.2% <1998 est.>); CIA WORLD FACTBOOK 1999 West Bank (Per Capita GDP: US\$2,000 <1998 est.>, Real Growth: 2.2% <1998 est.>); CIA WORLD FACTBOOK 2000 Gaza (Per Capita GDP: US\$1,060 <1999 est.>, Real Growth: 4.6% <1999 est.>); CIA WORLD FACTBOOK 2000 West Bank (Per Capita GDP: US\$2,050 <1999 est.>, Real Growth: 4.6% <1999 est.>); CIA WORLD FACTBOOK 2001 Gaza (Per Capita GDP: US\$1,000 <2000 est.>, Real Growth: -7.5% <2000 est.>); CIA WORLD FACTBOOK 2001 West Bank (Per Capita GDP: US\$1,500 <2000 est.>, Real Growth: -7.5% <2000 est.>); CIA WORLD FACTBOOK 2002 Gaza (Per Capita GDP: US\$650 <2001 est.>, Real Growth: -35% <2001 est.>); CIA WORLD FACTBOOK 2002 West Bank (Per Capita GDP: US\$1,000 <2001 est.>, Real Growth: -35% <2001 est.>). See also Gross, *supra* n.289, at 1559-61 (describing security-based Israeli closure policy and heightened inspection of goods in transit as crippling to Palestinian economic growth through 1990s, estimating cost to Palestinian economy of closure, at US\$4.4 million per day).

292. See ANC STATEMENT, *supra* n.213, Sec. 3.3 “Just Struggle in the International Context” (arguing their cause within historically recognized struggles for national liberation).

293. See ANC STATEMENT, *supra* n.213, Sec. 3.3 “Just Struggle in the International Context” (citing numerous U.N. Resolutions and international accords in support of their violent resistance to apartheid).

just war for national liberation,"²⁹⁴ allowed them, even in 1996, when submitting their statement before the Truth and Reconciliation Commission,²⁹⁵ to justify attacks on Afrikaner *civilians* deemed implicated in the apartheid regime.²⁹⁶ This same commitment to absolute self-determination can be seen in this statement by the Palestinian militant organization Hamas, released on the fifty-fourth anniversary of Israeli Independence and seven years after the founding of the Palestinian Council, "Our people have known that the only road leading to liberating and returning to their lands in dignity was none else than resistance and Jihad."²⁹⁷

Or compare the nationalist reaction to the 1998 Good Friday Agreement, which sought to increase the autonomy of Northern Ireland by granting joint custody to Ireland and Britain.²⁹⁸ In a partial concession to Irish Catholics following World War I, Britain partitioned the island of Ireland by granting au-

294. ANC STATEMENT, *supra* n.213, Sec. 2 "Introduction" (preming all Commission admissions on ANC cause's rightness as struggle for liberation).

295. See BYRNES, *supra* n.76, at 396 (describing Truth and Reconciliation Commission chaired by Archbishop Desmond Tutu to establish permanent record of crimes under apartheid granting amnesty to those who provided testimony). See generally ARCHBISHOP DESMOND TUTU, NO FUTURE WITHOUT FORGIVENESS (1999) (providing account and arguing efficacy of Truth and Reconciliation Commission in forging peaceful future for South Africa).

296. ANC STATEMENT, *supra* n.213, Sec. 6.2.4 "Conduct of War and Civilian Casualties" (justifying attacks on civilians in context of just struggle for liberation).

297. Hamas, *Fifty four years and resistance remains the only road*, May 16, 2002 (stating its continued commitment to armed opposition to Israel).

298. See GOOD FRIDAY AGREEMENT strd. II, Sec. 1. Section 1 of Strand Two of GOOD FRIDAY AGREEMENT provides:

Under a new British/Irish Agreement dealing with the totality of relationships, and related legislation, at Westminster and in the Oireachtas, a North/South Ministerial Council to be established to bring together those with executive responsibilities in Northern Ireland and the Irish Government, to develop consultation, co-operation and action within the island of Ireland — including through implementation on an all-island and cross-border basis — on matters of mutual interest within the competence of the Administrations, North and South.

Id. See also David Trimble, *The Belfast Agreement*, 22 FORDHAM INT'L L.J. 1145, 1156-57 (1999) (describing North/South Ministerial Council as balancing against British-Irish Council consistent with historic integration of British Isles). British-Irish Council would operate for common policies in areas of mutual interest by consensus vote *Id.*; David Byrne, *An Irish View of the Northern Ireland Peace Agreement: The Interaction of Law and Politics*, 22 FORDHAM INT'L L.J. 1206, 1208 (1999) (describing GOOD FRIDAY ACCORDS as treating issues of "self-determination" and partnership in administering common policies between North/South and British-Irish Councils and broader integration).

tonomy to its lower twenty-six counties.²⁹⁹ The northern most six counties (“Northern Ireland”), which were predominantly Protestant, remained part of the United Kingdom.³⁰⁰ An Irish Catholic minority (“nationalists” or “republicans”) in the north remained committed to a united Ireland,³⁰¹ while a Protestant majority (“unionists” or “loyalists”) sought to preserve continued administration under Britain.³⁰² The compromise of the Good Friday Accords far from satisfied the Irish nationalist party Sinn Féin’s³⁰³ leader Gerry Adams,³⁰⁴ writing in a collection of pieces

299. See JONATHAN BARDON, *A HISTORY OF ULSTER 476-479* (1992) (dating introduction of Government of Ireland Bill to Parliament on Feb. 25, 1920). Bardon comments that the Government of Ireland Bill derived in part from the policy prominence of self-determination following World War I. *Id.* at 479. Bardon quotes Lord Balfour as analogizing the partition of Ireland to the partition of central Europe following the Treaty of Versailles. *Id.* Bardon describes how the lower twenty-six counties were to be known as Southern Ireland that would retain greater autonomy than the northern six counties. *Id.* Bardon characterizes the this arrangement as “repugnant” to nationalists. *Id.* at 478; Cara Hirsch, *Policing Undercover Agents in the United Kingdom*, 25 *FORDHAM INT’L L. J.* 1282, 1291 (2002) (characterizing Irish independence in 1920 as Great Britain’s partially conceding to Irish nationalist desires).

300. BARDON, *supra* n.299, at 477 (stating six north-eastern counties on Ireland would be ruled directly from London after partition); J. BOWYER BELL, *THE IRISH TROUBLES: A GENERATION OF VIOLENCE 1967-1992 1* (1993) (referring to northern six counties of Ireland as still within United Kingdom).

301. See JOSEPH RUANE & JENNIFER TODD, *THE DYNAMICS OF CONFLICT IN NORTHERN IRELAND: POWER, CONFLICT AND EMANCIPATION 184-85* (1996) (describing Catholic inhabitants of Northern Ireland as feeling second class to Protestants and retaining affinity for southern Ireland); RICHARD ROSE, *NORTHERN IRELAND: TIME OF CHOICE*, 11 (1976) (describing Catholics often sectarian but frequently joined by small numbers of Protestants in commitment to united Ireland); Adams, *supra* n.76, at 1180-81 (opposing division of Ireland and stating nationalist commitment to united Ireland).

302. RUANE, *supra* n.301, at 179-81 (describing Ulster Protestants following partition as ambivalent to identity in status but ultimately and resolutely British in character); ROSE, *supra* n.301, at 11-12 (describing northern Protestants as generally committed to personal and national identity with strong identification with Britain); Duncan Shipley-Dalton, *The Belfast Agreement*, 22 *FORDHAM INT’L L. J.* 1320, 1320-21 (1999) (giving account of History of Ulster Unionism from perspective of Ulster Unionist Party Member of Northern Ireland Assembly and asserting unionists commitment to membership in United Kingdom).

303. See BELL, *supra* n.300, at 1 (describing Sinn Féin as notoriously political arm of Irish Republican Army); BARDON, *supra* n.299, at 424 (placing beginning of Sinn Féin to merger with Hibernians in 1907 to further Irish republicanism); *Id.*, at 458-59 (describing decline of non-violent Sinn Fein in 1916 and greater affiliation with militancy and growing strength in North).

304. See Gerry Adams, *supra* n.76, at 1179 (1999) (describing himself as leader of Sinn Féin); BELL, at 171 (describing Gerry Adams as part of next generation of republican opposition in 1970s).

on the Good Friday Agreement,³⁰⁵ that “Self-determination is universally accepted to mean a nation’s right to exercise the political freedom” to direct its future and institutions, reaffirming Sinn Féin’s continued commitment to “an united Ireland free of British interference.”³⁰⁶

Neither Hamas nor Sinn Féin are marginal organizations; 18.3%³⁰⁷ polled support Hamas compared to Arafat’s fragile 38.3% (enjoying as much support as opposition)³⁰⁸ and Sinn Féin holds eighteen seats in the Northern Ireland Assembly,³⁰⁹ while the Social Democratic and Labor Party³¹⁰ competes with twenty-four.³¹¹ While a majority 56% of Northern Irish polled in 2002 would still vote for the Good Friday Agreement,³¹² the decline from 70% four years before exemplifies the malaise of an incomplete peace.³¹³ The consistent support for national move-

305. ANALYSIS OF THE NORTHERN IRELAND PEACE AGREEMENT, 22 FORDHAM INT’L L. J. 1133-1905 (1999).

306. Adams, *supra* n.76, at 1180 (1999) (citing Sinn Féin, *Towards a Lasting Pace in Ireland*, 3 (1995)). See also *Quote of the Day*, BELFAST NEWSLETTER, May 24, 1998 (quoting Gerry Adams upon passage of Good Friday Agreement, “If God spares me to live long enough, I hope to grow old in a united Ireland”).

307. See Kukali, *supra* n.291, at 4. (listing 18% of Palestinians supporting Hamas when asked, “If municipality or village council elections being held today, which political party would you vote for?”); *Both Israelis, Palestinians have right to live in peace: Palestinian poll*, AGENCE FR. PRESSE, June 10, 2002 (reporting Kukali poll as 18.6% support for Hamas).

308. See Kukali, *supra* n.291, at 5 (listing 20.2% of Palestinians Strongly supporting Arafat, 18.1% of Palestinians Somewhat Supporting Arafat, 21.7% Somewhat opposing Arafat and 16.1% strongly opposed to Arafat); *Both Israelis, Palestinians have right to live in peace: Palestinian poll*, AGENCE FR. PRESSE, June 10, 2002 (reporting Arafat’s support generally around 30%).

309. See *Northern Ireland Assembly*, at <http://www.ni-assembly.gov.uk/members/parties/party.htm> (listing Assembly Members by party and listing Sinn Féin with eighteen seats).

310. See BELL, *supra* n.303, at 182 (describing Social Democratic and Labor Party as formed as alternative to Irish Republican Army Catholic opposition to unionism); BARDON, *supra* n.299, at 679 (describing formation of Social Democratic and Labor Party in 1970 as principle voice of Catholic minority).

311. See *Northern Ireland Assembly*, *supra* n.309 (listing Assembly Members by party and showing Social Democratic and Labor Party with twenty-four seats).

312. See *BBC Northern Ireland Survey Reveals Support for The Agreement, at its Lowest*, BRITISH BROADCASTING CORP. INT’L., Oct. 17, 2002 (reporting poll of 56% for Good Friday Agreement in Northern Ireland with one third of unionist support and 82% republican support).

313. See William Graham, *Catholic Support for GFA still High*, IRISH NEWS, Feb. 20, 2003, at 8 (reporting poll showing 60% unionist support and 92% Catholic support for GOOD FRIDAY AGREEMENT, only thirty-six per cent of unionists would still vote for it today and ninety per cent of Catholics; down from 71%, at time of referendum); *BBC*

ments and their ability to grow over decades of mutually brutal violence, indicate autonomy and ethnic jurisdiction may not satisfy those seeking sovereignty and nationality.³¹⁴

Likewise, majorities only begrudgingly divest themselves of authority³¹⁵ (especially over territory)³¹⁶ as can be seen in the above exposition on the actual narrowness of the “Amend or Repeal Clause” of the Transkei Constitution Act.³¹⁷ The South African Parliament would amend the Transkei Constitution five years after its passage to wholly remove Transkeian jurisdiction over two mixed-ethnicity, urban areas within the Transkei.³¹⁸ After the Knesset voted to approve Oslo II by 61 to 59,³¹⁹ now

Northern Ireland Survey Reveals Support for The Agreement, at its Lowest, BRITISH BROADCASTING CORP. INT’L., Oct. 17, 2002 (reporting decline in support by both unionists and republicans from seventy per cent support when GOOD FRIDAY AGREEMENT was put up for referendum).

314. See, e.g., John Hume, *Ireland – The Healing Process*, 22 FORDHAM INT’L L.J. 1171, 1172-73 (1999). Hume rather eloquently describes “the Nationalist mindset” as rooted in a territorialism that demands absolute sovereignty. *Id.* He argues that to overcome this, it must be emphasized that rights are vested in people, not land, and the division of territory is an artificial barrier between people not a geographical feature. *Id.* He asserts the division of Ireland runs far deeper than any line on a map to the very worldview of its people. *Id.* To overcome this division, Hume argues that only agreement, and not violence and domination, is capable of to end conflict. *Id.*

315. See *supra* nn.102-107, 182-182, 253-253 and accompanying text (listing provisions of TRANSKEI CONSTITUTION ACT and Oslo II expressly reserving powers to South Africa and Israel respectively).

316. See *supra* nn.116-122 and provisions where Israel retained territories in West Bank.

317. See CARTER, *supra* n.76, at 124 (analogizing provisions of TRANSKEI CONSTITUTION ACT to reserves of power common to British and French colonial territories). See generally Kahn, *supra* n.237 (arguing apparent broadness of South African divestment of authority to Transkei is more modest than it appears).

318. Transkeian Constitution Amendment Act, No. 36 (1968) (S. Afr.). [hereinafter TRANSKEIAN CONSTITUTION AMENDMENT ACT]. TRANSKEI CONSTITUTION AMENDMENT ACT reads, in relevant part:

1. . . . The provisions of subsections (2) to (5) [of the Transkei Constitution Act Section 48(6)], inclusive, shall not apply in any area in the district of Matatiele or Port St. Johns which is not a Bantu area, and all such areas in each of the said districts, whether or not constituting a single area. . . .

2. . . . The High Court for the Transkei shall not have jurisdiction in or over any area in the district of Matatiele or Port St. Johns which is not a Bantu area. *Id.*; ANNUAL SURVEY 1969, *supra* n.277, at 33-34 (documenting provisions of TRANSKEIAN CONSTITUTION AMENDMENT ACT to remove from Transkeian Legislative Assembly jurisdiction over numerous judicial and civil functions in Matatiele and Port St. Johns).

319. See *Oslo II is Now in Force*, MIDEAST MIRROR, Oct. 6, 1995 (reporting Knesset passage of Oslo II by 61-59); *Israel Ratifies West Bank Autonomy Deal — Hamas truce reported*, DEUTSCHE PRESSE-AGENTUR, Oct. 6, 1995 (reporting on Knesset pre-dawn vote following sixteen hour debate ratifying Oslo II).

Prime Minister Ariel Sharon wrote in an editorial following the autumn of Oslo II and Rabin's assassination,

The Oslo agreement is bad and it is dangerous, but it is in the stages of implementation. The possibility of reversing it and implementing a different plan now seems unlikely.

What we must strive for is the reduction of future dangers, while keeping all possible available options. This plan should reduce friction, and afford security and calm to both sides.³²⁰

Despite a 70% Yes vote on the Good Friday Agreement referendum, the Protestant vote split 51-49.³²¹ Dr. Ian Paisley, who heads the Democratic Unionist Party³²² (which garners 29% of unionist support³²³ and holds eighteen seats in the Assembly³²⁴ compared to the Ulster Unionists Party's³²⁵ 44% unionist support³²⁶ and twenty-six Assembly seats)³²⁷, accused the British government of "selfishly appeasing the crocodile of a violent minority" by throwing the costs of English peace onto the Protestant

320. Ariel Sharon, *Making the Best of a Bad Deal*, JERUSALEM POST, Dec. 29, 1995, at 4 (writing of his continued opposition to Oslo II). See also Ariel Sharon, *After Two Years, a Balance Sheet*, JERUSALEM POST, Sept. 15, 1995, at 6 (listing Arafat's achievements for terrorism, costs to Israel of peace process and calling concessions by Israel capitulation abused by Arafat with impunity).

321. Peter Kellner, *Blair and Trimble can Ignore Loyalist Hostility*, OBSERVER, May 24, 1998, at 3 (reporting protestant vote in favor of only 51%); John Mullen, *Ulster: '70pc yes' to Peace; Republic 95pc in Favor — Exit Poll*, GUARDIAN, May 24, 1998, at 1 (reporting narrow victory for yes vote by protestants).

322. See BELL, *supra* n.303, at 232 (describing Democratic Unionist Party as fundamentalist loyalist and home to Protestant militants); BARDON, *supra* n.299, at 685 (describing Ian Paisley's founding of Democratic Unionist Party in September 1971 to act as "third force" to operate as militant counterweight to Irish Republican Army).

323. See Peter Kellner, *Blair and Trimble can Ignore Loyalist Hostility*, OBSERVER, May 24, 1998, at 3 (showing poll support for Ulster Democratic Unionist Party). See also Steve Bird, *South 94% North 71% — Ireland Votes for Peace*, SUNDAY MIRROR, May 24, 1998, at 1 (reporting 45% no vote in exit poll of Protestants with Ian Paisley claiming victory for opposition despite overall loss).

324. *Northern Ireland Assembly*, *supra* n.309 (listing Assembly Members by party and showing Democratic Unionist Party with twenty-one seats).

325. See BELL, *supra* n.303, at 23 (describing Ulster Unionists as opposed to Home Rule and supportive of political and social policy of continued identification with British); BARDON, *supra* n.299, at 383 (describing formation of precursor Conservative and Unionist Party in 1886 to oppose Home Rule).

326. See Peter Kellner, *Blair and Trimble can Ignore Loyalist Hostility*, OBSERVER, May 24, 1998, at 4 (showing poll support for Ulster Democratic Unionist Party). See also Steve Bird, *South 94% North 71% — Ireland Votes for Peace*, SUNDAY MIRROR, May 24, 1998, at 1 (reporting 45% no vote in exit poll of Protestants with Ian Paisley claiming victory for opposition despite overall loss).

327. *Northern Ireland Assembly*, *supra* n.309 (listing Assembly Members by party and showing Ulster Unionist Party with twenty-six seats).

Northern Irish.³²⁸

III. SEPARATE BUT NOT TRANQUIL

To resolve ethno-political conflict, "separate development," as articulated by Minister de Wet Nel above,³²⁹ promises the preservation of national identity without the security, economic and political costs of full succession or integration.³³⁰ Like a sitcom, the solution of drawing a line down the middle of a room appears easy enough. Geographical confinement, the inevitable interdependence of neighbors and insurmountable political realities, however, question the wisdom and practicality of drawing such a line.³³¹

For one, the line is inevitably dotted. Even where full severance is had, geographically linked regions are inevitably dependant on one another in trade, the use of resources, security, economic development and the sharing of labor pools.³³² This leads to greater bureaucratic redundancy and more inter-governmental barriers in the administration of comparatively small populations.³³³ Moreover, if the relationship remains acrimonious, shared administrative interests become more complicated by the presence of two State actors with the capacity to mobilize force against one another as opposed to interest groups under a common governmental apparatus.³³⁴

Second, when the dominant authority's domestic political

328. Paisley, *supra* n.78, at 1273 (opposing GOOD FRIDAY AGREEMENTS as selling-out Northern Protestants). See also Dr. Ian Paisley, *Republicans Reaping Fruits of Appeasement*, BELFAST NEWSLETTER, Sept. 3, 1998, at 14 (claiming peace process root of violence).

329. See PROGRESS THROUGH SEPARATE DEVELOPMENT, *supra* n.274 and accompanying text (piece by Foreign Minister Muller describing practical expedience of separation policy to quell ethnic tensions).

330. See *supra* n.289, and text by Gross (balancing pros and cons of Israeli-Palestinian economic integration and concluding economic considerations pull toward increased integration while political considerations pull toward separation).

331. See *supra* nn.192-211, 282-288 (documenting mutual failure of Oslo and Bantu Homelands).

332. See, e.g., *supra* nn.154 and 291 and accompanying text (describing Palestinian reliance on employment in Israel and how construction of barriers to trade and travel negatively affect Palestinian economy).

333. See, e.g., *supra* nn.107-110, 130, 137, 143, 143-153, 166-169, 253-253 and accompanying text (describing various administrative procedures required for legislation and administration between dominant and subordinate authorities).

334. See *supra* nn.79, 94-92, 107-110, 121-122, 130, 137, 143, 143-154, 166-169, 253-253, 291, 298 and accompanying text (providing various provisions requiring joint conferencing, etc. to implement basic policies).

climate makes substantial concessions impossible, what the dominant authority is willing to give up to the subordinate³³⁵ is an autonomy unacceptably limited and incapable of satiating claims of “self-determination.”³³⁶ Especially with power issues as sensitive as land, jurisdiction and legislative authority, dominant authorities have every incentive and the bargaining power to ensure the supremacy of their hand over the subordinate’s as the their prerogatives may dictate.³³⁷ This impoverishes the subordinate authority’s stature before its own people, further diminishing its capacity to effectively administer its affairs,³³⁸ a consequence only exacerbated by jurisdictional limitations on the subordinate.³³⁹ For example, Oslo II created perverse incentives to flee Palestinian jurisdiction and evade extradition³⁴⁰ and the immunity provided Israeli citizens undermined the Palestinian police’s capacity to maintain (at least the appearance of) their authority.³⁴¹ Consequently, the subordinate authority is unable to manage problems, such as terrorism, that may affect the dominant authority.³⁴² The dominant is therefore forced to entangle itself in the internal affairs of a hostile population³⁴³

335. AUTHOR’S NOTE: I use “dominant” and “subordinate” authority to reference majority and minority populations respectively. I refrain from using “superior” and “inferior” authority because of the possible connotations.

336. See *supra* nn.203, 212, 306 and accompanying text (citing commitment to “self-determination” of South African, Palestinian and Irish Republican nationalists).

337. See *supra* nn.102-110, 113-115, 253-253, 278 and accompanying text (outlining steps taken by Israel and South Africa to limit or redact subordinate sphere of authority).

338. See, e.g., *supra* n.60 and accompanying text by Shikaki (describing Palestinian lack of faith in Arafat’s ability and his kow-towing to Israel in administering their affairs); *supra* n.202 and accompanying text (referencing U.S. Army study that cited lack of geographical contiguity as inhibiting Palestinian central exercise of authority).

339. See *supra* nn.175-182, 269-269, 318 and accompanying text (outlining provisions of Oslo II limiting Palestinian jurisdiction, South African reservation of jurisdiction over non-Transkei citizens, and South African legislation rescinding authority granted under Transkei constitution act). See also *supra* n.175 and accompanying text by Shaqair on criminal jurisdiction under Oslo I.

340. See *supra* n.181 and accompanying text (outlining provision of Oslo II limiting crimes for which Israel must extradite to Palestinian jurisdiction).

341. See *supra* nn.176-176 and accompanying text (describing Israeli measures of control over criminal authority).

342. See *supra* nn.162-169, 253, 269 and accompanying text (listing limitations on subordinate capacity to administer security).

343. See *supra* nn.79, 94-92, 107-110, 121-122, 130, 137, 143-154, 166-169, 253-253, 291 and accompanying text (describing various required cooperation and administrative oversight provisions as well as necessary investment by South Africa for Transkei to succeed).

and put in the uncomfortable position of having to do so before international scrutiny.³⁴⁴

A third, increasingly important and recurrent problem in these agreements, is the disenfranchisement of these subordinate populations from international law.³⁴⁵ As shown above, a common line of political theory asserts States are limited in the extent to which they can divest themselves of authority over peoples within their borders.³⁴⁶ States have an obvious disinterest in creating internal foreign populations with a statehood that insures certain rights and privileges, such as United Nations representation or the power to bring claims in the International Court of Justice.³⁴⁷ This disenfranchisement has the collateral effect of again enfeebling the stature of the subordinate authority in commanding the respect of its population,³⁴⁸ deprives the subordinate authority of means of peaceful redress against the dominant authority³⁴⁹ and, consequently, leaves wide open a power vacuum to be filled by unofficial (and hostile) minority factions.³⁵⁰ The consequence is to, again, force the dominant authority to excessively entangle itself in the subordinate's administration.³⁵¹

Fourth, the political reality of how these agreements are implemented inhibit the perception of success and therefore scuttle the good faith necessary for prolonged peace.³⁵² A "process"

344. See *supra* nn.42, 279, 293 and accompanying text (describing international criticism of Israel and South Africa in their dealings with their respective subordinate populations).

345. See *supra* nn.102-105, 261-262, 259-260, 278-281 and accompanying text (describing Palestinian incapacity for international affairs and Transkei disenfranchisement from international bodies).

346. See *supra* n.247 (arguing as matter of theory that States cannot absolutely divest themselves of authority to subordinate bodies).

347. See *supra* n.259 and accompanying text (citing both U.N. and World Court requirement of Statehood for membership).

348. See, e.g., *supra* n.60 and accompanying text by Shikaki (describing Palestinian lack of faith in robustness of Arafat's administration).

349. See *supra* nn.65, 196, 282-284, 297 and accompanying text (outlining various armed resistance by Palestinian and South African factions).

350. See *supra* nn.60-67, 203, 213 and accompanying text (describing resistance by violent national groups in South Africa and Israel/Palestine).

351. See *supra* nn.79, 94-92, 107-110, 121-122, 130, 137, 143-154, 166-169, 253-253, 291 and accompanying text (outlining various types of entanglement of Israel and South Africa over Palestinian Council and Transkeian Authority respectively).

352. See *supra* n.40 (Beilin discusses with rather remarkable frankness Oslo's political difficulties and strangeness of moving past symbolic attitudes toward Arafat, in par-

that is dragged over years and decades fritters away whatever momentum is gained from the reaching of a "Deal."³⁵³ Almost a decade passed between the Madrid Conference and the ultimate collapse of the Oslo process.³⁵⁴ Viewed against the demographics of 27.1% of Israelis and 46.3% of Palestinians being under the age of 15 in 2002,³⁵⁵ sizable portions of both sides' futures spent the majority of their conscious lives routinely frustrated by a moribund negotiation process. Likewise, when South Africa declared the Transkei independent in 1976, the gesture was largely viewed as a farce and South Africa was left as the only country recognizing the Transkei national status.³⁵⁶ Whatever severance is had is protracted because competing nationalist groups on both sides, while perhaps not commanding an electoral majority,³⁵⁷ exert sufficient pressure and influence, if only in rhetoric, to stifle any momentum built by the "capitulationists."³⁵⁸

Fifth, the reluctance with which land is turned over to a subordinate or emancipated population will often translate to the dominant authority keeping the best cut for itself.³⁵⁹ Moreover, even where dominant has acted in good faith, the perception often still remains that the dominant authority has been stingy or that it merely seeks to jettison economically burdensome territory.³⁶⁰ This certainly was the perception after the Hebron Protocol, where a nominal number of aggressive Israeli set-

ticular, as enemy) and nn.79 and 290 (commenting on declining Israeli and Palestinian hopes for peace process and suspicion of others commitment).

353. *See supra* nn.79, 202, 290 and accompanying text (describing popular malaise with prolonged peace process).

354. *See supra* nn.202, 204-211, 290 and accompanying text (listing subsequent agreements, prolonged redeployments and popular frustration with peace process).

355. *See supra* n.204 and accompanying text (citing age demography in Israel and the Occupied Territories).

356. *See supra* nn.279-280 and accompanying text (describing South Africa's sole place in recognizing Transkei and consequent disenfranchisement of Transkei "citizens").

357. *See supra* nn.307-307, 324 (showing Sinn Féin, Hamas, and Ulster Democratic Unionists with sizable minority positions).

358. *See, e.g., supra* n.208-208 (showing inability to reach final Israeli-Palestinian agreement because of need to appease nationalist opposition).

359. *See supra* nn.196, 212 and accompanying text (describing resentment by Palestinians of Israeli presence on valuable 20% of Hebron and South African resentment of white ownership of South African land).

360. *See supra* n.228 and accompanying text (depicting enormous poverty in Transkei).

tlers were left on a not insignificant portion of a dense city with an enormous Palestinian majority.³⁶¹

Finally, and most paradoxically, once an umbrella identity is nationally recognized, it may shatter from its internal divisions. A common enemy or purpose smoothes over fissures that may be far more substantial and relevant to the day-to-day than a shared history or ethnicity. Managing and motivating an "Us" may be far easier than maintaining a "We."³⁶² As traditions are self-propagating and often adapt as necessary to history, their institutionalization is inconsequential to their preservation and only serves to undermine their sanctity.³⁶³

In a recent *NEW YORK TIMES MAGAZINE* interview, Libya's Muammar Qaddafi (hardly a historic proponent for peace with Israel) musingly proposed joining Israel and Palestine as the only way to serve both of their interests, "They can call it Israet-ine."³⁶⁴ He is hardly the first person to call for an Israeli/Palestinian State.³⁶⁵ Combined, the geographic position on the cusp of the Mediterranean, the large Arab Muslim and Western Jewish populations and the historically global character of the region would make such a country an international bridge for diplomacy and commerce. The wisdom of the alternative, of a resolutely divided checker board of autonomy or sovereignty over a landmass the size of New Jersey, at best is questionable when even the once bloodthirsty kingdoms of Europe have put their mutual interests before their mutual animosities.³⁶⁶

361. *See also supra* nn.196-196 and accompanying text (detailing Palestinian offense taken to Hebron Protocol).

362. *See supra* n.289 and accompanying text (covering considerations on infra-national resentments that have occurred once "nationality" has been recognized).

363. *See supra* n.289 and accompanying text (covering the discussion of resentment by young Israelis who are required to serve in the army over the exemption given to orthodox yeshiva students).

364. *See supra* n.289 and accompanying text covering comments in *N.Y. TIMES MAGAZINE* piece by Anderson (quoting Qaddafi as supporting unification of Israel and Occupied Territories).

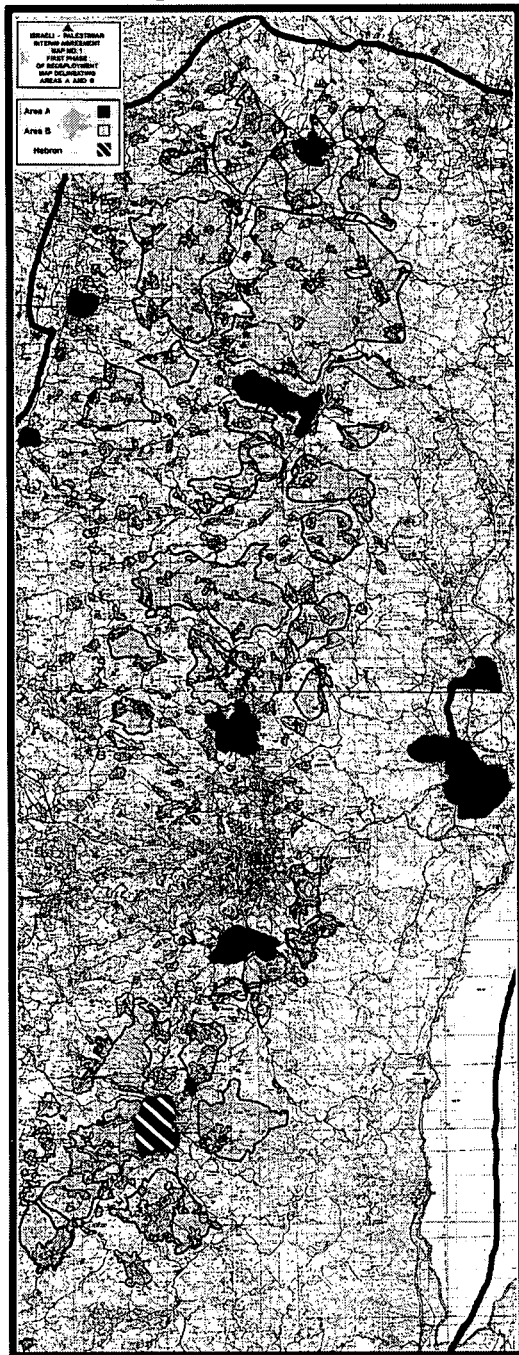
365. *See supra* n.289 and accompanying text describing comments by Stone (calling for confederation with Israel, West Bank and Jordan) and Said (criticizing policy of separation) and Gross (questioning economic potential of full unification).

366. *See supra* n.289 and accompanying text describing analysis by HITCHCOCK (documenting modern European history of integration) and SIEDENTOP (arguing competing trends in Europe but taking for granted movement toward integration).

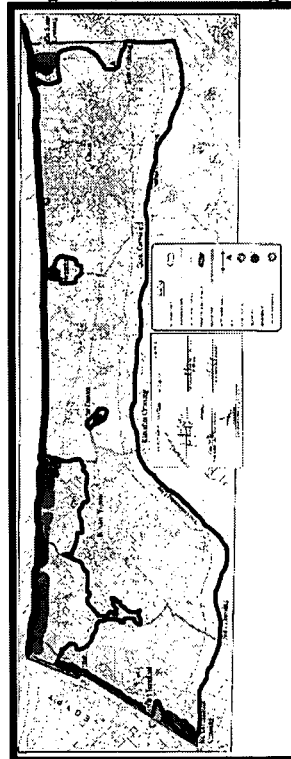
CONCLUSION

The creation of a "national" State is a homage to a history. It equates self-determination with an unbroken line of ethnic heritage rather than universal political enfranchisement. It resorts to sequestration rather than reconciliation to resolve conflict, a policy that because of regional practicalities has yet to show sustained effectiveness. Wilson is long dead and national homelands are fundamentally an acquiescence to and institutionalization of hate and tribalism. While it may be unnecessary and counterproductive to force pluralism on any society, it may be equally unnecessary and counterproductive to use the law to defend the integrity of ethnicities against miscegenation and to ignore the dynamism of identity over time. Do law and politics even have the capacity to mount such a defense? How many examples of the full separation of interspersed populations are there in history and how many attempts have ultimately deteriorated into genocide? Does edifying the myths of history work at making a peace worth living in?

Map 1 (West Bank)



Map 2 (Gaza Strip)



Author's Note: Maps have been enhanced for view in black & white.

