Preface

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The book brings together, for the first time ever, independent and well-established lawyers and jurists from both sides of the century-old conflict, to reflect over matters of common interest. As violence recedes before negotiation and compromise, the issues covered by the ongoing negotiations will be increasingly determined by the emerging rule of law. Part of the originality of the book comes from the professional and experienced legal contributions of the best authors in the field over strategic issues: reflections on history and law, on key international treaties, on the domestic dimensions in the process, on water arrangements, on economic issues, and on the legal institutions which are being created and must adapt to the new scene. Another feature of the book is that, as an end result, it succeeds in showing that the old legal apposition of Israeli and Arab views is giving way to a common informed reflection and endeavour on modes of coexistence primarily determined by law.

Difficult as keeping pace with momentous developments may be on the political level, taking account of the hundreds of pages of legal agreements is a task even more difficult to contemplate. At the same time, there is no escaping the fact that, in the same way as force has dictated the efforts of four generations to cope with the new realities which the Zionist project had created in the late nineteenth century, once violence is shunned for the benefit of institutionalised processes, the only guide out of the persisting conflicts must be the law. The Peace Treaty with Jordan, the Palestinian-Israeli Declaration of Principles and the several agreements and protocols which followed it, the latest being the Interim Agreement[1] which was signed in Washington as this book was going to press: all these detailed texts and their appendices offer an inescapable point of reference for generations to come. The latest Interim Agreement, which comes in 31 long articles and appendices running into dozens of pages, serves perhaps as another reminder that in the Palestinian-Israeli search for accommodation, there will never perhaps be a final text. The Interim Agreement itself, together with its antecedents discussed in the present book by the most eminent authorities in the field, is testimony to a legal opening up onto several other agreements to come.

First, we should venture a word on the impulse behind the conference which led to this book, itself an unprecedented event in the legal history

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[1] Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, Washington, September 28, 1995. For full text (without Annexes), see Appendix, p. 271.

of the region. Back in December 1992, the Centre of Islamic and Middle Eastern Law had organised a conference on water in the Middle East,[2] which was attended by several Israeli scholars, including a jurist from the Hebrew University, Dr Eyal Benvenisti. It was already clear, even though the agreements between the PLO and the Israeli government were still in the making, that the experience of lawyers would be crucial in the process, including the potential conflicts over water in the area. Since many other issues alongside water were under discussion since the international conference had been convened in Madrid in October 1991, a more sustained and comprehensive reflective effort was needed. The sense that a more serious attention to the importance of law was required prompted CIMEL to start planning a conference on the legal frameworks in the region soon afterwards. Eyal Benvenisti was the main facilitator, on the Israeli side, as was Raja Shehadeh on the Palestinian side, for the set-up of the delicate arrangements leading to the conference which resulted in the present book. The signing of the Declaration of Principles in September 1993 encouraged us in our efforts, and the slow process of a scholarly enterprise was undertaken, with particular insistence on the long-range academic value of a proper thinking on law. The conference came together in December 1994 in London, with a unique atmosphere of measured discussions, which will also be evident in the chapters in this book. The strongest indicator of the quality of the proceedings is the necessity to look carefully into the texts to discover, perhaps, the national provenance of their authors.

An ongoing process like the present negotiations is not conducive to long-term reflection. As agreement follows agreement, eyes are fixed on the practical results: as this book goes to press, the foremost issues are elections, withdrawals, redeployment and the release of prisoners. This does not mean that other texts were superseded, and the insistence in the recent Interim Agreement on building upon the founding accords means that the trail will get even more complex. Indeed, new texts are informed by the old, themselves opening the door to the vaster field of international law and UN decisions such as the famous 1967 Security Council Resolution 242. In the maelstrom of technical documents, only a clear legal vision offers adequate appreciation of what is primary in a text and what has become secondary because of time and new realities on the ground. In many ways, the chapters in this book help illustrate the phenomenon of the existing priorities, as well as those priorities which will force themselves onto the agenda in the future.

As an illustration, both Raja Shehadeh and Ruth Gavison open up the negotiating process into avenues, the importance of which the negotiators might have failed to realise. How the philosophy of

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[2] Proceedings are now published in J.A. Allan and C. Mallat, eds., *Water in the Middle East: Legal, Political and Commercial Implications*, (1995, London, I.B. Tauris Publishers).

conducting legal negotiations failed the Palestinian team appears, in Shehadeh's analysis, in the poor treatment of the laws of occupation by the Declaration of Principles, and the contradictions it forced onto the earliest emanations of Palestinian legal sovereignty. More fundamentally perhaps, he points out the deficiencies of the legal philosophy of the Palestinian national movement over generations, which the leading negotiators may still be unaware of. Part of the problem, of course, is the nature of occupation, and before it, the difficulty for the Palestinians in being educated in a dynamic system of law or for the production of judges and courts in the absence of territorial autonomy or stable living conditions. The reflections of Ruth Levush on the strengths of the domestic legal system in Israel over the past decades, and the criticism of Mona Rishmawi of the fledgling rule of law in the freed Gaza strip reinforce that importance at the close of the book. In the section History and Law, Professor Gavison's view has a different slant. She pays attention to those whom the process finds difficult to accommodate: how is it possible to address the difficult moral and legal arrangements confronting Jewish settlers, Palestinian 'collaborators', and the Palestinian 'heroes' of the national movements who ended up in prison for their sometimes violent resistance? Dealing with this eminently legal problem is not simple, nor are there easy recipes which could be transplanted from South African or European experiments. Only a legal reflection informed by the excruciating moral problems entailed in this particular historical set-up of interlocked peoples and individuals can help smooth the transition to peace with all the legal 'rejects' it produces. Thus the several overlapping layers of history and law.

More immediate attention is accorded in the next two chapters to the Declaration of Principles and the subsequent Palestinian-Israeli agreements: whilst Judge Eugene Cotran questions the spirit in which the agreement was made and the view of its chief draftsman, and points to the protracted process of its application, the delays and the deadlocks occasioned, and the resulting frustrations over repeatedly missed deadlines, Eyal Benvenisti observes in the transitional process hallmarks of a new legal configuration taken by the Palestinian Authority. Both studies are situated in an early transitional context. Since the signing of the Interim Agreement in Washington on 28 September 1995, the deadlines originally intended appear to have been revived. This may be especially the case with regard to the withdrawal of the Israeli army from heavily populated Palestinian sites to allow for the first Palestinian national elections to take place since the Majlis-e Mab'uthan of 1908, the Ottoman Parliament of the Emissaries which saw several deputies elected in Jerusalem to represent Palestine in the Ottoman capital. The scene at the time of writing this introduction (October 1995) is

dominated by these momentous and defining events, as elections[3] can only be within the process opened up four years ago in Madrid.

The structures of domestic developments are addressed by two of the most eminent jurists of the area: David Kretzmer, who has authored one of the most thorough studies on the patterns of legal inequality between the Jewish and Arab citizens of Israel, and Anis Al-Qasem, who, as Chairman of the Palestine National Council Legal Committee, has accompanied the difficult production of legal texts by the Palestinian movement since before the formation of the PLO in 1964. The subjects addressed here might seem, in classic legal categories, separate from the Arab-Israeli accords proper. As international law moves away from the patterns of the non-intervention in domestic affairs principle, perhaps the most remarkable illustration of the undermining of this principle appears in the agreements between Israelis and Palestinians, and between Israelis and Jordanians. In the first case indeed, Professor Kretzmer shows how the domestic definition of the rule of law and human rights in Israel is affecting the process, and is in turn affected by it. Dr Anis Al-Qasem addresses an eminently domestic Palestinian issue: that of defining the Constitution or Basic Law of the Palestinian state. In the absence of a Palestinian state with full attributes of sovereignty for the present, this might sound an ambitious exercise. This domestic dimension, however, is the essence in the present process, not only for Palestinians, but also for the Israeli government, which has insisted from early on that the so-called Palestinian Covenant of 1968 be changed as early as possible. Already in his first letter to the Israeli Prime Minister, and as part of the package deal of mutual recognition and the Declaration of Principles, the PLO Chairman had written that:

> the PLO affirms that those articles of the Palestinian Covenant which deny Israel's right to exist, and the provisions of the Covenant which are inconsistent with the commitments of this letter are now inoperative and no longer valid. Consequently, the PLO undertakes to submit to the Palestinian National Council for formal approval the necessary changes in regard to the Palestinian Covenant.[4]

With the Interim Agreement, the process of change appears more pressing, as Article XXXI.9 stipulates that:

> the PLO undertakes that, within two months of the date of the inauguration of the Council, the Palestinian National Council will convene and formally approve the necessary changes in regard to the Palestinian Covenant...[5]

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[3] The elections for the Council and the President are expected to take place on 20 January 1996.

[4] Letter from Y. Arafat to Y. Rabin, 9 September 1993, in E. Cotran and C. Mallat eds., *Yearbook of Islamic and Middle Eastern Law 1994*, (London and the Hague, 1995, Kluwer Law International). This book includes the main agreements between Palestinians, Israelis and Jordanians.

[5] See Appendix containing full text, and Article XXXI.9 at p. 295.

Since the Palestinian National Council remains the most representative institution for Palestinians inside and outside Palestine, and the Covenant requires, under its own terms, modification by two thirds of its members, the legal intersection between the draft constitution or Basic Law and the historic charter now appears significant. Even if, as noted in the chapter, the draft remains a project, the internal structure of the Palestinian Authority introduced in 1994, and the Palestinian Council which should, after the electoral process, now emerge, will have to be governed by Palestinian-made institutions against the background of the Covenant. Conflicting rights and duties will no doubt emerge, as will, perhaps even more significantly, issues of identity. A serious reflection at this level, as started perhaps for the first time in the present book, has become all the more necessary for the next final stage of the peace process.

This interlocking of domestic and regional structure might be inevitable because of the interlocking of populations. The section of the book on water shows how the geographic imperative makes the fluidity between domestic and regional inevitable in the case of water, which both Israelis and Jordanians have officially recognised as a problem in the Treaty signed in October 1994. The legal consequence of this reality also defies the classical system of the impermeability of frontiers, and the concept of joint management might be another model which the Middle East is constructing with some success. The principle of exchange of water as established in the Treaty, and the reality of this exchange in the summer of 1995 between the two countries, reinforces the unusual premise taken by both Sharif Elmusa and Eran Feitelson in their chapters: that the structure of joint management in an area of particular scarcity and importance, such as water, should be the focus of discussion, rather than a classical division of water according to fixed percentages.

Like water, economy tends to defy boundaries. Economic issues are obscure to non-economists, and the two studies in the book should help foster an understanding of the more practical side of the new arrangements in terms of trade and labour flows, even if the picture at the end tends to be discouraging both from the point of view of a ravaged Palestinian economy to which the agreements have not proved particularly generous (Elmusa and Jaafari), or from the absence of a joint approach where common ventures could create common stakes beyond the division of spoils tailored to two different entities (Fassberg).

The book closes with separate reflections on the process of creating legal institutions on the two sides of the divide. Whilst the conclusions of Mona Rishmawi clearly show the amount of effort needed to overcome the problems faced by new Palestinian rule, it is clear in the remarkable overview of Ruth Levush that the construction of the rule of law in Israel has required a considerable investment of time and effort

since before the creation of the Israeli state in 1948, and much more effort since. Whilst this reality could cause some to be disheartened before the task to be accomplished, almost from scratch, there is no escaping the fact that the rule of law does not come all-equipped like the Greek Goddess of war. It is a patient and protracted process, and a never ending one. This is a book, no doubt, on the *first* Arab-Israeli accords. The new chapter opened up by the Interim Agreement already requires a similar effort to be undertaken anew.