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Peace and the Political Imperative of Legal Reform in Palestine

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SYMPOSIUM: THE LEGAL FOUNDATIONS OF PEACE AND PROSPERITY IN THE MIDDLE EAST

PEACE AND THE POLITICAL IMPERATIVE OF LEGAL REFORM IN PALESTINE*

*George E. Bisharat***

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I. INTRODUCTION

The message I wish to convey is relatively simple: first, that an aggressive program of legal reform in Palestine¹ would contribute strongly to the successful conclusion of a just, and therefore, durable peace between Israelis and Palestinians; and second, that such a program of legal reform should be elevated to a primary concern on the list of international and U.S. policy objectives for the region from its currently low level.² Palestinians are far more likely to remain committed to the peace process when they are convinced that peace has brought tangible benefits to their lives. After nearly thirty years of strongly repressive Israeli military occupation, Palestinians in the West Bank and Gaza Strip have a deep yearning for democratic self-government, and their continued frustration erodes support for the peace process. Moreover, a stable, democratic Palestinian administration is, in the long run, a more reliable peace

¹ Although I join the international consensus in support of the right of the Palestinian people to national self-determination, I do not use the term "Palestine" to signal such support. No commonly accepted expression exists that describes the complex of laws and institutions needing to be reformed. "Palestine" is the term currently used by Palestinians to describe the entity that is now emerging in the region. I adopt this term without prejudice as to whether this entity will ultimately gain recognition as a state or not. See generally Omar M. Dajani, *Stalled Between Seasons: The International Legal Status of Palestine During the Interim Period*, 26 DEV. J. INT'L L. & POL'Y 27 (1997) (discussing the national rights of the Palestinian people).

² As one observer has put it, the challenge of creating a viable legal system in Palestine has been overshadowed by the "high politics" surrounding the Oslo peace process. See Glenn E. Robinson, *The Politics of Legal Reform in Palestine*, J. PALESTINE STUD., Sept. 22, 1997, available in 1997 WL 10948373.

partner for Israel than one that is founded on personalistic ties to an aging, and possibly ailing, leader — Yasser Arafat.³

The impetus for this Article has its roots in my experience within the last year consulting over the Palestinian Legislative Council's draft law on the independence of the judiciary, during which time I have met with elected council members, professional staff of the Council, representatives of the judiciary and executive branches, academics, and others. Part of my mission here is simply to bear witness to the hopes and desires of some of the people on the ground — hard-working, over-burdened, and largely unrecognized Palestinians who are struggling against daunting odds to provide their people with an accountable government and a society governed by the rule of law.

The term "legal reform" is a broad one. Indeed, the scope of reform needed in Palestine is very broad, encompassing legal institutions, civil and criminal procedure, and many areas of substantive law.⁴ I will not, however, address all aspects of the needed reform. Specifically, I will not discuss the necessity for substantive changes in the areas of corporate banking and commercial law,⁵ even though such changes are necessary to stimulate local and foreign investment, which in turn are needed to counteract unemployment and the general economic deterioration in the Palestinian sector. Other symposium participants will address these topics with far greater expertise than I would.⁶ More to the point, however, there are other areas of legal reform that have a greater capacity to directly enhance the peace process — namely, those that affect the human

³ There has been much speculation in the press as to the status of Arafat's health. See, e.g., *Arafat's Tremors*, JERUSALEM POST, Nov. 20, 1997, at 10; Marjorie Miller, *Arafat's Sickly Appearance Raises Questions About Health, Succession, Mideast: Palestinian Leader's Tremors Add to Concerns About Peace Process with Israel*, L.A. TIMES, Nov. 18, 1997, at A6.

⁴ See generally Hiram E. Chodosh & Stephen A. Mayo, *The Palestinian Legal Study: Consensus and Assessment of the New Palestinian Legal System*, 38 HARV. INT'L L.J. 375 (1997) (discussing the status of and proposing reforms to the Palestinian legal system).

⁵ For a discussion of these issues, see generally MAZEN E. QUPTY & JOHN L. HABIB, *LEGAL ASPECTS OF DOING BUSINESS IN PALESTINE* (1995).

⁶ See David P. Fidler, *Foreign Private Investment in Palestine Rejected: An Analysis of the Revised Palestinian Investment Law*, 31 CASE W. RES. J. INT'L L. 293 (1999); see also Keith C. Molkner, *Legal and Structural Hurdles to Achieving Political Stability and Economic Development in the Palestinian Territories*, 19 FORDHAM INT'L L.J. 1419 (1996).

and civil rights of the Palestinians — and it is these areas on which I wish to focus.⁷

Legal reform is only one of many objectives that can and should be pursued in support of the peace process, and I do not for a moment imagine that it, alone, will insure a lasting peace. As the negotiations have proven so labored and their success is in no way guaranteed, we must exploit every avenue possible to advance the cause of peace. Moreover, legal reform is one important area in which progress is politically feasible, a feature that may distinguish it from other possible policy objectives that, in the abstract, seem to offer even more attractions.

My argument is laid out in eight sections, of which this introduction is the first. In the second section, I will outline the legal framework within which the Palestinian Authority⁸ — the interim governing body established for the Palestinians in parts of the West Bank and Gaza Strip — operates. Third, I will identify a set of problems inherited by the Palestinian Authority in the administration of justice in the West Bank and Gaza Strip, and fourth, I will examine the efforts to address these problems already undertaken over the last few years. Fifth, I will describe a series of abuses perpetrated by the Palestinian Authority against the human and civil rights of the Palestinian residents under its rule. Sixth, I will analyze the political impact of the Palestinian Authority's abuses of power within the Palestinian community, particularly as it pertains to the peace process. Seventh, I will review the record of the U.S. policy and that of the international community vis-à-vis the development of the rule of law in Palestine. Eighth, and finally, I will propose a set of specific policy recommendations that, if implemented, would begin to ameliorate the problems I have identified, and in so doing, would further the objective of reaching a just, durable peace between Israelis and Palestinians.

II. THE LEGAL FRAMEWORK

Since 1993, Israel and the Palestinians have signed a veritable blizzard of declarations, agreements, letters, annexes, protocols, notes for the record, and the like, which together total close to 1,000 pages of documents, including the recent Wye River Memorandum of October 23,

⁷ Public opinion polls suggest that Palestinian support of the peace process is undermined more significantly by undemocratic practices of the Palestinian Authority than by the deteriorating economic circumstances. See Khalil Shikaki, *Peace Now or Hamas Later*, FOREIGN AFF., July-Aug. 1998, at 29, 38-40.

⁸ The Palestinians refer to the Palestinian Authority as "As-sulta al-wataniya al-filastiniya," or the "Palestinian National Authority." See *Palestinian National Authority* (visited Jan. 20, 1999) <<http://www.pna.org/>>.

1998.⁹ It may help us to step back from this maelstrom for a moment and be reminded of the broad outlines of the current peace process. All of us remember the dramatic image of Yasser Arafat and the late Yitzhak Rabin shaking hands on the White House lawn under the approving eye of President Clinton. In broad contours, the agreement they had reached consisted of three major components.¹⁰ First, Israel and the Palestinians exchanged “recognitions” — Israel recognized the Palestinian Liberation Organization (P.L.O.) as the representative of the Palestinian people, and the P.L.O. recognized the right of Israel to exist in peace and security.¹¹ Second, the two sides agreed in general terms to a phased withdrawal of Israeli troops and administrative apparatuses from parts of the West Bank and Gaza Strip — areas occupied by Israel in the 1967 Arab-Israeli War and ruled by military government ever since — and to the establishment in those places of an interim Palestinian self-governing authority.¹² Third, the parties agreed to continue negotiating the issue of sovereignty over the territories, as well as the related issues of the status of the city of Jerusalem, the rights of Palestinian refugees, the fate of Jewish settlers in the West Bank and Gaza Strip, and others.¹³ All of these things were to unfold within a “transitional” period of up to five years, commencing with the date of the inauguration of the Palestinian self-governing authority. Final status negotiations were to commence no later than the beginning of the third year of the interim period.¹⁴

The first steps to implement the Accord were taken in May 1994, when Israel and the Palestinians concluded the Agreement on the Gaza

⁹ See Wye River Memorandum (Interim Agreement), Oct. 23, 1998, Israel-Palestine Liberation Organization: 37 I.L.M. 1251 [hereinafter Wye River Memorandum].

¹⁰ The agreements were solidified as the Declaration of Principles (DOP). See Israel-Palestine Liberation Organization: Declaration of Principles on Interim Self-Government Arrangements, Sept. 13, 1993, 32 I.L.M. 1525 [hereinafter Declaration of Principles].

¹¹ This was accomplished in side letters to the Declaration of Principles between P.L.O. Chairman, Yasser Arafat, and Israeli Prime Minister, Yitzhak Rabin. See Letter from Yasser Arafat, Chairman of the P.L.O., to Yitzhak Rabin, Prime Minister of Israel (Sept. 9, 1993) and Letter from Yitzhak Rabin to Yasser Arafat (Sept. 9, 1993), reprinted in 1992/94 VIII PALESTINE Y.B. OF INT'L L. (Al-Shaybani Soc'y of Int'l L.), at 230-31. The recognitions are not, of course, fully reciprocal, as the P.L.O. recognized the right of Israel to exist as a nation while Israel only recognized the P.L.O. as the representative of the Palestinian people, without acknowledging the latter's rights to national self-determination.

¹² The precise terms of the withdrawal, the structure, and jurisdiction of Palestinian self-government were left for further negotiations.

¹³ See Declaration of Principles, *supra* note 10, at art. V(3).

¹⁴ See *id.* at art. V(2).

Strip and Jericho Area.¹⁵ A "Palestinian Authority" (P.A.) was created with powers and responsibilities over a range of civil matters delegated to it by the Israeli military administration,¹⁶ though none touching on matters set for discussion in the final status negotiations. One important fact to underscore here is that the conclusion of this agreement on May 4, 1994, started the clock ticking on the five-year interim or transitional phase, which will come to an end on May 4, 1999. Shortly thereafter, in June 1994, Yasser Arafat arrived in Gaza from abroad to head up an interim administration comprised of twenty-four members.

In September 1995, the Israeli-Palestinian Interim Agreement on the West Bank and Gaza Strip,¹⁷ often referred to as "Oslo II," was reached, which extended the jurisdiction of the P.A. into other areas of the West Bank. The Agreement divided the region into three territorial categories: A, B, and C. In Area A, composed of the larger urban areas of the West Bank, and including about four percent of its total land area, the P.A. assumed responsibility for public order and internal security. In Area B, consisting of West Bank villages, the P.A. took charge of public order and security for Palestinians, while Israel retained responsibility for security in order to protect Israeli nationals and to confront the threat of "terrorism." Areas A and B together contained about sixty-eight percent of the population of the West Bank and twenty-three percent of its land. Most of the land was assigned to Area C, where civil authority was planned to be gradually ceded by the Israeli military government to the P.A., while Israel maintained complete control over security and order. Israel further maintained exclusive authority over external security and foreign affairs.

In accordance with this scheme, Israel began withdrawing its army from the major towns of the West Bank and, with the sole exception of the town of Hebron, this first phase of withdrawal was completed by the

¹⁵ See Israel-Palestine Liberation Organization: Agreement on the Gaza Strip and the Jericho Area, May 4, 1994, 33 I.L.M. 622 [hereinafter Agreement on the Gaza Strip and the Jericho Area].

¹⁶ Annex II of the Agreement on the Gaza Strip and the Jericho Area, entitled a Protocol Concerning Civil Affairs, contains a list of 38 powers and responsibilities transferred from the Civil Administration of the Israeli military government to the Palestinian Authority. See Agreement on the Gaza Strip and the Jericho Area, *supra* note 15, at Annex II, art. II.

¹⁷ See Israel-Palestine Liberation Organization, Interim Agreement on the West Bank and the Gaza Strip, Sept. 28, 1995, 36 I.L.M. 551 [hereinafter Oslo II].

end of 1996.¹⁸ Three further Israeli troop withdrawals were scheduled to occur in six-month intervals.¹⁹

Elections for the head²⁰ of the P.A. and for an eighty-eight seat Legislative Council were then conducted on January 20, 1996.²¹ In these elections, Yasser Arafat, Chairman of the Executive Committee of the P.L.O., received nearly eighty-eight percent of the popular vote, and fifty members of his Fatah political party gained seats in the Legislative Council.²² Under the Oslo II agreement, the Council, together with the head of the P.A., exercises both legislative and executive authority. However, under Article V of the Oslo II agreement, the Council is to exercise executive powers through a special committee named the "Executive Authority." This body is composed of the head of the Council, a number of ministers and department chiefs selected by the head from among elected members of the Council, and other non-elected persons from outside the Council whose number may not exceed twenty percent of the total of the committee.²³

Beyond this, the relative powers of the executive, legislative, and judicial branches of the P.A. are minimally spelled out. As events have unfolded, it has become increasingly clear that the real decision-making power within the P.A. rests almost solely within the hands of Yasser Ara-

¹⁸ See Dilip Hiro, *Israel-Palestine: Netanyahu's Untenable Position*, Inter Press Serv., Jan. 16, 1997, available in 1997 WL 7073221. Israel refused to withdraw from Hebron following a series of suicide bombings in early 1996, perpetrated by Islamist opponents of the peace process, in which 59 persons were killed. See *Pullout from Hebron Not Expected Until After Elections*, JERUSALEM POST, May 5, 1996, at 1, available in 1996 WL 4072316. While a subsequent agreement was reached for Israeli withdrawal from Hebron in January, 1997, Israeli troops remain in the town, ostensibly to guarantee the security of several hundred Jewish settlers who are ensconced in the middle of the otherwise exclusively Palestinian Arab town. See Rebecca Trounson & Marjorie Miller, *Netanyahu, Arafat Agree on Long-Stalled Hebron Pull-Out*, L.A. TIMES, Jan. 15, 1997, at A1.

¹⁹ See Hiro, *supra* note 18.

²⁰ The term used in the agreement for the leader of the Council is the Arabic "ra'ees," which is translated as either "president" or "chairman." See ELIAS A. ELIAS & ED E. ELIAS, *ELIAS' MODERN DICTIONARY ENGLISH-ARABIC* 127, 566 (17th ed. 1970).

²¹ The number of representatives in the Council was originally fixed at 82. See Oslo II, *supra* note 17, ch. 1, art. IV. Later the number was increased to 88 by an amendment to the Palestinian Election Law. See JERUSALEM MEDIA & COMMUNICATION CENTRE, *THE PALESTINIAN COUNCIL* 14 (2d ed. 1998).

²² See JERUSALEM MEDIA AND COMMUNICATION CENTRE, *supra* note 21 (providing a detailed report of the election results and noting that, of the 35 new members of the Council formally registered as "independent," many leaned toward Fatah).

²³ See Oslo II, *supra* note 17, ch. 1, art. V.

Arafat and a small circle of advisors, while the Palestinian Legislative Council (P.L.C.) has been largely marginalized and rendered ineffective.²⁴

The latest round of agreements, reached in October 1998, at Wye River, Maryland, solidified an earlier commitment by Israel to conduct a further stage of troop withdrawals.²⁵ Israeli forces were to have pulled back from a further thirteen percent of the West Bank, now part of Area C. Most of the ceded territory was slated to become part of Area A, under full P.A. control, which would have then constituted a little over fourteen percent of the region, while a small area was to have become part of Area B, under shared Israeli-Palestinian security authority. In return, the Palestinians agreed to take further actions to annul specific clauses of the P.L.O. charter calling for Israel's destruction and guarantee Israeli security.²⁶

Clearly, neither Oslo I nor Oslo II awarded sovereignty over the West Bank and Gaza Strip to the Palestinians. In fact, both parties to the Accords undertook not to engage in activities that prejudiced the outcome of the final status negotiations.²⁷ One might justifiably wonder, then, where does my call for legal reform fall within this framework? After all, fundamental changes in the structure of the legal system and the substantive laws governing community life are quintessentially a sovereign prerogative. Would Palestinian action in this field run counter to the spirit, if not the letter of the Oslo Accords? The clear answer is "no." The original Declaration of Principles contemplated the establishment of "independent Palestinian judicial organs,"²⁸ and provided that the

²⁴ The effect of Arafat's repeated snubs and neglect of the P.L.C. has been to relegate that body to the role of "a powerless debating club." See *The Dilemma Facing Yasser Arafat*, 3 STRATEGIC COMMENTS, 1, 2 (Nov. 1997). For example, after an inquiry in 1997 uncovered widespread corruption and mismanagement among his ministers, President Arafat stalled for over a year in presenting a new cabinet for P.L.C. approval. Finally, in August, 1998, President Arafat appeared before the P.L.C., delivered a speech focusing on the travails of the peace negotiations, and then announced that the entire previous government would remain in office, supplemented by eight new "state" ministers without portfolio. See Graham Usher, *Arafat's New Cabinet - "Back Me or Sack Me,"* MIDDLE E. INT'L, Aug. 21, 1998, at 3.

²⁵ As noted above, this commitment was contained in the Oslo II agreement at Article I and timeline attached thereto. The Wye River Memorandum establishes a 12-week implementation schedule and also commits both parties to negotiate the terms of the third Israeli troop withdrawal provided for in Oslo II. See Oslo II, *supra* note 17, ch. 2, art. X; Wye River Memorandum, *supra* note 9.

²⁶ See Wye River Memorandum, *supra* note 9, § II.

²⁷ See Oslo II, *supra* note 17, at Preamble.

²⁸ Declaration of Principles, *supra* note 10, art. VII(2).

Palestinian "Council" would have the power to legislate within its jurisdiction.²⁹ The Agreement on the Gaza Strip and Jericho Area further authorized the P.A. "to promulgate legislation, including basic laws, laws, regulations, and other legislative acts"³⁰ and the Oslo II Interim Agreement specifically assigned the administration of justice through an independent judiciary to the P.A.³¹ There is little doubt, then, that the kind of legal reform I advocate is, in principle, entirely consistent with the Oslo Accords and the overall peace process.³²

It is also important to point out that, although the precise international legal identity of the P.A. may be somewhat indeterminate, as a political matter, at least, there is little or nothing to prevent the insistence by outside parties that it abide by international human rights standards and work to implement the rule of law.³³ In the first place, such a requirement is written into the Oslo II Agreement, where both parties agree to "exercise their powers and responsibilities pursuant to this Agreement with due regard to internationally accepted norms and principles of human rights and the rule of law."³⁴ Secondly, both the P.L.O. during the period prior to the Oslo Agreements and the P.A. after these agreements have unilaterally committed themselves to the observance of international human rights principles on a number of occasions and in a variety of ways.³⁵ For example, a "Basic Law" passed by the P.L.C. and intended to serve as an interim constitution for the P.A. contains numerous articles committing the P.A. to respecting fundamental human and civil rights

²⁹ See *id.* art. IX.

³⁰ Agreement on the Gaza Strip and Jericho Area, *supra* note 15, art. VII, ¶ 1.

³¹ See Oslo II, *supra* note 17, ch. 1, art. IX, ¶ 6.

³² This is not to say, however, that specific types of legal reform could not violate the agreements as they currently stand.

³³ As the P.A. is not a state, it is ineligible to become a party to international agreements, including those pertaining to human rights. An argument can certainly be made, however, that the P.A. is nonetheless a subject of international law and may be held accountable at least to abide by customary norms of international law in the area of human rights. See HUMAN RIGHTS WATCH/MIDDLE EAST, PALESTINIAN SELF-RULE AREAS: HUMAN RIGHTS UNDER THE PALESTINIAN AUTHORITY 39 (Sept. 1997) [hereinafter H.R.W./MIDDLE E. REP.]; Eyal Benvenisti, *Responsibility for the Protection of Human Rights Under the Interim Israeli-Palestinian Agreements*, 28 ISR. L.REV. 297 (1994).

³⁴ See Oslo II, *supra* note 17, ch.3, art. XIX. The commitment is reiterated in the Wye River Memorandum. See Wye River Memorandum, *supra* note 9, art. II, ¶ 4.

³⁵ The P.L.O. attempted to become a signatory of the Geneva Conventions of 1949 and their additional protocols in 1977, but was rebuffed on account of its non-state status. See Paul Lewis, *P.L.O. Seeks to Sign 4 UN Treaties on War*, N.Y. TIMES, Aug. 9, 1989, at A5.

both as delineated in various international treaties and in more general terms.³⁶ Yasser Arafat, moreover, issued a decree establishing the Palestinian Independent Commission on Citizens' Rights, a quasi-governmental board charged with monitoring the performance of the P.A. and ensuring the compliance of public institutions with human rights principles.³⁷

In sum, then, the legal framework established by the various agreements between Israel and the Palestinians virtually promises legal reform in the manner I will suggest below.

III. PROBLEMS IN THE ADMINISTRATION OF JUSTICE IN THE WEST BANK AND GAZA STRIP

The P.A. inherited a staggering array of problems in the administration of justice in the West Bank and Gaza Strip. For the sake of simplicity, these problems may be summarized as follows: 1) the absence of legal unity between the two regions; 2) confused and antiquated bodies of substantive and procedural law; 3) weak and vastly under-resourced judiciaries; and 4) a fragmented, demoralized, and poorly trained legal profession.³⁸ Let us briefly examine each of these challenges.

A. *Absence of Legal Unity*

Although the two regions historically had shared a common legal legacy through both the Ottoman Turkish administration and under British mandatory rule, they followed divergent legal trajectories since the

³⁶ See THE PALESTINIAN BASIC LAW (Third Reading) (1998) (Palestine), translated by Saladin Al-Jurf [hereinafter BASIC LAW]. The text of the PALESTINIAN BASIC LAW is reprinted in the Appendix to this issue of the *Case Western Reserve Journal of International Law*. 31 CASE W. RES. J. INT'L L. 495 (1999). Article 10 of the Basic Law states: "1) Human rights and basic freedoms are necessary and an obligation of respect. 2) The Palestinian National Authority works without delay to incorporate international and national declarations and agreements which protect human rights." *Id.* art. 10. Other articles guarantee equality before the law, freedom from arbitrary search or detention, the right to a public and fair trial, freedom of conscience, and the like. See *id.* arts. 9, 11, 14, 18.

³⁷ See Decree Number 59 (1993) (in Arabic). The Decree was published in the Official Gazette and became effective only in 1995.

³⁸ See generally Chodosh & Mayo, *supra* note 4 (reviewing problems of legal development facing the Palestinian Authority); see generally Frederick Russillo, Preliminary Judicial Systems Needs Assessment: The Autonomous Areas of Palestine and the Occupied Territories (Nov. 1994) (unpublished manuscript on file with author) (outlining and proposing solutions that address the current deficiencies in the legal framework and judicial structure of the West Bank and Gaza Strip).

collapse of the British Mandate in 1948. The West Bank then fell under Jordanian administration, and following its annexation in 1950, its court system and substantive laws were gradually assimilated into those of Jordan, which, like most of the Arab World, followed the continental civil law system.³⁹ The Gaza Strip, on the other hand, fell under the administration of the Egyptian military government, yet was never annexed to Egypt. Instead, its legal system continued to operate relatively free from Egyptian interference, applying "Palestinian law," which had its roots in the common law-influenced British mandatory system.⁴⁰ Thus, the two systems came to employ different terminology, procedures, and substantive law administered through different institutions.

Why is this a problem? Why is it any more problematic, one might wonder, than each of the fifty states of the United States having its own legal system? The answer is that the West Bank and Gaza Strip constitute a geographically tiny area and are sites of an evolving polity and economy that face multiple challenges: political, economic, administrative, and otherwise. Under these circumstances, integration is virtually a condition for survival. It is both costly and unwieldy to maintain two distinct legal systems and legal disunity hampers the development of commerce and other aspects of intercommunal life between the two regions.⁴¹ Further, the absence of an integrated legal system was never the free choice of distinct communities with regionally distinct identities, but rather the product of the Palestinians' loss of independence to two different occupying authorities. There is political symbolic value to legal unity as well, as it re-affirms the "one-ness" of the Palestinian people.

B. *Confused and Antiquated Laws*

Already subject to multiple layers of law laid down by foreign authorities — Ottoman, British, and Jordanian — both the West Bank and Gaza Strip were placed under Israeli military administration following the June 1967, Arab-Israeli war and remained so until the enactment of the Oslo Accords. What was the fate of the legal systems of the two regions for nearly thirty years under Israeli rule? International law requires that an occupying power— that is, a state that comes into control of territory outside its boundaries in a time of war, as Israel did of the West

³⁹ See generally E. Theodore Mogannam, *Developments in the Legal System of Jordan*, 6 MIDDLE EAST J. 194 (1952) (discussing the post-1950 changes to Jordanian laws and the Jordanian judicial system).

⁴⁰ See John Quigley, *Judicial Autonomy in Palestine: Problems and Prospects*, 21 U. DAYTON L. REV. 697, 704-05 (1996); see also ADAMA DIENG ET AL., *THE CIVILIAN JUDICIAL SYSTEM IN THE WEST BANK AND GAZA: PRESENT AND FUTURE*, 14-15 (1994).

⁴¹ See *Keeping People in their Place*, ECONOMIST, Sept. 12-18, 1998, at 48-53.

Bank and Gaza Strip — maintain the legal institutions and substantive law in force on the eve of its occupation. Amendments to existing law are permitted only for reasons of military necessity or where such changes are mandated by the interests of the public.⁴²

These principles were at least partially honored by Israel. Thus, the Gaza Strip and West Bank legal systems (or whatever remnants of them existed in the regions) resumed operations within one year of the 1967 war.⁴³ However, no efforts were made to unify their court systems nor to reconcile their divergent procedural and substantive laws. Legislation enacted in Jordan following the 1967 war was not enforced in the West Bank because it was not in force on the eve of the occupation. Thus, the Israeli military governments established in the West Bank and Gaza Strip assumed all governing authority there, including powers of legislation.⁴⁴

In time, the Israeli military government liberally exercised its legislative authority by enacting over 1,400 legal changes in the form of military orders in the West Bank and 1,100 in the Gaza Strip.⁴⁵ Many of these orders dealt with military and security matters, while others seemed patently targeted to protect Israeli interests and not those of the Palestinian residents of the region. For example, a series of military orders issued in the early 1980s forced Palestinian farmers to count and register all fruit

⁴² Article 43 of the Regulations Respecting the Laws and Customs of War on Land states:

The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.

1 PROCEEDINGS OF THE HAGUE PEACE CONFERENCES 629 (James B. Scott ed., 1920).

⁴³ Several important changes occurred in the West Bank court system as a consequence of its separation from Jordan and Israel's annexation of Jerusalem: access to the Jordanian High Court of Justice in Amman was cut off and judicial power was transferred by Israeli military order to the West Bank Court of Appeals. The latter court, formerly sitting in Jerusalem, was, because of its annexation by Israel in 1967, transferred to the West Bank city of Ramallah, ten or so miles to the north. See generally GEORGE E. BISHARAT, *PALESTINIAN LAWYERS AND ISRAELI RULE: LAW AND DISORDER IN THE WEST BANK*, 56-60 (1989) (discussing the interaction between the Israeli military court system and the existing legal system in the Gaza Strip and the West Bank).

⁴⁴ See PROCLAMATION ON LAW AND ADMINISTRATION, (PROCLAMATION NO. 2) (Isr.), reproduced in *MILITARY GOVERNMENT IN THE TERRITORIES ADMINISTERED BY ISRAEL 1967-1980: THE LEGAL ASPECTS*, 450-51 (1982).

⁴⁵ See ADAMA DIENG ET AL., *supra* note 40, at 39-40.

trees, tomato plants, and eggplants, and obtain licenses to plant any new ones — a rather obvious measure designed to protect Israeli agriculture.⁴⁶

Meanwhile, a means for assessing the Palestinian community's need for new legislation was never institutionalized and local Palestinian leaders remained perennially reluctant to seek legislative innovations from an occupying power whose legitimacy they refused to acknowledge. Thus, the law remained stagnant in many areas of importance to the Palestinians. The gulf in communication between occupier and occupied was compounded by the fact that the Israeli military government never consistently publicized its orders, such that the Palestinians, including lawyers, were at times totally unaware of the laws that governed them.⁴⁷

The resulting situation "cause[d] confusion about governing norms, prevent[ed] consistent and timely adjudications of civil and criminal cases, and produce[d] serious gaps between the formal codes and actual practice. Related to the lack of uniformity, the substantive law [was] not harmonized sufficiently with emerging international standards of commercial law."⁴⁸

⁴⁶ See BISHARAT, *supra* note 43, at 136.

⁴⁷ See RAJA SHEHADEH & JONATHAN KUTTAB, *THE WEST BANK AND THE RULE OF LAW*, 43-44 (1980).

⁴⁸ Institute for the Study and Development of Legal Systems, *Palestinian Legal Study: The Restoration and Modernization of the Palestinian Civil and Criminal Justice Processes* 23 (June 30, 1995) (unpublished manuscript, on file with author). Raja Shehadeh, a Palestinian lawyer practicing in the West Bank since the late seventies and a prominent commentator on Palestinian legal affairs, challenges the "commonly held misconception" that the existence of multiple layers of law in the West Bank and Gaza Strip in itself was a source of confusion, as local practitioners always had ways of determining which among the possible sources of law properly governed particular legal problems. See RAJA SHEHADEH, *FROM OCCUPATION TO INTERIM ACCORDS: ISRAEL AND THE PALESTINIAN TERRITORIES* 74 (1997). It is perhaps more accurate to say that the existence of the various legal strata caused no confusion as long as there was a consensus within the legal community on the means for resolving potential conflicts of laws. But the Israeli military government has, on occasion, exploited ambiguity concerning the ongoing applicability of certain laws to its own advantage. This was notably true of the Defence Emergency Regulations, a set of draconian measures enacted by the British during the Mandate period to suppress both Palestinian and Zionist paramilitary groups and nationalist activities. The Israeli military government has maintained that these regulations were never formally repealed either in the Gaza Strip or West Bank, while Palestinian lawyers, including Shehadeh, have argued that they were repealed by implication. The Israeli view is contained in UZI AMIT-KOHN ET AL., *ISRAEL, THE "INTIFADA" AND THE RULE OF LAW* 45-48 (David Yahav et al. eds., 1993). The contrary view is argued in RAJA SHEHADEH & JONATHAN KUTTAB, *THE WEST BANK AND THE RULE OF LAW* 24 (1980), and MARTHA ROADSTRUM MOFFETT, *PERPETUAL EMERGENCY: A LEGAL ANALYSIS OF ISRAEL'S USE OF*

C. Weakened Judiciaries

The third problem is weakened and impoverished judiciaries. By all appearances, the Israeli military government, for its nearly three-decade stewardship over the court systems in the Occupied Territories, devoted as few resources as possible to judiciaries without actually forcing their closure. By the mid-1980s, the courts were already suffering from inadequate staffing at all levels, corruption brought on in large part by pathetically inadequate salaries, repeated challenges to their independence from the Israeli military government, crumbling physical facilities, administrative inefficiencies, and a host of other maladies.⁴⁹

Perhaps most importantly, Israel had set up a military legal system in the Occupied Territories composed of courts and other administrative tribunals. In time, this system usurped the jurisdiction of the indigenous courts of the West Bank and Gaza Strip in so broad an array of civil matters as to effectively marginalize them.⁵⁰ During the *Intifada*, the Palestinian uprising between 1987 and 1993, the Palestinian police officers charged with investigating crimes prosecuted in the local courts and executing their judgments, resigned en masse, causing the legal systems of the West Bank and Gaza Strip to all but cease to function.⁵¹

D. Fragmented Legal Reform

The fourth problem centers upon the fragmented, demoralized, and professionally enfeebled bar. The problem was most acute in the West Bank, where leaders of the profession made the fateful decision to boycott the courts upon their re-opening after the 1967 war. The intent of the strike was to signal the profession's rejection of the legality of the Israeli

THE BRITISH DEFENSE (EMERGENCY) REGULATIONS, 1945, IN THE OCCUPIED TERRITORIES 45-47 (1989).

⁴⁹ See generally BISHARAT, *supra* note 43, at 125-44 (discussing the general deterioration of the West Bank's formal court system); ADAMA DIENG ET AL., INTERNATIONAL COMMISSION OF JURISTS & THE CENTRE FOR THE INDEPENDENCE OF JUDGES AND LAWYERS, THE CIVILIAN JUDICIAL SYSTEM IN THE WEST BANK AND GAZA 38-52 (1994) (identifying main problem areas in the civilian court system in the West Bank and Gaza).

⁵⁰ Cf. RAJA SHEHADEH, OCCUPIERS' LAW: ISRAEL AND THE WEST BANK 84-91 (1985) (describing how the power and jurisdiction increased for the military courts and decreased for the civil courts).

⁵¹ The formal court systems also faced competition from informal mediators whose judgments were made more quickly and, as a result, were perceived to be more effective than those made by the courts. See generally Adrien Wing, *Legal Decision-Making During the Palestinian Intifada: Embryonic Self-Rule*, 18 YALE J. INT'L L. 95, 123-27 (1993).

occupation and, in particular, its annexation of the city of Jerusalem. Little thought was devoted at the time to the possible duration of Israeli rule but the assumption was that it would be short-term. Eventually, a few lawyers resumed practice, as did some new graduates of law faculties, only to be ostracized by the strikers.⁵² Thus, the strike, officially called off only in 1995,⁵³ not only split and marginalized the profession, but also deprived it of a generation of wisdom and mentoring, and thereby led the way for Israeli military officials to exercise the responsibilities formerly vested in the local bar association. This they did with the same degree of inattention to community interests as they did other matters.

Circumstances were a little less dire in Gaza. But even there, the influx of many new and poorly trained lawyers to practice greatly weakened the economic status of the profession, and with it the social and political standing of lawyers. In neither region was there a law faculty offering instruction in local law; aspirants to law practice either studied by correspondence or by traveling abroad where they received training in the systems of the host countries. And in both regions the profession was essentially idled by the closure of the courts during the *Intifada*.⁵⁴ Needless to say, there was never a bar association that united the legal professions in the two regions. Together, these factors clearly exacted a toll on the professional competence of the bar.⁵⁵

To recount, then, the P.A. inherited a legal system facing challenges in four key areas: 1) legal disunity; 2) confused and antiquated laws; 3) weak judiciaries; and 4) an enfeebled legal profession of questionable competence. Keeping in mind that the various components of a viable legal system for any state are generally accepted as: 1) independent judiciaries; 2) substantive and procedural laws that are responsive to community interests; and 3) a professionally competent legal profession, one can appreciate just how devastating these problems were to the Occupied Territories.

⁵² See generally BISHARAT, *supra* note 43, at 145-61 (examining the disintegration of the legal profession in the West Bank); George E. Bisharat, *Courting Justice? Legitimation in Lawyering Under Israeli Occupation*, 20 L. & Soc. INQUIRY 399-402 (1995) (describing and analyzing the effects of the West Bank lawyers' strike).

⁵³ See RAJA SHEHADEH, *FROM OCCUPATION TO INTERIM ACCORDS: ISRAEL AND THE PALESTINIAN TERRITORIES* 162 n.7 (Ctr. Of Islamic & Middle E. L. Book Series No. 4, 1997).

⁵⁴ See Lisa Hajjar, *AUTHORITY, RESISTANCE, AND THE LAW: A STUDY OF THE ISRAELI MILITARY COURT SYSTEM IN THE OCCUPIED TERRITORIES*, 526 (1995) (unpublished Ph.D. dissertation, American University) (discussing the migration of lawyers from the civil courts to the Israeli military courts).

⁵⁵ See Chodosh & Mayo, *supra* note 4, at 380, 430-31.

IV. THE ADMINISTRATION OF JUSTICE UNDER THE PALESTINIAN AUTHORITY

What, then, has the P.A. done to deal with the problems we have just identified? To their credit, Palestinian leaders quickly recognized the need to revive and unify the moribund legal systems in the two regions, and there was reason for optimism that genuine, meaningful changes might be rapidly achieved.⁵⁶ Most significantly, the P.A. developed, with assistance from Australia, a detailed plan for improving the administration of justice in the areas under its control.⁵⁷ Work also began on establishing a Basic Law that was intended to serve as an interim constitution for the P.A.. After considerable public and official debate, a draft law was passed by the P.L.C. in April 1997.⁵⁸ Though not a perfect document, the Basic Law, if enacted and, more importantly, observed would greatly advance the rule of law in the region.⁵⁹ To date, however, it hangs in limbo, awaiting the signature of Yasser Arafat, who has offered no public rationale for his failure to ratify the law.⁶⁰ And as further events have unfolded, those reasons for early optimism have diminished rather than increased. Although modest progress has been achieved on some

⁵⁶ See, e.g., Gary A. Hengstler & Richard L. Fricker, *Yasser Arafat: My Vision*, A.B.A. J., Feb. 1994, at 46; Gary A. Hengstler, *Building a Rule of Law*, A.B.A. J., Feb. 1994, at 50; Gary A. Hengstler, *First Steps Toward Justice*, A.B.A. J., Feb. 1994, at 52; Richard L. Fricker & Gary A. Hengstler, *From Military Rule to Civil Law*, A.B.A. J., Feb. 1994, at 62.

⁵⁷ Specifically, the plan addressed 1) the unification of existing laws governing the West Bank and Gaza Strip; 2) the improvement of court buildings and facilities; 3) the unification of judicial systems and procedures; 4) the standardization of prosecution procedures; 5) the development of computerized legal and judicial databases; and 6) the development of an independent forensic science capability. See RULE OF LAW STRATEGIC DEVELOPMENT PLAN (The Palestinian Authority Ministry of Justice ed., 1996) (this publication was prepared in part by the contributions of Australian International Legal Resources).

⁵⁸ See Adrien Katherine Wing, *The Palestinian Basic Law: Embryonic Constitutionalism*, 31 CASE W. RES. J. INT'L L. 383 (1999); Palestinian Legislative Council, *Laws and Projects* (visited Feb. 24, 1999) <<http://www.pal-p.l.c.org/english/laws/laws.htm>>.

⁵⁹ For a critique of an early draft of the Basic Law, see Naseer Aruri & John Carroll, *A New Palestinian Charter*, 23 J. PALESTINE STUD. 5 (1994).

⁶⁰ Marwan Kanafani, a spokesman for Arafat and P.L.C. member, suggested that Arafat's refusal to sign the Basic Law is out of concern over the lack of input from diaspora Palestinians, whose interests Arafat represents in his capacity as Chairman of the Executive Committee of the P.L.O. See Larry Kaplow, *Arafat Vows Power-Sharing, Crackdown on Corruption*, ATLANTA J./ CONST., Dec. 31, 1997, at A7. According to Kanafani, "[h]e has a problem with (the Council) being part of the Palestinian people but not all of the Palestinian people." *Id.*

fronts, the overall performance of the P.A. exhibits a troubling diffidence, and at times, outright contempt of the law. So let us examine the P.A.'s record in our four key problem areas.

A. *Legal Unification*

First, in the area of legal unification, depressingly little has been accomplished. Yasser Arafat issued a decree extending the jurisdiction of the High Court of Justice formerly sitting in Gaza to include the West Bank; however, it appears not to have been fully implemented.⁶¹ Some steps to establish law commissions — one dealing with the reform and harmonization of civil procedure and the other doing the same with respect to criminal procedure have been taken — but as of July 1998, neither commission had been fully staffed nor had become fully operational.⁶² New laws applicable to both regions, either in the form of decrees issued by Yasser Arafat, or legislation promulgated by the P.L.C. since 1996, have begun to establish a common corpus of law for the West Bank and Gaza Strip.⁶³ However, substantial distrust between these legal communities, each of which tends to push for unification on its own terms has, no doubt, hampered progress in this important area.⁶⁴

B. *Confusion in Laws*

In the second problem area, confused and antiquated substantive and procedural laws, things have only become increasingly complex and confusing. There are, as I have already mentioned, new sources of legislation, in the decrees made by Yasser Arafat, and laws passed by the P.L.C., which add to the multiple strata left by previous administrations. There is also confusion as to the ongoing applicability of the Israeli military orders. On the one hand, the Oslo Accords specifically call for the continuing application of those orders. On the other hand, one of the very

⁶¹ See SHEHADEH, *supra* note 53, at 152-53 (describing the High Court's extended jurisdiction). The Palestinian Independent Commission for Citizens' Rights reports that, as of December 1997, no effort had been made to unify the High Courts in Gaza and the West Bank. See PALESTINIAN INDEPENDENT COMMISSION FOR CITIZENS' RIGHTS, THIRD ANNUAL REPORT, 79-80 (1997) [hereinafter PICCR].

⁶² See Interview with Ibrahim Sha'ban, Member of the Civil Law Commission, Jerusalem (July 16, 1998) (notes on file with author).

⁶³ As Raja Shehadeh points out, however, none of the new laws have explicitly identified the region(s) within which they are to be effective and it is only by inference that they have been made applicable to both the West Bank and Gaza Strip. See SHEHADEH, *supra* note 53, at 152-53.

⁶⁴ See GLOBAL BUREAU CENTER FOR GOVERNANCE AND DEMOCRACY, JUDICIAL ADMINISTRATION PROJECT IN THE WEST BANK AND GAZA (Mar. 1996), at I-3.

first proclamations of Yasser Arafat following his assumption of powers was that "the laws, regulations and orders which were in force prior to 5 June 1967 in the West Bank and Gaza Strip shall remain in force until unified."⁶⁵ Note the date — June 5, 1967, the day on which the Arab-Israeli war started — and it is the laws prior to that date that are to remain in effect. The later-issued military orders are therefor presumably excluded. This decree, widely reported in the region's Arabic press, was apparently Arafat's attempt to distance himself from the politically unpopular military orders without patently violating a commitment spelled out in the Accords. A later decree, however, stated that the laws in force in the territories as of May 19, 1994, would remain operative — including, one must assume, the Israeli military orders issued before that date.⁶⁶ It has also become clear since then that the P.A. views some military orders as still in force and has directly cited them as authorizing some of its actions.⁶⁷

In addition, the P.A. has imported laws on criminal procedure that have no roots in local jurisprudence, but instead were applicable to the revolutionary courts of the P.L.O. outside the West Bank and Gaza Strip.⁶⁸ These rather unforgiving rules have been applied in special courts set up by the P.A. — about which more will follow — without any enabling legislation.⁶⁹ Not surprisingly, local legal practitioners have little or no familiarity with or even access to these laws and are at an obvious disadvantage in the courts that apply them.⁷⁰ Thus, the confusion mounts.

⁶⁵ SHEHADEH, *supra* note 53, at 149 (quoting text of Decision No. 1 issued on May 20, 1994).

⁶⁶ *See id.* at 139, 150 (stating that the Israeli government has not stopped issuing military orders in the areas still under its control).

⁶⁷ *See, e.g.*, The Palestinian Society for the Protection of Human Rights and the Environment, *PNA Carries out Forced Eviction in Jericho Using Israeli Absentee Property Law* (visited Oct. 14, 1997) <http://www.birzeit.edu/lawe/reports/1994/nov_94.html>. In one case reported by LAW, the Palestinian Society for the Protection of Human Rights and the Environment, the P.A. evicted a tenant and his family from a rented home in the Jericho area via an administrative order through the "Department of Absentee Property," an agency established by Israel to administer lands and properties confiscated from Palestinians who were alleged to have been absent from the property during the 1948 war. *See id.*

⁶⁸ *See* Mona Rishmawi, *The Actions of the Palestinian Authority under the Gaza/Jericho Agreements*, in *THE PALESTINE NATIONAL AUTHORITY: A CRITICAL APPRAISAL* 3, 7 (Center for Policy Analysis on Palestine, 1995).

⁶⁹ *See generally id.* at 7-8 (describing the procedures used by the courts and law enforcement agencies in treating prisoners).

⁷⁰ *See id.* at 7.

One positive accomplishment in this area should be noted. The P.A. Ministry of Justice contracted with the Bir Zeit University Law Center to, for the first time, tabulate, gather, and index all the laws in force in the two regions. This project, now complete, enables judges, lawyers, legislators, and others to at least undertake their respective obligations with a better awareness of the laws in force.⁷¹

C. Problems in the Judiciary

Let us now turn to the third challenge, the weak and under-resourced judiciary, where the courts have faced repeated challenges to their independence from the executive branch. First, there has been no clarification of the rules regarding which body has the authority to select judges and what procedure governs their appointments. As a matter of practice, this power has been monopolized by Yasser Arafat, who, in a number of his appointments, has appeared to reward political loyalty over professional competence and knowledge of local rules and practice.⁷² More troubling still is the fact that several judges have been dismissed or forced into resignation in retaliation for issuing judgments unfavorable to the government. This apparently was the case with Chief Justice of the High Court in the West Bank, Amin Abd al-Salam, who received a resignation order one week after a High Court ruling ordering the release of a number of university students illegally detained by the P.A.⁷³ Moreover, Chief Justice of the Gaza High Court, Qusai al-Abadla, was forced to resign in early 1998, following the publication of an interview in which he criticized Minister of Justice, Freih Abu Medein,⁷⁴ for interventions in the judicial system contrary to law. On a number of occasions as well, P.A. officials have simply refused to enforce or abide by decisions of the West Bank and Gaza courts.⁷⁵

Just as the integrity of the court systems in the West Bank and Gaza Strip were undermined by Israel's establishment of a parallel military legal system, so too have they now been undermined by the establish-

⁷¹ See Interview with Dr. Camille Mansour, Director of Bir Zeit University Law Center, in Bir Zeit, Jordan (July 9, 1998) (notes on file with author).

⁷² Thus a former lawyer from Gaza who returned from forced exile was appointed Chief Justice of Gaza. See Rishmawi, *supra* note 68, at 7.

⁷³ See H.R.W./MIDDLE E. REP., *supra* note 33. Abd al-Salam's predecessor in that position, Khalil Silwani, had earlier suffered a similar fate. See Glenn E. Robinson, *Authoritarianism with a Human Face*, CURRENT HIST., Jan. 1998, at 13, 16.

⁷⁴ See Rachele H.B. Fishman, *Palestinian Human Rights Suffer from Official Corruption*, 351 LANCET 425, 425 (1998).

⁷⁵ See PICCR, *supra* note 61, at 77-90.

ment of two new court systems under the P.A. The Security Court system adjudicates internal and external national security cases according to procedures elaborated for the P.L.O. revolutionary courts abroad.⁷⁶ The High Court for State Security, established in a decree by Yasser Arafat in February 1995, convenes specially at the behest of the executive authority — an obvious infringement against the principle of the separation of powers.⁷⁷

The military court system ostensibly tries cases involving members of the Palestinian security services on matters arising out of the performance of their duties.⁷⁸ With the proliferation of security agencies, the number of persons subject to the jurisdiction of these courts is considerable.⁷⁹ Military court trials follow the same procedures that are required for the Security Courts. As we shall see below, these procedures are summary, deficient, and unfair, especially in those cases that have imposed the death penalty.⁸⁰

The message conveyed by the existence and practices of the security and military courts is that the regular civil courts are simply not the locus of real power. Thus, Palestinian citizens often appeal to security personnel, rather than the courts, for the resolution of their disputes. Nor has the message of the powerlessness of the regular civil courts been lost on their own judges. The High Court, ostensibly the highest legal authority in the land, has several times declined to hear cases involving illegal detentions ordered by military courts, on the grounds that it lacks the jurisdiction to do so.⁸¹

On the bright side, the P.L.C. passed a Law on the Independence of the Judiciary in late November 1998, which was subsequently given to Yasser Arafat for ratification. This law is of paramount significance given its potential to greatly strengthen the judicial branch of government. In its current form, however, the law continues to suffer from numerous deficiencies, and I am pessimistic as to whether the law will even be ratified, let alone exert the positive influence over the judiciary that it

⁷⁶ The Security Courts consist of a Misdemeanor State Security Court, a General State Security Court, and High Court for State Security. *See id.* at 81-82.

⁷⁷ *See id.*

⁷⁸ *See id.* at 83.

⁷⁹ *See* Debrah Horan, *Palestinian Police Preside Without Law*, HOUS. CHRON., June 22, 1997, at 1.

⁸⁰ *See* PICCR, *supra* note 61, at 82.

⁸¹ *See, e.g.,* Amnesty International, *Palestinian Authority: Prolonged Political Detention, Torture, and Unfair Trials* (visited Feb. 5, 1999) <<http://www.amnesty.org.uk/reports/palestine/index.html>>.

set out to establish.⁸² Despite this pessimism, enactment of the law on the Independence of the Judiciary will figure prominently on my list of policy recommendations.

D. The Legal Profession

Lastly, let us turn to the status of the legal profession. Here, at least, we can say that some real progress has been made. Negotiations between the various organizations representing lawyers in the West Bank and Gaza Strip resulted in an agreement for the establishment of a founding committee for a new Palestinian Bar Association, encompassing both regions, in June 1997. Shortly thereafter, a decree by Yasser Arafat bestowed on this committee the powers of a bar association.⁸³ From these measures, the legal profession has at least the beginnings of an organization that can articulate the concerns of lawyers, assure the competence of new entrants to the bar, enforce discipline within the profession, and perform other similar responsibilities. In addition, legal education tailored more to local practice is now available in several local universities.⁸⁴ No doubt the benefits of these developments will become more readily apparent as time goes on.

Overall, however, the progress of the P.A. toward overcoming the problems in the legal system has been disappointing. Perhaps this assessment of the performance of a fledgling government facing challenges at nearly every level seems overly harsh and critical. The consequences, however, may be read in the P.A.'s rather dismal record in the area of respect for Palestinian human and civil rights. It is to that record that I now turn.

⁸² The law had not yet been signed by the head of the P.A. – a condition for its enactment – as of February 15, 1999, nor was there any indication that a signature was forthcoming. Telephone Interview with Keith Schultz, Associates in Rural Development, in Ramallah, Jordan (Feb. 15, 1999).

⁸³ See *The State of Human Rights in Palestine II: the Judicial System*, PALESTINIAN HUM. RTS. MONITOR, Aug. 1997, at 17; PICCR, *supra* note 61, at 79.

⁸⁴ Bir Zeit University Law Center has established a Masters in Law program geared to educate graduates of foreign law schools in local law. See Interview with Dr. Camille Mansour, *supra* note 71. Jerusalem University now offers a four-year undergraduate program in law, which leads to a "license" degree authorizing its holders to enter local professional practice. See Interview with Ali Khashan, Faculty of Law Dean at Jerusalem University, in Jerusalem (July 16, 1998) (notes on file with author).

V. ABUSES OF HUMAN AND CIVIL RIGHTS UNDER THE PALESTINIAN AUTHORITY

Let me first clarify the relationship between the problems in the legal system outlined in the prior two sections and the abuses of human and civil rights I am about to describe. It is not the case that the problems in the legal system simply cause the human rights abuses. Indeed, both the problems and the abuses may themselves share roots in deeper causes related to external pressures on the P.A., internal political challenges faced by its leadership, and the nature of the Palestinian political culture.⁸⁵

The external pressures emanate from Israel and the United States in the form of repeated demands that the P.A. crack down on "terrorism" as a price for further Israeli military withdrawals from the Occupied Territories. As I go through this litany of abuses, keep in mind that U.S. officials have been fully cognizant of them and have acquiesced and even encouraged their commission. The internal challenges involve maintaining the legitimacy of the peace process and the political leadership that has pinned its fate to the success of that process and holding off the Islamist and leftist nationalist opposition to the Oslo Accords. These demands fall on a leadership accustomed to working within the framework of a revolutionary movement only minimally constrained by law.

Even so, deficiencies in the legal system encourage the abuses, while improvements in the legal system will undoubtedly foster, though not independently cause, advancements in the P.A.'s respect for human and civil rights.

One other important clarification the security services, under the direction of the executive branch, is primarily responsible for most of the rights violations. The executive branch consists of the P.A. head, Yasser Arafat, his selected ministers, and other department chiefs. The P.L.C., in contrast, is now the most important forum for airing the dismay of the Palestinian community over abuses by the executive authority of citizens' rights. However, its many resolutions and recommendations to the executive branch regarding human and civil rights violations have been consistently ignored, reflecting, in part, the absence of a constitution or other legal referent that clearly defines the relative powers of the branches of government in the P.A.⁸⁶ Thus, as I detail the record of abuses under the "P.A.," I am primarily referring to its executive branch.

⁸⁵ See generally Glenn E. Robinson, *Authoritarianism With a Palestinian Face*, CURRENT HIST., Jan. 1998, at 13 (discussing the causes of the P.A.'s authoritarian politics).

⁸⁶ See PICCR, Third Annual Report, *supra* note 61, at 55-58.

The record of human rights abuses highlights the following four areas: 1) illegal and arbitrary arrests and detentions; 2) torture and physical abuse of detainees; 3) unfair trials; and 4) violations of the freedom of press and public expression.

A. *Illegal Arrests and Detentions*

Arbitrary arrests without reference to the law are perhaps the most widespread of violations against human rights by the P.A. There are, of course, laws of criminal procedure in force in both the Gaza Strip and the West Bank that regulate seizures of persons.⁸⁷ While wanting in some important respects, these laws nonetheless impose either warrant requirements or, in exigent circumstances justifying warrantless arrests, post-arrest review of one form or another.⁸⁸ The laws also establish standards and procedures for review of pre-trial detention and provide for attorney and family visitation.

The P.A. has frequently engaged in wide-ranging sweeps, generally in the aftermath of an act of violence against Israelis by Islamist opponents of the peace process, in which hundreds, if not more, have been arrested without warrant, often on the basis of political beliefs and affiliations rather than any grounded suspicion of actual criminal responsibility. For example, following several suicide bombings in Israel in 1996, the P.A. arrested almost 1,100 suspected sympathizers of *Hamas*⁸⁹ and Islamic Jihad and detained them for periods far in excess of the law.⁹⁰ The Palestinian Human Rights Monitoring Group in 1997

⁸⁷ For an overview of criminal procedure in Gaza and the West Bank, see Palestinian Legal Study, *supra* note 48.

⁸⁸ Gaza law requires post-arrest review within 48 hours by magistrate; Jordan vests power of review in prosecutor. *See id.* at Attachment E at 1, Attachment F at 3.

⁸⁹ "Hamas" in Arabic means "zeal" and is the acronym of "harakat al-muqawima al-islamiya," or "Islamic Resistance Movement." *See* ZIAD ABU-AMR, ISLAMIC FUNDAMENTALISM IN THE WEST BANK AND GAZA: MUSLIM BROTHERHOOD AND ISLAMIC JIHAD 66 (1994). Hamas was founded in Gaza before the *Intifada*, while Islamic Jihad was founded during it, both with the goal of ending Israeli occupation and establishing an Islamic state in Palestine. *See id.* at 53, 66, 93, 103. Hamas is composed of a non-military, administrative, charitable, and political wing, and a military wing which has launched a series of deadly attacks against Israeli soldiers and civilians. *See id.* at 67; AHMAD RASHAD, HAMAS: PALESTINIAN POLITICS WITH AN ISLAMIC HUE 7 (1993). Islamic Jihad is a purely politico-military organization which is also responsible for multiple lethal attacks against Israelis. *Cf. id.* at 4-5; ABU-AMR, *supra* at 106-08.

⁹⁰ *See Human Rights Under the Palestinian Authority: Hearing Before the Subcommittee On International Operations and Human Rights of the Committee on International Relations*, 104th Cong. 77 (1996) (statement of Abigail Abrash, Director, Robert F. Kennedy Memorial Center for Human Rights) [hereinafter Abrash Hearing].

The Palestinian Human Rights Monitoring Group in 1997 documented 117 cases in which individuals were detained without charge and without trial for more than a year,⁹¹ and in some cases, detention has lasted for more than two years.⁹² In August of that same year, another Palestinian human rights group estimated the number of persons detained without charge or trial at between 200 and 300.⁹³ Many have been held incommunicado for lengthy periods as well.

No doubt a condition contributing to this particular kind of violation is the proliferation of security services under the P.A. As of 1997, at least twelve military branches have been operating in the region, employing as many as 30,000 to 50,000 individuals.⁹⁴ The problem is not only, or even chiefly, one of numbers. Few members of the security forces are professionally trained police officers. Most members are either former P.L.O. fighters who came to the regions with the P.L.O. leadership in 1994, or young *Intifada* activists, many formerly imprisoned by the Israelis, who were awarded appointments in return for service to the nationalist cause and, one may surmise, ongoing political loyalty to Arafat.⁹⁵ The duties and terms of reference of these many agencies are nowhere specified. According to *Human Rights Watch*, "[t]he various security agencies appear to be autonomous units whose duties are ill-defined and overlapping. They appear to be accountable to no one but President Arafat, and sometimes act in competition with one another."⁹⁶ Courts, moreover, have proven nearly powerless to halt these illegal and arbitrary arrests.

B. *Torture and Abuse of Detainees*

The character of the security agencies also plays a role in the second even more disturbing category of human rights violations committed under the P.A., namely torture and abuse of detainees. The first death of a detainee in the custody of the P.A. was that of Farid Abu Jarbu'a in July,

⁹¹ See PALESTINIAN HUMAN RIGHTS MONITOR, *supra* note 82, at 7-8.

⁹² See Avi Machlis, *Israel: Demands Foster Palestinian Police State*, FIN. TIMES (LONDON), Oct. 21, 1998, Int'l at 5, available in LEXIS Market Library, Promt File.

⁹³ See HUMAN RIGHTS WATCH, HUM. RTS. WATCH WORLD REP. 1998, at 340 (1998) [hereinafter H.R.W. WORLD REP. 1998].

⁹⁴ See Horan, *supra* note 79. One of the salutary provisions of the Wye River agreement is the planned reduction of this number to no more than 30,000; even that number is large in light of the size of the population of the region.

⁹⁵ See generally GRAHAM USHER, PALESTINE IN CRISIS: THE STRUGGLE FOR PEACE AND POLITICAL INDEPENDENCE AFTER OSLO, 65-67 (1995).

⁹⁶ H.R.W./MIDDLE E. REP., *supra* note 33, at 9.

1994, shortly after the P.A. came to power in the Gaza-Jericho areas.⁹⁷ An autopsy revealed traces of violence on his body, later announced by the Palestinian Justice Minister to have been the cause of death.⁹⁸ By the end of 1997, an additional fourteen Palestinians had died in P.A. custody under questionable circumstances.⁹⁹ Some certainly died of pre-existing health conditions, but in 1996 and 1997 at least fourteen deaths were confirmed to have been directly caused by torture.¹⁰⁰ Numerous reports of physical abuse at less than lethal levels have led Palestinian human rights workers to conclude “[t]orture is a routine and everyday reality in the Autonomous Areas”¹⁰¹

The forms of torture employed by Palestinian security officials include beatings both with and without weapons, positional abuse, hooding, exposure to extremes of heat and cold, sleep deprivation, burning with electric elements, cigarettes, or molten plastic, and threats and insults.¹⁰² Detainees are often subjected to more than one of these forms of abuse. Some methods, for example, positional abuse, which often involves shackling the person to a child-sized chair in a painfully contorted position for periods of many hours, mimic techniques used by Israeli interrogators against Palestinian detainees and may have been learned by Palestinian security officers who had previously been tortured themselves.¹⁰³

As one can imagine, the practice of torture has not gone unremarked within or outside of the Palestinian community. Palestinian official response to the outcry has generally been to deny the widespread torture of detainees, while admitting its occurrence in isolated examples and, even

⁹⁷ See *id.* at 18.

⁹⁸ See *id.*

⁹⁹ See *id.*

¹⁰⁰ See SENATE COMM. ON FOREIGN RELATIONS & HOUSE COMM. ON INT’L RELATIONS, 105TH CONG., COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1997, 1481 (Joint Comm. Print 1997) [hereinafter COUNTRY REPORTS 1997].

¹⁰¹ *The State of Human Rights in Palestine III*, PALESTINIAN HUM. RTS. MONITOR, Dec. 1997, at 4.

¹⁰² See Amnesty International, *supra* note 81, ch. 6; U.S. Dep’t State, *Israel and the Occupied Territories Reports on Human Rights Practices for 1997* (Jan. 30, 1998) <http://www.state.gov/www/global/human_rights/1997_hrp_report/Israel.html>(describing position torture used on Ahma Abu Hamed).

¹⁰³ See Amnesty International, *supra* note 81. On Israeli torture techniques, see HUMAN RIGHTS WATCH/MIDDLE EAST, TORTURE AND ILL-TREATMENT: ISRAEL’S INTERROGATION OF PALESTINIANS FROM THE OCCUPIED TERRITORIES (1994).

less frequently, investigating and bringing to justice its perpetrators.¹⁰⁴ Yet the manner of those investigations and trials: hasty, summary, and rife with procedural inadequacies,¹⁰⁵ suggests a lack of will to systematically root out the causes of official torture and instead a desire to appease critics with "show" trials and public scapegoats.

Earlier I alluded to unfair trials, especially those conducted in either the Security Courts or in the military courts. Let me now spell out some of the procedural deficiencies of these courts. Between the first trial in the Security Courts in April 1995 and February 1997, some fifty-seven additional cases were tried. According to *Human Rights Watch*:

Trials have usually been held at night, within hours of arrest, and have often lasted only minutes. Defendants have been systematically denied the right to be represented by independent counsel, bring witnesses, or appeal their verdicts. The judges presiding over these courts are military commanders who reportedly have no judicial experience, having served in neither the ordinary criminal nor the military courts.¹⁰⁶

Although P.A. officials announced that these trials would be held in public, authorities have typically given no advance notice of the trials and suspects themselves have only learned of their impending trial upon their entering the courtroom.¹⁰⁷ Families of defendants have typically not been notified prior to trial, and some have learned of their loved one's convictions by radio announcement after the fact.¹⁰⁸

The shortcomings of a Security Court trial are mirrored in the proceedings of the military courts. Punishments meted out by both types of courts have not been trivial. Both, in fact, are empowered to enforce the death penalty, and a number of death sentences have been handed down between the two court systems.¹⁰⁹ None had been carried out until August 1998, when two members of a Palestinian security service tried in military court for murder and assault against other Palestinians were executed

¹⁰⁴ See *Deaths in Detention: A Pattern of Abuse, Illegality, and Impunity*, PALESTINIAN HUM. RTS. MONITOR, Dec. 1997.

¹⁰⁵ H.R.W./MIDDLE E. REP., *supra* note 33, at 14-15.

¹⁰⁶ *Id.*

¹⁰⁷ See Amnesty International, *supra* note 81.

¹⁰⁸ See *id.*

¹⁰⁹ See, e.g., Rebecca Trounson, *Palestinian Brothers Executed 4 Days After Crime*, L.A. TIMES, Aug. 31, 1998, at A6.

by firing squad within four days of the alleged offense.¹¹⁰ Other sentences that included many years of hard labor have also been imposed.¹¹¹

D. Muzzling Freedom of Expression

Let us now turn to the fourth and last major category of human rights violations, limitations on the freedom of the press and public expression. The P.A. has repeatedly shown a deplorable readiness to stifle public opposition to the peace process or criticism of its performance.¹¹² It has done so through either temporary or permanent closures of newspapers, interference with their distribution, and harassment and arrest of journalists, human rights workers, and other critics of the government.¹¹³ This is so, notwithstanding provisions of the Palestinian Press Law passed by the P.L.C., guaranteeing freedom of expression.¹¹⁴

Interference with the distribution of newspapers or their closure was particularly endemic in the first two years of P.A. rule. In May 1995, the East Jerusalem newspaper *al-Umma* ran a caricature of Yasser Arafat, earning it a warning from the Preventive Security Service (P.S.S.) (perhaps the largest of the Palestinian security agencies) against issuing that edition.¹¹⁵ Although most of the copies were seized by the P.S.S., some had already been released. The paper then published a statement outlining and criticizing the behavior of the P.S.S.¹¹⁶ Shortly thereafter, arson damaged the offices of *al-Umma* and its owner, who reportedly had also been threatened, subsequently shut down the paper.¹¹⁷ Further, the largest Palestinian daily in the area, *al-Quds*, suffered a one-week shut-down

¹¹⁰ See *id.*

¹¹¹ Amnesty International, for example, reports that two Palestinian naval policemen were sentenced to 15 and 10 years imprisonment with hard labor for causing an unintentional death. Their trial, including a half-hour recess, was concluded within two hours. See Amnesty International, *supra* note 81.

¹¹² See H.R.W./MIDDLE E. REP., *supra* note 33, at 23, 28-30.

¹¹³ See *id.* at 24-35.

¹¹⁴ Although the Press Law also contains vague provisions barring the publication of articles that "may cause harm to national unity," it authorizes the confiscation of such articles. H.R.W./MIDDLE E. REP., *supra* note 33, at 24 (quoting Article 37(3) of the 1962 Basic Law of the Gaza Strip). For a thorough analysis of the impact of the Press Law on freedom of expression, see PALESTINIAN CENTRE FOR HUMAN RIGHTS, CRITIQUE OF THE PRESS LAW OF 1995 ISSUED BY THE PALESTINIAN AUTHORITY (1995).

¹¹⁵ See H.R.W./MIDDLE E. REP., *supra* note 33, at 24.

¹¹⁶ See *id.*

¹¹⁷ See *id.*

after publishing a paid announcement by *Hamas* and interviewing a prominent Palestinian critic of the peace process.¹¹⁸

Harassment and detentions of journalists were also common during this period. In one of the best-publicized of these incidents, the editor of *al-Quds* received a call on Christmas Eve, 1995, instructing him to move an article describing a meeting between Yasser Arafat and the Greek Orthodox Patriarch from page eight in the paper to the front page.¹¹⁹ Following his refusal, the Preventive Security Service personnel detained him for five days.¹²⁰ Many other journalists, up to twenty-five in the first two years,¹²¹ suffered detentions, while others had been beaten, threatened, and insulted at scenes they had attempted to report, and had equipment, notes, and personal belongings destroyed or confiscated by security personnel.¹²²

Such assaults on the freedom of the press have been less common recently, though they have not stopped completely. In late October, 1998, eleven journalists were briefly detained and their notes and videotapes seized, while they attempted to interview Sheikh Ahmad Yassin on the Islamist reaction to the agreement reached at Wye River.¹²³ Following the Wye River meetings and in a misguided effort to carry out the terms of the Memorandum, Yasser Arafat issued an "anti-incitement" decree that would punish not only incitement to racial discrimination and violence, but also incitement "to division" or "to breaching the agreement" reached between the P.L.O. and other states — in short, virtually any criticism of the policies and actions of the Authority.¹²⁴ The effect of all of this has been, predictably, self-censorship on the part of the Palestinian press. In the words of one prominent Palestinian journalist, Ghassan al-Khatib:

¹¹⁸ See *id.* at 24-25.

¹¹⁹ See *id.* at 25.

¹²⁰ See H.R.W./MIDDLE EAST REPORT, *supra* note 33, at 25.

¹²¹ See *id.*

¹²² See *The State of Human Rights in Palestine IV*, PALESTINIAN HUM. RTS. MONITOR, Jan. 1998, at 17-21.

¹²³ During the Negotiations of the Israeli/Palestinian Peace and Security Agreement at Wye Plantation, the Palestinian Police Arrests Journalists and Prevents Them from Contacting the Political Opposition and Confiscates their Films and Tapes, Palestinian Hum.Rts Monitoring Group, Press Release, Oct. 24, 1998 (on file with author).

¹²⁴ See *Wye: A Charter for Human Rights Violations* (visited Feb. 3, 1999) <http://www.lawsociety.org/press/1998/oct_26.html> (containing severe criticisms of the Wye negotiations and agreement published by LAW in an October 26, 1998 press release).

The problem is that there is no respect for the law and because the judicial system is weak, there is nobody strong enough to challenge these acts. Therefore newspapers are afraid to write anything that might annoy the P.A. Instead, they count on Wafa, the official Palestinian news agency, for what they know is okay to print.¹²⁵

Lawyers and human rights workers who have spoken critically of P.A. practices have also been targeted. By far the best-publicized of these cases is that of Dr. Eyad Sarraj, a medical doctor and former commissioner-general of the Palestinian Independent Commission on Citizens' Rights.¹²⁶ He was initially detained in December 1995, for allegedly "defaming" the P.A.¹²⁷ He was again arrested in May 1996, for "allegedly slandering the P.A.," after having described it as "corrupt, dictatorial, [and] oppressive" in a *New York Times* editorial.¹²⁸ During this incident, he was detained for eight days.¹²⁹ He was released on bail, yet had never formally been charged.¹³⁰

On June 10, 1996, Sarraj was re-arrested and charged with possession of hashish in his clinic office.¹³¹ Several days later, Sarraj was brought before a State Security Court which extended his detention on the charge that he had assaulted a policeman while in custody.¹³² After seventeen days in custody, Sarraj was released on bail after signing a document committing him to "abide by the law when it comes to publishing anything to do with the authorities."¹³³ However, the trumped-up drug charges were never officially dismissed.¹³⁴ Variations on this experience have been endured by a number of other human rights workers and lawyers in the region.¹³⁵

¹²⁵ H.R.W./MIDDLE E. REP., *supra* note 33, at 26.

¹²⁶ *See id.* at 32.

¹²⁷ *See id.*

¹²⁸ Anthony Lewis, *Darkness in Gaza*, N.Y. TIMES, May 6, 1996, at A15.

¹²⁹ *See* H.R.W./MIDDLE E. REP., *supra* note 33, at 32-33.

¹³⁰ *See id.* at 33.

¹³¹ *See id.*

¹³² *See id.*

¹³³ *Id.* (quoting Eyad Sarraj, *Justice in Heavens*, open statement following his third release from prison, on July 15, 1996).

¹³⁴ *See* H.R.W./MIDDLE E. REP., *supra* note 33, at 33.

¹³⁵ Others detained include Raji Sourani, director of the Gaza Center for Rights and Law; Bassam Eid, a researcher for the Israeli human rights organization B'Tselem; and Muhammad Dahman, an activist in ad-Dameer (a prisoner support organization). *See id.* at 31-35.

This is only a partial list of the abuses against human and civil rights perpetrated by the P.A. To be sure, they pale by comparison to the range and scale of abuses suffered by Palestinians under Israeli military government in its heyday. For example, the P.A. has never engaged in punitive home demolitions,¹³⁶ deliberate campaigns of politically motivated killings,¹³⁷ forced exile,¹³⁸ and land confiscations.¹³⁹ According to Israeli military sources, 83,321 Palestinians were brought to trial in military courts during the *Intifada*,¹⁴⁰ and more than 18,000 administrative detention orders were issued from the beginning of the uprising to November, 1997.¹⁴¹ Even in the post-Oslo period, substantial numbers of Palestinians continue to be held in Israeli prisons.¹⁴² In May 1998, the Israeli human rights group B'Tselem made claims that Israeli intelligence services detain and interrogate some 1,000 to 1,500 Palestinians per year and that an estimated eighty-five percent are tortured.¹⁴³

Still, one may ask, "How have the Palestinians put up with all of this? Why haven't they engaged in open revolt against the P.A.?" They may yet, in fact, and that is precisely the danger that neglect of these

¹³⁶ See generally Dan Simon, *The Demolition of Homes in the Israeli Occupied Territories*, 19 YALE J. INT'L L. 1 (1994) (providing a critical legal analysis of the Israeli home demolition policy).

¹³⁷ See Elia Zureik & Anita Vitullo, *Extrajudicial Killings: Israel's Latest War on the Intifada* 20 (1992) (unpublished manuscript on file with author) (providing evidence of Israel's reliance on political killings and summary executions).

¹³⁸ See B'TSELEM, 1987-1997 A DECADE OF HUMAN RIGHTS VIOLATIONS 26 (Jan. 1998).

¹³⁹ See generally George Bisharat, *Land, Law, and Legitimacy in Israel and the Occupied Territories*, 43 AM. U. L. REV. 467 (1994) (arguing, in part, that Israeli has expended a great deal of energy to construct a legal regime facilitative of land confiscations).

¹⁴⁰ See HUMAN RIGHTS WATCH/MIDDLE EAST, TORTURE AND ILL-TREATMENT: ISRAEL'S INTERROGATION OF PALESTINIANS FROM THE OCCUPIED TERRITORIES 2 (1994).

¹⁴¹ See B'TSELEM, *supra* note 138, at 18.

¹⁴² At the end of 1997, the U.S. State Department reported that 3,565 Palestinians were imprisoned by Israel, of whom 382 were under administrative detention. See COUNTRY REPORTS 1997, *supra* note 100, at 1465.

¹⁴³ See Press Release from B'Tselem and ACRI, in Joint Report to the U.N. Committee Against Torture: Israel Continues to Violate Convention Against Torture, (May 14, 1998) (visited Mar. 1, 1999) <<http://www.btselem.org/PRESS/980514.htm>>. Other forms of repression continue as well. See generally B'TSELEM, DEMOLISHING PEACE: ISRAEL'S POLICY OF MASS DEMOLITION OF PALESTINIAN HOUSES IN THE WEST BANK (Sept. 1997) (describing Israel's policy of mass demolition carried out on Palestinian homes built without effectively available building permits).

abuses entails. So let us now turn to look at the political impact of these violations of Palestinians' human and civil rights, and, in particular, weigh their implications for the progress of the peace negotiations.

VI. THE POLITICAL IMPACT OF HUMAN AND CIVIL RIGHTS VIOLATIONS

The first thing to keep in mind in gauging the political impact of the P.A.'s human and civil rights violations is the broader historical context. Palestinians of the West Bank and Gaza Strip suffered many years under a highly repressive Israeli military government. At the same time, occupation brought the Palestinians into unprecedented proximity with Israeli society and government and thus, introduced them to a working democracy. While never under illusions about the fruits of this democracy for themselves, or even for their Arab relatives living within Israel and suffering discrimination there,¹⁴⁴ Palestinians in the Occupied Territories were, nonetheless, able to witness parliamentary elections and debates, a highly critical and relatively free press, open public debate and assembly, and an authentic, healthy court system.

Though the Israeli military government in the Occupied Territories was repressive, it was also in many respects a highly legalistic administration.¹⁴⁵ This allowed at least limited scope for legal opposition to military government practices, and, by the mid-eighties, a number of Palestinian human rights groups had cropped up which were schooled in the language and organizing tactics of the international human rights movement and protected somewhat from Israeli retribution by ties to that movement.¹⁴⁶ In other fields such as labor and womens' movements, health, agriculture, and education a number of non-governmental organizations (NGOs) were developed to address the human and social needs of the Palestinian people that were not being addressed by the Israeli military government.¹⁴⁷ These NGOs were decentralized in leadership and stressed institutionalized internal governance rather than personalized

¹⁴⁴ See generally DAVID KRETZMER, *THE LEGAL STATUS OF THE ARABS IN ISRAEL*, 77-134, 175-79 (1990) (discussing overt, covert, and institutional discrimination against Arabs in Israel).

¹⁴⁵ See BISHARAT, *supra* note 43, at 47-69 (discussing the dual character of the Israeli military government).

¹⁴⁶ See generally George Bisharat, *Attorneys for the People, Attorneys for the Land: The Emergence of Cause Lawyering in the Israeli-Occupied Territories*, in *CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES*, 453, 463-67 (Austin Sarat & Stuart Scheingold eds., 1998).

¹⁴⁷ See generally GLENN E. ROBINSON, *BUILDING A PALESTINIAN STATE: THE INCOMPLETE REVOLUTION* 38-65, 184 (1997) (describing the rise of these organizations and the management of these organizations by the PNA).

politics. In sum, then, a dynamic Palestinian civil society had emerged that had an image of what a democracy, albeit a flawed one, was all about, one which had some modest experience with democratic practices and high aspirations, if not expectations, of democratic self-government under the incoming Palestinian administration.

The Palestinian political spectrum today is broadly composed of three main forces: 1) a mainstream nationalist center, led by Yasser Arafat's Fatah; 2) a leftist nationalist opposition, including the Popular Front for the Liberation of Palestine and the Democratic Front for the Liberation of Palestine; and 3) the Islamist opposition, associated with *Hamas* and Islamic Jihad.¹⁴⁸ While the relative weight of these three forces in the West Bank and Gaza Strip has varied over the last several years, largely in response to ebbs and flows in the peace negotiations, the mainstream center, with the establishment of a Palestinian state through the Oslo peace process the centerpiece of its agenda, has maintained pre-eminence. Support by the Palestinian public for the peace process has proven remarkably durable, and there has even been a Palestinian constituency in support of P.A. repression for those who have attempted to derail the peace process through dramatic acts of violence.

However, the undemocratic practices of the P.A. have disappointed the Palestinians and undermined their enthusiasm for the peace process. How could it not be so? This is a community, after all, that had honed its knowledge of human rights principles and advocacy skills under Israeli occupation, conducted grass-roots organizing and international publicity campaigns against Israeli torture of Palestinians, and had criticized the injustices rampant in Israeli military courts. What pain and humiliation Palestinians must feel, to now be subjected to the exact same abuses, even down to the details of the torture techniques, at the hands of their own government. A combination of disbelief and deep despair were palpable in the voice of one Palestinian human rights lawyer to whom I spoke last July. He told me:

You know, under the Israelis, when a client's family approached me, I would at least know where to go to find out his whereabouts. Now, with all of these different security services, I can't even begin my representation — I have no idea even where to start, who to ask, what prison to go to find my client. It is very, very bad — worse than it has ever been.¹⁴⁹

¹⁴⁸ See Shikaki, *supra* note 7, at 30-32.

¹⁴⁹ Interview with Mazen Qupty, Mazen Qupty & Associates, in Jerusalem (July 14, 1998).

As emotionally telling as this comment is on one level, it is factually inaccurate. To repeat: neither the range nor the scale of P.A. abuses of human and civil rights approaches that of the Israeli occupation authorities. That matters are perceived otherwise by my human rights lawyer friend, however, tells you something about the deep psychological hurt P.A. practices inflict — mocking as they do the high hopes for an accountable, democratic regime that Palestinians of the West Bank and Gaza Strip had developed.

If support for the peace process has been surprisingly constant, even in the face of this catalogue of abuses by the P.A., it would be a grave mistake to assume that it will necessarily continue. This is because the support has been contingent on two key factors: 1) the sense that the peace process is actually moving forward, even if incrementally, and has not become totally stalled — in other words, that the “end” justifying the otherwise objectionable “means” is ultimately not lost; and 2) the ongoing leadership of Yasser Arafat. In the words of Palestinian political scientist Khalil Shikaki:

The key to continued Palestinian support for Oslo is Arafat himself. If he were to leave the scene, the pro-peace camp would be in grave trouble. Indeed, the main constituency for peace comes from Arafat’s Fatah movement, [which] defers to his leadership, and sees him as the unchallenged leader of Palestinian nationalism. Arafat remains the most potent symbol of the Palestinian revolution.¹⁵⁰

The peace process was momentarily resuscitated with the agreement reached at Wye River, but has stalled yet again with the Israeli cabinet’s vote to suspend implementation of the agreement. Far more intractable, final status issues loom ahead. How long Yasser Arafat survives — he is widely reported to be in ill-health — is anyone’s guess. It thus seems evident that institutionalizing the Palestinian leadership and investing the broadest segment of the Palestinian population as is possible with substantial interests in the negotiations, is a necessity for the survival of the peace process. We can ill afford to have the Palestinians wake up some day and find that, with their economy shot and their leadership corrupt and repressive, they have gained absolutely nothing from peace, and therefore, have absolutely nothing to lose in resorting to violence. It is for just that reason that U.S. policy responses to this situation, and so, too, those of other nations have thus far been so disappointing. Let us now turn to those responses.

¹⁵⁰ See Shikaki, *supra* note 7, at 41.

VII. U.S. AND INTERNATIONAL POLICY RESPONSES

In fairness, the United States, the European Union, and other international organizations or nations have not been totally neglectful of the problems discussed herein. In fact, an impressive number of groups and countries have offered technical assistance of a wide variety to what might be called "rule of law development" under the P.A. As of July, 1997, some seventeen donors and ten United Nations agencies and programs supported legal development in the West Bank and Gaza Strip with a total committed budget of about \$72 million.¹⁵¹ U.S. support has been mostly channeled through U.S. aid to a number of non-profit development organizations which have sponsored programs for judicial training, technical assistance in legislative drafting, Ministry of Justice staff development, and other similar activities.¹⁵² Although it may be premature to judge the effect of these various efforts, the fact remains that little progress has been made in addressing the major challenges to the administration of justice that I identified earlier.

But my main criticism is not with the level or efficacy of support for the P.A. rendered at the technical level. Certainly, one could counsel — and I do counsel — that more such support be provided given the enormity of the challenges. But none of it is likely to be effective without shifts in policy at the highest political levels, because at those levels, the consistent message conveyed by American leaders to Palestinian leaders is one of tolerance, if not actual encouragement of P.A. abuses, and an indifference to the glacial pace of legal reform efforts. This has come about as U.S. policy makers have repeatedly pressured the P.A. to act decisively to quell anti-Israeli violence, virtually without regard to the human and civil rights of Palestinians.

For example, in March, 1995, during a visit to Yasser Arafat in Jericho, Vice President Al Gore "warned that the P.A. must control Islamic suicide bombers . . ." and welcomed as "an important step forward" a commitment by Arafat to set up the State Security Courts.¹⁵³ After receiving Arafat's pledge of redoubled efforts to counter "terrorism," the Vice President announced an accelerated U.S. aid program of \$65 mil-

¹⁵¹ See *Rule of Law Development in the West Bank and Gaza Strip: Survey and Status of the Development Effort*, UNSCO, at 9 (1997).

¹⁵² See *id.* Annex One: Rule of Law Sector Support Table, at 31-40 (providing a detailed list of recent legal reform activities along with their respective implementing organization, donor, and budget).

¹⁵³ Clyde Haberman, *In Jericho, Pledges of U.S. Aid and a Glimpse at Arafat*, N.Y. TIMES, Mar. 25, 1995, at A2.

lion.¹⁵⁴ Later, on the eve of the first prosecutions in the State Security Courts, Vice President Gore again praised the courts saying: "I know there has been some controversy over the security courts. I personally believe that the accusations are misplaced and that they [the Palestinians] are doing the right thing and moving forward and that they must move forward now with prosecutions."¹⁵⁵

In April 1995, U.S. officials voiced approval of scores of arbitrary arrests following two bombing attacks. State Department spokesperson Christine Shelly said, "We expect the P.A. to take this type of concrete action against those within its jurisdiction who seek to destroy the peace process through acts of violence and terror."¹⁵⁶ At the same time, President Clinton was reported to have appealed to Palestinian authorities to respond to attacks launched from areas under their jurisdiction with "strict punishment."¹⁵⁷

On August 5, 1997, Secretary of State Madeline Albright commented that "[w]hat we would like is as robust a reaction to the terrorists as [Arafat] took in March 1996, where he undertook a series of very specific steps to deal with the terrorist threat," a supposed reference to the arrests and detention without charge of several hundred suspected Islamists and the "abrupt closing" of a number of charitable societies affiliated with Hamas.¹⁵⁸ The relentless pressure on the P.A. to contain "terrorism" continued through the run-up to the Wye River negotiations, as President Clinton again reminded the Palestinian leadership of the need to take all measures necessary to suppress attacks on Israelis.¹⁵⁹

It is not that U.S. policy leaders are ignorant of the abuses committed by the P.A. in their anxiety to measure up to U.S. and Israeli demands. The State Department's Country Reports on human rights have reported such abuses annually since 1995.¹⁶⁰ The U.S. Central Intelli-

¹⁵⁴ See *Arafat Promises Crackdown on Terror*, PLAIN DEALER, Mar. 25, 1995, at A15.

¹⁵⁵ *Gore Sees Palestinian Trials Starting Soon*, REUTERS N. AM. WIRE, Apr. 5, 1995, available in LEXIS, NEWS Library, REUNA File (providing the comments of Vice President Gore made in a public conference held at the Washington Institute).

¹⁵⁶ *U.S. Endorses Arrests in Wake of Gaza Attack*, AGENCE FRANCE PRESSE, Apr. 10, 1995, available in LEXIS, NEWS Library, AFPFR File.

¹⁵⁷ See *id.*

¹⁵⁸ See *The Israeli-Palestinian Peace Process, Remarks and Q&A Session at the National Press Club Washington, D.C.*, (Aug. 6, 1997) (remarks of Secretary of State Madeleine K. Albright) (visited Mar. 1, 1999) <<http://secretary.state.gov/www/statements/970806.html>>; H.R.W. WORLD REP. 1998, *supra* note 93, at 343.

¹⁵⁹ See *id.*

¹⁶⁰ See SENATE COMM. ON FOREIGN RELATIONS & HOUSE COMM. ON INT'L RELATIONS, 104TH CONG., COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1995 (Joint Comm.

gence Agency has also been actively engaged in facilitating intelligence transfers between Israeli and Palestinian security officials even before the more public and formal role assigned to it in the Wye River agreement.¹⁶¹ It simply strains credulity to think that the excesses of the P.A. have gone unnoticed by American officials working in such intimate cooperation with Palestinian officials.

To be fully accurate, U.S. officials have not always turned a blind eye to P.A. excesses. There has been a markedly greater willingness to criticize the P.A. when the context was one other than the direct battle against anti-Israeli violence, such as the harassment or jailing of domestic critics of the P.A. The United States publicly criticized the detention of Palestinian-American television journalist Daoud Kuttab, who had broadcasted sessions of the P.L.C. in which corruption on the P.A. had been discussed,¹⁶² and intervened constructively in the previously mentioned case of Eyad Sarraj, the Commissioner General of P.I.C.C.R.¹⁶³ In February 1997, U.S. Consul in Jerusalem Edward Abington decried the excessive numbers of Palestinian deaths in P.A. prisons, and stated "[s]ecurity is important but it can't come at the cost of human rights."¹⁶⁴ A welcome statement, to be sure. But if you were Yasser Arafat, recipient of these mixed signals from U.S. officials, to whom would you listen: Edward Abington or Al Gore, with \$65 million in aid to offer, Madeline Albright, and President Clinton?

No one should question the right of Israelis to be free of violent attack, nor the obligation of the P.A. to strive conscientiously to protect that right. Yet Palestinians, too, are entitled to this right. They are entitled to protection from the abuses of the Israeli military government, where it continues to operate. They are entitled to protection from armed Israeli settlers, who have often initiated attacks on or retaliated against non-lethal attacks from Palestinians with lethal violence. And they are entitled to protection from the abuses of the P.A. Ever solicitous of Is-

Print 1995); SENATE COMM. ON FOREIGN RELATIONS & HOUSE COMM. ON INT'L RELATIONS, 104TH CONG., COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1996 (Joint Comm. Print 1996); COUNTRY REPORTS 1997, *supra* note 100.

¹⁶¹ H.R.W./MIDDLE E. REP., *supra* note 33, at 41.

¹⁶² See H.R.W. WORLD REP. 1998, *supra* note 93, at 341, 343.

¹⁶³ See H.R.W./MIDDLE E. REP., *supra* note 33, at 42. The arrest of Sarraj also stimulated interest by the U.S. Congress in the excesses of the P.A., which led to hearings before the House Subcommittee on International Operations and Human Rights of the Committee on International Relations in July, 1996. See *Human Rights Under the Palestinian Authority: Hearing Before the Subcomm. on Int'l Operations and Human Rights of the House Comm. On Int'l Relations*, 104th Cong. 1-3 (1996).

¹⁶⁴ H.R.W. WORLD REP. 1998, *supra* note 93, at 343.

raeli security, U.S. official statements have rarely focused on violations of Palestinian security, or worse, they have endorsed them. This inconsistency can hardly boost our claim to even-handedness in our oversight of the peace process.

As Abigail Abrash of the R.F.K. Memorial Center for Human Rights said:

Neither the findings from these U.S. [rule of law] assistance initiatives nor the detailed accounts of human rights abuses and systematic problems contained in the U.S. State Departments country reports appear to have informed U.S. policy. The U.S. government has not demonstrated a credible human rights policy towards the region.¹⁶⁵

The time has come to rectify this inadequacy.

VIII. CONCLUSION

So what might we do differently? Here are two general, and three more specific steps that can be taken to redress the problems in current U.S. policy toward P.A. abuses of human and civil rights.

1. U.S. policy makers should consistently communicate that suppression of violent opposition to Israel and the peace process cannot come at the expense of Palestinian human and civil rights. The P.A. must, as it has promised, abide by international standards and conventions for the protection of human rights in its treatment of persons under its jurisdiction. This message will really only be effective if it occurs at the top leadership level, starting where it matters most — with the President of the United States — and ending, again, where it matters most — with Yasser Arafat. This admonition is also likely not to be effective if it is only one-sided — that is, if it is directed only at the P.A. and not simultaneously at the Israeli government, which has continued to commit violations of Palestinians' human rights during the post-Oslo period.

2. Rule of law development programs for the P.A. should not only receive further funding, but also feature more prominently in policy discussions at the top leadership levels. Programs have already been targeted to address the four major problem areas previously identified. What is now needed is a sense of urgency, an acknowledgment that the success or failure of these efforts are not inconsequential to the peace process, and a redoubling of efforts to overcome some of the obstacles to the efficient administration of justice under the P.A.

These are the two general recommendations I would make. My third, fourth, and fifth more specific recommendations build on the rec-

¹⁶⁵ See Abrash Hearing, *supra* note 90, at 82-83.

ognition that international vigilance may not be effective and, as a matter of principle, should not be required to insure respect for human rights under the P.A. Rather, the United States, together with the international community, should nurture the development of an indigenous infrastructure that will ensure the vindication of basic rights for Palestinians. The first and most fundamental task here is the building of a strong, independent judiciary equipped with a body of law adequate to constrain abuses of executive power. Thus, I recommend:

1. The United States should insist that the P.A. abolish the State Security Courts, and offer new trials in regular courts to those previously convicted in the Security Courts system. The record shows that trials in these courts have regularly fallen below minimum standards of justice and the very existence of the courts imperils the integrity of the judiciary as a whole. Military courts should be brought into conformity with universal standards for fair trials and clear principles defining the persons over whom military courts have jurisdiction must be elaborated.

2. U.S. policy makers should strongly urge that President Arafat sign, and thus render effective, the Basic Law. The Basic Law enshrines fundamental principles of human and civil rights recognized and voted on by elected representatives of the Palestinian community. Further, the Basic Law provides guidance for police and government officials as to the legality of their conduct and offers local courts standards by which to review claimed abuses of government authority. The Basic Law also sets forth a legal referent for the relative powers of the three branches of the Palestinian government, in the absence of which, the Palestinian executive authority functions without check. No other law or laws currently in place in the West Bank or Gaza Strip provide a substitute for the Basic Law.

3. U.S. policy makers should strongly encourage the P.A. to prioritize the passage of a comprehensive, coherent law for the judiciary that lays the cornerstone for a truly independent third branch of government. Most crucially, this law must establish a system of judicial selection that ensures appointment to these pivotal offices solely on the basis of merit, rather than political fealty. The version of the law already passed by the P.L.C. is neither comprehensive, coherent, nor is there any guarantee that it will be signed into law by Yasser Arafat. We cannot afford to be indifferent to the fate of this absolutely critical piece of legislation — rather we should follow its progress closely and do everything possible to see that the law accomplishes what it must to be effective.

It goes without saying that the mere passage of laws in and of themselves will not significantly alter circumstances on the ground. Indeed, the P.A. has often demonstrated its readiness to act with little or no re-

gard for law whatsoever. Real implementation and respect for the laws passed must also be monitored and ensured.

More can and should be done. Yet these steps alone will give a tremendous boost to the morale of those Palestinians, mainly in the P.L.C., who are trying to establish an accountable, law-abiding government. It will also mean much to the Palestinian public, waiting, with fading hopes, for some tangible benefit from the peace process.

I will not predict an apocalypse in the event we fail to do what I recommend. Perhaps it will all be unnecessary, and, at the end of the interim period, we will all toast a new Middle East peace. Something tells me that this is not likely, however, considering the arduousness of the negotiations thus far over issues far less intractable than the ones that lie ahead. I suspect, instead, that we are in for several more years of painful work.

What I can say with confidence is that we will narrow our chances of reaching that elusive goal of peace if, in the meantime, we do not exploit every avenue, including the one of legal reform, to broaden the constituency for peace. As the principal overseer of the Middle East peace process it is our responsibility to do this; as the pre-eminent power in the world today, it is also our moral duty.

