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Constitutionalism, Human Rights, and Islam after the Arab Spring



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Impulses from the Arab Spring on the Palestinian State-Building Process

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I. INTRODUCTION

In 2012, Palestine, while keeping its status as an observer, won the status of non-member state in the United Nations via a majority vote at the UN General Assembly (UNGA).¹ For the Palestinians, the move was considered a diplomatic victory, especially considering Israel's and the United States' isolation during the UNGA voting session. President of the Palestinian Authority (PA) Maḥmūd 'Abbās, who considered the resolution as a "birth certificate" of the state of Palestine,² returned triumphant to Ramallah, despite having in fact only obtained recognition for what can be considered a nominal state. Some weeks earlier, a ceasefire deal was reached between Ḥamās and Israel. The ceasefire put an end to the escalating violence that had resulted in the deaths of dozens of Palestinians by Israeli bombs, and the launch of hundreds of rockets toward Israeli cities, even reaching Tel Aviv, as well as the assassination of Aḥmad Al-Ja'barī, a high-ranking official of al-Qassām Brigades, the Ḥamās Military Wing.³

¹ UNGA Res. 67/19 (November 29, 2012) UN Doc A/RES/67/19. There were 138 states in favor, out of 193 member states of the United Nations, 9 against, and 41 abstentions.

² As appears in Mr. 'Abbās's speech upon his return from New York, to a packed rally in Ramallah on December 2, 2012. See: <http://edition.cnn.com/2012/12/02/world/meast/israel-settlements/>, accessed May 9, 2015.

³ The Israeli attack on Gaza started officially on November 14, 2012, with the assassination of Aḥmad Ja'barī. A ceasefire was announced on November 21, 2012. According to OCHA office in the occupied Palestinian territory, Palestinian casualties were 103 dead and 1,399 injured; 6 Israelis were killed and 224 injured; 450 housing units were destroyed in Gaza while 8,000 sustained minor damage. Approximately 12,000 individuals in Gaza City and Northern Gaza governorate fled their homes and sought refuge in emergency shelters set up in 14 UNRWA and 2 government schools. UNOCHA, Gaza Initial Rapid Assessment, Final

Ḥamās and Fatāḥ appeared to be united—or at least less divided. Fatāḥ supported Ḥamās in resisting Israeli attacks on Gaza, while Ḥamās officially supported the PA's move at the United Nations. The Arab countries apparently also united in support of the PA going to the United Nations. Egypt under Muḥammad Mursī appeared more supportive of Palestinians of Gaza (when compared to Egypt under Mubārak during the 2008/2009 attacks⁴). As usual, Egypt had played a crucial role in reaching the ceasefire.⁵ The Arab world seems different as a result of the so-called “Arab Spring.”⁶ Palestinians appear to have changed, too. This chapter aims at assessing the Arab Spring's impact on the Palestinians, in particular in their quest for statehood and their state-building efforts, with particular emphasis on relevant constitutional law and institutions.

While it may be impossible to measure the impact of an incomplete process of change in the Arab world on an incomplete statehood, it is possible to identify certain impacts the Arab Spring is having on Palestine. To do so, two different approaches are possible. One can observe the Palestinians' (leadership, parties, civil society, and population) behavior and reaction to the many internal challenges they see occurring in the Arab world. In this approach one would engage in a very useful intellectual process of observation and induction. However, such efforts aim at reaching a conclusion (i.e., that an impact on Palestine can be observed), which, in this chapter, will be assumed as a sound basis for further analysis. Also such observation goes beyond the limited scope of this chapter, aiming at analyzing formal processes of state-building. It is also possible—as the author will do in this chapter—to analyze certain steps and actions undertaken by the PA and by the Ḥamās-led government in the Gaza Strip in light of (or at least since) the beginning of the Tunisian and Egyptian revolutions in late 2010 and early 2011, respectively.⁷

In a previous study, in a volume similar in content to the current one, the present author connected the process of constitution-making to that of state-building in Palestine, and concluded that the two processes contribute to and urge for the redefinition of the Palestinian nation and those who represent it.⁸ The case studies in this chapter are intended as a contribution to such a redefinition.

Report, November 24–26, 2012, http://www.ochaopt.org/documents/gaza_initial_rapid_assessment_report_nov_2012_eng.pdf, accessed January 11, 2015.

⁴ For a discussion of the attack on Gaza in winter 2008/2009, its context, objectives, and consequences, see: Camille Mansour, “Reflections on the War on Gaza” (2009) 38 (4) *Journal of Palestine Studies* 91–95.

⁵ In an article published by the *New York Times*, Egypt's President Muḥammad Mursī was praised for his demonstrated pragmatism, as he balanced public support for Ḥamās with a determination to preserve the peace with Israel. See: David Kirkpatrick and Jodi Rudoren, “Israel and Hamas Agree to a Cease-Fire, After a U.S.-Egypt Push,” *The New York Times* (November 21, 2012), available at: http://www.nytimes.com/2012/11/22/world/middleeast/israel-gaza-conflict.html?pagewanted=all&_r=0, accessed January 11, 2015.

⁶ For an excellent discussion of the connotations of the terms used to describe the changes taking place in the Arab world, see: Rami Khouri, “Drop the Orientalist term ‘Arab Spring,’” *The Daily Star* (August 17, 2011) 7, <http://www.dailystar.com.lb/Opinion/Columnist/2011/Aug-17/Drop-the-Orientalist-term-Arab-Spring.ashx#axzz2HbiHXdjdj>, accessed January 11, 2015.

⁷ The reference to the “Tunisian Revolution” refers to those events taking place on December 18, 2010, that led to the ousting of the President Zīn al-‘Ābidīn Ben ‘Alī on January 14, 2011. While the Egyptian revolution started on January 25, 2011. It resulted in the overthrow of President Ḥusnī Mubārak on February 11, 2011.

⁸ Asem Khalil, “Constitution-Making and State-Building: Redefining the Palestinian Nation” in Rainer Grote and Tilmann J. Roeder (eds), *Constitutionalism in Islamic Countries: Between Upheaval and Continuity* (Oxford University Press, Oxford 2012) 596.

II. CONSTITUTIONAL DEADLOCK

In 2006, Ḥamās won PA legislative elections, one year after Maḥmūd ‘Abbās, a Fatāḥ-affiliated leader, was elected president of the PA, succeeding Yāsir ‘Arafāt. Ḥamās formed a new government (led by Ismā‘īl Hanīyah) and obtained majority vote in the Palestinian Legislative Council (PLC). Immediately after the election, Israel started to administratively detain Ḥamās PLC members. The PLC was blocked from functioning as a regular legislative assembly.

The cohabitation between a PA president and a Ḥamās-led government was (or became) impossible and the international community and Israel contributed to the deadlock by imposing economic sanctions on the Palestinian government. PA institutions were also paralyzed as a result of strikes over the lack of salaries for public servants, and many institutions and powers were transferred by presidential decrees to the president’s office and his advisors. Ḥamās, under internal, regional, and international pressure accepted the formation of a unity government, composed of Fatāḥ and Ḥamās officials. However, the international community and Israel could choose the ministers within the cabinet they wished to deal with. This unity government, which resulted from the so-called Mecca Accord of 2007, was ultimately unsuccessful in uniting the Fatāḥ and Ḥamās factions.⁹

The PA under Ḥamās government between February 2006 and June 2007 was rife with contradiction. After all, how is a government supposed to govern without control over security forces, public money, or civil servants? Ḥamās’ reaction was as problematic as Fatāḥ and PA attitudes toward Ḥamās’ victory. The Ḥamās-led government started to change existing procedures so as to allow its members admission to public and security offices. They established, through the minister of interior, a new armed group, called the Executive Force, completely under his control, without any connection to the many existing groups of security forces. As a result of international (mostly Western) sanctions and lack of support, they further tried to obtain funds from other sources (including Iran).

The Palestine Liberation Organization (PLO)—previously ignored by Fatāḥ leadership and PA officials—began to play a more important role, in order for President ‘Abbās (who is also the chairperson of the PLO Executive Committee) to justify his increased prerogatives. Ḥamās was asked to accept all agreements signed by the PLO, and to submit the government program to the PLO Executive Committee for approval. Ḥamās is not part of the PLO since it didn’t exist at the time of its establishment in 1964, nor was it admitted at a later stage (Islamic Jihād is also not part of the PLO). However, this reality is not only a result of historical timing. It also reflects the PLO’s anxiety in dealing with Islamic groups, and uneasiness on Ḥamās and Islamic Jihād’s side to form a coherent position concerning their possible admittance to the PLO.

The Basic Law of 2003 and its amendment in 2005, as a constitutional text, didn’t contain necessary rules and institutions to maintain a functioning system of government in such cohabitation. Also, it didn’t (and wasn’t supposed to) envisage Israeli reaction to the elections, nor that of the international community. It was also impossible to find norms in the Basic Law that can help the authority to function in light of a long strike of public servants that paralyzed most PA institutions. The Basic Law further contained contradictory provisions, giving the PA president and the government completely different signals for what their authorities and limitations were. The PLC was unable to function regularly, and

⁹ For more about the Mecca Accord, see: Talāl Okal, “Ettefāk makkā: kerāa fel mukaddemāt wal natāej” (2006) 18 (69) *Majallat al-dirāsāt al-filasṭīniyah* 142–148.

the government was not provided with necessary executive tools (public servants, public funds, and security forces) to govern effectively.¹⁰

The judiciary was also unable to clarify what conflict-resolution mechanisms the constitution or the law provides for. In a famous case of the High Court acting as a High Constitutional Court, the court had to look into a decision of a Ḥamās PLC speaker canceling all decisions undertaken by previous PLC members in an extraordinary session called for in between the declaration of the electoral results and the new PLC members taking office. The court was divided but eventually reached the conclusion that a PLC speaker alone couldn't cancel all previous PLC enactments.¹¹ However, the court did not and was not supposed to speak out about the legitimacy of the actions undertaken by previous PLC members (the majority from Fatāḥ) who effectuated changes after they knew the electoral results. Interestingly, Ḥamās didn't use the court to confirm or re-establish its prerogatives—possibly and presumably due to lack of trust in the court's judges and the judicial system in general.

In June 2007, Ḥamās committed a bloody coup in Gaza, taking command of Fatāḥ-controlled PA offices, and has since controlled Gaza by force. Ḥamās immediately began to make changes to the legal system in place, starting by issuing an Official Gazette from Gaza (different from the one the PA issued from the West Bank). They also reformed the security forces and nominated new public servants, while the ministries pretended to function as usual. The Ḥamās PLC members in Gaza, under Aḥmad Bahār (a deputy to the PLC Speaker), started to convene pretending to have procuration from their imprisoned colleagues. They even started to issue laws, changing the existing legal system in Gaza in a drastic way. Constituting one of the latest legislative interventions in Gaza, the controversial Civil Law Code replaced the Ottoman Majallah (which remained in force outside of the Gaza Strip). Ḥamās even effectuated changes in the judicial system, nominating new judges (although this is a prerogative of the PA president), formed a new judicial council for the Gaza Strip, and nominated a new Prosecutor General.¹² They further issued death penalty decisions and executed the condemned, without the endorsement of the PA president as required by the Basic Law.¹³

President 'Abbās ruled the West Bank by decrees and decree-laws in the absence of a functioning PLC. During the one-month emergency period in June 2007, he nominated Salām Fayāḍ as prime minister. Salām Fayāḍ's government was the longest serving Palestinian government ever formed since Oslo and started a new plan for building institutions (in the West Bank) in preparation for statehood. International money returned in support of the PA, and negotiations with Israel began again. However, President 'Abbās' legislative interventions were not limited to necessary legislative interventions. There were also many problematic interventions (amendments) such as those related to Income Tax Law, Company Law, and the Election Law.

¹⁰ For more about the crisis of government after Ḥamās arrival to power, see: Asem Khalil, "Beyond the Written Constitution: Constitutional Crisis of, and the Institutional Deadlock in, the Palestinian Political System as Entrenched in the Basic Law" (2013) 11 (1) International Journal of Constitutional Law.

¹¹ The High Court acting as High Constitutional Court in the case 1/2006 of December 19, 2006. The decision is available in English on Al-Muqtafi, Birzeit University, <http://muqtafi.birzeit.edu/en/courtjudgments/ShowDoc.aspx?ID=52112>, accessed January 11, 2015.

¹² For more information, see: Ṣalāḥ 'Abd al-Mu'ti, "Wāqi' al-qadā' al-filasṭīnī fī qīṭā' ghazah" (2008) 20 *majalat tasāmuḥ* 131–134.

¹³ Such decisions were subject of expression of concerns of the Palestinian Independent Commission for Human Rights. See, for example, the statements issued by the Commission in 2012 at: <http://www.ichr.ps/ar/1/4?d=2012#>, accessed January 11, 2015.

President ‘Abbās’s and the PLC’s four-year terms ended in 2010, but in the absence of presidential and parliamentary elections, both remained in power. Some scholars connect Ḥamās and Fatāḥ’s reaching an accord with the agreement to parliamentary and presidential elections. Such connection made reconciliation even harder as it was impossible to agree on elections without reconciliation between Fatāḥ and Ḥamās, while reconciliation became with time a condition for the elections themselves. It is clear that over time, the gap between the West Bank and the Gaza Strip, and between the PA Fatāḥ and Ḥamās has deepened, and the political and legal division is more entrenched.

III. BUILDING STATE INSTITUTIONS DURING OCCUPATION

Salām Fayād’s new idea to build an infrastructure of the state, despite the occupation is a controversial one. The plan was praised by some as a “brilliant idea.”¹⁴ Fayād’s plan was aimed at creating a de facto state, and was not a unilateral declaration of statehood. This plan was developed in 2009 and thus preceded any changes in the Arab world (Tunisia’s first popular movement only began in December 2010). Interestingly, Fayād’s plan aimed at achieving similar goals as the Arab uprisings would two years later: full citizens’ rights, enfranchisement, and a government for the people.¹⁵

The document containing Fayād’s program, the PA Thirteen Government program, was titled “Palestine: Ending the Occupation, Establishing the State.”¹⁶ The national goals included the end of occupation, promoting national unity, protecting Jerusalem as the eternal capital of the Palestinian state, protecting refugees, and following up on attainment of their rights, securing the release of prisoners, ensuring human development, achieving economic independence and national prosperity, bringing equality and social justice to all citizens, consolidating good governance, bringing safety and security across the homeland, and building positive regional and international relations. The document also contained a full plan of action in terms of institutional development. This included the unification and modernization of the legal framework, the rationalization of government organization, structures, and processes, encouraging the use of information and communication technology, and the management of financial and human resources. The document finally identified sector priorities, policies and programs, and implementing bodies. The sectors the document referred to are governance, social, economy, and infrastructure.

In a staff report presented in April 2011, the International Monetary Fund (IMF) states “that the PA is now able to conduct the sound economic policies expected of a future well-functioning Palestinian state, given its solid track record in reforms and institution-building in the public finance and financial areas.”¹⁷ Similar positive reports, issued by other respectable

¹⁴ Daoud Kuttab, “Fayyad’s Brilliant Two-Year Plan for Palestinian Statehood,” *Huffington Post* (August 27, 2009), http://www.huffingtonpost.com/daoud-kuttab/fayyads-brilliant-two-yea_b_270253.html, accessed January 11, 2015.

¹⁵ Juliane von Mittelstaedt, “An Independent Palestine Will Be Inevitable,” *Spiegel Online International* (September 19, 2011), <http://www.spiegel.de/international/world/spiegel-interview-with-palestinian-prime-minister-an-independent-palestine-will-be-inevitable-a-787165.html>, accessed January 11, 2015.

¹⁶ The Plan is made available in English at Wafa, Palestinian News & Info Agency, at: <http://english.wafa.ps/?action=detail&id=12943>, accessed January 11, 2015.

¹⁷ Oussama Kanaan, Javier Gomez, Udo Kock, and Mariusz Sumlinski, *Staff Report for the Meeting of the Ad Hoc Liaison Committee* (IMF, Brussels 2011), http://unispal.un.org/pdfs/IMF_AHLCrep130411.pdf, accessed January 11, 2015.

international organizations, including the World Bank and the United Nations, show that Salām Fayād's plan was considered a "birth certificate" for the state of Palestine.¹⁸ However, as outlined by Patrick Clawson and Michael Singh, the conclusion of the IMF staff report required three important caveats: "First, it depends on Israel-Palestinian cooperation; second, it is contingent on Gaza's return to Palestinian Authority control; and third, it does not take into account the PA's broader political readiness for statehood, which continues to lag."¹⁹

The plan's success depends on the occupying powers' cooperation, while the plan itself aims at putting an end to occupation. One example of this paradox is the development of Area C, which is still under full Israeli control. In an interview with the Institute of Palestine Studies regarding his plan, Salām Fayād didn't sufficiently answer the tricky question put forward by Prof. Camille Mansour: "[H]ow can you build a state under occupation, especially in 'off limits' zones like Area C where approval by the occupying power is required?" Instead, he elaborated on the need for international support in the formation of a Palestinian state.²⁰ In other words, Fayād's plan assumes that a changed international atmosphere would pressure Israel into cooperating and contributing to de facto Palestinian state-building. The Arab Spring in a sense contributed (together with other factors, such as the Eurozone crisis and the US electoral cycle) to the marginalization of the Palestinian cause, as outlined by Salām Fayād himself in 2012.²¹ The Arab Spring hence presents an obstacle to Palestinian (or Fayād's) state-building efforts.

Demonstrations erupted in 2012 against Salām Fayād's plans to increase prices, in particular fuel. Some believed the demonstrations were orchestrated by Fatāḥ supporters, and tolerated by security forces.²² Maḥmūd 'Abbās himself referred to the demonstrations using the term "Palestinian Spring" and expressed solidarity with the protesters and their demands.²³ Clearly the demonstrations were not—as some may have hoped—a sign of the beginning of a Palestinian spring, nor can a Palestinian spring—as some may have wanted—be the result of orchestrated efforts, or supported by the leadership it wishes to displace.

The two-year limit ended in 2011, and the de facto Palestinian state Fayād was aiming for wasn't in place. The Palestinian economy was still dependent on Israeli markets and on international aid, and the Palestinians were still unable to control their own natural resources. They continue to lack control over their borders and cannot profit from the human, natural, and financial capital they possess. Development under occupation seemed to be out of Fayād's reach. In September 2011, Fayād responded to a question put to him by German newspaper *Der Spiegel* that he was not sure the Palestinian state would be consolidated during his term in office, though he has no doubt it will happen eventually.²⁴

¹⁸ Juliane von Mittelstaedt (n 15).

¹⁹ Patrick Clawson and Michael Singh, "Is the Palestinian Authority really ready for statehood?," *The Jerusalem Post* (April 24, 2011), <http://www.jpost.com/MiddleEast/Article.aspx?id=217691>, accessed January 11, 2015.

²⁰ "A Palestinian State in Two Years: Interview with Salam Fayyad, Palestinian Prime Minister" (2009) 39 (1) *Journal of Palestine Studies* 58–74.

²¹ Donald Macintyre, "Salam Fayyad: 'We have never been more marginalized,'" *The Independent* (London July 26, 2012), <http://www.independent.co.uk/news/people/profiles/salam-fayyad-we-have-never-been-more-marginalised-7976731.html>, accessed January 11, 2015.

²² Khaled Abu Toameh, "A 'Palestinian Spring': A Renewed Fatāḥ Bid to Remove Fayyad," *GATESTONE Institute* (September 14, 2012), <http://www.gatestoneinstitute.org/3346/palestinian-spring-fayyad>, accessed January 11, 2015.

²³ *Id.*

²⁴ Juliane von Mittelstaedt (n 15).

IV. THE NON-MEMBER STATE STATUS AT THE UNGA

In September 2011, the PA president, also the chairperson of the PLO Executive Committee, presented a request to the UN Security Council, through the UN Secretary General, requesting full UN membership for Palestine. Full UN membership requires positive recommendation from the Security Council by a majority of 9 out of 15 members (including the five permanent members), and a two-thirds majority vote in the UNGA. The request wasn't successful as the Palestine didn't secure the necessary votes in the Security Council.

One year after the request, Maḥmūd 'Abbās sought recognition of Palestine in the UNGA as a non-member state, keeping Palestine's previous observer status. The resolution needed a majority vote to pass through, and Palestine secured 138 countries in its favor.²⁵ Both requests referred to pre-1967 borders, not the partition plan, at its basis, as was the case in the Palestinian Declaration of Independence in 1988.²⁶

Resolution A/RES/67/19 described Fayāḍ's 2009 plan—referred to as the Palestinian National Authority's 2009 plan—as “constructing the institutions of an independent Palestinian State within a two-year period,” and welcomed “the positive assessments in this regard about readiness for statehood by the World Bank, the United Nations and the International Monetary Fund.”²⁷ Such a reference gives the impression that applying for the “non-member state” status at the United Nations is part of an overall strategy. The impression is however misleading, as the same resolution expresses the urgent need for the resumption and acceleration of negotiations. Also the resolution gives different impressions by referring to various PLO positions and declarations, including the Declaration of Independence in 1988 and the UNGA partition plan of 1947. The impression given here is, again, misleading.

What was depicted by Palestinian leadership and media as a Palestinian diplomatic victory has more of a symbolic value. The vote at the UNGA doesn't mean Palestine became a state. Recognition of a state is not a constitutive element for statehood, nor is a vote at the UNGA. Legally, Palestine wasn't a state before the 2012 Resolution and neither is it after that vote.

Some may argue that obtaining the status of a non-member state may facilitate access to other UN Specialized Agencies and international organizations, including access to the International Criminal Court. In fact it did. On April 1, 2014, Mr. Maḥmūd 'Abbās ratified the Four Geneva Conventions and its First Protocol, together with 13 other international treaties.²⁸ While denying the PLO the privilege to access the Geneva Conventions in the

²⁵ UN Doc A/RES/67/19 (n 1).

²⁶ The Palestinian National Council convening in Algiers, declared independence of the state of Palestine on November 15, 1988. An unofficial translation to English is published by Arab Thought Forum, <http://www.mulqa.org/pdfs/PNC%20INDEPENDANCE%20DECLARATION.pdf>, accessed January 11, 2015.

²⁷ UN Doc A/RES/67/19 (n 1) 3.

²⁸ The other treaties ratified by President 'Abbās were: The International Convention on the Suppression and Punishment of the Crime of Apartheid. The International Covenant on Civil and Political Rights. The International Covenant on Economic, Social and Cultural Rights. The Convention on the Rights of the Child and the Optional Protocol to the Convention on the Rights of the Child (on the involvement of children in armed conflict). The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The Convention on the Prevention and Punishment of the Crime of Genocide. The UN Convention against Corruption. The Vienna Convention on Diplomatic Relations. The Vienna

past,²⁹ Switzerland, the depository power of these conventions, now accepted the request of the state of Palestine to join the conventions.³⁰ On January 1, 2015, Mr. Maḥmūd ‘Abbās ratified 18 treaties and conventions, including the Rome Charter, which enabled Palestine to access the International Criminal Court as a full member state.³¹ The latter step again had not been possible a few years earlier, when Palestine’s request before the UNGA to join the International Criminal Court (ICC) wasn’t accepted.³²

While the status of a non-member state at the United Nations has had a facilitative role, access to other international organizations is not an automatic or guaranteed step. Access to other international organizations will depend on accession procedures which reflect the political choices of member states. It is important to note that Palestine was admitted

Convention on Consular Services. The Convention on the Elimination of All Forms of Discrimination against Women. The Hague Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations Concerning the Laws and Customs of War on Land. The Convention on the Rights of Persons with Disabilities. The Vienna Convention on the Law of Treaties. The International Convention on the Elimination of All Forms of Racial Discrimination. See: Dalia Hatuqa, “‘Paradigm shift’: Palestinians join treaties,” <http://www.aljazeera.com/news/middleeast/2014/04/shift-palestinians-join-treaties-2014418111950813313.html>, accessed May 9, 2015.

²⁹ The request first presented on June 21, 1989, was rejected because Switzerland, as explained by its Foreign Ministry at the time, could not decide on the outcome of the application as the existence or nonexistence of a state of Palestine was still contested.

³⁰ See “Palestinians join Geneva Conventions” at: http://www.swissinfo.ch/eng/rules-of-war_palestinians-join-geneva-conventions/38371102, accessed May 9, 2015.

³¹ The treaties ratified by President ‘Abbās were: Convention on the Political Rights of Women. Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “New York Convention”). Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal. Convention on Biological Diversity and the Cartagena Protocol on Biosafety to the Convention on Biological Diversity. Protocol Additional to the Geneva Conventions of August 12, 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II). Protocol Additional to the Geneva Conventions of August 12, 1949, and relating to the Adoption of an Additional Distinctive Emblem (Protocol III). Convention on the Law of the Non-Navigational Uses of International Watercourses. Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents. United Nations Convention against Transnational Organized Crime. Convention on the Safety of United Nations and Associated Personnel and the Optional Protocol to the Convention on the Safety of United Nations and Associated Personnel. United Nations Convention on the Law of the Sea. Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity. Agreement on the Privileges and Immunities of the International Criminal Court. Rome Statute of the International Criminal Court. Declaration in accordance with the Rome Statute of the International Criminal Court. The Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons. The Treaty on the Non-Proliferation of Nuclear Weapons. Convention on Cluster Munitions. See: “Abbas moves for Palestine to join 18 international treaties,” *Maan News Agency* (January 1, 2015), <http://www.maannews.com/Content.aspx?id=751160>, accessed April 24, 2015; see also: *Majallat Al-Dirasat Al-Falastenyya* (2015) 26 (102).

³² See: the document issued by the office of the Prosecutor General of the ICC, issued on April 3, 2012, explaining the reasons why the request of the government of Palestine to accept the jurisdiction of the International Criminal Court wasn’t accepted, because of its status as observer, and not non-member state in the UN, at: <http://www.icc-cpi.int/NR/rdonlyres/C6162BBF-FEB9-4FAF-AFA9-836106D2694A/284387/SituationinPalestine030412ENG.pdf>, accessed May 9, 2015. The ICC prosecutor office almost suggested to the Palestinian leadership ways forward so as to render a future application to join the ICC successful. This makes it possible to understand the Palestinian shift of strategy in the following years, which related to becoming a non-member state by a UNGA resolution.

as a full member of UNESCO even before obtaining the status of non-member state at the United Nations. This example consolidates the argument advanced in this paper: The admission of Palestine to international organizations is a political process independent of the status obtained in the United Nations as non-member state.

Besides serving its purposes to facilitate its objective to ratify international treaties and join international organizations, including the ICC, such move also helps the Palestinian leadership in its internal politics. This would mean that such steps are actually directed at domestic politics, more than they are intended to serve the Palestinians internationally. Palestine is faced with a population that is increasingly dissatisfied with its leadership's lack of vision, the lack of reconciliation, and the lack of advancement in negotiations with Israel. In the following, two examples are put forward to support this claim.

The Palestinian diplomatic move was accompanied domestically by a revival of the discussion of the draft constitution of the state of Palestine, whose latest version was made public in 2003.³³ Salīm Za'nūn, the chairperson of the PLO Palestinian National Council, headed three meetings with experts and politicians (the group was informally called "The Committee for the Preparation of the Constitution") to discuss the latest version of the draft constitution.³⁴ Once the admission request had been presented to the Secretary General in 2011, the Committee was never convened again until recently. In May 2015, and in an unexpected way, the chairperson of the Palestinian National Council reconvened the Committee. The Committee met President Maḥmūd 'Abbās who urged the committee to finalize the constitution of the state of Palestine³⁵—a step criticized by Ḥamās for not being the result of "national consensus."³⁶

Since 2012, after Palestine was admitted as a non-member state to the United Nations, there has been increasing reference made to the necessity of having the constitution adopted.³⁷ So the logic may be formulated as follows: "As we are now a state, we need to act like one. We need to have a constitution like states do, use symbols of the state, and establish a new government for the state, etc."³⁸

³³ For an English unofficial translation of the third draft constitution, with an excellent commentary, see: Nathan Brown, "The Third Draft Constitution for the Palestinian State: Translation and Commentary" (2003) *Palestinian Center for Policy and Survey Research*.

³⁴ See the Palestinian National Council coverage of the event: http://www.palestinepnc.org/index.php?option=com_content&view=article&id=620%3A2011-10-30-15-52-15&catid=93%3A2010-05-25-10-32-12&Itemid=356&lang=ar, accessed January 11, 2015.

The author of this chapter has personally participated in these meetings as part of the new "constitutional committee" that was never formally composed by the president of the PA. When reconvened four years later, in 2015, the author declined to participate in the meetings of the committee, for many reasons, including the lack of a clear mandate for the work of the committee—which to date (May 2015) has not been officially established.

³⁵ See the news in local newspapers about the meeting of the committee with President Maḥmūd 'Abbās: <http://www.wattan.tv/ar/news/132053.html>, accessed May 9, 2015.

³⁶ See, for example: <http://www.ramallah.city/archives/21214>, accessed May 9, 2015.

³⁷ PA president Maḥmūd 'Abbās commented: "It is not logical we stay without a Constitution. There is a draft constitution we are working on, and we hope to receive comments from everyone, and once it is done, we will make it public." (Translated by the author). News item is available at: <http://www.qudsnet.com/arabic/news.php?maa=View&id=232662>, accessed January 11, 2015.

³⁸ Aḥmad Quray said: "We need to form a government of the State of Palestine, instead of that of the Palestinian Authority." (Translated by the author). News item is available at: <http://m.aawsat.com/content/1356218563839444400/aaa%20News%20and%20Politics>, accessed January 11, 2015.

Another example is the consideration of issues that usually follow the establishment of a state; i.e., the possibility of entering into a confederation with neighboring states. Despite official denials, reports mentioned that Maḥmūd ‘Abbās asked leaders in Fataḥ to start thinking of this scenario,³⁹ and King ‘Abdullāh of Jordan seems to be discussing this option with Israeli Prime Minister Benjamin Netanyahu, too.⁴⁰ Notably, the Palestinian position was always that a confederation with Jordan would be discussed only after the state of Palestine is established. Again, the logic seems to be along the lines of: “Now that we have been admitted as non-member state to the UN, we can start talking about the post-state scenarios even before the state is established.”

To clarify this point, it is useful to reiterate the following two contradictory positions of the Palestinian leadership vis-à-vis the accession to international treaties on the one side and regarding the internal legal system on the other side. In fact, Palestine is one of the few Arab countries which ratified international treaties without any reservation whatsoever. At the same time, there is nothing in the Palestinian legal system that suggests that such treaties will be applied domestically as binding law. This means that the discrepancy between international obligations created by the treaty and internal Palestinian laws will stay as is and that Palestinian courts will continue to apply the same domestic law as before, without any change whatsoever as a result of the ratification of those treaties. It is possible then to conclude that such ratification processes were simply diplomatic shows, aiming at creating new venues and paths in the absence of a negotiated peace process and offer an alternative to the internal stagnation in the Palestinian Authority itself. In such a context, the Palestinian leadership so far did not show the extent to which this ratification serves advancing Palestinian rights. For example, accession to international treaties alone does not protect Palestinian refugees, who continue to suffer in many Arab countries, in particular in Syria, or as a result of the events in Syria. The state of Palestine is unable to provide them with the protection they need in the place they are staying in (such in Yarmūk Camp, under attack by the Syrian regimes, its opponents, and the “Islamic State in Iraq and Syria” [known as ISIS] itself), or in the places they are displaced to (such as in Jordan, where they often have to stay in camps separate from those for other Syrians, subordinated to separate sets of rules than other displaced Syrians, etc.) while not being able of course to ensure their return to Palestinian territory. Similarly, the reconstruction of Gaza, largely unachieved as a result of Israeli siege, continued to be an objective impossible to obtain even after the UNGA bid had been achieved and international treaties had been ratified.

V. THE RECONCILIATION EFFORTS

The Fataḥ-Ḥamās divide has been going on since 2007 and the origins of this divide have already been referred to. This section of the chapter will discuss the impact of this division on state-building efforts, in particular in light of the Arab Spring. The remarkable thing about the division between the two Palestinian factions is that for a long time the inter-Palestinian division was associated with the factions’ regional connection and dimension. In wake of the Arab Spring, the regional actors changed drastically, and the kind of support Palestinian factions could expect changed, too. Surprisingly, the result remained the

³⁹ See news report at: <http://www.alwatanvoice.com/arabic/news/2012/12/13/342629.html>, accessed January 11, 2015.

⁴⁰ See news report at: <http://www.echoroukonline.com/ara/articles/152364.html>, accessed January 11, 2015.

same: complete stagnation. Reconciliation and unity between Fatāḥ-PA and Ḥamās seems more and more difficult to realize.

It is important to emphasize that the divide between the West Bank and the Gaza Strip is older and deeper than the Ḥamās-Fatāḥ, or even the Ḥamās-PA/PLO divide. In fact, from 1948, the Gaza Strip was under Egyptian administration, while the West Bank was made part of the Kingdom of Jordan. This division was also reflected in the legal and political cultures of both entities, which was entrenched and kept after the Israeli occupation in 1967. The Gaza Strip was under a different military government and civil administration than the West Bank. Israel granted different identification numbers to residents of both areas (and separated East Jerusalem from both). Under the Oslo agreements, Gaza and the West Bank were officially referred to as one entity. However, in reality, the separation by military orders, and by a system of permits and restrictive regulations on residency status, made it possible to keep the two populations separated. For the PA, the West Bank–Gaza Strip dichotomy was important in all decisions related to elections, nominations to public offices, judiciary, ministries, security forces, etc. Israel unilaterally withdrew from most parts of the Gaza Strip in 2005, the occupation regime intensified in Areas A, B, and C in the West Bank and East Jerusalem, and the annexation of land in the West Bank increased with the construction of a wall in the area.

In an earlier section of this chapter, it was argued that the Ḥamās takeover of the Gaza Strip may be a Ḥamās reaction to the lack of empowerment they experienced while in government on matter such as public money, public servants, and security forces. In other words, it is a conflict over power. But this is not the only reason for the divide; it is also about representation. Contrary to expectation, Ḥamās is more represented by PA institutions than PLO institutions, as it is in their interests that the PA become stronger, not the PLO. This is partially because Ḥamās is not part of the PLO. Part of the disagreement between Maḥmūd ‘Abbās and the nominated prime minister in 2006, Ismā‘il Haniyah, was about the insistence of the PA president that the government present its plan to the PLO Executive Committee for approval, and the nominated prime minister’s refusal to do so. Haniyah insisted on the Basic Law that regulates this matter and gives only the PLC the power to give confidence, not any other institution, including the PLO. This is why any negotiation between Fatāḥ and Ḥamās ends up discussing the role of the PLO, and the need for reform of the PLO.

But the divide is increasingly becoming a legal one, too. Since 2007, both the Haniyah government and the PLC members of the Gaza Strip amended the law in force in the Gaza Strip. Other examples have already been referred to earlier in this chapter, such as the replacement of the Ottoman Majallah with the controversial Civil Law Code. Decrees to effectuate change were also used in the West Bank. President ‘Abbās exercised his powers to issue decree-laws, ensuring the Fayād government has remained in office and acted as regular government without the PLC’s vote of confidence since the issuing of the decrees. The interesting thing is that both parties refer to the Basic Law as the source of their authority and use it to delegitimize the other party.⁴¹ Over time, reconciliation has become even harder to realize, considering the kind of legal changes that are taking place.

But what does the Arab Spring have to do with Fatāḥ-Ḥamās reconciliation efforts? In February 2012, a deal was reached between Maḥmūd ‘Abbās and Khālid Mash‘al to form a unity government, headed by Maḥmūd ‘Abbās himself. Many saw this change in Ḥamās and Fatāḥ as a result of change in the Arab world. Of course, the removal of Mubārak in Egypt, and later on Muḥammad Mursī, and the current revolution in Syria have had clearly

⁴¹ Khalil (n 10).

an impact on Ḥamās in Gaza, and on Fatāḥ and the PA in the West Bank, seen the regional alliances those two groups developed with government authorities and opposition groups. The impact is, however, yet to be discovered, as outcome of the current fight in Syria is not settled in one direction or another at the time of the writing, nor the clearly harsh policies of the post-Mursī government toward Gaza-Ḥamās after the withdrawal of Islamic Brotherhood from government.⁴² The deal between ʿAbbās and Mashʿal has been forgotten, as many other deals before it, including the agreement reached in the post-Mubārak Cairo in May 4, 2011.⁴³

Following the Israeli attacks on Gaza in 2012, a ceasefire was reached with Egypt as mediator. A more positive atmosphere between Fatāḥ and Ḥamās leaders seems to be apparent, as they appear more willing to discuss agreements. A real and substantive reconciliation and unification of Palestinian factions, nevertheless, seems unlikely within the foreseeable future, although over time an agreement on a “unity government” has been reached between Fatāḥ and Ḥamās under Rāmī Ḥamdallah as prime minister.

VI. ḤAMĀS RULE OF GAZA

Ḥarakat al-Muqāwamah al-Islāmiyah (Ḥamās), literally the Islamic Resistance Movement, first appeared on a leaflet at the beginning of the first *Intifāḍah* in 1987, although their connection to the Islamic Brotherhood’s social welfare programs can be traced to earlier stages.⁴⁴ However, this was a different Ḥamās from the one currently governing Gaza, or at least it is not the Ḥamās I’m referring to here in this section. Rather, the reference here is to the organized Ḥamās that forcibly took control of the Gaza Strip in 2007 and has governed it since. In a sense, this new Ḥamās is the real challenge to efforts of Palestinian state-building and constitutionalism, not the old social activist Ḥamās.

In an earlier section, this chapter already discussed the *de facto* and *de jure* separation between the West Bank and the Gaza Strip since 1948. It also covered how Israel maintained the separation, and how the PA dealt with it. It further addressed the challenge Ḥamās poses to the representation of Palestine and the Palestinians, particularly considering the lack of Ḥamās representation in the PLO. This section of the chapter shall discuss the events of 2005, when Maḥmūd ʿAbbās was elected as successor of Yāsir ʿArafāt as both the PLO Executive Committee chairperson and PA president, and when Ariel Sharon, the then Israeli prime minister, unilaterally withdrew from most of the Gaza Strip.

The withdrawal from the Gaza Strip didn’t change the legal status of that territory as an occupied territory. The legal qualification as an occupied territory is important for the application of international humanitarian law, and Israel’s obligations as the occupying power, toward civilians of the Gaza Strip.⁴⁵ For the PA, the Gaza Strip was part of the occupied Palestinian territory before 2005 and remained so afterward. Erez is the main crossing

⁴² Nathan Brown, “The Hamas-Fatah Deal,” *Journal of Turkish Weekly* (February 20, 2012), <http://carnegieendowment.org/2012/02/20/hamas-fatah-deal/9ssv>, accessed January 11, 2015.

⁴³ For more about the reconciliation efforts, see: Youssef Munatter, “Prospects for Palestinian Unity After the Arab Spring” (2011) 13 (3) *Insight Turkey* 21–31; Khalil Shāhīn, “Al-muṣālahah al-filastīniyah bayn naʿyī ʿamaliyat al-salām wa-tajāhul al-rabīʿ al-ʿarabī” (2011) 22 (87) *Majallat al-dirāsāt al-filastīniyah* 131–148.

⁴⁴ See: Shaul Mishal and Avraham Sela, *The Palestinian Hamas: Vision, Violence, and Coexistence* (Columbia University Press, New York 2000) 16.

⁴⁵ Lena Abu-Mukh, *Movement to and from the Palestinian Territories under Israeli Occupation after Oslo (1993–2006)* (Research Report, CARIM-RR, 2006/02) 16, http://cadmus.eui.eu/bitstream/handle/1814/6275/CARIM-RR_2006_02.pdf?sequence=1, accessed January 11, 2015.

for passage through Israel to the West Bank, and Karni the main crossing for food and supplies; both are strictly and exclusively controlled by Israel and often closed on the basis of Israeli political/security considerations. This means that any PA policies on the Gaza Strip (rebuilding Gaza after the 2007–2008 and 2012 attacks, for example, which is part of Salām Fayād's two-year plan for building the institutions of the state) will depend on Israeli permission (and Ḥamās permission, as no PA plans can be implemented in the Gaza Strip without the approval of Ḥamās).

As for the borders with Egypt, Rafah is the only official crossing point. In November 2005, a deal was reached between the concerned parties (the Agreement on Movement and Access and the Agreed Principles for the Rafah Crossings⁴⁶) giving full control of the crossing to the Palestinians on the Palestinian side of the borders, though monitored by an EU mission (EU BAM Rafah), while Israel monitors the borders via closed-circuit television.⁴⁷ However, the agreement gives Israel the power to veto who can enter and exit the Gaza Strip.⁴⁸ Following the second legislative elections in 2006 and Ḥamās's victory, Israel threatened to close the Rafah crossing if Ḥamās administered it. As a result, President 'Abbās adopted a presidential decree⁴⁹ placing the Directorate of Crossings and Borders autonomy (originally part of the Ministry of the Interior) under his direct control. After Ḥamās's takeover of the Gaza Strip on June 14, 2007, the Rafah crossing was often closed, and hundreds were caught in between the Egyptian and the Palestinian side. In July 2008, a ceasefire was reached between Ḥamās and Israel with the mediation of Egypt, resulting in some alleviation of the restrictions on the entry of supplies and food, and, in coordination with the Egyptian side, the gradual opening of Rafah crossing in urgent humanitarian cases.

Since the change of regime in Egypt, crossing Rafah borders has become easier, though there is no information showing there is bilateral agreement or coordination between Ḥamās and Egypt on the administration of entry and exit through the crossing, as Rafah remains an Egyptian-controlled crossing. However, the tunnel economy and business between Egypt and Gaza continues as usual.⁵⁰ During the 2012 attacks on Gaza, Egypt under Mursī appeared different. Egyptian Prime Minister Hishām Qandil visited the Gaza Strip on November 16, 2012, and expressed Egyptian solidarity with the Palestinians of Gaza. However, Egypt continues to play the same role as mediator as it did under Mubārak in 2008.

The interesting thing about Ḥamās ruling Gaza is that, despite its clear de facto defiance of the Basic Law and the constitutional system of the PA, the appearance of legality is maintained. Ismā'īl Haniyah, dismissed by presidential decree following the Ḥamās coup in the

⁴⁶ The agreement between Israel and the Palestinian Authority, available at: [http://domino.un.org/UNISPAL.NSF/796f8bc05ec4f30885256cef0073cf3a/c9a5aa5245d910bb852570bb0051711c/\\$FILE/Rafah%20agreement.pdf](http://domino.un.org/UNISPAL.NSF/796f8bc05ec4f30885256cef0073cf3a/c9a5aa5245d910bb852570bb0051711c/$FILE/Rafah%20agreement.pdf), accessed January 11, 2015.

⁴⁷ Lena Abu-Mukh (n 45) 21.

⁴⁸ In other words, those who do not hold an ID card (issued by the PA, with Israeli approval) couldn't enter Gaza through Rafah, with some exceptions, such as diplomats and workers in international organizations. For more information, see: Maslak, *Man yaḥmal mafāṭih ma'bar Rafah?* (Gisha—Legal Center for Freedom of Movement and Physicians for Human Rights 2009), http://www.gisha.org/userfiles/File/publications/Rafah_Report_Arabic.pdf, accessed January 11, 2015.

⁴⁹ Presidential decree No. 16 of 2006, available at: <http://muqtafi.birzeit.edu/Legislation/GetLegFT.aspx?LegPath=2006&MID=15262>, accessed January 11, 2015.

⁵⁰ Yezid Sayigh, " Hamas Looks to the Future: With Gains Come Dilemmas," *Al-Hayat* (March 8, 2012), available at: <http://carnegie-mec.org/2012/03/08/hamas-looks-to-future-with-gains-come-dilemmas>, accessed January 11, 2015.

Gaza Strip in 2007, is officially the head of a caretaker government. His government believes itself to be the legitimate Palestinian government (the other one being that of Salām Fayād, established by a presidential decree and without a vote of confidence by the PLC). Also, Ḥamās is maintaining the appearance of legality by making legal changes official through legislative amendments, and by adopting decrees that are published in an Official Gazette (issued separately for the Gaza Strip, and different from the one issued by the PA in the West Bank).

Another challenge is related to the financial and economic transactions in the Gaza Strip. As a result of the blockade, a new kind of economy has developed in the Gaza Strip: the tunnel economy. Although what the tunnels offer is nothing else but smuggling, in the Gaza Strip began as a unique way to satisfy the Gaza population's needs. Over time and despite the ease of movement of goods between the Gaza Strip and Egypt in particular, the tunnel economy became a major source of imported products (and for that reason, of economic transactions). The Ḥamās government, through the Ministry of Public Works and Housing, used to facilitate the access to public services for the users and workers of the tunnels, for instance, by providing them with water and electricity. Reports also indicate that the Ḥamās government used to collect taxes from the owners of the tunnels and their users. Gaza's tunnel economy was booming, and could even be considered a semi-public sector due to the Ḥamās authority's intervention, as described above. However, it remained informal, as it was outside the regular application of the law that applied to economic activities, and the import of goods. It was certainly also outside of any kind of public accountability and control.⁵¹ On different occasions, the Egyptian authorities flooded the tunnels.

Another challenge to state-building efforts is the form of financial transactions in the Gaza Strip. Because of the international sanctions on the PA since 2006 (and the boycott of Ḥamās ministers in 2007), and as a result of the siege and the development of an unofficial tunnel economy, i.e., the trade and transfer of goods and capital through the tunnels. As all transactions of Palestinian banks necessarily pass by Israeli ones, financial transactions involving Ḥamās money only passed through the informal sector. A new bank was established for this purpose, though it was not recognized by the Palestinian Monetary Fund: the Islamic National Bank. This bank remains an autonomous financial entity in Gaza tasked with the implementation of the financial decisions made by the Gaza government, including transferring salaries for public employees.⁵² Ḥamās has so far managed to pay their staff salaries, while the PA continues to pay salaries for the PA staff in the Gaza Strip, although many of them no longer work—another financial burden on the PA.⁵³ Also, the fuel required from Israel by electricity companies in Gaza is paid for from the tax revenues Israel collects for the PA.⁵⁴ Ḥamās, on the other hand, collects the money for electricity from the Palestinian citizens and keeps the money for themselves.⁵⁵

⁵¹ For an excellent discussion of the tunnel economy in Gaza, see: Nicolas Pelham, "Gaza's Tunnel Phenomenon: The Unintended Dynamics of Israel's Siege" (2012) 41 (4) *Journal of Palestine Studies* 6–31. Also available at: <http://www.palestine-studies.org/jps/fulltext/42605>, accessed March 17, 2016.

⁵² Are Hovdenak (ed), *The Public Service under Hamas in Gaza: Islamic Revolution or a Crisis Management?* (PRIO Report 03/2010) 27. The same author argued that "[t]he establishment of the bank apparently represented a formalization of the tunnel economy."

⁵³ Apparently, those who accepted to work with under the Ḥamās government feared threats of having their salaries and pensions terminated. *Id.* 30.

⁵⁴ World Bank, *Stagnation or Revival? Palestinian Economic Prospects: Economic Monitoring Report to the Ad Hoc Liaison Committee* (March 21, 2012), <http://siteresources.worldbank.org/INTWESTBANKGAZA/Resources/WorldBankAHLCreportMarch2012.pdf>, accessed January 11, 2015.

⁵⁵ Referring to Hisham Omari, CEO of the Jerusalem District Electricity Company, it was claimed that "[i]n Gaza, the Hamas government collects fees from residents and businesses for electricity use, but

VII. PA RULE OF THE WEST BANK

This section of the chapter will examine the PA's form of government and the challenges that such kind of government poses to state-building efforts in Palestine. In particular, the present author will discuss the way laws are effectively put in place, particularly addressing the way laws were created and enforced after 2007.

The PA, as a lawgiver, faces two different risks that are intrinsically related. On the one hand, there is a clear tendency to legislate law, as fast as possible, and in as many areas as possible. Hundreds of laws, decree-laws, and bylaws have been adopted since the establishment of the Palestinian Authority, even before the election of the Palestinian Legislative Council. The risk here is the legislature's tendency to expand its power, by thinking that legislation allows the creation of any law, covering any domain of individuals' lives, without any restrictions whatsoever. Most important, the elected legislative body may be willing to expand its powers on the expense of the executive or even the judiciary. This falls outside the principle of the separation of power, which is theoretically included as a basis of the Palestinian Authority's legal and political system. The nonsovereign character of the PA "exacerbates the perceived need and tendency to silence critics and repress political opponents,"⁵⁶ while at the same time rendering accountability under international human rights treaties is *de iure* impossible⁵⁷—until the recent ratification of international human rights treaties.

On the other hand, the PA did not exclude the rule by decree, thus granting or maintaining a primordial role of the executive, especially the president of the PA. This role is even entrenched in a written constitution-like legislated text, the Basic Law of 2003. Following the Ḥamās coup in Gaza in 2007, and the declaration of the state of emergency by President 'Abbās, a technocratic government under Salām Fayāḍ was formed, and a new era of "rule by decree" was set in motion in the West Bank. Surprisingly, this took place with the support of the international community, which saw this situation as an opportunity to realize reforms in many domains, including security governance and public finance.

These two risky tendencies may appear at first glance to be contradictory, however, they are in fact completely coherent as the result of the legacies that the PA had inherited. The first tendency is a result of decades of Israeli occupation that did not come to an end with Oslo, while the second emerges from the legacy of the PLO, a liberation movement. Military orders are in fact adopted by Israeli military "governors"⁵⁸ (whether personally or by authorized personnel), in their capacity of a lawgivers, executors, and judges, at the same time. Accordingly, all authorities are concentrated in the same person. The PLO

never transfers them to the Palestinian Energy Authority in Ramallah, using the money for its own purposes." Sharon Udasin, "Israel pays PA electricity debts with withheld taxes," *The Jerusalem Post* (Jerusalem December 12, 2012). Available at: <http://www.jpost.com/Sci-Tech/Article.aspx?id=295690>, accessed January 11, 2015.

⁵⁶ Lisa Hajjar, "Law against Order: Human Rights Organizations and (versus?) the Palestinian Authority" (2001) 56 *University of Miami Law Review* 59–76. For a discussion of the impact of the character of the Palestinian Authority on protection of human rights, see: Nasser Aruri and John J. Carroll, "A New Palestinian Charter 2 (1994) 23 (4) *Journal of Palestine Studies* 9–12.

⁵⁷ See generally: Justus Weiner, "Human Rights in Limbo during the Interim Period of the Israel-Palestinian Peace Process: Review, Analysis, and Implications" (1995) 27 *New York University Journal of International Law and Politics* 795–803.

⁵⁸ Term used in plural because there were two Israeli governors, one for Gaza and another for the West Bank, referred to in military orders, as Judea and Samaria.

itself, although theoretically adopting three branches of government (the Palestinian National Council acting as a parliament-like body; the Executive Committee, chosen from within the Palestinian National Council, which serves as a cabinet; and the military courts) had a similar concentration of powers in the form of the chairman of the Executive Committee.

In his evaluation of Salām Fayāḍ's plan to build the institutions of the state, Nathan Brown harshly notes that "Fayāḍ has managed to [. . .] maintain many of the institutions built earlier and make a few of them more efficient. But he has done so in an authoritarian context that robs the results of domestic legitimacy. In the long term, neither Fayāḍ nor his international backers are well served by ignoring the hollow nature of the current strategy."⁵⁹ One may disagree with Brown on the evaluation on the institutions Salām Fayāḍ helped to establish, ameliorate, or consolidate. However, it is possible to support the main claim, i.e., that the reform and change promised and delivered by Salām Fayāḍ, was in fact executed in an authoritarian context—it was a government by decree, rather than a government by legitimately adopted or pre-established legal rules.

The authoritarian character of the lawmaking and of the government work of the PA persisted after the resignation of Salām Fayāḍ as prime minister, and the nomination of Rāmī Ḥamdallah as a successor in June 2013.⁶⁰ The stagnation in Palestinian internal politics became even more entrenched than before. The establishment of the so-called "unity government" in 2014, under the same prime minister, Rāmī Ḥamdallah, did neither lead to unity nor has it so far made it possible to achieve reconciliation between Ḥamās and Fatāḥ.

VIII. CONCLUSION

The title of this chapter may appear biased to one narrative of the events taking place in the Arab world and the impact on Palestinians—a positive and optimistic narrative. The Arab world appears as one body politic, young again and full of life. Impulses are only the sign of a living body, thanks to the circulating blood necessary for the survival of all its organs (including the Palestinians, and their state-building efforts). If one applies this analogy to the Arab Spring, and its impact on Palestinian state-building, then it means accepting several assumptions (including the unity of the body politic, and the steady and regular impulses of that body, and the organs' need for blood to survive). All such assumptions appear necessary to give a positive and optimistic narrative of events, but that does not render them inherently sound.

Such an image is misleading, and the impression it gives is wrong. This is not because one should exclude such a positive and optimistic narrative, but because it is not the only possible one. The cases this chapter considered in the Palestinian context show how Palestinian leadership uses the new dynamics taking place regionally and locally, to support (or undermine) the state-building process. Also, the changes taking place in the Arab world are shaping the way the state-building process is taking place in Palestine, and the kind of constitutional system that is put in place. Indeed, contrary to populist allegations of Palestinian leaders and the superficial popular expectations, change in the Arab

⁵⁹ Nathan Brown, "Are Palestinians Building a State?" (Carnegie Commentary, June 2010), available at: http://www.carnegieendowment.org/files/palestinian_state1.pdf, accessed January 11, 2015.

⁶⁰ Ali Sawafta, "Palestinian PM Hamdallah sworn in, faces Hamas, economic issues," *Reuters* (Ramallah June 6, 2013), <http://www.reuters.com/article/2013/06/06/us-palestinians-government-idUSBRE95510Z20130606>, accessed May 12, 2015.

world did not result in a more accountable, transparent, and popularly legitimate process of state-building in Palestine, that enhances the pillars of a constitutional system, while mindful and respectful of human rights and freedoms, the rule of law, and the separation of powers.

Instead, Palestine as a claimed political entity is now officially reduced to the 1967 borders (West Bank, including East Jerusalem, and the Gaza Strip), this time by Palestinian request and insistence at the United Nations. In reality, the geography of (this new) Palestine is shrinking as a result of Israeli settlements. Palestine as a body politic is also divided between the West Bank and the Gaza Strip, Fatāḥ and Ḥamās, etc.

Formally speaking, the Basic Law remained in force in both the West Bank and the Gaza Strip, despite clear transgression of its provisions and its spirit by both the PA and Ḥamās governments. In this chapter, reference has been made to some examples. Nevertheless, the Basic Law was rarely attacked as the Supreme Law and highest reference for powers and authorities, by both the PA and Ḥamās-led governments. In both cases, however, new terms are introduced to help maintain the text, but overcome its provisions whenever deemed necessary; such terms include national or public unity, interest, or security. Words change, as much as those who use them, but they all turn around “national”, “interest” and “security”. They are all vague terms used by every competing and conflicting party to justify contradictory positions.

As for efforts of reconciliation between Ḥamās and Fatāḥ, one cannot but notice that they take place outside any constitutional framework. In other words, Palestinian factions dealt with the issue of Fatāḥ-Ḥamās division as something outside the framework of regular application of the law, including the regular application of institutions and rules that were made available by the Basic Law. All the undertakings of both parties as a result of the division are not challenged in court. Rather, the courts are accommodating the new authorities in place. Courts, including the Supreme Court acting as a High Constitutional Court, didn't play a role in finding a solution for the division. They are in a sense part of the division as they are dealing with the system they are part of; they don't question the system itself. Rather, they help consolidate the fragmentation and the division.

Another layer of the separation still exists between Palestinians of the Diaspora, Palestinians in the occupied Palestinian territory, and Palestinians inside Israel. The separation here is important for the issue of representation (the PLO, marginalized sometimes, and at the center of Palestinian politics, the PA). Issues become even more complicated in terms of representation with the possibility of creation of a Palestinian state.

Salām Fayāḍ plan to build institutions of the state while still under occupation (but also to put an end to it) fell short. Not only weren't the plan's objectives realized, it consolidated a kind of political process of state-building where technocrats are presented as alternative to politicians, governance as alternative to government, and management as alternative to rule. Also, the fact that the plan is presented by a government that is ruling only the West Bank, and in the absence of a functioning PLC and the lack of unity between the two factions, Ḥamās and Fatāḥ, meant that the plan consolidated the rule by decree that took place in the West Bank after the Ḥamās takeover of Gaza in 2007.

On the other hand, the UNGA vote enabled the Palestinians to establish a nominal state. The occupied Palestinian territory (the West Bank, including East Jerusalem, and the Gaza Strip) is now referred to as Palestine or occupied Palestine. For the supporters of this move, the new status necessitates some domestic changes, including the adoption of a constitution, and thinking about possible scenarios following statehood, even before its full realization, such as a confederation with Jordan. For these supporters, the Gaza Strip may remain separated for now—with no impact at all on the adopted measures regarding

the constitution and the confederation. Thus, it is possible that a similar confederation or another kind of partnership agreement is reached with Egypt over the Gaza Strip. For Israel, this is an ideal solution, as solid agreements are already in place with both Egypt and Jordan, and accordingly the Egypt-Gaza and Jordan-West Bank option would be just fine. Accordingly, the UNGA's nominal state of Palestine was a gift for Israel that Palestinian leadership offered for free, undermining the Palestinian national cause and putting at risk its main (unique?) achievements: the unity of Palestinians as a people, and the recognition for their right to self-determination and to independence.