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The Quest for Creative Jurisdiction: The Evolution of Personal Jurisdiction Doctrine of Israeli Courts Toward the Palestinian Territories

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THE QUEST FOR CREATIVE JURISDICTION: THE EVOLUTION OF PERSONAL JURISDICTION DOCTRINE OF ISRAELI COURTS TOWARD THE PALESTINIAN TERRITORIES

*Michael M. Karayanni**

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I. INTRODUCTION

Legal aspects concerning the actions taken by the State of Israel with respect to the Occupied Palestinian Territories,¹ and afterwards with respect to the territories that came under the control of the Palestinian Authority—territories that will be jointly referred to as the Palestinian Territories (PT)—have drawn a relatively large amount of scholarly attention worldwide.² Most writings focus on issues in the public eye deemed to be of central importance to the Israeli-Palestinian conflict, particularly from the point of view of public international law.³ These include issues such as the right of the Palestinian people to self-determination,⁴ the status and nature of Israeli occupation and control over the West Bank and the Gaza Strip,⁵ and the extent to which access to human rights for the Palestinian population can be overseen and guaranteed.⁶ Scholarly interest has intensified in recent years with the rise

1. It is appropriate to note at the outset that the Occupied Palestinian Territories have been referred to in Israel by a score of other names. The term “West Bank,” which implied recognition of Jordanian sovereignty, was officially changed to “Judea and Samaria” to stress the biblical attachment of Israel to these areas. See Amnon Rubinstein, *The Changing Status of the “Territories” (West Bank and Gaza): From Escrow to Legal Mongrel*, 8 TEL-AVIV U. STUD. L. 59, 61 (1988). In the course of time, other terms were used, all of which also tried to give the Occupied Palestinian Territories a sort of neutral status, such as “the Territories,” the “Administered Territories,” and “the Area.” *Id.* at 61–62.

2. See DAVID KRETZMER, *THE OCCUPATION OF JUSTICE: THE SUPREME COURT OF ISRAEL AND THE OCCUPIED TERRITORIES* (2002).

3. See, e.g., INTERNATIONAL LAW AND THE ADMINISTRATION OF OCCUPIED TERRITORIES: TWO DECADES OF ISRAELI OCCUPATION OF THE WEST BANK AND GAZA STRIP (Emma Playfair ed., 1992).

4. See, e.g., Francis A. Boyle, *The Creation of the State of Palestine*, 1 EUR. J. INT’L L. 301 (1990); James Crawford, *The Creation of the State of Palestine: Too Much Too Soon?*, 1 EUR. J. INT’L L. 307 (1990); Peter Malanczuk, *Israel: Status, Territory and Occupied Territories*, in 2 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 1468, 1491–92 (Rudolf Bernhardt ed., 1995); Sally V. Mallison & W. Thomas Mallison, Jr., *The Juridical Bases for Palestinian Self-Determination*, 1 PALESTINE Y.B. INT’L L. 36 (1984); Eugene Rostow, “*Palestinian Self-Determination*”: *Possible Futures for the Unallocated Territories of the Palestine Mandate*, 5 YALE STUD. WORLD PUB. ORD. 147 (1979); John Collins, Note, *Self-Determination in International Law: The Palestinians*, 12 CASE W. RES. J. INT’L L. 137 (1980).

5. See ALLAN GERSON, *ISRAEL, THE WEST BANK AND INTERNATIONAL LAW* (1978); Yehuda Z. Blum, *The Missing Reversioner: Reflections on the Status of Judea and Samaria*, 3 ISR. L. REV. 279 (1968); Richard Falk, *Some Legal Reflection on Prolonged Israeli Occupation of Gaza and the West Bank*, 2 J. REFUGEE STUD. 40 (1989); Allan Gerson, *Trustee-Occupant: The Legal Status of Israel’s Presence in the West Bank*, 14 HARV. INT’L L.J. 1 (1973); Theodor Meron, *Applicability of Multilateral Conventions to Occupied Territories*, 72 AM. J. INT’L L. 542 (1978); Adam Roberts, *Prolonged Military Occupation: The Israeli Occupied Territories Since 1967*, 84 AM. J. INT’L L. 44 (1990).

6. See ESTHER COHEN, *HUMAN RIGHTS IN THE ISRAELI-OCCUPIED TERRITORIES 1967–1982* (1985); Eyal Benvenisti, *Responsibility for the Protection of Human Rights Under the Interim Israeli-Palestinian Agreements*, 28 ISR. L. REV. 297 (1994); Theodor Meron, *West Bank and Gaza: Human Rights and Humanitarian Law in the Period of Transition*, 9 ISR. Y.B.

and demise of the Oslo Peace Process⁷ and the international debate regarding the construction of the so-called Separation Barrier.⁸ Interest is periodically kindled by recurring peace initiatives, the most recent of which, at publication, is the Annapolis Conference.⁹

Central as these questions may be, and despite the severe human cost and territorial upheavals endured by many since Israel took control of the PT in 1967, there existed the private sphere of relations, in which private corporations and individuals from both sides of the conflict interacted among and between each other. Occasionally, these interactions led parties to seek legal remedies to their disputes. In this context, the principles of private international law of each side were implicated in an effort to untangle the conflict of laws issues that arose out of such disputes. This particular sphere of the Israeli-Palestinian conflict has received only scant attention. In what follows, I intend to offer an analysis of the construction of personal jurisdiction doctrine by Israeli courts with respect to PT-related private disputes from 1967, when these territories were first occupied by Israel, until the present day.¹⁰ This body of

HUM. RTS. 106 (1979); Wendy Olson, *UN Security Council Resolutions Regarding Deportations from Israeli Administered Territories: The Applicability of the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, 24 STAN. J. INT'L L. 611 (1988); Jordan J. Paust et al., *Report of ICJ Mission of Inquiry into the Israeli Military Court System in the Occupied West Bank and Gaza*, 14 HASTINGS INT'L & COMP. L. REV. 1 (1990); Richard Z. Alderson et al., Note, *Protection of Human Rights in Israeli-Occupied Territories*, 15 HARV. INT'L L.J. (1974).

7. See generally THE ARAB-ISRAELI ACCORDS: LEGAL PERSPECTIVES (Eugene Cotran, Chibli Mallat & David Stott eds., 1996); GEOFFREY R. WATSON, THE OSLO ACCORDS: INTERNATIONAL LAW AND THE ISRAELI-PALESTINIAN PEACE AGREEMENTS (2000); Peter Malanczuk, *Some Basic Aspects of the Agreement Between Israel and the PLO from the Perspective of International Law*, 7 EUR. J. INT'L L. 485 (1996); Jill Allison Weiner, Comment, *Israel, Palestine and the Oslo Accords*, 23 FORDHAM INT'L L.J. 230 (1999).

8. See also Agora: *ICJ Advisory Opinion on Construction of a Wall in the Occupied Palestinian Territory*, 99 AM. J. INT'L L. 1 (2005) (offering a series of contributions). See generally Pieter H.F. Bekker, Comment, *The World Court's Ruling Regarding Israel's West Bank Barrier and the Primacy of International Law: An Insider's Perspective*, 38 CORNELL INT'L L.J. 553 (2005); Barry A. Feinstein & Justus Reid Weiner, *Israel's Security Barrier: An International Comparative Analysis and Legal Evaluation*, 37 GEO. WASH. INT'L L. REV. 309 (2005); Andrew R. Malone, Comment, *Water Now: The Impact of Israel's Security Fence on Palestinian Water Rights and Agriculture in the West Bank*, 37 CASE W. RES. J. INT'L L. 639 (2005); Sarah Williams, *Has International Law Hit the Wall? An Analysis of International Law in Relation to Israel's Separation Barrier*, 24 BERKELEY J. INT'L L. 192 (2006); Robert A. Caplen, Note, *Mending the "Fence": How Treatment of Israeli-Palestinian Conflict by the International Court of Justice at the Hague has Redefined the Doctrine of Self-Defense*, 57 FLA. L. REV. 717 (2005).

9. CONG. RES. SERV., ISRAELI-PALESTINIAN PEACE PROCESS: THE ANNAPOLIS CONFERENCE (2007), available at <http://fpc.state.gov/documents/organization/98093.pdf>.

10. This is not to suggest that such was the only issue of conflict of laws related to the Palestinian Territories (PT) dealt with by Israeli courts. In fact, two recent Israeli Supreme Court judgments dealing with choice of law in torts and choice of law in contracts addressed PT-related actions filed by Palestinian plaintiffs and are quite unique and give important inputs

doctrine has developed primarily as a consequence of the numerous civil actions filed before Israeli courts that related, in one way or another, to the PT.

My central thesis contends that the construction of Israeli personal jurisdiction doctrine is characterized by three different stages. The first runs from 1967 until the early 1980s, a stage at which personal jurisdiction doctrine significantly expanded. In this period, the PT of the West Bank and the Gaza Strip were in many respects regarded as Israeli territory for personal jurisdiction purposes, notwithstanding the fact that the State of Israel undertook no official act of annexation in respect to these territories (with the exception of East Jerusalem). The second stage runs from the early 1980s until the signing of the Oslo Peace Accords in the mid-1990s, when personal jurisdiction doctrine became more instrumental. With the establishment of a relatively firm personal jurisdiction grip on the PT, courts in Israel began to employ discretionary jurisdictional tools, principally the *forum non conveniens* doctrine, in order to filter in only those cases with a substantial tie to the State of Israel.

The start of the third stage is marked by the initiation of the Oslo Peace Process in the mid-1990s. The formation of the Palestinian Authority (PA) and the creation of the West Bank and the Gaza Strip as entities over which the PA has effective territorial jurisdiction made it necessary for the personal jurisdiction doctrine of Israeli courts to adjust to the new developments. However, since the jurisdiction accorded to the PA under the Oslo Peace Accords did not reach the level generally accorded to an independent sovereign State, the rules governing the personal jurisdiction of Israeli courts with respect to civil actions related to the PT were of an intermediate and indeterminate nature.

The thesis offered here, marking three different stages in the development of the personal jurisdiction doctrine of Israeli courts toward the PT of the West Bank and the Gaza Strip, has two additional attributes. One concerns the doctrinal innovation in the general personal jurisdiction doctrine of Israeli courts that also took place as these different stages unfolded. The evolving status of the West Bank and the Gaza Strip over the years, together with the need of courts to reach conclusive results in the cases brought before them, made it necessary for courts to be creative in adjusting the existing rules of personal jurisdiction to apply to PT-related civil actions. This Article will illuminate these creative

to private international law doctrine in general and to that of Israel in particular. See HCJ 5666/03 Amutat Kav la-Oved v. Nat'l Labor Court in Jerusalem [2007] IsrSC (not yet reported) (choice of law in contracts); CA 1432/02 Yanon v. Qara'an [2004] IsrSC 59(1) 345 (choice of law in torts).

jurisdictional maneuvers and afford a theoretical appraisal of their significance.

The second attribute of the development is the connection between these stages and the basic policies of the State of Israel toward the PT. When Israel first sought full territorial control over the PT, personal jurisdiction doctrine was expansionist and regarded the PT, for the purpose of applying a major personal jurisdiction doctrine, as part of Israel. When Israel began to realize the burden of the PT, personal jurisdiction doctrine produced an elastic form of the *forum non conveniens* doctrine in order to relieve Israeli courts from PT-related civil litigation. And, when the Oslo Peace Accords created a semi-sovereign Palestinian entity, personal jurisdiction doctrine also evolved and began to treat the PT as a semi-sovereign foreign State. Indeed, these propositions imply that personal jurisdiction doctrine is still attuned to the political concern of a State rather than to the general trend in personal jurisdiction doctrine, which is to stress issues of fairness in litigation.¹¹ The strong link between personal jurisdiction doctrine and concerns of sovereign power seems to be particularly true, as this Article will try to demonstrate, when personal jurisdiction is assessed and defined in the context of a unique and undefined inter-jurisdictional relationship, such as that existing between the State of Israel and the PT over the years. In an effort to facilitate laying out this doctrinal evolution of Israel's personal jurisdiction doctrine, I found it proper to begin by briefly giving two necessary background abridgements in Part II: the first concerns the nature of Israel's personal jurisdiction doctrine, and the second concerns the status of the West Bank and the Gaza Strip under the municipal law of the State of Israel. Part III discusses the evolution of Israeli personal jurisdiction doctrine in what was called the "first stage" of development, running from 1967 to the early 1980s. Part IV discusses this evolution in the "second stage," running from the early 1980s to the mid-1990s, and Part V examines the impact of the Oslo Peace Accords on Israeli personal jurisdiction doctrine. Besides the analysis offered in these Parts on the characteristics of each stage of development, each Part also includes a

11. In the United States, the introduction of the notion of fairness into personal jurisdiction theory is generally credited to the landmark case of *International Shoe Co. v. Washington*, 326 U.S. 310 (1945); see Earl M. Maltz, *Sovereign Authority, Fairness, and Personal Jurisdiction: The Case for the Doctrine of Transient Jurisdiction*, 66 WASH. U. L.Q. 671, 673 (1988). Some have even argued that considerations of fairness, instead of physical power over the defendant's person, provided the foundation for the traditional notion of personal jurisdiction under common law theory in England as well as in the United States. See Albert Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens*, 65 YALE L.J. 289 (1956). For a discussion on the shift of personal jurisdiction theory in general from a "power theory" approach to that of "fairness," see Arthur Taylor von Mehren, *Adjudicatory Jurisdiction: General Theories Compared and Evaluated*, 63 B.U. L. REV. 279 (1983).

separate section offering a theoretical appraisal of the significance of the doctrinal leap taken in each stage.

II. BACKGROUND

A. Personal Jurisdiction Doctrine

The Israeli doctrine of personal jurisdiction, referred to at times as “international jurisdiction,” is deeply rooted in English common law.¹² This goes back to the historical fact that much of the doctrines composing Israel’s private international law were heavily influenced by the common law tradition.¹³ The principal reason for this was the British Mandate over Palestine, established by the League of Nations after British forces took over the region from the Ottoman Turks in 1917.¹⁴ One of the first major legal enactments undertaken by the British Mandate was the Palestine Order in Council of 1922 (POC), a semi-constitutional document that defined the jurisdiction accorded to each of the government branches as well as the major sources of law to be applied in courts.¹⁵ Most relevant to our discussion is Article 46 of the POC, under which local courts had recourse to “the common law and the doctrines of equity in force in England” whenever no applicable norm on the issue could be found in local law, and “insofar as the circumstances in Palestine permitted.”¹⁶ In 1938, still during the British Mandate, a whole new set of procedural rules were enacted¹⁷ that have bearing on the inception of personal jurisdiction theory. Many of the provisions were identical to the then-existing English rules governing civil proceedings before English courts.¹⁸ The transplantation of English procedural rules, together with the statutorily mandated recourse to English common law in the event that local norms lacked positive guidance—and much was lacking in terms of local private international law—incorporated the major at-

12. Stephen Goldstein & Elisheva HaCohen, *Israel*, in 3 INTERNATIONAL ENCYCLOPEDIA OF LAWS: CIVIL PROCEDURE 67 (Piet Taelman ed., 1994).

13. See Amos Shapira, *Private International Law*, in INTRODUCTION TO THE LAW OF ISRAEL 361, 361 (Amos Shapira & Keren C. DeWitt-Arar eds., 1995).

14. See David M. Sassoon, Comment, *The Israel Legal System*, 16 AM. J. COMP. L. 405 (1968).

15. 3 THE LAWS OF PALESTINE 2569 (Robert Harry Drayton ed., 1934).

16. *Id.*

17. Civil Procedure Rules 1938, P.G. 31 Jan. 1938, Supplement No. 2, 111 (Brit. Mandate of Palestine). These Rules have now been superseded by the Rules of Civil Procedure. See 1984, KT 4685, 2220 (Isr.) [hereinafter RCP]. The RCP do not introduce any substantive change to the pre-existing law on personal jurisdiction. See *id.*

18. Stephen Goldstein, *Civil Procedure*, in INTRODUCTION TO THE LAW OF ISRAEL, *supra* note 13, at 295, 296, 309.

tributes of English common law doctrine of personal jurisdiction in local doctrine.

The establishment of the State of Israel in 1948 did not change much with respect to the legal dependence on English private international law, notwithstanding the termination of the British Mandate. One of the first legal enactments of the State of Israel was that the body of law existing in the country on the eve of its establishment was to continue in effect.¹⁹ This led to the continued presence of Article 46 of the 1922 (British) Palestine Order in Council and the continued importation of English common law doctrines into the local law of conflicts.²⁰ Only in 1980 did Israel rescind Article 46, making such principles as freedom, justice, equity, and Israel's heritage as the sources that a court should look to when faced with a legal lacuna.²¹ However, as this law specifically provides, this development should have no effect on the status of the legal norms incorporated in the past.²²

The absorption of the English doctrines of private international law entailed adherence to a territorial notion of personal jurisdiction that, as a first step, sought to inquire into the amount of physical power that the court had over the defendant's person.²³ This, in turn, made it necessary to distinguish between a defendant present within the territorial jurisdiction of Israeli courts and a defendant absent therefrom.²⁴ With respect to a present defendant, personal jurisdiction is recognized as being effectuated upon service of court documents initiating the proceedings on the defendant's person.²⁵ Moreover, in conformity with the development of English common law, such service also was taken to be effective when made to someone other than the defendant who at the time of service happened to have some form of association with the defendant.²⁶ Accordingly, courts in Israel recognized that service of documents in Israel on the defendant's business representative or on the defendant's attorney was sufficient to establish personal jurisdiction over the defendant,

19. Law and Administration Ordinance, 5708-1948, 1 LSI 7 (1948) (Isr.).

20. U. Yadin, *Reception and Rejection of English Law in Israel*, 11 INT'L & COMP. L.Q. 59 (1962).

21. The Foundation of Law Act, 5740-1980, 34 LSI 181 (1980) (Isr.).

22. *Id.* § 2(b).

23. The widely quoted observation in this respect is that of U.S. Supreme Court Justice Oliver Wendell Holmes, Jr., that "[t]he foundation of jurisdiction is physical power . . ." *McDonald v. Mabee*, 243 U.S. 90, 91 (1917).

24. See J.G. COLLIER, *CONFLICT OF LAWS* 71-83 (3d ed. 2001) (providing a helpful summary of the English law position in cases not governed by the 1968 European Community's Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters (the Brussels Convention)).

25. Goldstein & HaCohen, *supra* note 12, at 67.

26. See generally YOEL SUSSMANN, *SIDREI HA-DIN HA-EZRAKHI* [THE LAW OF CIVIL PROCEDURE] 232-36 (Shlomo Levin ed., 7th ed. 1995) (Hebrew).

notwithstanding the fact that the defendant, at the time of service, was absent from the territorial jurisdiction of Israeli courts.²⁷ Another significant import from English common law, with respect to personal jurisdiction effectuated by means of service of process within the territorial jurisdiction of the Israeli courts, was the notion that jurisdiction established in such a manner was a matter of "right."²⁸ The principal consequence of this proposition concerned the latitude of discretionary power that courts permitted themselves to have when asked to decline exercising what is conceived as a rightfully acquired jurisdictional authority. Again, in conformity with English practice, the initial stand of Israeli courts was that only in the most exceptional circumstances would the court decline jurisdictional authority when such an authority was acquired as a matter of "right."²⁹

Personal jurisdiction over a defendant absent from the territorial jurisdiction of Israeli courts was recognized only when it was possible to grant leave for service of process outside of the jurisdiction. This procedure is contained today in Rule 500 of the Rules of Civil Procedure (RCP).³⁰ However, in spite of courts' explicit authority to grant leave for service outside of the jurisdiction under the aforementioned Rule 500, such a jurisdictional capacity was from the start regarded as having an "assumed" nature. Leave under Rule 500 would be denied unless a whole list of cumulative conditions had been fulfilled.³¹ These conditions include: first, the existence of a nexus, explicitly recognized in Rule 500, between the defendant or the underlying cause of action and the State of Israel;³² second, *prima facie* evidence establishing the case against the absent defendant;³³ third, a showing that the Israeli forum is the *forum conveniens*;³⁴ fourth, a showing that the application for leave was filed in due time after initiating legal proceedings;³⁵ and, fifth, the establishment that the plaintiff acted in good faith, disclosing all relevant facts.³⁶ Israeli courts have also stated that any remaining doubt at the end of the discussion pertaining to the grant of leave of service outside of the jurisdiction should work to the defendant's advantage.³⁷ The assumption of Israeli

27. Goldstein & HaCohen, *supra* note 12, at 68.

28. CA 300/84 Abu Attiya v. Arabtisi [1985] IsrSC 39(1) 365, 384.

29. *Id.*

30. RCP, art. 500, 1984, KT 4685, 2220 (Isr.).

31. Goldstein & HaCohen, *supra* note 12, at 69.

32. CA 565/77 Mizrahi v. Nobel's Explosives Co. [1978] IsrSC 32(2) 115.

33. CA 65/81 Fiat Auto, s.p.a Torino v. Ashdod Bonded Ltd. [1983] IsrSC 37(3) 837.

34. CA 4601/02 Rada Elec. Indus. Ltd. v. Bodstray Co. [2004] IsrSC 58(2) 465; CA 74/83 Ra'ad v. Chai [1986] IsrSC 40(2) 141.

35. CA 837/87 Hoyda v. Hindi [1990] IsrSC 44(4) 545.

36. *Id.*

37. CA 98/67 Libher v. "Gazit & Shakham" Bldg. Co. [1967] IsrSC 21(2) 243.

courts seems to be that personal jurisdiction sought against an absent defendant is tentative at best, given that such service infringes on the sovereignty of the country in which the defendant happens to be when service is to be effectuated.³⁸ This conception, in turn, is embodied in the territorial notion of jurisdiction, that is, that each sovereign State has exclusive jurisdictional authority over the persons present within its territory.³⁹ Therefore, demanding that a defendant in one State litigate an action in another State is taken as a breach of the sovereign powers of the State in which the defendant resides. Consequently, courts applying jurisdiction over absent defendants have indicated that such jurisdictional authority is to be handled with care.⁴⁰

Given the strong influence that English law has had on former British colonies, the transplantation of English common law notions of personal jurisdiction in Israeli law is not surprising. What is innovative in the Israeli case, however, is the way that Israeli law developed these notions in the context of PT-related civil litigation.

B. The Legal Status of the West Bank and the Gaza Strip

In the wake of the 1967 Six-Day War, the territories of the West Bank and the Gaza Strip, as well as the Golan Heights and the Sinai Peninsula, were placed under the administration of a military government.⁴¹ This body was run by the Israel Defense Forces (IDF), and its primary function was to ensure effective control over these territories.⁴² Proclamation No. 1 of the military government stated that the IDF has now “assumed responsibility for security and maintenance of public order.”⁴³ Administrative legalism, *i.e.*, the effort to base each and every action of the military government on predetermined norms as identified by the IDF, was characteristic of the operation of the military government in its first years of existence. Meir Shamgar, who is generally credited with creating the legal framework of the military government,⁴⁴ had Military

38. SUSSMANN, *supra* note 26, at 40.

39. *Id.* at 34–35 (discussing Article 38 of the Palestine Order in Council of 1922).

40. See CA 9725/04 Ashbouran Hevra le-Sokhnuyot u-Miskhar, Ltd. v. CAE Elecs. Ltd. [2007] IsrSC (not yet reported). *But see* Goldstein & HaCohen, *supra* note 12, at 69 (arguing that, due to the increasing interdependence of international trade and commerce, courts in Israel exhibit a tendency to construe broadly the nexus prescribed in Rule 500).

41. See Roberts, *supra* note 5, at 58–59.

42. See Meir Shamgar, *Legal Concepts and Problems of the Israeli Military Government—The Initial Stage*, in 1 MILITARY GOVERNMENT IN THE TERRITORIES ADMINISTERED BY ISRAEL 1967–1980: THE LEGAL ASPECTS 13, 13 (Meir Shamgar ed., 1982).

43. *Id.*

44. Shamgar was Military Advocate General (1961–68) and Attorney General (1968–75) before becoming a justice of the Supreme Court of Israel in 1975. He served as president of the Israeli Supreme Court from 1983 to 1995.

Advocate General units follow the occupying forces in the Six-Day War itself and instruct these forces to act according to a preconceived manual of operation.⁴⁵ The very same day that the military government in the West Bank was established, Proclamation No. 2 was also published, stating two additional constitutive norms.⁴⁶ First, the Proclamation declared that the law in existence in these territories on June 7, 1967, “shall remain in force so far as there is nothing therein repugnant to this proclamation.”⁴⁷ Second, it vested “all powers of government, legislation, appointment and administration in relation to the Region or its inhabitants” in the IDF Military Commander.⁴⁸

One of the fundamental legal controversies that ensued after Israel took control of the PT was whether, under applicable norms of international law such as The Hague Regulations⁴⁹ and the Fourth Geneva Convention,⁵⁰ the West Bank and the Gaza Strip were to be classified as “occupied territories.”⁵¹ Israel contended that these territories were not to be regarded as such since, on the eve of the Six-Day War, these territories were not part of a territory of a High Contracting Party to the Fourth Geneva Convention.⁵² On the other hand, international organizations such as the International Committee of the Red Cross argued the contrary.⁵³ As noted recently, the “Israeli position . . . has been . . . widely rejected, even within Israel itself.”⁵⁴ In practice, much of this controversy has become moot, since Israel submitted that, despite its official stance, it is willing to observe and implement the humanitarian provisions of the Geneva Conventions.⁵⁵ It is also important to note that, as far as Israeli law was concerned, the establishment of a military government in the PT meant that all sovereign powers that existed before Israel took control

45. Shamgar, *supra* note 42, at 24–25, 25 n.27.

46. *Id.* at 52.

47. *Id.*

48. *Id.* at 53.

49. Regulations Concerning the Laws and Customs of War on Land, Annex to the Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631 [hereinafter Hague Regulations].

50. Geneva Convention (Fourth) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention].

51. See EYAL BENVENISTI, *THE INTERNATIONAL LAW OF OCCUPATION* 108–12 (1993).

52. Shamgar, *supra* note 42, at 31–43; see also Blum, *supra* note 5.

53. See Malanczuk, *supra* note 4, at 1495–96 (discussing the various positions).

54. Orna Ben-Naftali, Aeyal M. Gross & Keren Michaeli, *Illegal Occupation: Framing the Occupied Palestinian Territory*, 23 *BERKELEY J. INT’L L.* 551, 567 (2005).

55. Haim H. Cohn, *Foreword* to *ISR. NAT’L SECTION OF THE INT’L COMM’N OF JURISTS, THE RULE OF LAW IN THE AREA ADMINISTERED BY ISRAEL* vii, vii–viii (1981); see also Roberts, *supra* note 5, at 62–66; Shamgar, *supra* note 42, at 15; Meir Shamgar, *The Observance of International Law in the Administered Territories*, 1 *ISR. Y.B. HUM. RTS.* 262, 266 (1971).

were now suspended.⁵⁶ The orders of the belligerent power, *i.e.*, the orders and commands of the IDF Military Commander, were to be considered supreme during the period of military administration.⁵⁷

However, the status of one part of the West Bank, East Jerusalem, dramatically changed *vis-à-vis* the other Palestinian territories. Within days of the end of the Six-Day War, the government of Israel decided to extend Israeli law and administration to that part of the city.⁵⁸ Despite the fact that this act was controversial,⁵⁹ Israeli courts accepted its validity, henceforth considering East Jerusalem part of the sovereign territory of the State of Israel and therefore governed by Israeli law. This status was identical to that of any other territory inside the so-called Green Line,⁶⁰ Israel's *de facto* boundary as drawn by the armistice agreements ending the 1948 Arab-Israeli War.

While East Jerusalem is now for all purposes part of the State of Israel in the eyes of Israeli law, the other Palestinian territories, as a result of Proclamation No. 2, became subject to the law existing in these territories on the eve of the Six-Day War.⁶¹ In addition, the military government maintained the functioning of the local courts, which included a number of courts of first instance and a court of appeals.⁶² Thus, soon after the 1967 War, the PT emerged as a quasi-separate territorial

56. H CJ 337/71 Al'Jemiyah Al'Massehiya L'lazriya Al'Maqdasa v. Minister of Defense [1972] IsrSC 26(1) 574.

57. *Id.*; see also H CJ 663/78 Kiryat Arba Admin. v. Nat'l Labour Court [1979] IsrSC 33(2) 398; H CJ 302/72 Abu Hilo v. Gov't of Israel [1973] IsrSC 27(2) 169.

58. The Knesset, at the government's insistence, enacted an amendment to the Law and Administration Ordinance, 1 LSI 7 (1948) (Isr.), which provided that the "law, jurisdiction and administration of the State" would henceforth apply to any part of the Land of Israel "designated by the Government," Law and Administration Ordinance (Amendment No. 11) Law, 5727-1967, 21 LSI 75 (1966-67) (Isr.). Subsequently, the government issued a decree applying Israeli law, jurisdiction, and administration in East Jerusalem. See KRETZMER, *supra* note 2, at 6. In order to legally bind Israel's attachment to a united Jerusalem, in 1980, the Knesset enacted yet another statute. Basic Law: Jerusalem, Capital of Israel, 5740-1980, 34 LSI 209 (1979-80) (Isr.).

59. See Roberts, *supra* note 5, at 60 (indicating that the international community continued to view East Jerusalem, and the Golan Heights, for that matter, as occupied territories, their official Israeli annexation notwithstanding).

60. See CA 434/79 Graetz v. Dajani [1981] IsrSC 35(2) 350, 353-54. Nonetheless, in terms of governing law, rights vested in parties according to the pre-existing legal system were to be recognized under Israeli law. *Id.*

61. Shamgar, *supra* note 42, at 54.

62. *Id.* at 55-56. Shamgar notes that he himself, as Military Advocate General, made a personal appeal as early as June of 1967 to judges in the PT to continue serving in their posts "for the common good of the inhabitants." *Id.* at 46 n.60. He said that this appeal was most successful in the Gaza Strip, but that in the West Bank, judges and attorneys "went on strike in protest of the new reality." *Id.*

legal entity,⁶³ albeit under the direct control of an Israeli organ, the IDF Military Commander.

Israel's future plans for the PT were unclear in the immediate aftermath of the Six-Day War. As one scholar has noted, this period was characterized by "a decision not to decide," with actual policy determined by "events and steps taken by those entrusted with the day-to-day administration of the Occupied Territories."⁶⁴ However, in the first decade of Israeli occupation of the West Bank and the Gaza Strip, the Israeli government initiated a project that would change, perhaps forever, the territorial relations between Israel and the PT, and later play a central role in influencing the territorial limits of Israeli norms and jurisdiction. The project was Israeli settlements, which established a continuous presence of Jewish Israeli civilians in designated areas in the PT. At this stage, the settlement project was still of modest proportions, having as its proclaimed objective the establishment of settlements in strategic areas in order to enhance Israel's security interests.⁶⁵

A major shift in Israeli policy occurred in 1977, when the Likud Party, lead by Menachem Begin, came to power.⁶⁶ This party, and the right-wing coalition governments it formed over the years, was more ambitious in terms of retaining control and eventually extending Israeli sovereignty over the PT.⁶⁷ Ideologically, it saw the West Bank and the Gaza Strip as part of "Greater Israel," into which pre-1967 Israel could expand. It politically harnessed the Zionist settlement project⁶⁸ to advance settlement building beyond the Green Line and to encourage Israeli civilians to move to these settlements as a fulfillment of Zionist ideology.⁶⁹ Jewish settlement in the PT grew dramatically. In 1973, there were only seventeen settlements in the PT with a total population of 1,514 Israeli Jewish civilians, while, by 1993, there were 120,000 Israeli settlers

63. Celia Wasserstein Fassberg, *Israel and the Palestinian Authority: Jurisdiction and Legal Assistance*, 28 *ISR. L. REV.* 318, 320 n.8 (1994) ("The existence of a separate legal system in the areas administered by Israel since 1967 was recognized and formally maintained by Israel throughout.").

64. KRETZMER, *supra* note 2, at 7.

65. See RAJA SHEHADEH, *FROM OCCUPATION TO INTERIM ACCORDS: ISRAEL AND THE PALESTINIAN TERRITORIES* 3 (1997).

66. MERON BENVENISTI, *THE WEST BANK DATA PROJECT: A SURVEY OF ISRAEL'S POLICIES* 52-53, 59 (1984); MARK TESSLER, *A HISTORY OF THE ISRAELI-PALESTINIAN CONFLICT* 519-21 (1994).

67. WILLIAM W. HARRIS, *TAKING ROOT: ISRAELI SETTLEMENT IN THE WEST BANK, THE GOLAN AND GAZA-SINAI, 1967-1980*, at 138-39 (1980); KRETZMER, *supra* note 2, at 8.

68. See W. THOMAS MALLISON & SALLY V. MALLISON, *THE PALESTINIAN PROBLEM IN INTERNATIONAL LAW AND WORLD ORDER* 244-52 (1986).

69. SHEHADEH, *supra* note 65, at 3-4; John Quigley, *Living in Legal Limbo: Israel's Settlers in Occupied Palestinian Territory*, 10 *PACE INT'L L. REV.* 1, 6 (1998).

in the West Bank (excluding East Jerusalem) living in 150 settlements.⁷⁰ According to Raja Shehadeh, a prominent Palestinian lawyer who has closely monitored Israeli legal measures in the West Bank, Israeli settlers, a six percent minority of the population of the West Bank, have effectively taken over more than sixty percent of the land.⁷¹

In terms of their legal identity, the settlements were excluded from the rest of the territories⁷² and today are generally considered to be “Israeli enclaves” for choice of law purposes.⁷³ This was facilitated by piecemeal military orders under which the law of the State of Israel either applied with respect to the territorial jurisdiction, which designated the settlements as local Israeli municipal authorities, or by having Israeli law apply on a personal basis to Israeli citizens whose regular place of residence is in the PT. So, without changing the legal status of the PT or that of the indigenous Palestinian population, the status of Israeli settlers in the PT was, in effect, equalized with that of other Israelis, while not formally annexing the settlements to Israel.⁷⁴

The 1978 Camp David Agreements signed by Israel and Egypt tried to establish a path for the solution of the Israeli-Palestinian conflict.⁷⁵ The Agreements contained extensive provisions for a self-governing authority in the West Bank and Gaza.⁷⁶ This authority was to be realized by the grant of “full autonomy to the inhabitants” and the free election of a “self-governing authority.”⁷⁷ The Agreements “also provided for the withdrawal of Israeli military government and civil administration.”⁷⁸ The 1978 Agreements were successful in establishing peace between Israel and Egypt, or at least in ending the state of war between them, but they proved to be a failure in terms of establishing a path for peace between Israelis and Palestinians and were heavily criticized by Palestinians inside and outside of the PT.⁷⁹ In addition, a number of key

70. SHEHADEH, *supra* note 65, at 5.

71. Raja Shihadeh, *Can the Declaration of Principles Bring About a “Just and Lasting Peace?”*, 4 EUR. J. INT’L L. 555, 559 (1993).

72. EYAL BENVENISTI, LEGAL DUALISM: THE ABSORPTION OF THE OCCUPIED TERRITORIES INTO ISRAEL 3–4 (1989).

73. HCJ 5666/03 Amutat Kav la-Oved v. Nat’l Labor Court in Jerusalem [2007] IsrSC (not yet reported).

74. BENVENISTI, *supra* note 72, at 3; Ben-Naftali et al., *supra* note 54, at 584–85.

75. A Framework for Peace in the Middle East Agreed at Camp David, Egypt-Isr.-U.S., Sept. 17, 1978, 78 State Dep’t Bull. 7 (Oct. 1978), reprinted in 17 I.L.M. 1463, 1466 (1978) [hereinafter Camp David Agreements].

76. Roberts, *supra* note 5, at 59.

77. See Mayer Gabay, *Legal Aspects of the Camp David Framework for Peace in Relation to the Autonomy Proposal*, in MODELS OF AUTONOMY 255, 256 (Yoram Dinstein ed., 1981).

78. Antonio Cassese, *The Israel-PLO Agreement and Self-Determination*, 4 EUR. J. INT’L L. 564, 570 (1993).

79. Roberts, *supra* note 5, at 59.

provisions of the Agreements turned out to be extremely vague to Israeli and Egyptian officials alike. For example, while the proposition “full autonomy for the inhabitants” was interpreted by Israel to mean “personal autonomy,” Egypt took this proposition to mean “territorial autonomy” in the West Bank, the Gaza Strip, and even East Jerusalem.⁸⁰ These and other major differences in interpretation brought one scholar to comment that in the context of Israeli-Palestinian relations, “the Camp David agreements loosely amalgamated two different ‘models’ that in actual fact were poles apart.”⁸¹

The major modification that actually came out of the Camp David peace process with respect to the PT was the reorganization of the military government, namely the creation of a more substantial bureaucratic body of civil administration.⁸² It was assumed by Israeli policy-makers that this civil administration “would gradually be taken over by civilians . . . [and] that local Palestinians would assume the administrative tasks, including senior positions.”⁸³ However, this did not mean that the civil administration was to become independent of the military government. On the contrary, the military orders were drawn out so that the civil administration would remain under the ultimate control of the military government.⁸⁴ It is not surprising therefore, that the creation of the civil administration was met with resentment and a general boycott from the Palestinian leadership with accusations concerning the scheme being “an introductory step to Israeli annexation” or, at best, “a perpetuation of the existing occupation.”⁸⁵

Israeli-Palestinian relations entered into a new phase with the outburst of the Palestinian uprising in December of 1987, commonly known as the First Intifadah.⁸⁶ Besides bringing the Palestinian cause and Israeli occupation of the PT to world attention, the First Intifadah proved to be a major catalyst for the Israeli-Palestinian peace process, first leading to the Madrid Summit in 1991,⁸⁷ and then to the signing of the Oslo Peace Accords between Israel and the Palestine Liberation Organization

80. Gabay, *supra* note 77, at 256.

81. Cassese, *supra* note 78, at 570.

82. See JONATHAN KUTTAB & RAJA SHEHADEH, CIVILIAN ADMINISTRATION IN THE OCCUPIED WEST BANK: ANALYSIS OF ISRAELI MILITARY GOVERNMENT ORDER NO. 94715 (1982); Joel Singer, *The Establishment of a Civil Administration in the Areas Administered by Israel*, 12 ISR. Y.B. HUM. RTS. 259 (1982).

83. Singer, *supra* note 82, at 278.

84. *Id.* at 280.

85. *Id.* at 259.

86. See generally EITAN Y. ALIMI, ISRAELI POLITICS AND THE FIRST PALESTINIAN INTIFADA: POLITICAL OPPORTUNITIES, FRAMING PROCESSES AND CONTENTIOUS POLITICS (2007).

87. See F. ROBERT HUNTER, THE PALESTINIAN UPRISING: A WAR BY OTHER MEANS 230–33 (1991).

(PLO).⁸⁸ These accords brought both parties to recognize each other and led to the establishment of the PA, a semi-sovereign entity that gradually grew both in territory and in authority in the PT. It was initially hoped that the peace process would eventually lead the parties to a final peace agreement, but these hopes were soon disappointed. The region has witnessed a second uprising, commonly known as the al-Aqsa Intifadah.⁸⁹ Additionally, Israel unilaterally disengaged from the Gaza Strip in 2005, effectively bringing the Gaza Strip under total control of the PA.⁹⁰ However, as intra-Palestinian clashes erupted between the two main parties in the PA, Hamas and Fatah, the government in the Gaza Strip is now in the hands of Hamas and separated from the West Bank, which is dominated by Fatah.

Major transformations in the status of the PT have evidently taken place since the Six-Day War of 1967 until the present day and, if the past is any measure, many will yet occur before a peace settlement is reached between the Israelis and the Palestinians. However, to summarize the major developments of the relations between Israel and the PT thus far, we perceive how the PT has moved from being under total territorial control by Israel to becoming a territorial entity of its own, although still short of an independent sovereign State. During this process, the relations between the parties have witnessed a number of severe conflicts as well as interim peace agreements. In devising their personal jurisdiction doctrine toward the PT, Israeli courts have been attuned to these developments. It could not be otherwise, given that the personal jurisdiction doctrine in Israel is deeply embedded in notions of territoriality and physical power. Interestingly, in devising rules to meet the evolving conditions in Israeli-Palestinian relations, Israeli courts were not able to

88. Although the Camp David Agreements were totally ineffective in bringing about changes in the sphere of Israeli-Palestinian relations, it should be noted that the idea of a phased peace process, whereby the parties would enter into interim agreements and conclude with a final settlement agreement, was envisioned within the confines of the Camp David Agreements as the appropriate track to follow in order to achieve peace between Israel and the Palestinians. Indeed, the Oslo Peace Accords adopted this phased peace process as its strategy. See SHEHADEH, *supra* note 65, at 14; see also Yehuda Z. Blum, *From Camp David to Oslo*, 28 ISR. L. REV. 211 (1994) (discussing the differences between the two processes in spite of the shared vision of a phased peace process). However, one should note that the initial Israeli position in the Camp David negotiations was that the autonomy would be only over persons, and that this would also be the permanent solution. Gabay, *supra* note 77, at 258.

89. See, e.g., Richard Falk, *International Law and the al-Aqsa Intifada*, 217 MIDDLE E. REP. 16 (2000); see also CHARLES ENDERLIN, *THE LOST YEARS: RADICAL ISLAM, INTIFADA, AND WARS IN THE MIDDLE EAST, 2001–2006* (Suzanne Verderber transl., 2007) (offering a general account of the events).

90. On the importance of this move in terms of managing the Israel-Palestinian conflict, see Yaacov Bar-Siman-Tov & Kobi Michael, *The Israeli Disengagement Plan as a Conflict Management Strategy*, in *THE ISRAELI-PALESTINIAN CONFLICT: FROM CONFLICT RESOLUTION TO CONFLICT MANAGEMENT* 261 (Yaacov Bar-Siman-Tov ed., 2007).

apply the existing rules, which were found to be inadequate to meet the challenges of the evolving state of affairs between Israel and the PT.

Therefore, Israeli courts undertook “creative” measures in modifying existing personal jurisdiction rules in the context of PT-related civil actions.

III. STAGE ONE: PERSONAL JURISDICTION DOCTRINE AS A MEANS OF CONTROL OVER THE PT

A. The Construction of a Territorial Notion of Personal Jurisdiction Regarding the Palestinian Territories

As was outlined in the previous Part, the official policy of the State of Israel in the first decade or so after the 1967 Six-Day War was to establish full territorial and governmental control over the PT.⁹¹ In addition, the PT was not regarded by Israel as “regular” occupied territories, subject to the norms of international law, but rather as territories administered by the State of Israel for the time being, awaiting the determination of their permanent status in a future peace settlement.⁹² A logical consequence of such premises for the personal jurisdiction of Israeli courts over defendants present in the PT would be to regard the PT as part of Israel for jurisdictional purposes. If territorial notions of personal jurisdiction are primarily concerned with physical power over the defendant’s person and the need to avoid undue infringement on the sovereignty of a foreign State, then why should a defendant present in the PT be considered any differently from the one present inside Israel? Through the IDF, Israel had physical control over each and every person present in the PT, and, in light of Israel’s control over the PT after the Six-Day War, no foreign sovereignty could any longer be said to exist over these territories. Interestingly, however, the reasoning of the District Court of Tel-Aviv in a judgment rendered in October 1967, three months after the war, was just the opposite. The case of *Sandoka v. Sandoka*⁹³ dealt with an alimony and maintenance action filed by a Gazan wife and her children against their husband and father, also a resident of Gaza. The case was filed before the Israeli court soon after the Six-Day War ended, when the wife and her children moved to Jaffa. Importantly, service on the husband-defendant was effected by the IDF military police stationed in Gaza. No leave for service outside the jurisdiction was sought or granted. In light of the absence of such leave, the defendant

91. See JOHN QUIGLEY, *THE CASE FOR PALESTINE: AN INTERNATIONAL LAW PERSPECTIVE* 174–75 (2d ed. 2005); see also TESSLER, *supra* note 66, at 465–66.

92. See Cohn, *supra* note 55, at vii.

93. CC (TA) 1163/67 *Sandoka v. Sandoka*, [1967] 59 IsrDC (1) 356.

moved to dismiss the action for lack of personal jurisdiction, and his motion proved successful. In a lengthy judgment delivered by Judge Shlomo Asher, later to become a Justice of the Supreme Court of Israel, the court stated that

everyone knows, and no proof is needed on this issue, that the City of Gaza is located in a territory that was occupied by the IDF in the Six-Day War—and the question is whether this court (or any other district court in Israel) has jurisdiction over the mentioned occupied territory.⁹⁴

Since Israeli sovereignty, as the Sandoka court explained, had not been extended over the Gaza Strip, it was to be regarded as foreign to the State of Israel, making it essential to obtain leave for service to the defendant outside of the State's jurisdiction.⁹⁵ This case was recognized by one Israeli scholar as drawing a strict border between Israel and the West Bank and the Gaza Strip, in spite of Israel's military control.⁹⁶

But, the Israeli Ministry of Justice acted quickly in 1969, issuing a special set of rules—the Rules of Procedure (Service of Documents in Administered Territories) (SDAT)—for the service of process in all of the territories occupied by Israel during the Six-Day War, including the PT.⁹⁷ Three important provisions were made in these rules. The first pertains to the definition of “Region” (*ezor*), defined in Rule 1 as “each of the territories held by the Israel Defense Forces.”⁹⁸ The second and most important provision is contained in Rule 2(a), under which service of any official documents generated by a civil claim filed before an Israeli court is to be effectuated in accordance with the ordinary set of civil procedure rules relevant to the service of documents inside of Israel.⁹⁹ These later rules, as shown earlier, provide for service on any present defendant without the need for any form of leave. The third provision worthy of notice is the coda added to Rule 2(b), providing that all documents served in accordance with Rule 2(a) must be accompanied by an Arabic translation.¹⁰⁰

94. *Id.* at 357.

95. *Id.* at 357–59.

96. Amnon Rubinstein, *Yisra'el ve-ha-Shtakim: Samkhuyot Shiput [Israel and the Territories: Judicial Powers]*, 14 EYUNEI MISHPAT [LEGAL ISSUES] 415, 444 (1989) (Hebrew).

97. Rules of Procedure (Service of Documents in the Administered Territories), 1969, KT 2482, 458 (Isr.) [hereinafter SDAT]. The Rules were supplemented by an order issued by the Military Commander in the PT authorizing the service of documents originating in Israeli proceedings in the PT. See BENVENISTI, *supra* note 72, at 25.

98. SDAT, *supra* note 97, Rule 1, 1969, KT 2482, 458 (Isr.).

99. RCP, art. 2(a), 1984, KT 4685, 2220 (Isr.).

100. *Id.* art. 2(b).

It is interesting to note that the Rules refrain from the use of the term “occupied” (*kevushim*), using instead the term “held” (*muhzakim*) in relation to the PT. Later, the more dominant term, at least in English, will be “administered.”¹⁰¹ In addition, the need to translate all served documents into Arabic is a provision most certainly implying that the potential perceived receivers of service of documents are members of the indigenous Arabic-speaking residents of the PT.

All this now seems to suggest that service of process inside the PT, a territory “held” by the IDF, and thus qualifying as a “Region,” does not require a grant of leave for service outside Israeli jurisdiction. Indeed, this was the conclusion reached by the Israeli Supreme Court in *Al-Khir & Sons Co. v. Van Der Hurst Fruit Import*.¹⁰² The proceedings dealt with an action filed by a Dutch company against a Gazan defendant before the District Court of Jerusalem. The cause of action concerned a contract made in Rotterdam for the export of a certain amount of oranges from Gaza to Holland. It was stipulated in the contract that if the quantity of putrid oranges in the received shipment exceeded four percent, then the Dutch importer would be entitled to sell the oranges and claim the loss from the Gazan exporter. Eventually, this turned out to be the case, bringing the Dutch company to initiate a monetary claim against the Gazan exporter. Interestingly, the action was initiated before the Israeli court in spite of the lack of any connection between the case or the parties to the State of Israel. Moreover, in serving the Gazan defendant with the process, the Dutch plaintiff served the defendant directly without obtaining leave from the court. The defendant moved to dismiss the action for lack of personal jurisdiction, arguing that if personal jurisdiction were be recognized in the present case, then Israel would be considered to have annexed the Gaza Strip—a step that the Government of Israel explicitly chose not to undertake. The Deputy President of the Israeli Supreme Court at the time, Justice Yoel Sussmann, rejected these arguments.¹⁰³ Although he recognized the basic legal principle that service of process outside of the jurisdiction usually necessitates leave of the court, he concluded that no such leave is required when service is effectuated in the PT.¹⁰⁴ In light of SDAT, Justice Sussmann proclaimed that service can be made directly to a defendant present in the PT, since the ordinary rule of service to a defendant present in Israel has been extended to these “Regions.”¹⁰⁵ Regarding the annexation argument, the judgment made

101. See *supra* note 1.

102. CA 55/71 *Abu Al-Khir & Sons Co. v. Van Der Hurst Fruit Import* [1971] IsrSC 25(2) 13.

103. *Id.* at 15.

104. *Id.*

105. *Id.*

clear that the *Al-Khir* Court was only concerned with the extent of Israeli personal jurisdiction authority over a defendant present in what was defined as the "Region," and nothing more.¹⁰⁶

The *Al-Khir* decision was severely criticized in a Note published soon after it was rendered.¹⁰⁷ The essential point pressed in the Note was that the Court in *Al-Khir* strayed from the guiding principles of personal jurisdiction doctrine with respect to foreign defendants previously established in Israeli Supreme Court judgments. These judgments were heavily influenced by English law, and stipulated that when personal jurisdiction is assessed against an absent defendant, the assessment is to be cautious and guarantee the existence of a sufficient nexus (explicitly specified in the rules for service outside of the jurisdiction) before personal jurisdiction is established.¹⁰⁸ The *Al-Khir* judgment effectively obviates these requirements, making it possible to establish personal jurisdiction in an extra-territorial manner without the need to take the requirements into consideration. Indeed, the end result of the *Al-Khir* decision is that a defendant present in the PT is viewed as present in Israel.¹⁰⁹ The Note suggested that the SDAT rules should have been interpreted as only offering the method of serving the documents on the defendant after leave had been sought by the plaintiff and granted by the court.¹¹⁰

The Israeli Supreme Court was not swayed by this criticism. A short time after rendering its judgment in *Al-Khir*, the Court decided another case in which it went out of its way to offer a doctrinal rationale for service of process in the PT without need for recourse to the procedure for service outside of the jurisdiction. In *Shourafa v. Wechsler*,¹¹¹ an Israeli resident brought summary proceedings in Israel against a resident of Gaza to collect a dishonored check. The court concluded that the proceedings should be dismissed for both the defective manner in which the plaintiff articulated the cause of action and for the fact that the lower court, in which the complaint had been filed, lacked proper venue (local jurisdiction).¹¹² Nonetheless, the Court added that, in light of *Al-Khir*,

106. *Id.*

107. Baruch Bracha, *Hantsa'at Mismakhim la-Shtakhim ha-Mukhzakim* [Service of Documents to the Administered Territories], 4 MISHPATIM [LAWS] 119 (1972) (Hebrew).

108. See SUSSMANN, *supra* note 26, at 239–47.

109. Goldstein & HaCohen, *supra* note 12, at 69 ("It should be noted that due to special regulations in this regard, [supposedly referring to SDAT,] for purposes of service of process the territorial limits of the State of Israel include the territories administered by Israel since the 1967 Six Day War.").

110. Bracha, *supra* note 107, at 126, 129; see also BENVENISTI, *supra* note 72, at 24, 67 n.134.

111. CA 211/73 Shourafa v. Wexler [1974] IsrSC 28(1) 512.

112. *Id.* at 515–18.

there was no lack of personal jurisdiction, given that the defendant was properly served under SDAT.¹¹³ The Court explained that the doctrinal reason why no leave for service outside of the jurisdiction is required when SDAT rules are applicable was “simple.”¹¹⁴ According to the Court, leave is required for service outside of the jurisdiction because of the potential infringement on the sovereign powers of the foreign State in which the defendant is present when he or she is brought under the personal jurisdiction of local courts when served with the opening summons.¹¹⁵ But, given the current status of the “Administered Territories,” the Court explained, all sovereign powers that existed over them are suspended under international law.¹¹⁶ In light of the fact that these territories were captured by the IDF, the sovereign entity that effectively controls them is the State of Israel.¹¹⁷ It follows, therefore, that when residents of the PT are served with the opening summons of an Israeli court in a direct fashion, no powers of foreign sovereignty are undermined, and thus there is no real need to condition service upon obtaining leave for service outside the jurisdiction of Israeli courts.¹¹⁸

In spite of its marginal effect on the outcome of the case at hand, this rationale had a profound doctrinal influence on affirming the Israeli courts grip on personal jurisdiction over defendants present in the PT.¹¹⁹ The far-reaching significance of this process came to light a few years later in the groundbreaking judgment of *Bank Leumi le-Yisrael Ltd. v. Hirschberg*, which concerned the jurisdictional capacity of Israeli courts to issue interim injunctions with respect to property located in the PT.¹²⁰ The District Court of Jerusalem issued a provisional attachment order for a bank account held by the Bethlehem branch of Bank Leumi, an Israeli-incorporated bank that operated a number of branches in the PT, including the respondent branch in Bethlehem. The bank account was apparently owned by a local Palestinian resident who was the defendant in an action filed by an Israeli plaintiff before an Israeli court. According to the RCP, such attachment orders can be issued as part of the enforcement of a monetary judgment.¹²¹ The Israeli Supreme Court affirmed the grant of this attachment order, although it acknowledged the well-established international law principle that one sovereign State cannot

113. *Id.* at 517.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. CA 318/81 Cohen v. Mantsura [1981] IsrSC 36(1) 222; CA (BS) 151/80 Kaplan v. Gabai, [1980] IsrDC 5742(2) 290.

120. CA 179/77 Bank Leumi le-Israel Ltd. v. Hirschberg [1978] IsrSC 32(1) 617.

121. RCP, Rule 374, 1984, KT 4685, 2220 (Isr.).

undertake enforcement actions in the territory of another sovereign State without the express consent of the latter.¹²² The Court once again reasoned that, in the case of the “Administered Territories,” no foreign power exists, and that these territories are effectively controlled by the State of Israel. Therefore, when such a provisional attachment order is effected in Bethlehem, no foreign sovereignty is undermined, and thus there should be no concern about undermining established norms of international law.¹²³

However, the doctrinal innovation of the *Al-Khir* decision was not enough to achieve the jurisdictional expansion it sought, as there was still another hurdle to overcome.

B. *The Missing Link: Venue*

According to established principles of civil procedure in Israel, a civil court needs to possess proper venue, or, as local terminology terms it, proper “local jurisdiction,”¹²⁴ even when the court is otherwise competent to hear the action.¹²⁵ This requirement effectively prevented Israeli courts from entertaining most PT-related actions in the first stage. Unlike the doctrine developed in *Al-Khir*, local jurisdiction under Israeli RCP requires that the judicial district seized with the action have a nexus with the action to be able to adjudicate the case.¹²⁶ So, although an Israeli court may have personal jurisdiction over a defendant resident in the PT, it could still be unable to adjudicate the case on the merits for lack of local jurisdiction.

Israel is divided today into six different judicial districts for venue purposes. In each of these districts there is one district court and a number of other magistrate courts.¹²⁷ The district court serves both as an appellate court on judgments rendered by the intra-district magistrate courts, as well as a court of first instance in certain civil and criminal matters. RCP—and the Rules preceding them—provide a detailed set of provisions for litigants choosing between the courts of the different venue districts.¹²⁸ Generally, in actions not dealing wholly with immovable property, in which case venue lies in the district where the property is situated, and where no forum selection clause exists designating the

122. See generally IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 306–08 (6th ed. 2003).

123. *Hirschberg*, [1978] IsrSC 32(1) at 620–21.

124. However, at times, the term “territorial jurisdiction” is used. See Goldstein & HaCohen, *supra* note 12, at 6.

125. CA 420/63 *Abramovsky v. Gleitmann* [1963] IsrSC 17(4) 2605, 2607.

126. RCP, Rules 3–6, 1984, KT 4685, 2220 (Isr.); see also SUSSMANN, *supra* note 26, at 72–84.

127. Goldstein & HaCohen, *supra* note 12, at 61.

128. *Id.* at 62–63.

forum of a certain district, in which case the stipulation would override the rule, the action can be brought in any of the districts depending on the nexus: the defendant's place of residence or place of business; the place where the obligation was created; the place assigned or intended for fulfilling the obligation; the place of delivery of the goods that the action concerns; or the place of the act or omission that the action concerns.¹²⁹ Therefore, if the defendant is properly served with the opening summons, but none of the recognized nexuses for the establishment of venue can be established with any of the local Israeli judicial districts, the case must be dismissed.¹³⁰ This happened in *Shourafa*, where dismissal was based on the finding that the Jerusalem District Court did not have any nexus for adjudicating the case as far as local jurisdiction was concerned.¹³¹

The missing nexus or venue link, even when the defendant is properly served with process, was seen as a jurisdictional deficit. It created a strange anomaly to have Israel qualify as a single geographical unit in terms of dealing with an action, only to find that no court in the country has proper venue to adjudicate the case.

The first step to fill this jurisdictional void was taken by the Military Commander for the West Bank. A special military order issued in 1968 provided that Israeli citizens injured in motor vehicle accidents in the West Bank could bring their claims before the Israeli court in which the Israeli insurance agency overseeing the activities of local West Bank insurance companies had its principal place of business.¹³² However, this order was declared invalid by the District Court of Haifa.¹³³ The court reasoned that the office of the Military Commander of the West Bank had no administrative power over the Israeli civil courts, and therefore

129. See SUSSMANN, *supra* note 26, at 72–77.

130. RCP, Rule 101(9)(2), 1984, KT 4685, 2220 (Isr.).

131. CA 211/73 *Shourafa v. Wexler* [1974] IsrSC 28(1) 512, 517–18. The Supreme Court's ruling in *Shourafa* was preceded by a district court decision, *Hamdan v. Shaheen*, in which the Court found that the lower court lacked local jurisdiction, notwithstanding that the defendant, a resident of Bethlehem, was properly served with the opening summons. CC (Jer) 1149/68 *Hamdan v. Shaheen*, [1968] IsrDC 64(1) 91, 91. Interestingly, it seems that the lower court in *Al Khir*—the District Court of Jerusalem—also lacked local jurisdiction to adjudicate the case. However, this issue was not raised by the defendant. According to accepted civil procedure principles, the court is not allowed to raise the issue of local jurisdiction on its own motion (*sua sponte*), and the defendant, once failing to raise an objection to the court's supposed local jurisdiction early in the proceedings, is deemed to have waived any argument on the issue. See Goldstein & HaCohen, *supra* note 12, at 64.

132. Motor Vehicles' Insurance Order (Third-Party Risks) (Judea & Samaria) (No.215), §§ 1, 4, 5728–1968, 11 Kamtasam 421 (Isr.).

133. CC (Hi) 3650/74 *Amr v. Mana'a*, [1975] IsrDC 5736(1) 156.

could not prescribe when and under what circumstances the courts could have local jurisdiction.¹³⁴

The real change was to take place only after the Israeli Supreme Court decided in *Mantsura v. Cohen* to voice its dissatisfaction with the lack of coordination between the rules of personal jurisdiction and those of local jurisdiction.¹³⁵ The action was brought by a resident of Kiryat Arba (one of the first Israeli settlements in the West Bank) against another Kiryat Arba settler, from whom the plaintiff claimed compensation for an alleged tort also committed in Kiryat Arba. The District Court of Jerusalem dismissed the action after finding that it lacked local jurisdiction.¹³⁶ The Supreme Court affirmed the decision, clarifying once again that while service of process establishes personal jurisdiction when served on the defendant present in the PT, it does not necessarily establish local jurisdiction.¹³⁷ Justice Sussmann, now President of the Supreme Court, ended his judgment by sending a clear message to the legislative branch. In the current state of affairs, he cautioned, there is a “void in the rules of jurisdiction with respect to Jewish settlements in the Administered Territories, but it is for the legislature to provide a solution.”¹³⁸

This call was soon answered. In 1979, the Israeli Minister of Justice amended the venue provisions of Israeli courts, providing that when an action is within the jurisdiction of Israeli courts, but venue does not lie in any of the existing judicial districts, the action may be filed in a court sitting in Jerusalem with proper subject-matter jurisdiction.¹³⁹ With this amendment, the courts of Israel effectively consolidated their jurisdictional authority over defendants present in the PT. Thus, any action filed against a defendant resident in the PT who happens to be served with the opening summons while present in the PT, even temporarily, is within the territorial jurisdiction of Israeli courts, both in terms of personal jurisdiction and in terms of venue.

Like the jurisdictional expansion that followed the *Al-Khir* decision, this new amendment to the venue rules also drew criticism in the legal

134. *Id.* at 160.

135. CA 301/77 *Mantsura v. Cohen* [1978] IsrSC 32(3) 405.

136. *See id.* at 406.

137. In the present case, no local jurisdictional nexus was established, and, in fact, none could be established in localized disputes among settlers of the PT. *Id.* at 406-07.

138. *Id.* at 407.

139. At present, the relevant provision is contained in Rule 6 of the RCP, which reads:

An action that is not within the proper jurisdiction of a court under these rules or any other law, is to be brought before a court in Jerusalem that has proper subject matter jurisdiction, but the court in Jerusalem may order otherwise should it believe that under the circumstances trial in another forum would be more convenient for the parties.

literature. This time, however, it was a sitting judge who cautioned against the combined effect of *Al-Khir* and the venue amendment: Judge Eli Nathan of the District Court of Jerusalem.¹⁴⁰ It is also worth noting that before his appointment to the bench, Judge Nathan was a senior attorney at the State Attorney's Office, serving as the head of the Department of International Affairs, a position that particularly qualified him to speak with authority on the international law implications of Israel's handling of the PT. Indeed, the principal argument that Nathan put forward was that the extension of the personal jurisdiction authority of Israeli courts over residents of the PT was essentially a breach of international law. Nathan's basic normative assumption was that the actions of the State of Israel in the PT were governed by the international law of belligerent occupation.¹⁴¹ This body of law includes the relevant provisions of The Hague Regulations as well as Articles 64–66 of the Fourth Geneva Convention.¹⁴² These norms prohibit the belligerent occupant from extending its sovereign powers over the administered territories or over its inhabitants.¹⁴³ Nathan concluded that since the jurisdiction of courts is a manifestation of a State's sovereign powers, the extension of Israeli personal jurisdiction over all persons present in the PT by the mere virtue of being present there contradicted international law.¹⁴⁴

Nathan's argument is novel in the field of personal jurisdiction. It has traditionally been held that international law norms do not restrict States' adjudicative powers when dealing with civil actions.¹⁴⁵ In essence, a State is free to allocate to its courts the volume and type of personal jurisdiction capacity it sees proper.¹⁴⁶ If States nevertheless work to restrict personal jurisdiction allocated to their courts, they do so out of local concerns, some of which may, of course, take into consideration issues of foreign relations.¹⁴⁷ Nathan manages to establish that interna-

140. See Eli Nathan, *Israeli Civil Jurisdiction in the Administered Territories*, 13 ISR. Y.B. HUM. RTS. 90 (1983).

141. *Id.* at 102.

142. *Id.* at 101–02.

143. *Id.* at 107.

144. *Id.* at 115.

145. Some authorities, however, have provided that a State derives its jurisdictional authority in all spheres of law from the norms of international law. See Joseph H. Beale, *The Jurisdiction of a Sovereign State*, 36 HARV. L. REV. 241, 243 (1923); see also F.A. Mann, *The Doctrine of Jurisdiction in International Law Revisited After Twenty Years*, 186 RECUEIL DES COURS I (1984-III); F.A. Mann, *The Doctrine of Jurisdiction in International Law*, 111 RECUEIL DES COURS I, 10–11 (1964-I) (“The existence of the State's right to exercise jurisdiction is exclusively determined by *public international law*.”).

146. Michael Akehurst, *Jurisdiction in International Law*, 46 BRIT. Y.B. INT'L L. 145, 170 (1972–73); R.Y. Jennings, *The Limits of State Jurisdiction*, 32 NORDISK TIDSSKRIFT FOR INTERNATIONAL RET [NORDIC J. INT'L RTS.] 209, 212 (1962).

147. Max Rheinstein, *The Constitutional Bases of Jurisdiction*, 22 U. CHI. L. REV. 775, 799–800 (1955).

tional law does impose limitations on personal jurisdiction with respect to the population of an occupied territory when such jurisdictional powers are allocated to the courts of a belligerent occupant.¹⁴⁸ Another important by-product of Nathan's thesis is that it makes irrelevant the entire question of whether the assertion of personal jurisdiction of Israeli courts over residents of the PT undermines foreign sovereign powers, a question addressed frequently by the Israeli Supreme Court.¹⁴⁹ Nathan's thesis detaches the issue of the personal jurisdiction of Israeli courts with respect to PT residents from the general body of personal jurisdiction theory advising Israeli courts by addressing the issue of the extent of sovereign powers that Israel, as a belligerent occupant, can exert over the PT.¹⁵⁰

In practice, this argument, even when combined with the criticism mounted against the *Al-Khir* decision, did not suffice to bring about a change in the basic rules governing the personal adjudicative authority of Israeli courts over residents of the PT. *Al-Khir* proved to be effective in guiding Israeli courts to establish their personal jurisdiction authority over PT-present defendants.¹⁵¹ In fact, when Judge Nathan himself presided over a case in the District Court of Jerusalem, he abided by the line of precedent established by *Al-Khir* precedent without questioning either its validity or its wisdom.¹⁵² Apparently, the premise guiding Israeli authorities, including the Supreme Court, was that international law norms applicable to a belligerent occupant delimit only the powers of the military government and not those of the government of the occupant itself.¹⁵³ What has evolved under this guiding premise, as Eyal Benvenisti shrewdly put it, is the axiom that the State is permitted to do what its army cannot, although it is the army, not the State, which is endowed under international law with the authority to administer occupied territories.¹⁵⁴

C. Evaluation of the First Stage

I would like to end the discussion of the first stage, as I will do later with respect to the next two stages, by making a number of observations on the uniqueness of the development of the personal jurisdiction doctrine of Israeli courts in the context of PT-related civil actions.

148. Nathan, *supra* note 140, at 107–14.

149. *Id.* at 111.

150. *Id.* at 111, 115.

151. CA 300/84 Abu Attiya v. Arabitsi [1985] IsrSC 39(1) 365; CA 588/83 Al-Rayis v. Arab Ins. Co. [1984] IsrSC 38(3) 495.

152. See CC (Jer) 748/82 Jabbour v. Hanitan, [1982] IsrDC 5743(1) 499.

153. BENVENISTI, *supra* note 72, at 25.

154. *Id.* at 26.

Observation 1: Is the Al-Khir decision equivalent to the jurisdictional annexation of the PT to the State of Israel?

On a number of occasions, it has been generally stated that the *Al-Khir* decision “wipe[d] out, for purposes of personal jurisdiction, the pre-1967 [Israeli] borders.”¹⁵⁵ Indeed, in terms of the transient rules of personal jurisdiction, especially after the 1979 amendment of the rules on venue, this assessment is accurate.¹⁵⁶ However, one cannot categorically say that, at the end of this stage, the PT could be characterized as part of Israel for purposes of personal jurisdiction. Notwithstanding the developments described above, one material distinction in the sphere of personal jurisdiction between Israel and the PT still remained. The distinction becomes apparent when an Israeli court was asked to establish personal jurisdiction over a defendant not present in Israel or in the PT who has substantial ties and contacts with the PT but none with Israel. In such a hypothetical case, the plaintiff would need to seek permission for service on the defendant under the civil procedure rules for service of process outside the jurisdiction—rules stipulated primarily in Rule 500 of the RCP.¹⁵⁷ As mentioned earlier, this procedure conditions the grant of leave for service outside of the jurisdiction on establishing the existence of a nexus from a list stipulated in RCP Rule 500, such as the fact that the defendant happens to have her regular place of residence in Israel or that the contract was made in Israel, etc. But, these provisions specifically refer to the State of Israel and as such disregard any and all connections to the PT. The *Al-Khir* decision brought with it a substantial expansion of Israeli personal jurisdiction with respect to the PT, but only when service of process was sought in the PT. When the defendant happened to be absent from the PT, and the plaintiff sought to obtain leave for service outside of the jurisdiction, a nexus with the PT was not considered to be equivalent to a nexus with Israel’s sovereign territory. In this respect, neither *Al-Khir* nor any other enactment was able to overcome the international obligations implicit in the pre-1967 borders.

155. *Id.* at 24.

156. *See* Goldstein & HaCohen, *supra* note 12, at 67.

157. RCP, Rule 500, 1984, KT 4685, 2220 (Isr.). However, the plaintiff might not need to take this route for acquiring personal jurisdiction over the absent defendant if service can be made on another person present in Israel or in the PT who is related to, or operates on behalf of, the defendant. Such circumstances are detailed in a special section of the RCP, and, if established, could also be applicable to representatives of the defendant that are present either in Israel or the PT. *See* RCP, Rule 482, 1984, KT 4685, 2220 (Isr.).

Observation 2: Presence or service, which comes first?

In assessing the meaning and significance of *Al-Khir*, the functional relationship between the power to serve process on the defendant and the assessment whether personal jurisdiction exists seems to have escaped the scrutiny of both the courts and the scholars who have discussed the decision. The *Al-Khir* analysis presupposes the existence of a legal axiom in which personal jurisdiction over the defendant exists if there is a procedural power to serve the defendant with process. But, in looking to the history of personal jurisdiction under the power theory, the axiom seems to be the other way around. The initial inquiry was whether the forum State has territorial power over the defendant's person, a power that exists if the defendant is present in the sovereign territory of said State, and does not exist if the defendant is absent from this territory.¹⁵⁸ Only after undertaking this initial inquiry can courts know whether the defendant can be served with process.¹⁵⁹ Under the notion of the power theory, therefore, the matter was not the procedural power to serve process, but the whereabouts of the defendant, whether or not present in the sovereign territory of the State.

The mode of service was simply the corollary of this inquiry. Indeed, in light of the fact that personal jurisdiction, to be acquired, required actual service on the defendant, and such service was preconditioned by different requirements depending on the whereabouts of the defendant, one could reasonably be led to understand that personal jurisdiction depended on whether a mode for service of process existed. This, however, is only the impression and not the rule. Had the Israeli Supreme Court in *Al-Khir* first asked whether the defendant was present on Israeli sovereign territory and could thus be served directly, it would have been much harder for it to reach a positive finding on personal jurisdiction. The Court would not have passed the first leg of the inquiry under the power theory of personal jurisdiction, a theory that supposedly guided the Court in its legal maneuverings in *Al-Khir* and thereafter. Moreover, the axiomatic relationship that the court drew in *Al-Khir* between service of

158. See *Pennoyer v. Neff*, 95 U.S. 714, 722 (1878) (holding that "no State can exercise direct jurisdiction and authority over persons or property without its territory"); COLLIER, *supra* note 24, at 71 (stating that an English court's jurisdiction depends primarily "on the defendant's presence in England"); Zelman Cowen, *Transient Jurisdiction: A British View*, 9 J. PUB. L. 303, 304 (1960) ("[T]here is no escape from the proposition that the mere transient presence of the defendant in England, however short his stay may be, renders him amenable to the jurisdiction of the English Courts.").

159. See *Laurie v. Carroll* (1958) 98 C.L.R. 310, 323 (Austl.) ("The defendant must be amenable or answerable to the command of the writ. His amenability depended and still primarily depends upon nothing but presence within the jurisdiction.").

process and jurisdiction entered deep into the fabric of legal interpretation in Israeli law, and reverberated in other decisions in which personal jurisdiction was assessed in contexts not connected to the PT.¹⁶⁰

*Observation 3: Two personalities for personal jurisdiction
assessment—Israeli settlers and Palestinian indigenes*

The remark ending the Supreme Court's judgment in *Mantsura* about the state of void when no local jurisdiction is found to exist, particularly if the litigants happen to be from Israeli settlements in the PT,¹⁶¹ strongly implies that the void is not as great concerning Palestinian residents of the PT. Indeed, when the 1979 amendment to local jurisdiction rules was made, it was understood primarily to serve Israeli plaintiffs.¹⁶² But the 1979 amendment to local jurisdiction rules did not make a distinction between Israeli and non-Israeli plaintiffs; it effectively offered recourse to the Jerusalem courts for all plaintiffs that managed to establish personal jurisdiction. And as subsequent developments amply showed, Palestinian plaintiffs would take advantage of this amendment as much as Israeli settler plaintiffs, even when their adversaries were other Palestinian litigants.¹⁶³ In practice, the 1979 amendment did not realize merely what Sussmann's remark in *Mantsura* had envisioned, but much more. However, as will be shown in the next section, the fine tuning of the 1979 venue amendment was eventually achieved by the courts within the confines of the *forum non conveniens* doctrine. So while Sussmann's remark did not produce clear-cut legislative rules, it led to a judicial practice that effectively made a distinction in the application of personal jurisdiction rules between Israeli settlers and Palestinian residents of the PT.

IV. STAGE TWO: PERSONAL JURISDICTION RESERVATIONS
AND THE RE-FORMULATION OF THE *FORUM*
NON CONVENIENS DOCTRINE

A. General

From the early 1980s onward, a growing number of civil actions originating in the PT found their way into Israeli courts. As was demonstrated in the preceding Part, the flow of cases was facilitated, from a

160. See, e.g., CA 39/89 Gen. Elec. Corp. v. Migdal Ins. Co. [1989] IsrSC 42(4) 762, 767.

161. CA 301/77 *Mantsura v. Cohen* [1978] IsrSC 32(3) 405, 407.

162. See BENVENISTI, *supra* note 72, at 23; Rubinstein, *supra* note 96, at 449–50.

163. See *infra* Part IV.

jurisdictional point of view, by the combined effects of the SDAT establishing personal jurisdiction in Israeli courts whenever the defendant is served with process while present in the PT, and of the 1979 venue amendment, which established local jurisdiction in Jerusalem courts if and when such jurisdiction is lacking in any other local jurisdiction district in Israel.¹⁶⁴

Interestingly, a large portion of this increased flow was comprised of civil actions filed by Palestinian plaintiffs against Palestinian defendants concerning incidents that took place entirely in the PT. In addition, there were civil actions among Israeli settlers in the PT, which witnessed a steadily-increasing population of settlers during the same period. It is easy to see why the latter group of litigants should seek adjudication in Israeli courts. For both ideological and practical reasons, Israeli settlers in the PT wanted to maintain their ties to Israeli civil institutions in spite of their physical relocation to the PT.¹⁶⁵ It is less clear, however, why Palestinian plaintiffs should seek adjudication of their PT-based actions against Palestinian defendants before Israeli courts. The logical forum for such actions should have been local PT courts which, as indicated before, continued to adjudicate civil actions according to local law. As a matter of fact, the local courts were the only central government authority that continued to exist in the post-1967 PT, as recognized in a Palestinian report published in 1980: "The judiciary is the only national institution that continues to function in the occupied territories."¹⁶⁶ But, it is precisely the diminishment of indigenous authority after the Israeli occupation, also within the court system, that made these courts unattractive to Palestinian litigants. The courts had limited subpoena powers (especially toward government officials)¹⁶⁷ and were also charged with corruption.¹⁶⁸ They operated under very poor conditions¹⁶⁹ and were understaffed,¹⁷⁰ poorly equipped,¹⁷¹ and operated by judges whose judicial

164. RCP, Rule 6, 1984, KT 4685, 2220 (Isr.).

165. See Catherine Cook & Adam Hanieh, *The Separation Barrier: Walling in People, Walling out Sovereignty*, in *THE STRUGGLE FOR SOVEREIGNTY: PALESTINE AND ISRAEL*, 1993-2005, at 338 (Joel Beinin & Rebecca L. Stein eds., 2006).

166. RAJA SHEHADEH & JONATHAN KUTTAB, *THE WEST BANK AND THE RULE OF LAW* 11 (1980).

167. *Id.* at 35.

168. See George E. Bisharat, *Peace and the Political Imperative of Legal Reform in Palestine*, 31 *CASE W. RES. J. INT'L L.* 253, 266 (1999).

169. BENVENISTI, *supra* note 72, at 23, 28.

170. SHEHADEH & KUTTAB, *supra* note 166, at 37 (noting "the problem of having to suspend proceedings because of the unavailability of a clerk to take a record").

171. *Id.* at 38 (noting that the unavailability of even a coin-operated photocopier makes it necessary for "[a]n attorney wishing to photocopy the official court record in a case, or any documents that have been entered in the file," to ask for "a special permit and then persuade on the busy clerks at the court to accompany him to a commercial photocopying center").

pronouncements were “less than inspiring.”¹⁷² It is no wonder, therefore, that plaintiffs strove to have their claims litigated before Israeli civil courts, which have traditionally enjoyed a reputation for being relatively efficient (although less so in recent years), well equipped, and free from corruption.¹⁷³

The second factor leading to increased civil litigation between Palestinians has to do with the manner in which the local PT courts were perceived by the Palestinian community itself. Upon the establishment of military government in the PT, the entire local judiciary was brought under the control of the Military Commander,¹⁷⁴ and recourse to the Court of Cassation in Amman from West Bank courts was abolished.¹⁷⁵ Of the thirty-nine judges employed by Jordan prior to 1967, only eight continued their judicial functions.¹⁷⁶ A substantial number of practicing lawyers in the PT, especially in the West Bank, went on strike and refused to represent clients before the local courts.¹⁷⁷ According to the prevalent view, such representation gave legitimacy to Israeli actions,¹⁷⁸ and under the conditions that the local courts were operating, “a lawyer [could not] hope to help his client obtain justice or get a fair trial”¹⁷⁹

172. See *id.* at 43–44.

173. See RAJAH SHEHADEH, STRANGERS IN THE HOUSE: COMING OF AGE IN OCCUPIED PALESTINE 138 (2002).

174. SHEHADEH & KUTTAB, *supra* note 166, at 28.

175. *Id.* at 18–19. In a report published by the Israel National Section of the International Commission of Jurists, this reality was justified on the grounds that the Court of Cassation, seated in Amman, “became inaccessible to the local [West Bank Palestinian] population after 1967.” ISR. NAT’L SECTION OF THE INT’L COMM’N OF JURISTS, *supra* note 55, at 22. Interestingly, this same report, when dealing with the basic freedoms enjoyed by the Palestinian residents of the West Bank, dedicates an entire sub-chapter to the issue of “Freedom of Movement.” *Id.* at 84–88. Within that chapter, there is also a section dedicated to the so-called Open Bridges Policy. *Id.* at 85–86. In accordance with this latter policy, the report stated,

The bridges across the Jordan river [sic] were opened in 1967 so that people and merchandise could pass from the Region to Jordan and thence to other countries.

A local resident wishing to leave for Jordan is entitled to receive an exit card at any post office in the Region, to fill in the required particulars, and to leave at any crossing point. No prior approval is necessary; the stamping of the card on leaving the Region constitutes the approval. This privilege is unique, since international law does not confer on inhabitants of occupied territory a right to leave, particularly to go to a state at war with the occupant.

Id. at 85.

176. ISR. NAT’L SECTION OF THE INT’L COMM’N OF JURISTS, *supra* note 55, at 23 (explaining that “a number of local judges had left the Region, several refused to resume their duties and others chose to retire”).

177. See *id.*

178. SHEHADEH & KUTTAB, *supra* note 166, at 45–46. Out of similar motives, local Palestinian leaders of the PT were reluctant to lobby the military government for legislative reforms. See Bisharat, *supra* note 168, at 265.

179. SHEHADEH & KUTTAB, *supra* note 166, at 41.

Consequently, a Palestinian plaintiff who decided to initiate legal proceedings against another Palestinian resident, would, after weighing the options, probably prefer to forgo the aforementioned malfunctions in the local court system by filing the action in an Israeli civil court. In terms of political identification, Israeli courts were seen as not too dissimilar from the local PT courts, given the fact that the latter were controlled by the IDF military government. Also, from the 1980s onward, another growing source of cases filed by Palestinian residents of the PT before Israeli courts emerged, namely, petitions against the military government and area commanders filed in Israel's Supreme Court in its capacity to apply judicial review standards with respect to actions undertaken by Israeli government organs.¹⁸⁰ This flow of cases, it is assumed, also contributed to softening any remaining barriers for recourse to Israeli courts.

The rising tide of PT-related civil actions brought before Israeli courts raised second thoughts about whether Israeli courts should adjudicate all of these cases.¹⁸¹ In the beginning of the 1980s, courts in Israel began to be overburdened with litigation generally, and one commission after another submitted reform measures in an effort to ease the burden of litigation on the judiciary.¹⁸² Thus, courts in Israel also came to functionally realize the burdensome effect of PT-related litigation. They already had more than they could handle with local Israeli cases.

Another important factor that contributed to this discomfort was the growing realization within the discipline of international civil litigation

180. See ISR. NAT'L SECTION OF THE INT'L COMM'N OF JURISTS, *supra* note 55, at ix-x, 35-42; SHEHADEH & KUTTAB, *supra* note 166, at 25-26, 35-42; Eli Nathan, *The Power of Supervision of the High Court of Justice over Military Government*, in 1 MILITARY GOVERNMENT IN THE TERRITORIES ADMINISTERED BY ISRAEL 1967-1980, *supra* note 42, at 109; Mazen Qupty, *The Application of International Law in the Occupied Territories as Reflected in the Judgments of the High Court of Justice in Israel*, in INTERNATIONAL LAW AND THE ADMINISTRATION OF OCCUPIED TERRITORIES, *supra* note 3, at 87, 12; Roberts, *supra* note 5, at 88-95.

181. It should be noted that, with respect to the petitions filed before the Supreme Court asking it to review the actions taken by the IDF and the military government officials operating in the PT, the Supreme Court was not equally disturbed. Apparently, this open-door policy toward judicial review petitions was motivated, *inter alia*, by a desire to promote faith in the Israeli legal system. See Eyal Benvenisti, *Judicial Review of Administrative Action in the Territories Occupied in 1967*, in PUBLIC LAW IN ISRAEL 371, 371-72 (Itzhak Zamir & Allen Zysblat eds., 1996).

182. On the problem of docket congestion in the Israeli court system, see generally DIN VE-HESHBON HA-VA'ADA LE-BDIKAT HA-MIVNE VE-HA-SAMKHUYOT SHEL BATEI HA-MISHPAT [REPORT OF THE COMMITTEE TO OVERVIEW THE STRUCTURE AND THE POWERS OF THE COURTS] (1980) (Hebrew) (highlighting the problem of docket congestion in the Israeli court system); DIN VE-HESHBON HA-VA'ADA LE-BDIKAT MIVNE BATEI HA-MISHPAT HA-REGILIM BE-YISRAEL [REPORT OF THE COMMITTEE TO OVERVIEW THE STRUCTURE OF GENERAL COURTS IN ISRAEL] (1997) (Hebrew); Symposium, *Al ha-Reforma be-Ma'arekhet Batei ha-Mishpat [On the Reform in the Court System]*, 8 MEHKAREY MISHPAT [RES. LAW] 9 (1990) (Hebrew) (discussing docket congestion).

that forum shopping as a phenomenon should be resisted.¹⁸³ Courts and scholars alike began to realize that a plaintiff's drive to seek litigation in a certain forum only because of the procedural or substantive advantages of law available at the forum can be burdensome and unfair to the defendant, as it is to the already burdened court in which the action was filed.¹⁸⁴ Unlike the plaintiff, the defendant is usually a passive party in terms of the forum in which litigation is initiated. But, as I have tried to clarify elsewhere, the plaintiff's quest to secure a favorable forum should not necessarily be viewed negatively.¹⁸⁵ The practice of forum shopping becomes tainted primarily when the plaintiff seeks to litigate in a forum that has no meaningful tie with either party to the litigation or with the underlying cause of action. If, however, the forum chosen by the plaintiff for litigation has some sort of meaningful connection to the underlying action, her choice of forum should essentially be considered legitimate, even though she might also be seeking some form of advantage by filing the action in this particular forum.

Logically, however, illegitimate forum shopping is not supposed to take place. The personal jurisdiction rules in *in personam* actions are supposed to filter in only those actions with meaningful ties with the forum, so that if the forum is deemed to have personal jurisdiction it should subsequently follow that it is the appropriate forum to adjudicate the case. Nevertheless, as one can learn from the body of rules establishing personal jurisdiction in common law and civil law systems, the existing rules do not guarantee that a meaningful connection to the forum exists in order to establish jurisdiction. Such rules, which are at times called "exorbitant" rules of personal jurisdiction, have become the prime facilitators of negative forum shopping because they afford plaintiffs an opportunity to create personal jurisdiction when no meaningful ties exist between the forum and the case at hand.¹⁸⁶

One of the common law rules of personal jurisdiction singled out for being especially exorbitant is the rule enabling the plaintiff to establish personal jurisdiction simply by serving process on the defendant while being present in the forum State's territory.¹⁸⁷ Therefore, it is once more

183. See MICHAEL KARAYANNI, *FORUM NON CONVENIENS IN THE MODERN AGE: A COMPARATIVE AND METHODOLOGICAL ANALYSIS OF ANGLO-AMERICAN LAW* 132–45 (2004).

184. *Id.* at 136–37.

185. *Id.* at 139–41.

186. See Kevin M. Clermont & John R.B. Palmer, *Exorbitant Jurisdiction*, 58 ME. L. REV. 474, 474 (2006). However, in some writings, "exorbitant jurisdiction" is defined as a function of whether the specific judgment rendered on the basis of a certain jurisdictional rule will be recognized and enforced in other jurisdictions. See L.I. De Winter, *Excessive Jurisdiction in Private International Law*, 17 INT'L & COMP. L.Q. 706, 712–13 (1968).

187. See Kurt H. Nadelmann, *Jurisdictionally Improper Fora*, in XXTH CENTURY COMPARATIVE AND CONFLICTS LAW 321, 328–29 (Kurt H. Nadelmann et al. eds., 1961).

understandable why Israeli courts felt uneasy about the heavy influx of cases from the PT; for, in many cases that had no meaningful tie with the State of Israel, personal jurisdiction was often established merely by virtue of service of process on a defendant who happened to be present in the PT.

Another important development in this second stage, spanning from the early 1980s to the mid-1990s, was the reorganization of the military government in the PT in 1981. As indicated before, one Israeli official policy behind this initiative was to structure government in the PT so that the local Palestinian population would be able to have some form of representation in the civil administration. Although not much has been realized in this respect, this change seemed to have signaled to Israeli courts that Israeli official policy was now more in favor of having local PT institutions, including the courts, to handle civil matters of the Palestinian population.

Ultimately, Israeli courts resorted to the *forum non conveniens* doctrine in their efforts to control the flow of litigation from the PT. However, in this endeavor the Israeli courts needed to become creative once again. First of all, the existing Supreme Court precedents of the early 1980s allowed courts to decline a jurisdictional power duly vested in them only in exceptional circumstances.¹⁸⁸ Yet, full control of the flow of litigation from the PT by utilizing the *forum non conveniens* doctrine needed a more liberal standard of discretion to stay proceedings. Moreover, the courts needed to adjust the doctrine to the special status, as perceived by the official Israeli policy toward the PT. Specifically, the courts needed to consider whether the doctrine, as applicable to the PT, should have the same standards as that applicable to foreign sovereign States, and how the doctrine should relate to civil actions among Israeli settlers of the PT. Should they be treated in the same manner as actions among Palestinian litigants? Indeed, the doctrinal evolution of the personal jurisdiction doctrine of Israeli courts toward PT-related civil litigation in this second stage of development is entirely within the scope of discussion of the *forum non conveniens* doctrine, and of how the doctrine was adjusted to control the flow of litigation from the PT into Israeli courts in a manner that best suited Israeli sovereign interests.

B. Forum Non Conveniens: *From St. Pierre to Abu Jakhla*

Initially, courts were apprehensive toward motions intended to bring them to decline a jurisdictional power they possessed by due right. The existence of jurisdictional power was taken to imply the existence of a

188. See *infra* Part IV.B.

duty to adjudicate the case on the merits. This notion was enshrined in a frequently quoted Latin maxim: *judex tenetur impertiri judicium suum* (a judge with jurisdiction over a case must render a final decision).¹⁸⁹ But, fortunately for the courts, at least in light of their quest to control the flow of litigation from the PT, they found that Israeli case law permits some form of discretionary power to decline jurisdiction, albeit of a limited form. This was found to exist in Lord Scott's opinion in *St. Pierre v. South American Stores Ltd.*, a 1936 English Court of Appeals case.¹⁹⁰ According to the standards formulated therein, a mere balance of convenience is not sufficient to stay the pending proceedings.¹⁹¹ In addition, the defendant, the party who naturally moves for the stay, needs to satisfy the court that the continuance of the action in the original forum "would be oppressive or vexatious to him" and that the stay will not "cause injustice to the plaintiff."¹⁹² Since Israeli courts generally followed English common law precedents in private international law, this pronouncement was also taken to represent the Israeli attitude with respect to the latitude courts had in Israel to decline jurisdiction.¹⁹³

However, when the Israeli courts first came to apply these standards, they allowed themselves rather more latitude and considered all of the relevant contacts of the case, instead of limiting the inquiry to how oppressive and vexatious the proceeding in Israel was to the defendant. The first case to address the issue was *Hakhamov v. Schmidt*.¹⁹⁴ The defendant moved to have the proceedings in Israel stayed because litigation on the same matter was pending elsewhere. Since a *lis alibi pendens* argument has traditionally been treated as a specific cause for a stay of proceedings,¹⁹⁵ the Israeli Supreme Court stated that the governing principles were those of *St. Pierre*, and ultimately the Court stayed the action.¹⁹⁶ However, had the Court followed the *St. Pierre* standard fully, it is doubtful that it would have rendered the stay, for *St. Pierre* allows little leeway. The plaintiffs in the *Hakhamov* case could not be said to have brought the action in Israel to vex and oppress the defendant—the underlying cause of action (construction of a hotel resort in Israel) was

189. David W. Robertson & Paula K. Speck, *Access to State Courts in Transnational Personal Injury Cases: Forum Non Conveniens and Antisuit Injunctions*, 68 TEX. L. REV. 937, 949 (1990); see also John Bies, Comment, *Conditioning Forum Non Conveniens*, 67 U. CHI. L. REV. 498, 508 n.93 (2000).

190. *St. Pierre v. S. Am. Stores Ltd.*, (1936) 1 K.B. 382 (C.A.) (Eng.).

191. *Id.* at 398.

192. *Id.*

193. Stephen Goldstein, *Israel*, in DECLINING JURISDICTION IN PRIVATE INTERNATIONAL LAW 259, 261 (J.J. Fawcett ed., 1995).

194. CA 280/57 *Hakhamov v. Schmidt* [1958] IsrSC 12(1) 59.

195. Goldstein, *supra* note 193, at 261.

196. *Id.* at 264, 270.

reasonably connected to Israel, and could certainly be regarded as sufficient for the plaintiff to file the action in Israel in the first place.¹⁹⁷ The same approach, liberal in light of *St. Pierre*, was displayed some twenty years later in *Perlmutter v. Perlmutter*, in which the action was also stayed based on *lis alibi pendens* grounds.¹⁹⁸ Here, the court once again upheld the *St. Pierre* standard to stay proceedings as the guiding principle, but worked to apply it in a less restrictive manner by including other considerations as well.¹⁹⁹

Another important development at about the same time was the loosening of the *St. Pierre* standard in English law. The first step came in the 1973 *Atlantic Star* case,²⁰⁰ and the second in 1978 in *MacShannon v. Rockware Glass Ltd.*²⁰¹ By the end of this process, it was observed that a reformulation of the English standard to decline jurisdiction had taken place, making the English law inquiry now turn on whether there exists another clearly more appropriate forum for litigation in which justice can be served.²⁰² This new English development was eventually picked up in an Israeli law review article published in 1980 by Professor Stephen Goldstein.²⁰³ He suggested that the present English law standard for staying proceedings where personal jurisdiction has been established on the basis of service of process on a present defendant is not that different from the already elastic American doctrine of *forum non conveniens*.²⁰⁴ Professor Goldstein welcomed this development and hoped for its adoption by Israeli courts, particularly in light of the 1979 amendment on venue that effectively guarantees the availability of an Israeli forum for any case in which process can be served on a present defendant.²⁰⁵

197. Stephen Goldstein, *Samkhit Shipput Beinle'umit Mevuseset al Tfisat ha-Nitba—Halakha le-Ma'ase ka-Yom* [International Jurisdiction Based Solely on Service of Process—In Practice Today], 10 MISHPATIM [LAWS] 409, 429–30 (1980) (Hebrew).

198. CA 100/76 *Perlmutter v. Perlmutter* [1976] IsrSC 30(3) 355.

199. *Id.* at 358–60. *Perlmutter* addressed the custody of a child born and raised in Israel by an Israeli couple. After the break-up of the marriage, but before the divorce, the mother traveled with the couple's child to Germany, telling the father that her stay in Germany would be temporary. While in Germany, the mother initiated custody proceedings before a German court. After learning of this, the father initiated proceedings in Israel, and the mother asked the Israeli court to stay the proceedings in light of the ongoing proceeding of the German court. *Id.* at 357–58.

200. *The Atlantic Star*, [1974] A.C. 436 (H.L.) (U.K.).

201. *MacShannon v. Rockware Glass Ltd.*, [1978] A.C. 795 (H.L.) (U.K.).

202. See COLLIER, *supra* note 24, at 84–85; Rhona Schuz, *Controlling Forum-Shopping: The Impact of MacShannon v. Rockware Glass Ltd.*, 35 INT'L & COMP. L.Q. 374, 376 (1986). Ultimately, the House of Lords acknowledged this development in *Spiliada Maritime Corp. v. Cansulex Ltd.* [1987] A.C. 460 (H.L.) (U.K.).

203. Goldstein, *supra* note 197, at 427.

204. *Id.*

205. *Id.* at 411–12; see also Goldstein & HaCohen, *supra* note 12, at 67.

Fusing these developments with the need to control the flow of litigation from the PT into Israel inevitably led Israeli courts to apply a liberal standard for the stay of proceedings.²⁰⁶ Since dominant procedural thinking perceived litigation among Palestinian residents of the PT as undesirable forum shopping, it was assessed that only wide discretion to decline jurisdiction, instead of the limited *St. Pierre* standard, could stem the tide.²⁰⁷ But, how could courts tailor their discretionary powers in dealing with PT-related civil actions, and what difference would—and should—it make to Israeli courts if the plaintiff were an indigenous Palestinian resident of the PT or an Israeli settler?

The first court to tackle these questions was the District Court of Jerusalem, which handed down a decision penned by Judge Eli Nathan in *Jabbour v. Hanitan*.²⁰⁸ The action was brought by a Palestinian resident of the PT injured in a motor vehicle accident that occurred between Hebron and Bethlehem in the West Bank. The two named defendants were also Palestinian: the alleged tortfeasor and his insurance company. Within the confines of a motion filed by the defendants to dismiss the action for lack of venue, Judge Nathan decided that, despite the fact that the court had both local and personal jurisdiction to adjudicate the case, this capacity was to be declined. The Israeli forum, it was pronounced, is not the natural forum, for neither the parties nor the underlying cause of action has any substantial connection to Israel.²⁰⁹ In reaching this conclusion, Judge Nathan took into consideration the fact that all parties were residents of the PT; witnesses as to the damages incurred by the plaintiff would also be from the PT; and, the assessment of damages needed to be done by a court familiar with the social and economic reality of the plaintiff.²¹⁰

This move toward identifying the natural forum for litigation by looking into the context of the case is a major advance relative to the “abuse of process” standard initially adopted in *St. Pierre*. Indeed, Judge Nathan noted the fact that the *St. Pierre* standard was applied rather liberally in the Israeli Supreme Court decisions, but his decision was the first to take the extra step of offering an alternative standard.²¹¹ Given that Judge Nathan made clear his dissatisfaction with the rule that establishes personal jurisdiction by Israeli courts upon service in the PT in an article he published very close to the date of the rendering of this deci-

206. See BENVENISTI, *supra* note 72, at 28 (noting the flexible criteria adopted by Israeli courts in identifying the natural forum in PT-related civil actions).

207. See Goldstein, *supra* note 193, at 259, 260–61.

208. CC (Jer) 748/82 Jabbour v. Hanitan, [1982] IsrDC 5743(1) 499.

209. *Id.* at 503, 506–07.

210. *Id.* at 507.

211. *Id.* at 503–04.

sion,²¹² it was not surprising that he would work to limit the personal jurisdiction of Israeli courts toward the PT, especially after the 1979 amendment on venue. Strictly abiding by the *St. Pierre* standard for abuse of process would have further consolidated the jurisdictional grip of Israeli courts over PT residents, since, in practice, this standard enormously limited the discretion of Israeli courts to decline their jurisdictional powers, once these were found to exist. Judge Nathan was explicit in this respect, explaining that it was “inconceivable” that by introducing the 1979 amendment, Israel sought to indiscriminately apply its jurisdiction to all residents of the “Administered Territories,” effectively annexing those territories without the issuance of an explicit order in this respect, as required by law.²¹³ It was similarly inconceivable, Judge Nathan added, that by making the amendment, Israel meant to undermine the workings of the local courts in the “Administered Territories,” especially as to their being the natural forum of local citizens with respect to PT-based civil litigation.²¹⁴

Another important remark made by Judge Nathan touched upon the actual policy reasons behind the 1979 amendment. Basing his appraisal on scattered remarks of the Israeli Supreme Court,²¹⁵ he concluded that the 1979 amendment was intended to serve the Israeli settlers of the PT, so that if they needed it, they would have recourse to an Israeli court.²¹⁶ This policy, in his view, was not relevant for the indigenous Palestinian residents of the PT, whose natural forum remained the local PT courts.²¹⁷

Judge Nathan dismissed the plaintiff’s claims about adjudication before local West Bank courts as being inefficient, rigid, and sometimes arbitrary.²¹⁸ These characteristics, Judge Nathan claimed, did not form “a true grave wrong to the plaintiff but maybe only some inconvenience that could be overcome.”²¹⁹ The only factor that Judge Nathan was willing to

212. See Nathan, *supra* note 140.

213. *Jabbour*, [1982] IsrDC 5743(1) at 505.

214. *Id.*

215. See, e.g., CA 318/81 Cohen v. Mantsura [1981] IsrSC 36(1) 222. At the end of his decision, the President of the Supreme Court at the time, Justice Yitzhak Kahan, observed,

Indeed the use of this rule [(the 1979 amendment)] might cause a problem at times. When the circumstances are different, it will not be appropriate that the action be adjudicated in Israel, for example when an Arab resident of Gaza files a claim against another resident of the same region, and brings the action before the court in Jerusalem, however this difficulty can be overcome as provided in . . . Professor Goldstein’s article.

Id. at 226.

216. *Jabbour*, [1982] IsrDC 5743(1) at 505–06.

217. See BENVENISTI, *supra* note 72, at 28.

218. *Jabbour*, [1982] IsrDC 5743(1) at 506–07.

219. *Id.* at 507.

take into consideration was that medical experts, apparently from Israel, might be called upon to give testimony before a local PT court, which might prove impractical. If this proved to be the case, he would be willing to renew the adjudication of the case before the Jerusalem court.²²⁰

Judge Nathan's decision in *Jabbour* can be considered another watershed in the development of the personal jurisdiction doctrine of Israeli courts toward residents of the PT. It essentially furnished the doctrinal mechanism that Israeli courts—soon with the blessing of the Supreme Court—came to use in order to “filter” PT-related civil actions. The technique is to look into the various contexts of the case in order to identify the natural forum for the litigation. When all litigants were Palestinian residents of the PT, and the underlying cause of action also was based in the PT, then the natural forum was identified to be that of the local PT courts.²²¹

The first major decision by the Israeli Supreme Court to adopt Judge Nathan's course of analysis was *Abu Attiya v. Arabitsi*.²²² The plaintiff, a minor, was injured in a work-related accident in the Ramallah factory where he was employed. The named defendants were the employer, also a resident of Ramallah, and Prudential, a foreign insurance company that issued a policy covering the employer's liability through its West Bank branch, but which also had a branch office in Jerusalem. The plaintiff filed his action before the District Court of Jerusalem. The court dismissed the action after it identified the natural forum for the present litigation to be in what the court termed the litigants' “backyard,” *i.e.*, Ramallah.²²³ On appeal, the Supreme Court affirmed the decision.

In its decision, the Supreme Court explicitly ruled that there was no longer any need to adhere to the *St. Pierre* standard.²²⁴ It stated that, instead, a court in Israel can decline its jurisdiction when it identifies the natural forum for the pending litigation as lying elsewhere. In making this assessment, a court is to take into consideration the nexus of the parties and the underlying cause of action to the contending forum, as well as the reasonable pre-litigation expectations of the parties regarding where the prospected litigation among them is to take place.²²⁵ In prac-

220. *Id.*

221. BENVENISTI, *supra* note 72, at 28; Rubinstein, *supra* note 96, at 456–57.

222. CA 300/84 *Abu Attiya v. Arabitsi* [1985] IsrSC 39(1) 365. However, in a short published decision of the Supreme Court, *Al-Rayis v. Arab Insurance Co.*, there is a clear sign that, with respect to claims filed by a Palestinian resident of the PT, against another Palestinian resident of the PT as a result of a cause of action originating in the PT, the applicable standard for a stay of action is relegated to the local PT courts without the need to apply the pre-modern standard of *St. Pierre*. See CA 588/83 [1984] IsrSC 38(3) 495.

223. See *Abu Attiya*, [1985] IsrSC 39(1) at 369–70.

224. *Id.* at 377–78.

225. *Id.* at 385.

tice, this standard has become the Israeli version of the *forum non conveniens* doctrine.²²⁶ Of particular importance are two observations that the Supreme Court made with respect to the PT. First, the Court validated the conception already set forth in *Jabbour* about the existence of an Israeli official policy that local residents of the PT are presumed to litigate their claims in the PT—a policy for which the Court found support in the fact that the IDF worked to maintain the operation of the local court system in the PT. The second observation concerned cases that included among their contexts what was termed a “significant Israeli factor,” in which case the *forum non conveniens* analysis is to be turned on its head.²²⁷ As to what could constitute such a significant factor, the Court gave as an example a case in which “one of the parties was an Israeli citizen or resident.”²²⁸ This approach effectively protects Israeli settlers of the PT from being denied recourse to Israeli courts, since they are Israeli citizens.

The *Abu-Attiya* decision supplied the guidance sought by the Israeli courts in order to stem the flow of cases from the PT, although its holdings essentially affirmed what *Jabbour v. Hanitan* had already decided. From then on, in cases in which all of the litigants were Palestinians from the PT and the underlying cause of action was based in the PT, the *forum non conveniens* doctrine would be routinely applied, enabling courts to decline jurisdiction.²²⁹ On the other hand, when the case had a significant Israeli factor, courts could refrain from applying the doctrine. This included cases in which the plaintiff was a Palestinian resident of East Jerusalem.²³⁰

The liberal standard for declining jurisdiction was pushed one step further in another Supreme Court case, that of *Abu Jakhla v. East Jerusalem Electric Co.*²³¹ Like other cases described here, this one concerned a Palestinian plaintiff resident of the PT who, within the confines of a civil action, sought compensation for an accident that took place in the PT. This case was different, however, because the action was filed against the East Jerusalem Electric Company, a company with its main offices in

226. It should be noted that there was some disagreement among the justices as to whether all of the factors that are relevant to the U.S. version of the doctrine would also be relevant in the Israeli context. While one Justice, Tova Strassberg-Cohen, opined that Israeli courts, like U.S. courts, should take into consideration public interest factors and choice of law evaluations, Justice Aharon Barak seemed to have some reservations about these factors. *Id.* at 377–79, 386.

227. *Id.* at 386.

228. *Id.*

229. See CA 4716/93 Arab Ins. Co. of Hebron v. Zarikat [1994] IsrSC 48(3) 265; CA 489/85 Salakhat v. Municipality of Nablus [1988] IsrSC 42(1) 497; CC (Jer) 1410/83 Arab Ins. Co. v. Khader, [1984] IsrDC 5744(2) 172.

230. CA 5118/92 Al-Tarifi v. Salaymah [1997] IsrSC 50(5) 407, 413.

231. CA 2705/91 Abu Jakhla v. E. Jerusalem Elec. Co. [1993] IsrSC 48(1) 554.

East Jerusalem and also officially incorporated under Israeli laws. In light of these attributes, it was argued that the case had a “significant Israeli factor” and, therefore, the motion to decline jurisdiction on the basis of the *forum non conveniens* doctrine should be dismissed.²³² The Court rejected this argument, ultimately applying the *forum non conveniens* doctrine. In a decision authored by Justice Meir Shamgar, by then the President of the Supreme Court, it was noted that the East Jerusalem Electric Company’s relation with Israel is of a “formal” nature.²³³ In this respect, Shamgar stressed the fact that the East Jerusalem Electric Company was incorporated under Israeli law a short time after the 1967 Six-Day War, in order to comply with a specific military order obliging all East Jerusalem corporations to re-register in Israel.²³⁴ Moreover, it was noted that the bulk of the company’s operations was in the West Bank. Other important factors that the Court considered were the parties’ pre-litigation expectations as to where a mutual action was to be brought, and the forum better situated to assess and determine the relevant standard of care—considerations that also pointed to local PT courts.²³⁵

In observing the evolution of the discretionary power of courts in Israel to decline jurisdiction, especially after *Abu Jakhla*, one can certainly sense the great doctrinal leap that took place in comparison with the original point of departure set by the *St. Pierre* standard. In the past, it would have been inconceivable for a defendant sued in the forum of residence to convince the Court that the adjudication of the action in this particular venue is vexatious or oppressive. The almost universally accepted personal jurisdiction rule grants courts jurisdiction on the basis of being the forum of the defendant’s domicile.²³⁶ This was predicated on the proposition that the defendant, being the passive party in the initiation of the proceeding, is entitled to have the action litigated in a convenient forum.²³⁷ Yet, the *Abu-Jakhla* Court, working within the broad discretionary powers articulated by Israeli courts to decline jurisdiction, was prepared to hear a *forum non conveniens* claim from a local defendant and ultimately sanction it. So, at the end of this stage, Israeli courts were able to utilize extremely broad discretionary powers that helped them to filter the bulk of civil litigation among Palestinians that had to do with PT-based causes of action.

232. *Id.* at 576.

233. *Id.*

234. *Id.* at 557.

235. *Id.*

236. See Joseph H. Beale, *The Jurisdiction of Courts Over Foreigners*, 26 HARV. L. REV. 193, 197 (1913).

237. For a detailed critical assessment of the defendant’s domicile as the basis for jurisdiction, see Arthur Taylor von Mehren, *Must Plaintiffs Seek out Defendants? The Contemporary Standing of Actor Sequitur Forum Rei*, 8 KING’S C. L.J. 23 (1997).

*C. Evaluation of the Second Stage**Observation 1: The appropriateness of the PT forum as an alternative forum*

A basic requirement in almost all *forum non conveniens* inquiries is the availability of an adequate alternative forum for litigation in which the plaintiff can bring the action against the defendant.²³⁸ It is generally assumed that a defendant who fails to prove the existence of such an alternative forum will not be entitled to a dismissal or a stay on *forum non conveniens* grounds. As a result, the forum in which the action was filed will need to adjudicate it on the merits.²³⁹ In the vast majority of cases in which the *forum non conveniens* doctrine was applied by Israeli courts to PT-related actions when the litigants were Palestinian residents of the PT with a PT-based cause of action, PT courts were portrayed as an adequate and independent forum. In addition, given the fact that the PT maintained a separate legal system, Israeli courts seemed willing to apply a certain amount of comity to the PT as if these territories were those of a foreign sovereign State. Indeed, precedents set with respect to the *forum non conveniens* doctrine in cases in which the alternative forum was a PT court and those in which the alternative forum was a foreign court were, until the mid-1990s, interchangeably applied to serve the application of the doctrine in the pending proceeding.²⁴⁰ Thus, although in the first stage the West Bank and the Gaza Strip were denied any foreign sovereign attributes, they gained some of these sovereign attributes within the confines of the *forum non conveniens* doctrine.

Adopting a more critical view, however, one might wonder how worthy the PT courts and laws are of comity in light of the ongoing military occupation in this second stage of development. During this period, the PT had no political process by which local Palestinian residents were afforded any opportunity to shape or influence the local legal system.²⁴¹ On the contrary, given the resignation of most Palestinian judges from

238. KARAYANNI, *supra* note 183, at 26.

239. *Id.* at 26–27.

240. See, e.g., CA 2705/97 Ha-Geves A. Sinai Ltd. v. Lockformer Co. [1998] IsrSC 52(1) 109 (referring to PT-related precedent in litigation involving an alternative overseas forum); CA 45/90 Abbada v. Abbada [1994] IsrSC 48(2) 77, 82 (same); CA 2705/91 Ab Jakhla v. E. Jerusalem Elec. Co. [1993] IsrSC 48(1) 554 (applying precedents set in the context of an alternative overseas forum in a PT-related case).

241. See SHEHADEH & KUTTAB, *supra* note 166, at 11. In his personal memoir, Shehadeh spoke of the way in which laws were shaped in the PT, noting, “The legal unit of the Israeli army at the headquarters in Beit El near Ramallah had been extremely meticulous in studying all the laws in force in the West Bank—Jordanian, British Mandate, and Ottoman—and had canceled, amended, and supplemented them as it pleased.” SHEHADEH, *supra* note 173, at 135.

the local courts soon after the Six-Day War and the subsequent lawyers' strike, presumably the local Palestinian community wanted to disassociate itself from the local legal system. So, who exactly was intended to be served by these considerations of comity? One Justice in the Abu Attiya case wrote:

. . . one needs to consider that on the one hand, the relations between the Region and Israel are not identical to the relations between two independent sovereigns, and on the other hand, that the Israeli legislature made it explicit that residents of the Region, who are not Israeli citizens and whose relation under all circumstances is to the law applicable in the Region and to the court there, are to be judged in the courts there and according to the applicable law there.²⁴²

So, in forming their comity considerations toward the PT, Israeli courts were in part, if not wholly, accommodating Israeli official policy rather than the integrity of the foreign legal system. This implies that when the civil actions involve strong Israeli interests, such comity considerations will be held back, in spite of the fact that the cause of action is wholly based in the PT. The general idea is that when the civil action has a significant connection to Israel, such as when the plaintiff is an Israeli resident or citizen, thus militating against the application of the *forum non conveniens* doctrine by an Israeli court, it can be seen as a corollary configuration of this self-regarding comity consideration.

Probably the most representative, yet extreme, version of how comity considerations toward the PT disappear altogether when the action contains a strong interest of an Israeli litigant is found in the judgment rendered by the District Court of Jerusalem in *Hijalah v. Judea and Samaria Co.* (JSC).²⁴³ In this case, a large area of land was allegedly bought by JSC from Hijalah for the purpose of establishing a Jewish settlement in the West Bank.²⁴⁴ After construction on the land by Jewish settlers had begun, Hijalah, together with a number of other Palestinian residents claiming title to the land, sought relief before the District Court of Nablus to declare the transaction void and to prevent the respondent from pursuing land registration in its name. The respondent, on the other

242. CA 300/84 Abu Attiya v. Arabitsi [1985] IsrSC 39(1) 365, 382 (Strassburg-Cohen, J.). Interestingly, Justice Strassburg-Cohen cites no enactment of the Israeli Knesset by which Israel made it clear that residents of the "Region" were to have their actions litigated before local PT courts. *Id.* Indeed, it is doubtful whether, at the time that this decision was rendered in 1985, there was any such enactment by the Israeli legislature.

243. CC (Jer) 2967/87 Hijalah v. Judea & Samaria Co., [1988] (unreported).

244. On the issue of private Israeli land acquisitions in the West Bank after 1967, see generally Eyal Benvenisti & Eyal Zamir, *Private Claims to Property Rights in the Future Israeli-Palestinian Settlement*, 89 AM. J. INT'L L. 295, 314-16 (1995).

hand, claimed that the action taken by the claimant and other local residents regarding the nonbinding effect of the transaction was a conspiracy on their part designed to evade the consequences of a valid sale agreement. The proceedings were initiated by JSC in the District Court of Jerusalem after seven years of litigation before the Nablus court, seeking an anti-suit injunction instructing the Palestinian parties to put an end to the litigation they had initiated before the Nablus court. Ultimately, the court issued the anti-suit injunction and, in doing so, also rejected the *forum non conveniens* argument made by the Palestinian litigants.

In taking this course of action, the court took anchor in the proposition made in *Abu Attiya* that the *forum non conveniens* argument would have little room since the pending case implicated significant Israeli interests.²⁴⁵ The proceedings in *Hijalah* did indeed contain such a factor: JSC's shareholders and the settlers who bought the land parcels from it were Israelis. Moreover, the *Hijalah* court stressed the fact that the Israeli government authorized the establishment of a Jewish settlement on the area of land purchased by JSC and, by doing so, surely did not intend that the rights of the settlers and the future of the Jewish settlement be entrusted to the adjudicative powers of the court in Nablus.²⁴⁶ This assessment by the court was buttressed by the claim that under applicable Jordanian law, selling land to Israelis counted as selling to the enemy or to enemy agents. Also, while actions were pending before the Nablus court, this court was first willing to form its position without giving JSC the opportunity to be heard. Furthermore, an assassination attempt was made against the attorney representing JSC, and the courthouse in Nablus was set on fire.²⁴⁷ In addition, some years after the action was initiated before the Nablus court, the military commander issued a special order mandating that local courts in the PT were no longer authorized to adjudicate actions made with respect to land subject to the process of first registration of title.²⁴⁸

What we see evolving is, again, a dual construction, this time of the standard of alternative adequate forum. There is one standard when the litigants are local Palestinian residents and another when Israeli interests are at stake. This brought Amnon Rubinstein, a preeminent Israeli jurist, to characterize the *Hijalah* decision as representing most bluntly how jurisdictional rules developed by Israeli courts were aligned with the reality

245. *Hijalah*, [1988] (unreported) at 11–12.

246. *Id.* at 12.

247. *Id.* at 15–16.

248. See DINEI HA-TIKHNUN, HA-BNIYA VE-HA-MEKARKE'IN BE-EZOR YEHUDA VE-HA-SHOMRON [PLANNING, BUILDING, AND LAND LAW IN JUDEA AND SAMARIA] 548 (Aharon Mishnayit ed., 1996) (Hebrew) (reproducing the order).

that came to exist in the PT.²⁴⁹ In reality, the growing Jewish-Israeli population is to be governed by Israeli laws as far as possible, and another population, the local Palestinian residents, is to live under military occupation and remain subject to local laws.²⁵⁰

Observation 2: A step away, but a standard apart

This legal dualism in the application of the *forum non conveniens* doctrine emerges in yet another context that is even more significant in terms of methodology. This has to do with a 1998 Israeli Supreme Court decision in *Ha-Geves v. Lockformer*, in which it was pronounced that, due to modern advancements in transportation and communication services, courts should be less willing to decline personal jurisdiction when undertaking a *forum non conveniens* inquiry.²⁵¹ Consequently, there is now a stronger presumption in favor of adjudicating the case on the merits once the court is found to possess a recognized personal jurisdiction nexus. In the Court's words,

The presumption under which a court should be more inclined to deny a *forum non conveniens* motion has another rationale. This rationale is based on the advancements that have occurred in communications and means of modern transportation. In the past, the hardships endured by the defendants, who needed to litigate a case before a foreign forum, were many and genuine. These were caused by difficulties in communication and their high cost. In our era of jet airplanes, cellular phones, the facsimile and the Internet, these hardships have lost much of their meaning. The whole world is becoming "one big village" in which the distance between two different locations does not have the same meaning it used to have before. Therefore, one should not exaggerate in weighing the difficulties associated with the need of the defendant and his witnesses to come to another country, and from this it is also necessary to conclude that the willingness to accept a *forum non conveniens* motion will diminish in time.²⁵²

249. Rubinstein, *supra* note 96, at 456.

250. *Id.* On the dual legal system that evolved in the PT, see generally BENVENISTI, *supra* note 72; QUIGLEY, *supra* note 91, at 180–81.

251. CA 2705/97 Ha-Geves A. Sinai Ltd. v. Lockformer [1998] IsrSC 52(1) 109, 114.

252. *Id.*

Ha-Geves has had a substantial impact on the application of the *forum non conveniens* doctrine in Israel since its pronouncement.²⁵³ Elsewhere, I have attempted to show that the deduction the Court makes in *Ha-Geves* from advancements in modern transportation and communications on the standard of the *forum non conveniens* doctrine is both methodologically faulty and a poor design of legal policy.²⁵⁴ For one thing, the very same reasons mentioned by the Court could be equally used to argue that a plaintiff today can more conveniently engage in forum shopping than ever before, given the possibilities afforded by modern means of communication and transportation to undertake and manage litigation in a distant forum. In addition, today it is easier for the plaintiff to establish personal jurisdiction with a fortuitous nexus. The required jurisdictional contact still largely hinges on a territorial relationship with the forum, but more and more this contact has been seen as weak and attenuated precisely because of modern means of communications and transportation. For example, is the forum in which a computer server is located more relevant to the contractual relationship concluded by an exchange of e-mails facilitated by that particular server if and when the “place” of contracting is considered to be an appropriate nexus for establishing personal jurisdiction?

So, in essence, the limitation of the *forum non conveniens* doctrine in the modern age is a recipe for more forum shopping and a larger volume of cases in which personal jurisdiction can be accidentally established.²⁵⁵ But, more importantly for our discussion, the course taken in *Ha-Geves* is even more remarkable given the geographical setting in which Israeli courts developed their elastic and liberal standard of the *forum non conveniens* doctrine to begin with—PT-related civil action among Palestinian litigants who lived at most only tens of kilometers away from the Israeli forum. Needless to say, in such a setting, modest means of transportation and communication would suffice to make litigation before an Israeli forum conveniently possible. In fact, in the *Abu Jakhla* case, the defendant, the East Jerusalem Electric Company, had its main offices in East Jerusalem, just a few blocks away from the Jerusalem courthouse in which the action was originally filed.²⁵⁶ As shown earlier, this did not prevent the Israeli Supreme Court from staying the

253. For decisions applying *Ha-Geves*, see, e.g., CA 4501/05 Deluxe Labs. Inc. v. De Luxe Hollywood/Isr. Film & Video Processing Ltd. [2005] (unreported); CA 749/05 Insight Venture Partners IV L.P. v. Techno Hold Ekhad Ltd. [2005] (unreported); CA 9141/00 Lang v. Marx [2001] IsrSC 56(1) 118, 123; CA 2736/98 Habboub Bros. Co. v. Nike Int'l Ltd. [2000] IsrSC 54(1) 614, 621; CA 2903/96 Masika v. Dolens [1998] IsrSC 52(1) 817, 821.

254. See KARAYANNI, *supra* note 183, at 103–08.

255. *Id.* at 153–54.

256. CA 2705/91 Abu Jakhla v. E. Jerusalem Elec. Co. [1993] IsrSC 48(1) 554, 557.

proceedings on *forum non conveniens* grounds, taking an extra step toward broadening the scope of the *forum non conveniens* doctrine in the process.²⁵⁷

There is no escaping the conclusion that the *forum non conveniens* doctrine practiced in Israel is based on a dual standard: a liberal standard ready to consider alternatives when the context of litigation is PT-related, and a restrictive standard allowing a *forum non conveniens* stay only in limited circumstances in non-PT related international civil litigation. From the point of view of forum shopping, such a dual standard can be regarded as somewhat creative. If forum shopping is particularly attractive in one context, as in the case of PT-related civil actions in Israeli courts, then the *forum non conveniens* standard can be adjusted in order to filter incoming litigation more rigorously, and the liberal standard makes such an adjustment possible. But, when forum shopping is not a strong alternative, courts can afford to maintain a more restrictive standard. This normative ontology is not at all foreign to the doctrine of *forum non conveniens*. It resembles, to a great extent, the position taken by the United States Supreme Court in *Piper Aircraft Co. v. Reyno*,²⁵⁸ in which it pronounced that a foreign plaintiff's recourse to a U.S. court deserves less deference than when recourse is sought by a U.S. plaintiff.²⁵⁹ For in the case of a foreign plaintiff, there is an underlying presumption that it is more likely that filing the action in a U.S. court can turn out to be a case of forum shopping than when the plaintiff is a U.S. resident.²⁶⁰

However, the dual standard developed in Israel seems to take this notion of *Piper Aircraft* one step further by making a distinction between foreign plaintiffs coming from one group of countries, relative to which the Israeli forum is regarded as particularly attractive, and plaintiffs from another group of countries, relative to which the Israeli forum is not particularly attractive. If this assessment is correct, I gather that Israeli courts will need to face the argument raised against *Piper Aircraft* that,

257. See *supra* Part IV.B.

258. See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981).

259. *Id.* at 266. The Court stated,

When the home forum has been chosen, it is reasonable to assume that this choice is convenient. When the plaintiff is foreign, however, this assumption is much less reasonable. Because the central purpose of any *forum non conveniens* inquiry is to ensure that the trial is convenient, a foreign plaintiff's choice deserves less deference.

Id. (emphasis in original).

260. See Laurel E. Miller, Comment, *Forum Non Conveniens and State Control of Foreign Plaintiff Access to U.S. Courts in International Tort Actions*, 58 U. CHI. L. REV. 1369 (1991).

by limiting foreign plaintiffs' access to U.S. courts, the U.S. courts are turning their backs on actions conducted by U.S. corporations or their subsidiaries outside of the United States.²⁶¹ And, in the context of relations between Israel and the PT, such an argument becomes particularly forceful in light of the fact that the IDF controls government in the PT, which further implicates Israel in responsibility for jurisdiction over the PT. For, if local Palestinian plaintiffs are relentlessly "forum shopping" in Israeli courts in the effort to have their civil actions adjudicated, this no doubt has to also do with the fact that local courts, which are under direct control of the IDF, do not have much to offer. However, in light of the fact that the status of the PT has since changed, it is possible that this duality in the *forum non conveniens* standard will not be further scrutinized or refined.

V. STAGE THREE: PERSONAL JURISDICTION ACCORDING TO THE OSLO PEACE ACCORDS AND BEYOND

A. General

In the preamble to the agreement that initiated the Oslo Peace Process, the Declaration of Principles of 13 September 1993 (Declaration of Principles), the Israeli and the Palestinian representatives announced that

[i]t is time to put an end to decades of confrontation and conflict, recognize . . . mutual and political rights, and strive to live in peaceful coexistence and mutual dignity and security and achieve a just, lasting and comprehensive peace settlement and historic reconciliation through the agreed political process
²⁶²

Besides mutual recognition of Israel and the PLO,²⁶³ the Declaration of Principles established a framework for a series of additional interim agreements²⁶⁴ and set May 1999 as the deadline for reaching a permanent status agreement.²⁶⁵

261. See Stephen L. Cummings, *International Mass Tort Litigation: Forum Non Conveniens and the Adequate Alternative Forum in Light of the Bhopal Disaster*, 16 GA. J. INT'L & COMP. L. 109 (1986).

262. Declaration of Principles on Interim Self-Government Arrangements, Isr.-P.L.O., Sept. 13, 1993, 32 I.L.M. 1525 (1993) [hereinafter Declaration of Principles].

263. David L. Schulman, *The Israel-PLO Accords on the Declaration of Principles on Interim Self-Government Arrangements: The First Step Toward Palestinian Self-Determination*, 7 EMORY INT'L L. REV. 793 (1993).

264. SHEHADEH, *supra* note 65, at 16.

265. Declaration of Principles, *supra* note 262, arts. I, IV, V; see also Justus R. Weiner, *Hard Facts Meet Soft Law—The Israel-PLO Declaration of Principles and the Prospects for*

Although the Oslo Peace Process was intended to relieve both sides of their anxieties and bring them to realize the actual meaning of peaceful relations,²⁶⁶ from today's perspective we can indisputably say that not much has been accomplished.²⁶⁷ Since the signing of the Declaration of Principles, the relationship between the two sides has deteriorated²⁶⁸ as violence has escalated, and many innocent lives have been lost. Nonetheless, the two parties managed, amidst serious crises, to conclude a number of interim agreements that did have some impact on their future relations.²⁶⁹ The most important agreement for personal jurisdiction purposes is the Interim Agreement on the West Bank and the Gaza Strip (Interim Agreement), signed 28 September 1995.²⁷⁰ Besides its regulation of central governmental institutions within the Palestinian Authority and

Peace: A Response to Katherine W. Meighan, 35 VA. J. INT'L L. 931, 948–52 (1995); Katherine Meighan, Note, *The Israel-PLO Declaration of Principles: Prelude to Peace?*, 34 VA. J. INT'L L. 435 (1994) (discussing the process leading up to the signing of the Declaration of Principles and the document's main legal and political meanings).

266. See THE ISRAELI-PALESTINIAN PEACE PROCESS: OSLO AND THE LESSONS OF FAILURE (Robert L. Rothstein, Moshe Ma'oz & Khalil Shikaki eds., 2002); George Ivezaj, *Oslo Breakdown: The Failing Israeli and Palestinian Peace Process*, 7 J. INT'L L. & PRAC. 275 (1998); Weiner, *supra* note 7, at 240–41.

267. See Orde F. Kittrie, *More Process than Peace: Legitimacy, Compliance, and the Oslo Accords*, 101 MICH. L. REV. 1661, 1668 (2003) (“The Oslo Accords were largely, if not entirely, a failure.”).

268. Joseph W. Dellapenna, *Exploring the Oslo Accords: Recipe for Peace or Footnote to History?*, 40 ALBERTA L. REV. 525, 526 (2002) (noting how the Declaration of Principles Agreement began to unravel almost immediately after it was signed).

269. The Sharm el-Sheikh Memorandum on Implementation Timeline of Outstanding Commitments of Agreements Signed and the Resumption of Permanent Status Negotiations (Sept. 4, 1999), *reprinted in* WATSON, *supra* note 7, at 385–89 (attempting to put the Oslo Peace Process back on track); Wye River Memorandum, Oct. 23, 1998, 37 I.L.M. 1251 (revising some measures relating to security and re-emphasizing issues that require attention in matters of economic and civil cooperation); Protocol Concerning the Redeployment in Hebron, Jan. 17, 1997, 36 I.L.M. 653 (arranging the redeployment of Israeli forces in the city of Hebron); Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, Sept. 28, 1995, 36 I.L.M. 557 [hereinafter Interim Agreement] (detailing a comprehensive structure of Israel-Palestinian Authority (PA) relations for the duration of the interim period, which established an election process for selecting Palestinian executive and legislative authorities, scheduled a phased reduction of Israeli forces in Palestinian populated areas, and arranged various matters of judicial assistance between the two parties in criminal as well as in civil proceedings); Agreement on Preparatory Powers and Responsibilities [Erez Agreement], Aug. 29, 1994, 34 I.L.M. 457 (transferring jurisdiction to the PA in certain limited spheres such as health, social welfare, direct taxation, tourism, education, and culture in additional parts of the West Bank outside of the Jericho area); Agreement on the Gaza Strip and the Jericho Area, May 4, 1994, 33 I.L.M. 626 [hereinafter Cairo Agreement] (providing for the partial deployment of Israeli administration and military forces in the Gaza Strip and the Jericho area in the West Bank and empowering the PA to assume most functions of local government in these areas as a first stage of self-rule); see also Justus R. Weiner, *Co-Existence Without Conflict: The Implementation of Legal Structure for Israeli-Palestinian Cooperation Pursuant to the Interim Peace Agreements*, 26 BROOK. J. INT'L L. 591 (2000) (outlining documents that formed the Oslo Peace Process).

270. See Interim Agreement, *supra* note 269.

creation of a general framework for the interim period,²⁷¹ this document also touched upon such issues as civil jurisdiction of courts and judicial assistance in matters of civil proceedings, subjects that are germane to the subject matter of this Part. In the following section, I will assess the doctrinal significance of these arrangements for the personal jurisdiction of Israeli courts over PT-related civil actions.

B. The Jurisdictional Implications of the Interim Agreement

One of the most basic aspects of the interim agreements was the creation of a self-governing authority in the PT, originally called the Palestinian Council, but later universally referred to as the Palestinian Authority (PA). The Palestinian Council was granted legislative and executive authority as well as the capacity to maintain a judiciary.²⁷² As provided in the 1994 Agreement on the Gaza Strip and the Jericho Area (the Cairo Agreement), the Palestinian Authority was first to receive administrative control over the city of Jericho in the West Bank and over certain Areas in the Gaza Strip.²⁷³ In the 1995 Interim Agreement, the West Bank was divided into three areas: A, B, and C.²⁷⁴ Area A initially comprised some four percent of the West Bank and nineteen percent of the Palestinian population, and included the major cities of the West Bank (other than Hebron, with respect to which a special arrangement was drawn).²⁷⁵ In Area A, the Palestinian Authority was to have control over security and municipal matters. Area B included Palestinian-populated zones outside of the major cities comprising twenty-three percent of the West Bank and sixty-eight percent of the Palestinian population. In Area B, the PA was to have control over municipal matters while the IDF remained in charge of overall security. Area C, containing Israeli settlements and military installations, was under the control of the IDF both in terms of security and in terms of handling municipal matters.²⁷⁶ Although Areas A and B contained the vast majority of the

271. See John Quigley, *The Israel-PLO Interim Agreements: Are They Treaties?*, 30 CORNELL INT'L L.J. 717, 720 (1997).

272. Eyal Benvenisti, *The Israeli-Palestinian Declaration of Principles: A Framework for Future Settlement*, 4 EUR. J. INT'L L. 542, 549 (1993).

273. See Cairo Agreement, *supra* note 269.

274. See Omar M. Dajani, *Stalled Between Seasons: The International Legal Status of Palestine During the Interim Period*, 26 DENV. J. INT'L L. & POL'Y 27, 63 (1997) (explaining areas A, B, and C). Note, however, that the Gaza Strip was not subject to this territorial classification. In practice, from the Oslo Accords, until the disengagement of Israel from the Gaza Strip in 2005, the Gaza Strip was divided into two areas, one under PA control and the other under IDF control. *Id.*

275. NIGEL CRAIG PARSONS, *THE POLITICS OF THE PALESTINIAN AUTHORITY: FROM OSLO TO AL-AQSA* 111 (Taylor & Francis Group 2005).

276. See SHEHADEH, *supra* note 65, at 37; see also Interim Agreement, *supra* note 269, annex III, art. IV (noting that, according to the terms of the Interim Agreement, all powers and

Palestinian population of the West Bank and Gaza,²⁷⁷ they only contained roughly one third of PT land.²⁷⁸

The PA emerged from these agreements with substantial governing powers in the territories under its control, primarily in the territories that were designated as Area A. However, the agreements fell short of recognizing the PA as an independent sovereign entity. For example, even in territory designated as Area A, the PA had no control over foreign relations and external security as such matters remained in the hands of the IDF.²⁷⁹

As noted before, the most important agreement on the issue of personal jurisdiction is the Interim Agreement, and, more specifically, for the purposes of this Article, it is the Interim Agreement's Protocol Concerning Legal Matters contained in Annex IV. Article III of this Protocol is titled Civil Jurisdiction, thus implying that the provision will address the extent of civil jurisdiction authority of both sides. But, reading through the Protocol, it becomes apparent that it was drawn with the sole purpose of defining the civil jurisdiction of Palestinian courts when an Israeli is a party to the proceedings. The Protocol leaves intact the regulation of the civil jurisdiction of Israeli courts when a Palestinian is a party. So, while the agreements show a willingness to reach a relationship based on mutual trust between the parties, provisions on civil jurisdiction exemplify the limited nature of this reciprocity.²⁸⁰ However, the Protocol does have one important provision that eventually had an impact on the doctrine of personal jurisdiction of Israeli courts toward Palestinian litigants. Article IV of Annex IV addresses the service of documents.²⁸¹ It provides that "Israel and the [Palestinian] Council will be responsible for the service of legal documents including subpoenas, issued by the judicial organs under the responsibility of the other [S]tate."²⁸² Accordingly, service of process to a Palestinian defendant in an action brought before an Israeli court was under the responsibility of the PA. But, it was not clear whether this provision was intended to provide an exclusive procedure for the service of process. Moreover, it is doubtful whether this provision alone could have changed current doctrine. Israeli law takes the position that for an international agreement to

responsibilities as to the Palestinian population "not related to territory" were to be transferred to the PA, even in Area C).

277. Weiner, *supra* note 269, at 604.

278. See Bisharat, *supra* note 168, at 258.

279. Fassberg, *supra* note 63, at 319; Weiner, *supra* note 269, at 660; see Joel Singer, *Aspects of Foreign Relations Under the Israeli-Palestinian Agreements on Interim Self-Government Arrangements for the West Bank and Gaza*, 28 ISR. L. REV. 268, 277-78 (1994).

280. See Fassberg, *supra* note 63, at 320.

281. Interim Agreement, *supra* note 269, annex IV, art. IV.

282. *Id.* annex IV, art. IV.1(a).

become part of Israeli municipal law, the Knesset needs to pass special incorporating legislation.²⁸³

Indeed, in an effort to give the Interim Agreement normative significance in terms of Israeli municipal law, a major amendment was made in 1996 to the 1967 Law for the Extension of Emergency Regulations (Judea, Samaria, and the Gaza Strip—Jurisdiction over Crimes and Judicial Assistance) (LEER).²⁸⁴ This enactment provided a new definition of the term “Region,” which excluded, for the purposes of the enactment, areas of “Judea and Samaria and the Gaza Strip,” which are regarded as territories of the Palestinian Council.²⁸⁵ Another important provision in this enactment authorizes the Israeli Minister of Justice to issue regulations regarding the service of official documents of Israeli-initiated civil proceedings in the “Region.”²⁸⁶

In 1999, the Minister of Justice took advantage of this latter authorization to enact the Emergency Order (Judea and Samaria and the Gaza Strip—Jurisdiction over Crimes and Legal Assistance) (The Territories of the Palestinian Council—Judicial Assistance in Civil Matters) (1999 Emergency Order).²⁸⁷ This enactment established a detailed mechanism for the judicial assistance generally prescribed in LEER. According to section 3 of the Order, an official document intended for service in the PA is to be first handed to the Israeli Judicial Assistance Officer, who in turn will proceed to effectuate service in the PA territories.²⁸⁸ This section also provides that when service of process is conducted under the provision of this section, *i.e.*, through the office of the Judicial Assistance Officer, the 1969 regulations on the special procedure for service in the PT are not applicable.

The following section tries to assess the actual and possible impact of these enactments on the existing personal jurisdiction doctrine of Israeli courts in PT-related civil actions.

C. The Current Status of the Al-Khir Precedent

The precedent set in *Al-Khir*, under which service of process originating in Israeli civil proceedings can be effectuated directly on a defendant present in the West Bank and the Gaza Strip without the need

283. See H CJ 2717/96 Wafaa v. Minister of Defense [1996] IsrSC 50(2) 848, 851–52.

284. Law for the Extension of Emergency Regulations (Judea, Samaria and the Gaza Strip—Jurisdiction over Crimes and Judicial Assistance), 1996, S.H. 1556, 34 (Isr.) [hereinafter LEER] (amending 1967, S.H. 517, 20 (Isr.)).

285. *Id.* § 1.

286. *Id.* § 7.

287. Emergency Order (Judea and Samaria and the Gaza Strip—Jurisdiction over Crimes and Legal Assistance) (The Territories of the Palestinian Council—Judicial Assistance in Civil Matters), 1999 KT 5947, 278 [hereinafter 1999 Emergency Order].

288. *Id.* § 3.

to secure the leave of the court, was made possible under SDAT. As one may recall, these rules permitted the plaintiff to effectuate service of process in what was defined to be the “Region”—an area defined by the same rules as “a territory held by the IDF.”²⁸⁹ These rules were neither abolished nor amended as a result of the Oslo Peace Accords, in spite of the fact that when the process was initiated the IDF held no territory other than the West Bank and the Gaza Strip.²⁹⁰

This should not be taken to mean that the Oslo Peace Accords had no effect on SDAT. In fact, one can point to two major changes brought about by the Interim Agreement that influenced the definition of the key term “Region” in these rules, and, as a consequence, also influenced the extent to which the *Al-Khir* precedent can be applied today. The first is the situation that currently obtains in the PT, where not all of the areas can be said, at least not in the same sense as before, to be held by the IDF.²⁹¹ The very essence of the Oslo Peace Process in general, and of the Interim Agreement in particular, was to redeploy the IDF in the PT so that the PA could take control of most areas populated by Palestinians. This is true for the territories designated as Area A, in which the PA took control of both security and local government affairs. Therefore, Area A could no longer be regarded as a “Region” for the purposes of SDAT and, as a result, direct service of process as sanctioned in *Al-Khir* is no longer possible in Area A. The second form of influence that the Interim Agreement had was the new definition of the term “Region,” now adopted in LEER. As previously noted, this enactment provides for a new definition that explicitly excludes the territories of the Palestinian Council.²⁹² Given the additional fact that this enactment addressed legal assistance generally, it could thus be reasonably taken to afford a new definition of the term “Region” that superseded the definition included in SDAT. Consequently, not only will areas designated as Area A now be excluded from the term “Region,” but so too will areas designated as Area B, for they will henceforth come under the jurisdiction of the Palestinian Council.

Evidently, these two forms of influence restrict the ability of courts to apply the *Al-Khir* precedent to PT-related civil litigation among

289. SDAT, Rule 1, *supra* note 97, 1969, KT 2482, 458 (Isr.).

290. As noted earlier, the Golan Heights and East Jerusalem were territories that were effectively annexed by Israel. The Sinai Peninsula was returned to Egypt as part of the Israeli-Egyptian peace process. The only region that had the potential to not be counted as part of the PT during this period was the “Security Zone” held by Israel in Southern Lebanon—until Israel withdrew its forces unilaterally from this area in May 2000. *See supra* Part II.B.

291. *See* Benvenisti, *supra* note 272, at 548 (“[A]fter the Israeli withdrawal, with the exception of the areas of the settlements, Israel will remain without authority to act within the territories from which it has withdrawn.”).

292. *See supra* text accompanying note 285.

Palestinian residents. Substantial areas inhabited by the Palestinian population are no longer considered to be a “Region” for the purpose of SDAT, and, therefore, defendants residing therein cannot be served, at least not in a direct fashion as before, with the process of an Israeli court.²⁹³

The Israeli Supreme Court has not yet spoken on this issue. However, the Magistrate Court in Jerusalem rendered two separate decisions—authored by the same judge—holding that neither Area A²⁹⁴ nor Area B²⁹⁵ can be considered today as a “Region” under SDAT, thus rendering the *Al-Khir* judgment inapplicable with respect to these two areas.

Ironically, the end result is that the SDAT provision mandating the translation of every document served under its provisions into Arabic, is applicable today only to Area C, which is largely inhabited by Israeli settlers.²⁹⁶

But, nevertheless, this position does not resolve the question of the scope of personal jurisdiction of Israeli courts over PT-related civil litigants. The discussion above merely affords the conclusion that the *Al-Khir* precedent does not apply today to most of the territories under the jurisdiction of the PA. In light of these developments, how should Israeli courts proceed when asked to establish personal jurisdiction over a defendant residing in areas held by the PA?

The most authoritative decision on this issue is from the District Court of Haifa in *Makhul v. Arab Bank*.²⁹⁷ Here, the court essentially held that to effectuate service of process in areas held by the PA, the plaintiff needed to secure leave for service of process outside the jurisdiction as well as effectuate service through the judicial assistance channel established as part of the fulfillment of the Interim Agreement in the 1999 Emergency Order.

The plaintiff, a citizen and resident of Israel, filed this action before the Haifa court, seeking recovery of the current value of 1,000 Palestinian Pounds deposited in 1947 in the Arab Bank’s branch office in Jaffa. The plaintiff based his claim on his status as the heir to the estate of his father-in-law, who originally deposited the sum, and asked the court to certify the claim as a class action, supposedly in an effort to bind the

293. See Fassberg, *supra* note 63, at 322 n.12.

294. CA (Jer) 1558/98 Shaheen v. Nat’l Ins. Co., [1991] (unreported).

295. PCC (Jer) 1421/01 Abd El-Hamid v. Far’un, [2001] (not yet reported).

296. See LC (Jer) 2061/00 Shirlin v. Youssef, [2003] (unreported) (recognizing the effect of establishing personal jurisdiction when service of process was effectuated under the 1969 Civil Procedure Rules on a defendant resident in the Ma’aleh Adumim—an Israeli settlement east of Jerusalem, located in Area C).

297. CA (Hi) 3475/00 Makhul v. Arab Bank, [2001] IsrDC 5770(1) 913.

defendant bank by the prospective judgment in future similar suits. The defendant bank was established in Mandatory Palestine in 1930, and, after 1948, relocated its activities to Jordan. The plaintiff had tried to claim the sum on three different occasions in the 1950s and 1960s, but to no avail. The bank argued that, in accordance with the instructions of the Jordanian government, it froze all assets belonging to residents and citizens of Israel, then an enemy State. After the creation of the PA, the Arab Bank established a number of branches in the PT, including in Ramallah, which branch, according to the plaintiff, received all of the original deposits and documents of the Jaffa branch. In filing the claim, the plaintiff was confident of his chances of recovering the money given that, by then, Israel and Jordan had signed a peace treaty ending the state of hostility that had existed between them.²⁹⁸ However, the plaintiff could not establish personal jurisdiction over the bank, and so was unsuccessful.

Not that the plaintiff did not try. At first, his attorney had an intern from his office personally effectuate service on the Ramallah branch. The intern served the documents on the bank guard. On advice from the bank's attorney, the documents were returned to the plaintiff's attorney by registered mail. The documents were then sent to the Israeli Judicial Assistance Officer acting on the authority of the 1999 Emergency Order. For reasons that remain unclear from the decision, the Israeli Officer, instead of having the documents sent to his Palestinian counterpart, who then was supposed to have the documents served on the defendant bank, had the documents sent by mail to the bank branch in Ramallah. But, shortly afterward, the envelope was returned to the Israeli officer stamped "addressee rejected delivery."

The case presented the court with two important questions as to the rules now governing the personal jurisdiction of Israeli courts over PT-based defendants: (a) is service of process in a PA-held territory, without the plaintiff first securing leave of the court in which the action was filed, sufficient to establish personal jurisdiction?; and (b) can the Israeli Judicial Assistance Officer effectuate service of process in a manner outside of the framework of the 1999 Emergency Order? The court answered both of these questions in the negative.

On the first question, the court held that since service was effectuated in this case outside of Israel, obtaining leave of court according to Rule 500 of the RCP was necessary.²⁹⁹ The court added that service of process outside of the jurisdiction is not merely a technical issue but a

298. Treaty of Peace Between the State of Israel and the Hashemite Kingdom of Jordan, Isr.-Jordan, Oct. 26, 1994, 34 I.L.M. 43.

299. *Makhul*, [2001] IsrDC 5770(1) at 916.

substantive one, and, in granting leave, the court should be sensitive to values pertaining to the sovereignty of foreign courts and comity.³⁰⁰ In this context, the court attached particular importance to the fact that the Arab Bank's headquarters are based in Amman, Jordan.³⁰¹

Turning to the second question, regarding the applicability of the 1999 Emergency Order, the court stated that the existence of this order did not obviate the need to obtain leave of court in accordance with Rule 500.³⁰² In any case, in the eyes of the court, the provisions of the 1999 Emergency Order itself were not carried out. As mentioned earlier, the Israeli Judicial Assistance Officer sent the statement of claim directly to the defendant bank instead of first sending it to his Palestinian counterpart.³⁰³ In the end, since leave for service outside of the jurisdiction was not requested, and since service was not carried out in accordance with the 1999 Emergency Order, conditions that the court regards as supplementary and cumulative, the court deemed itself lacking personal jurisdiction over the action.³⁰⁴

The position taken by the Haifa District Court deserves further reflection, a step that I take more fully later in this section. For now, it suffices to note the genuine leap in approach embodied in the decision. For the purpose of personal jurisdiction, the PA is treated on par with independent sovereign States, and its courts are considered worthy of deference and comity, notions that are normally reserved for courts of foreign jurisdictions. Moreover, the decision suggests that the PA deserves an even more robust form of reverence compared to other foreign States since, to effectuate service on PA-governed territories, one needs to do so through the judicial assistance channel as prescribed in the 1999 Emergency Order. Such a restriction does not exist in Israeli law with respect to service in any other foreign jurisdiction.

But realization soon crystallized in other Israeli courts that what the Haifa District Court did in *Makhul* may have been too great a leap, especially in light of the subsequent deterioration of relations between Israel and the PA and the outbreak of the Al-Aqsa Intifadah at the end of September 2000. What this meant in terms of the 1999 Emergency Order was that all forms of cooperation between the two sides—however rudimentary—that had existed prior to this latest bout of violence, were now forsaken. This is why, in another judgment, the District Court of Tel-Aviv concluded, in *obiter dicta*, that given the present reality of the relationship, the 1999 Emergency Order was not to be regarded as

300. *Id.* at 917.

301. *Id.*

302. *Id.*

303. *Id.*

304. *Id.* at 918.

prescribing an exclusive means for service of process in the PA-held territories.³⁰⁵ Soon thereafter, in 2004, an amendment was made to the 1999 Emergency Order, authorizing the Israeli Judicial Assistance Officer to allow for substitute service when service is deemed unavailable through the ordinary channel, that is, through the Palestinian Judicial Assistance Officer. Such alternative means include direct service through a person specifically authorized to effectuate service, by registered mail, by facsimile, or even by publication in a local Arabic-language newspaper widely circulated in the PT.³⁰⁶

Although this amendment allows the Israeli Officer for Legal Assistance to effectuate service of process unilaterally in a rather undemanding form, the fact that Israel took the effort to amend the 1999 Emergency Order substantiates to a great extent the course taken in the *Makhul* decision. The amendment can be taken to presume that the 1999 Emergency Order indeed affords an exclusive channel for service in PT territories held today by the Palestinian Authority. Otherwise, the already existing provisions in the Israeli RCP on substitute for service of process—regarded as applicable to service both inside and outside of Israeli jurisdiction³⁰⁷—would have sufficed.

D. *The Discretion to Stay PT-Related Civil Actions*

Another issue that must be addressed with respect to the Israeli doctrine of personal jurisdiction in PT-related civil actions concerns the power of Israeli courts to decline jurisdiction over such actions. Unlike the subject of establishing personal jurisdiction, this issue is expressly addressed in the Israeli enactments implementing the Interim Agreement. Section 2B(a) of the LEER provides a general rule stating that an Israeli court is not to abstain from exercising duly acquired jurisdiction over a civil matter brought by an Israeli when the cause of action is based on an act or an omission committed in the PT under the jurisdiction of the PA, solely on the grounds that a PT resident is the defendant or party to the action in any other manner.³⁰⁸ This provision is of an unusual character. Instead of first outlining when it would be appropriate for an Israeli court to decline jurisdiction over PT-related civil actions, it takes the extra step of regulating instances in which the Israeli court is expected not to decline its jurisdictional powers. Such a mode of regulation strongly implies that in PT-based actions filed by an Israeli against a

305. CC (TA) 3069/03 Merck Frosst Can. & Co. v. Birzeit Palestinian Pharm. Co., [2003] (unreported).

306. See 1999 Emergency Order, *supra* note 287, § 3(A1)–(A3).

307. See CA 39/89 Gen. Elec. Corp. v. Migdal Ins. Co. [1989] IsrSC 42(4) 762, 767.

308. LEER, *supra* note 284, § 2B(a), S.H. 1556, 34.

Palestinian, the Israeli court is expected to deal with the action rather than decline jurisdiction. This implication becomes stronger in light of the fact that Section 2B(b) also specifies those instances in which the court, in spite of the foregoing, can decide to decline its jurisdictional powers.³⁰⁹ This can happen when one of the following circumstances is present: (1) the subject of the action is an ongoing business of an Israeli in the PA; (2) the subject of the action is land situated in the PA; (3) the subject of the action is a contract that includes a forum selection clause in favor of a jurisdiction outside of Israel; and (4) there is a pending action elsewhere between the parties in the matter.³¹⁰

Such provisions, especially when considered in light of the one-sided focus of the Interim Agreement on limiting and restricting the power of Palestinian courts to litigate actions in which Israelis are parties, are clear manifestations of Israel's strong mistrust toward the Palestinian judiciary. This is particularly true when the civil action implicates Israeli interests and preempts the option that an Israeli party will be faced with litigation in a Palestinian court. This trend was already evident in the second stage. In the *Makhul* decision, however, the court seems to take a different attitude, one that seeks to exhibit greater comity and respect than the one underlying the Interim Agreement. A decision that exemplifies this point particularly well is that of the District Court of Jerusalem in the matter of *Kahati v. Al-Afifi*.³¹¹ The *Kahati* dispute concerned property rights over a piece of land located in Area C, near the historic hill of Nabi Samuel. The plaintiffs were Israelis claiming that they had lawfully acquired the land from the original Palestinian owners—a claim disputed by the latter. The Israeli party sought a declaratory judgment asserting their rights from the Israeli court.

Greatly to the surprise of the plaintiffs, the court disposed of the claim on *forum non conveniens* grounds, notwithstanding the arguments made by the plaintiffs, questioning the objectivity of Palestinian courts dealing with land disputes between Israeli settlers and local Palestinian owners, which the same court had embraced some years earlier in the *Hijalah* case.³¹² The court observed that, in light of the Interim Agreement and the Israeli legislation that had followed, the local Palestinian courts of the West Bank were to be regarded as a legitimate and qualified tribunal for adjudicating land disputes, including those to which an Israeli was a party. Although the land in dispute in this case was located in Area C, and thus not under the direct authority of the PA, in light of the

309. *Id.*

310. *Id.*

311. CC (Jer) 1820/96 *Kahati v. Al-Afifi*, [1998] (unreported).

312. CC (Jer) 2967/87 *Hijalah v. Judea & Samaria Co.*, [1988] (unreported).

new legal reality, litigating a claim brought by an Israeli over land situated in the West Bank before a local Palestinian court, still assumed to be a possible recourse even with respect to land in Area C, should not be taken as an act offensive to Israelis. The court also took into account that the Israeli parties claimed to have intentionally invested their money in a transaction for the purchase of land outside of Israel, and so they should also have expected that such a dispute regarding the land purchase be litigated in the local courts of the jurisdiction in which the land was situated.³¹³

Another important development concerns the entitlement of the PA to claim sovereign immunity from civil proceedings initiated against it before Israeli courts.³¹⁴ On a number of occasions, Israeli plaintiffs named the PA as a defendant after alleging its responsibility in torts for damages caused as a result of certain terror attacks.³¹⁵ In response, the PA requested the Israeli courts to dismiss such actions, *inter alia*, based on the doctrine of sovereign immunity. In one major decision dealing with such an action, the District Court of Jerusalem regarded the question of whether the PA is entitled to sovereign immunity as a question pertaining to Israel's foreign relations, and therefore beyond the court's ability to decide.³¹⁶ The court could apply sovereign immunity to the PA only after the Ministry of Foreign Affairs had settled this matter officially.³¹⁷ Another important decision rendered by this same court in 2006 takes a more conclusive view, eventually granting the PA sovereign immunity. In *Agudat Midreshet Alon Moreh v. The State of Israel*,³¹⁸ the plaintiff was an organization that obtained a judgment from an Israeli court against a Palestinian defendant who had allegedly defaulted in a land sale contract. The land was located in Area A but was purchased by the plaintiff

313. See *Kahati*, [1998] (unreported) at 4.

314. Israel has come to recognize the restrictive doctrine of sovereign immunity, under which foreign sovereigns undertaking action of a sovereign nature (*acta jure imperii*) are entitled to immunity for civil proceedings. CA 7092/94 Her Majesty the Queen in Right of Canada v. Edelson [1997] IsrSC 51(1) 625.

315. See Ruth Levush, *Compensation for Victims of Terrorist Actions: Israel as a Case Study*, 32 INT'L J. LEGAL INFO. 582, 588–90 (2004).

316. CC (Jer) 2538/00 Noritz v. Palestinian Authority, [2003] IsrDC 5762(2) 776.

317. In a subsequent appeal, the Supreme Court sidestepped the issue of sovereign immunity because the appellants did not raise in their appeal the question of whether the PA was entitled to claim sovereign immunity, but rather only raised the question of whether the alleged actions of the PA were of a governmental character. CA 4060/03 Palestinian Authority v. Dayan [2007] IsrSC (not yet reported). However, it should be noted that, in a proceeding before the District Court of Tel-Aviv-Jaffa, the Legal Advisor to the Ministry of Foreign Affairs issued a certificate that was eventually submitted before the court and which stated that the PA was not entitled to sovereign immunity in a proceeding raising the same questions as in the *Noritz* case. See CC (TA) 704/97 Dan v. Palestinian Authority, [1999] (unreported).

318. PCC (Jer) 1008/06 Agudat Midreshet Elon-Moreh v. Israel, [2006] IsrDC (not yet reported).

for the purpose of Israeli settlement in the PT. The plaintiff was unable to execute the judgment and claimed that the State of Israel and the PA were responsible in torts for their inability to execute the judgment. The PA moved to have the action against it summarily dismissed on sovereign immunity grounds and the court granted the motion. Relying on the various Israel–PLO agreements, especially the Interim Agreement, the court concluded that the PA possessed sufficient sovereign attributes—including exclusive control over a territory, a police force, elected government bodies, and international status—to entitle it to sovereign status and immunity, despite admitting that the PA had not attained the status of an independent State. According to the court, sovereign immunity is to be determined under a functional analysis that seeks to inquire into the actual sovereign functions possessed by the concerned entity. Moreover, it seemed unfair to the court that the PA would be held responsible as a governing authority yet at the same time be denied sovereign immunity.³¹⁹

This decision is another important ruling by an Israeli court that elevates the jurisdictional status of the PA. As in *Makhul* and *Al-Afifi*, the court took a position that essentially treated the PA as a foreign sovereign. While the Israeli government and the Israeli legislature seem generally distrustful of the PA, the Israeli judiciary has actively undertaken a much more balanced position.

E. *Evaluation of the Third Stage*

Observation 1: The one-sided nature of the Interim Agreement: Does it serve the peace process?

In looking at the overall design of personal jurisdiction under the Interim Agreement and the Israeli enactments that were made to enforce it, one cannot but first ask about the reasons behind such one-sidedness.³²⁰ No doubt this outcome can be partially attributed to poor negotiation skills on the part of the Palestinian delegation.³²¹ But, it probably also pertained to the working assumption of the Oslo Peace Accords, according to which the established Palestinian entity can only have such jurisdictional authority as is delegated to it by the Israeli side, with the Palestinian side acquiescing to such an assumption.³²² The residual powers when such authority is not transferred will lie in the hands of the

319. *Id.* para. 10.

320. See Shihadeh, *supra* note 71, at 558.

321. See SHEHADEH, *supra* note 65, at 29–30, 71–72.

322. See Raja Shehadeh, *Questions of Jurisdiction: A Legal Analysis of the Gaza-Jericho Agreement*, 23 J. PALESTINE STUD. 18, 22–23 (1994).

IDF.³²³ This is the “delegation paradigm.” The rationale of this paradigm derives from the status of authority in the PT prior to the agreements. Since such authority was totally within the hands of Israeli organs, any change thus necessitated the transfer of such authority from the Israeli side to the Palestinian side. In such a setting, specific arrangements are bound to be unbalanced and one-sided, for the underlying assumption is unbalanced, where one side is taken to possess the “whole” and the other side is to possess only that which is given.³²⁴

The breakdown of the Oslo Peace Process and its fitful revival, most recently in the Annapolis Conference, provide food for thought. It might be helpful to note that in the interest of establishing a lasting future settlement, the aim should not necessarily be to maximize to the utmost whatever negotiation power and legal paradigms each party can marshal, but to reach an arrangement that could qualify as balanced and just. For, if negotiations are designed to produce a sustainable relationship in which the other side is expected to act as an equal, reason also lends one to believe that this side should be treated from the start as an equal.

Observation 2: The Palestinian Authority in a twilight zone

There has been some discussion in jurisdictions around the world regarding whether the PA should be viewed as a sovereign State,³²⁵ partly for the sake of deciding whether the PA is entitled to claim sovereign immunity.³²⁶ The general tendency is to deny the Palestinian Authority the status of a sovereign State and, as a result, to deny sover-

323. Shihadeh, *supra* note 71, at 558.

324. This also explains why the parties agreed to maintain the existing legal system in both the West Bank and the Gaza Strip even after areas in both places were transferred to the PA. In practice, this created a formal obligation on the part of the PA to implement existing military order in the laws of the West Bank and the Gaza Strip as well as to maintain two separate legal systems in both jurisdictions. This latter point is a consequence of the historical fact that when the West Bank was occupied by Israel in 1967, the law there already included a substantial amount of Jordanian law, whereas in the Gaza Strip, which was never under Jordanian rule, the law simply remained dependent on British Mandatory law. See Bisharat, *supra* note 168, at 263; Fassberg, *supra* note 63, at 320 n.8; 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, 1429–31 (1996).

325. See Dajani, *supra* note 274; Kathryn M. McKinney, *The Legal Effects of the Israeli-PLO Declaration of Principles: Steps Towards Statehood for Palestine*, 18 *SEATTLE U. L. REV.* 93, 95–98 (1994); Justus R. Weiner, *An Analysis of the Oslo II Agreement in Light of the Expectations of Shimon Peres and Mahmoud Abbas*, 17 *MICH. J. INT'L L.* 667, 685–90 (1996); Caplen, *supra* note 8, at 703–06.

326. See Katherine Reece Thomas, *Non-Recognition, Personality and Capacity: The Palestine Liberation Organization and the Palestinian Authority in English Law*, 29 *ANGLO-AM. L. REV.* 228 (2000).

eign immunity.³²⁷ Two U.S. federal courts have explicitly taken this view.³²⁸ In light of this general sentiment, the Israeli decisions of *Makhul* and *Agudat Medreshet Elon Moreh* reemerge as particularly bold. The *Makhul* decision was prepared to treat the PA as a foreign sovereign State for the purpose of service of process, and *Agudat Midreshet Elon Moreh* recognized the entitlement of the PA to sovereign immunity.³²⁹ Since Israel is the State most involved with the PA and in the PT, one would have expected that its courts would take a tougher stance than that taken by foreign, less interested jurisdictions.

I emphasize this contrast because the position taken by the Israeli courts in these two decisions might, if embraced by other governmental bodies, point the way to peaceful coexistence. In the fragile and delicate relationship between Israel and the PA, it would seem to be an advisable step for the courts of one side to take extra precautions in the application of legal doctrine that courts of other jurisdictions are not prepared to apply. In other words, in the context of the conflicting entities that seemingly conduct their actions as two international entities, there might be special value in having the courts of one side accord the courts of the other side special considerations of comity. Such a stance will furnish a proper legal environment that will undoubtedly work to help stabilize the overall relationship.

CONCLUSION

The evolution of the Israeli doctrine of personal jurisdiction with respect to PT-related civil actions has no doubt been a dynamic one. In this Article, I have proposed a perception that detects three major stages in this development, and have also offered an analysis that identifies the doctrinal characteristics of Israeli personal jurisdiction doctrine in each stage. If I were to state the one major finding of this study, it would be the correlation between these different stages and Israeli official policy with respect to the PT generally. When this policy was to establish total control over the PT, personal jurisdiction doctrine took an expansionist course of development, thereby granting Israeli courts personal jurisdiction over any defendant present in the PT. When this policy viewed the Palestinian population of the PT—but still not the Jewish settlers of the

327. See *id.* at 244; see also Fassberg, *supra* note 63, at 320 n.7.

328. *Unger v. Palestine Liberation Org.*, 402 F.3d 274, 292 (1st Cir. 2005), *cert. denied*, 546 U.S. 1030 (2005); *Knox v. Palestine Liberation Org.*, 306 F. Supp. 2d 424, 426, 430–38 (S.D.N.Y. 2004).

329. PCC (Jer) 1008/06 *Agudat Midreshet Elon-Moreh v. Israel*, [2006] IsrDC ¶¶ 8–12 (not yet reported).

PT—as a burden and initiative loomed for granting some form of autonomy to the local Palestinian population in the civil administration, personal jurisdiction doctrine evolved, affording Israeli courts more discretionary authority to filter in PT-related civil disputes. And, finally, when the PT emerged as a semi-sovereign entity under the Oslo Peace Process, personal jurisdiction doctrine evolved, affording the PT some form of comity that, in light of the fragile nature of the Israeli-Palestinian relations, was at times even greater than that afforded to foreign jurisdictions.

In terms of personal jurisdiction doctrine in general, this analysis suggests that the doctrine seems to still be susceptible to general considerations of sovereignty, territorial control, and international comity, notwithstanding the modern shift to favoring considerations of fairness.

Indeed, the research presented here has focused on one subject: Israeli personal jurisdiction doctrine in the context of Israeli-Palestinian relations. There remain related but unresolved issues in the field of private international law, such as choice of law and recognition and enforcement of judgments. In addition, there is also much to say on the development of Palestinian private international law in this context.³³⁰ It is my hope that this study of the evolution of personal jurisdiction doctrine of Israeli courts in relation to the Palestinian Territories will offer some assistance in facilitating future research in the evolution of private international law doctrines—Israeli and Palestinian alike.

330. See AMIN R. DAWWAS, *TANAZ' AL-QAWANIN FI FALASTIN [CONFLICT OF LAWS IN PALESTINE]* (2001) (Arabic).