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

Michael M Karayanni, Hebrew University of Jerusalem
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I. Introduction

Legal aspects concerning the actions taken by the State of Israel in respect of the
Occupied Palestinian Territories,¹ and afterwards in respect of the territories that came
under the control of the Palestinian Authority – territories that will jointly be referred
to as the Palestinian Territories, or PT for short, have drawn a relatively large amount
of scholarly attention world-wide.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

¹Member (2007/2008), School of Social Science, Institute for Advanced Study, Princeton, New Jersey;
Edward S. Silver Chair in Civil Procedure, Faculty of Law, Hebrew University of Jerusalem.
²A note on terminology is required from the outset. Over the years the West Bank and the Gaza Strip
have received different names. At first, Israeli courts related to these territories as “Occupied” yet
without identifying them as Palestinian. However, other terms soon emerged. 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. IN L.
59, 61 (1988). In the course of time a score of other terms were used, all of which also tried to give the
OPT a sort of a neutral status, such as “the Territories”, “Administered Territories” and “the Area”. Id.
at 61-2. The change in name reflects as well as shapes the current legal ideology.
OCCUPIED TERRITORIES (2002).
⁴INTERNATIONAL LAW AND THE ADMINISTRATION OF OCCUPIED TERRITORIES: TWO DECADES OF
See e.g., Eugene Rostow, Palestinian Self-Determination: Possible Futures for the Unallocated
Territories of the Palestine Mandate, 5 YALE STUD. IN WORLD PUB. ORDER 147 (1979); John Collins,
Note, Self-Determination in International Law: The Palestinians, 12 CASE W. RES. J. INT’L L. 137
(1980); Sally V. Mallison and W. Thomas Mallison, The Juridical Bases for Palestinian Self-
Determination, 1 PALESTINE Y B. INT’L L. 36 (1984); 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, 1491-2 (Rudolf
occupation and control over the West Bank and the Gaza Strip, and the extent to which access to human rights for the Palestinian population can be overseen and guaranteed. Scholarly interest has intensified in recent years with the rise and demise of the Oslo Peace Process, and the international debate over the construction of the so-called Separation Barrier. Interest is periodically kindled by recurring peace initiatives, the most recent of which at the time of writing this article is the Annapolis Conference.

Central as these questions may be, and despite the severe human cost and territorial upheavals endured by many who lived through that period, there existed the private sphere of relations, in which private corporations and individuals from both

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9 See http://annapoliiscoference.state.gov.
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 set of conflict of laws issues that such disputes gave rise to. 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 in respect of private disputes related to the PT as it was developed from 1967, when these territories were first occupied by Israel, until the present day. This body of doctrine has developed primarily as a consequence of the numerous civil actions related in one way or another to the PT before Israeli courts.

My central thesis is that the construction of Israeli personal jurisdiction doctrine is characterized by three different stages. The first one runs from 1967 until the early 1980s, a stage at which personal jurisdiction doctrine expanded. In this period, the Palestinian Territories of the West Bank and 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, a period in which personal jurisdiction doctrine became more instrumental. With the establishment of a relatively firm grip of personal jurisdiction doctrine towards the

10 This is not to suggest that such was the only issue of conflict of laws related to the 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 deal with PT related actions filed by Palestinian plaintiffs; see CA 1432/02 Yanon v. Qara’an [2004] IsrSC 59(1) 345 (choice of law in torts); HCJ 5666/03 Amutat Kav la-Oved v. National Labor Court in Jerusalem (IsrSC, Oct. 10, 2007, not yet reported) (choice of law in contracts).
Palestinian Territories, courts in Israel began to employ discretionary jurisdictional tools, principally the *forum non conveniens* doctrine, in order to filter in only those cases that had a substantial tie with 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 creation of the Palestinian Authority (PA) and the creation of the West Bank and Gaza Strip as entities over which the PA has effective territorial jurisdiction made it necessary for 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, it came about that the rules governing personal jurisdiction of Israeli courts in respect of civil actions related to the Palestinian Territories 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 towards the Palestinian Territories of the West Bank and 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 Gaza Strip over the years, together with the need of courts to reach conclusive results in the cases brought before them, made it necessary to be creative in the work of adjusting the existing rules of personal jurisdiction to apply to PT-related civil actions. This article will illuminate these creative jurisdictional maneuvers and afford a theoretical appraisal of their significance.

The second attribute of the development is the connection between these stages and basic policies of the State of Israel towards 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 litigation fairness.\(^{11}\) 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 of facilitating the laying out of this doctrinal evolution of Israel’s personal jurisdiction doctrine, I found it proper to first begin by briefly giving two necessary background abridgements: 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. Chapter III discusses the evolution of Israeli personal jurisdiction doctrine in what was called the “first stage” of development running from 1967 until the early 1980s. Chapter IV discusses this evolution in the “second stage” running from the early 1980s until the mid 1990s, and Chapter V deals

with the implications of the Oslo Peace Accords on the Israeli personal jurisdiction doctrine. Besides the analysis offered in these chapters on the characteristics of each stage of development, the chapters include a 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 that compose 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 country 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),\(^{15}\) 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. Most relevant to our discussion is Article 46 of the POC, under which local courts are to have recourse to “the common law and the doctrines of equity in force in England” whenever there no applicable law on the issue could be found in local law, and “insofar as the circumstances in Palestine permitted.”

In 1938, still during the British Mandate, a whole new set of procedural rules was

\(^{12}\) Stephen Goldstein & Elisheva HaCohen, Civil Procedure: Israel 67 (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).


\(^{15}\) 3 THE LAWS OF PALESTINE 2569 (Robert Harry Drayton ed. 1934).
enacted\textsuperscript{16} that has 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.\textsuperscript{17} 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 – brought the major attributes of English common law doctrine of personal jurisdiction to be incorporated in local doctrine.

The establishment of the State of Israel in 1948 did not change much in the legal dependence on English private international law, the termination of the British Mandate notwithstanding. One of the first legal enactments of the state was that the body of law existing in the country on the eve of its establishment is to continue to be in effect. What this meant was the continued presence of Article 46 of the 1922 (British) Palestine Order of Council and the continued importation of English common law doctrines into the local law of conflicts.\textsuperscript{18} Only in 1980 did Israel rescind Article 46, making such principles as analogy, freedom, justice, equity and Israel’s heritage as the sources a court is to look into when faced with a legal lacuna.\textsuperscript{19} However, as this law specifically provides, this development shall have no effect on the status of the legal norms incorporated in the past.\textsuperscript{20}

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


\textsuperscript{17} Stephen Goldstein, \textit{Civil Procedure}, in \textsc{Introduction to the Law of Israel} 295, 296, 309 (Amos Shapira & Keren C. DeWitt-Arar eds., 1995)

\textsuperscript{18} Uri Yadin, \textit{Reception and Rejection of English Law in Israel}, 11 \textsc{Int'l & Comp. L. Q.} 59 (1962)

\textsuperscript{19} The Foundation of Law Act, 5740-1980, 34 LSI 181 (1980).

\textsuperscript{20} Section 2(b).
inquire into the amount of physical power the court had over the defendant’s person.\textsuperscript{21}

This in turn made it necessary to make a basic distinction between a defendant present within the territorial jurisdiction of Israel courts and a defendant absent therefrom.\textsuperscript{22}

In respect of a present defendant personal jurisdiction is recognized as being effectuated upon service of court documents initiating the proceedings on the defendant’s person.\textsuperscript{23} Moreover, in conformity with the development of English common law such service was taken to be effective also when made to someone other than the defendant who at the time of service happened to have had some form of association with the defendant. 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 in establishing personal jurisdiction against the defendant, notwithstanding the fact that the defendant, at the time of service, was absent from the territorial jurisdiction of Israeli courts.\textsuperscript{24}

Another significant importation from English common law, in respect of 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 is a matter of “right”. The principal consequence of this proposition concerned the latitude of discrentional power courts permitted themselves to have when asked to decline to exercise what is conceived to be 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 will the court decline jurisdictional authority.

\textsuperscript{21} The widely quoted observation in this respect is that of US Supreme Court Justice Oliver Wendel Holmes, Jr., that “[t]he foundation of jurisdiction is physical power…” McDonald v. Mabee, 243 US 90, 91 (1917).

\textsuperscript{22} For a helpful summary of the English law position in cases not governed by the EC Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, 1968 (the Brussels Convention), see J.G. COLLIER, CONFLICT OF LAWS 71-83 (3d ed., 2001).

\textsuperscript{23} GOLDSTEIN & HACOHEN, supra note 12, at 67.

\textsuperscript{24} Id. at 68.
Personal jurisdiction against a defendant absent from the territorial jurisdiction of Israeli courts was recognized only when it was possible to grant a leave for service of process outside of the jurisdiction. This procedure is contained today in RCP, Rule 500. However, in spite of the explicit authority of courts to grant leave for service outside of the jurisdiction under the aforementioned Rule 500, such a jurisdictional capacity was from the start regarded of an “assumed” nature. For the plaintiff to receive leave under Rule 500 entailed fulfilling a whole list of cumulative conditions, without which leave would be denied. 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; second, bringing prima facie evidence establishing the case against the absent defendant; third, showing that the Israeli forum is the *forum conveniens*; fourth, showing that the application for leave was filed in due time after initiating legal proceedings; and fifth, establishing that the plaintiff acted in good faith, disclosing all relevant facts. Israeli courts have also stated that any doubt the court is left with at the end of the process of leave of service outside the jurisdiction, is to work to the advantage of the defendant. The assumption of Israeli courts seems to be that personal jurisdiction sought against an absent defendant is tentative at best, given that such service infringes upon the sovereignty of the country in which the defendant happens to be when time service is effectuated. This conception, in turn, is embodied in the territorial notion of jurisdiction, that is, that each sovereign state has exclusive jurisdictional authority

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25 *Id.* at 69
30 *Id.*
over the persons present within its territory.\textsuperscript{33} Therefore, to demand that a defendant in one state come to litigate an action in another state is taken to be 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.\textsuperscript{34}

Given the wide influence 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 Israeli law developed these notions in the context of PT-related civil litigation.

\textbf{B. The Legal Status of the West Bank and Gaza Strip}

In the wake of the 1967 Six-Day War, the territories of the West Bank and Gaza Strip, as well as the Golan Heights and the Sinai Peninsula, were placed under the administration of a military government.\textsuperscript{35} This body was run by the Israel Defense Forces (IDF), and its primary function was to ensure effective control over these territories.\textsuperscript{36} Proclamation No. 1 of the military government stated that the IDF has now “assumed responsibility for security and maintenance of public order.”\textsuperscript{37} 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,

\begin{thebibliography}{9}
\bibitem{note13} Id. at 34-5 (discussion of Article 38 of the Palestine Order in Council, 1922).
\bibitem{note14} For a recent assertion of the principle see CA 9725/04 Ashbouran Hevra le-Sokhnuyot u-Miskhar, Ltd. v. CAE Electronics Ltd. (IsrSc, Sept. 4, 2007, not yet reported). \textit{But see} GOLSTEIN \& HACOHEN, \textit{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).
\bibitem{note15} See Roberts, \textit{supra} note 5, at 58-9.
\end{thebibliography}
at the time the Military Advocate General (1961-1968), generally credited with creating the legal framework of the military government,\(^{38}\) and President of the Israel Supreme Court (1983-1995), was present with the forces during the war. He deployed Military Advocate units to follow the occupying forces in the Six-Day War itself and instructed these forces to act according to a preconceived manual of operation.\(^{39}\) The very same day military government in the West Bank was established, Proclamation No. 2 was also published, stating two additional constitutive norms.\(^{40}\) First, 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.”\(^{41}\) Second, that “all powers of government, legislation, appointment and administration in relation to the Region or its inhabitants shall henceforth vest” in the Military Commander.\(^{42}\)

One of the fundamental legal controversies that ensued after Israel took control of the PT was the question whether under applicable norms of international law, mainly The Hague Regulations\(^{43}\) and the Fourth Geneva Convention,\(^{44}\) the West Bank and Gaza Strip are to be classified as “occupied territories”.\(^{45}\) Israel contended that these territories are 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.\(^{46}\) On the other hand, international organizations, among

\(^{38}\) He was to continue to occupy judicial roles, first as Attorney General (1968-1975), then as a Justice of the Supreme Court (from 1975) and as President of the Supreme Court (1983-1995).

\(^{39}\) Shamgar, \textit{supra} note 37, at 24-5, 25 n. 27.

\(^{40}\) \textit{Id.} at 52.

\(^{41}\) \textit{Id.}

\(^{42}\) \textit{Id.} at 52-53.

\(^{43}\) Regulations Concerning the Laws and Customs of War on Land, annexed to Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 1Bevans 631 [hereinafter Hague Regulations].


\(^{46}\) Shamgar, \textit{supra} note 37, at 31-43. \textit{See also} Blum, \textit{supra} note 5.
them the International Commission of the Red Cross, argued to the contrary. As noted recently, the “Israeli position has been… widely rejected even within Israel itself.” 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 Convention. 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 the sovereign powers that existed before Israel took control were now suspended. The orders of the belligerent power, i.e., the orders and commands of the IDF, were to be considered supreme during the period of military administration.

However, the status of one part of the West Bank dramatically changed vis-à-vis the other Palestinian Territories, that part being East Jerusalem. Within days after the end of the Six-Day War the government of Israel decided to annex this part of the city to the State of Israel. In spite of the fact that this annexation was seen as controversial, Israeli courts accepted its validity, henceforth considering East Jerusalem part of the sovereign territory of the State of Israel governed by Israeli law

47 For a discussion of various positions, see Malanczuk, supra note 4, at 1495-6.
52 This was made possible after the Knesset (the Israeli parliament), at the government’s insistence, enacted an amendment to the Law and Administration Ordinance, 1 LSI 7 (1948), under which it was 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. For the text of the Amendment, see 21 LSI 75 (1966-67). Subsequently the government issued a decree applying the Israeli law, jurisdiction and administration in East Jerusalem. See KRETZMER, supra note 2, at 6. To legally bind Israel’s attachment to a united Jerusalem, the Knesset enacted in 1980 the Basic Law: Jerusalem, Capital of Israel, 34 LSI 209 (1979-80).
53 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).
– a status identical to that of any other territory inside the so-called Green Line,\textsuperscript{54} that is, 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.\textsuperscript{55} 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 appeal.\textsuperscript{56} Thus soon after the 1967 War the PT emerged as a quasi-separate territorial legal entity,\textsuperscript{57} albeit under the direct control of an Israeli organ, the IDF.

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 being determined by “events and steps taken by those entrusted with the day-to-day administration of the Occupied Territories.”\textsuperscript{58} However, in the first decade of Israeli occupation of the West Bank and 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 that of 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

\textsuperscript{54} See CA 434/79 Graetz v. Dajani, [1981] IsrSC 35(2) 350, 353-4. Though in terms of governing law, rights vested in parties according to the pre-existing legal system were to be recognized under Israeli law. \textit{Id.}

\textsuperscript{55} Shamgar, \textit{supra} note 37, at 54.

\textsuperscript{56} \textit{Id.} at 55-56. Shamgar notes that he himself, as Military Advocate General, made a personal appeal already in June of 1967 to judges in the PT to continue serving in their posts “for the common good of the inhabitants.” He says this appeal was successful mostly in the Gaza Strip, but in the West Bank part of the judges and attorneys “went on strike in protest of the new reality.” \textit{Id.} at 46 n. 60.

\textsuperscript{57} Celia Wasserstein Fassberg, \textit{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.”)

\textsuperscript{58} KRETZMER, \textit{supra} note 2, at 7.
modest proportions, having as its proclaimed objective the establishments of settlements in strategic areas in order to enhance Israel’s security interests.\textsuperscript{59}

A major shift in the Israeli policy came about in 1977, when the Likud Party, lead by Menachem Begin, came to power.\textsuperscript{60} 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.\textsuperscript{61} Ideologically it saw the West Bank and the Gaza Strip as part of “Greater Israel” into which pre–1967 Israel could expand, and politically harnessed the Zionist settlement project\textsuperscript{62} to advance settlement building beyond the Green Line and to encourage Israeli civilians to move to these settlements, as a fulfillment of Zionist ideology.\textsuperscript{63} Settlement in the PT grew dramatically. In 1973 there were only 17 settlements in the PT with a total population of 1,514 Israeli Jewish civilians, in 1993 there were 120,000 Israeli settlers in the West Bank (excluding East Jerusalem) living in 150 settlements.\textsuperscript{64} According to Raja Shehadeh, a prominent Palestinian lawyer who has closely monitored Israeli legal measures in the West Bank, a 6 per cent minority of Israeli settlers on the West Bank have taken over more than 60 per cent of the land.\textsuperscript{65}

In terms of their legal identity, the settlements were excluded from the rest of the territories,\textsuperscript{66} and today are generally considered to be “Israeli enclaves” for choice

\textsuperscript{59} RAJA SHEHADEH, FROM OCCUPATION TO INTERIM ACCORDS: ISRAEL AND THE PALESTINIAN TERRITORIES 3 (1997).
\textsuperscript{62} See W. THOMAS MALLISON AND SALLY V. MALLISON, THE PALESTINIAN PROBLEM IN INTERNATIONAL LAW AND WORLD ORDER 244-52 (1986).
\textsuperscript{63} SHEHADEH, supra note 59, 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).
\textsuperscript{64} SHEHADEH, supra note 59, at 5
of law purposes.\textsuperscript{67} This was facilitated by piecemeal military orders, under which the law of the State of Israel either applied in respect of 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,\textsuperscript{68} while the status of the vast majority of civilians in the PT remained as it was before the Occupation. The major difference between Israeli settlements in the PT and Israeli territory proper was that the latter was directly governed by Israeli law whereas the first came to be (largely) governed by the same Israeli law through the intermediary of military orders issued by the IDF.

The 1978 Camp David Agreements signed by Israel and Egypt tried to establish a path for the solution of the Israeli-Palestinian conflict.\textsuperscript{69} The Agreements contained extensive provisions for a self-governing authority in the West Bank and Gaza.\textsuperscript{70} This was to be realized by the grant of “full autonomy to the inhabitants” and the free election of a “self-governing authority.”\textsuperscript{71} The Agreements also provided for the withdrawal of Israeli military government and civil administration.\textsuperscript{72} 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

\textsuperscript{67} Amutat Kav la-Oved, IstrSC.
\textsuperscript{68} BENVENISTI, supra note 66, at 3
\textsuperscript{70} Roberts, supra note 5, at 59.
\textsuperscript{72} Antonio Cassese, The Israel-PLO Agreement and Self-Determination, 4 EUR. J. INT’L L. 564, 570 (1993)
criticized by Palestinians inside and outside the PT.\textsuperscript{73} In addition, a number of key provisions of the Agreements turned out to be extremely vague to the understanding of Israeli and Egyptian officials alike. For example, while the proposition “full autonomy for the inhabitants” was interpreted by Israel as meaning “personal autonomy”, Egypt took this proposition to mean “territorial autonomy” in the West Bank, Gaza Strip and even East Jerusalem.\textsuperscript{74} These and other major differences 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.”\textsuperscript{75}

The major modification that actually came out of the Camp David peace process in respect of the PT was the reorganization of the military government there, namely the creation of a more substantial bureaucratic body of civil administration.\textsuperscript{76} It was proclaimed that this civil administration “would gradually be taken over by civilians …[and] that local Palestinians would assume the administrative tasks, including senior positions.”\textsuperscript{77} However, this did not mean that the civil administration is to become independent of the military government. On the contrary, the military orders were drawn out so that the civil administration is to remain under the ultimate control of the military government.\textsuperscript{78} 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 looming about the scheme being “an

\textsuperscript{73} Roberts, supra note 5, at 59.
\textsuperscript{74} Gabay, supra note 71, at 256.
\textsuperscript{75} Cassese, supra note 72, at 570.
\textsuperscript{76} See Joel Singer, The Establishment of a Civil Administration in the Areas Administered by Israel, 12 ISR. Y.B. HUM. RTS. 259 (1982).
\textsuperscript{77} Id. at 278.
\textsuperscript{78} Id. at 280.
introductory step to Israeli annexation” or at best “a perpetuation of the existing occupation.”  

Israeli-Palestinian relations entered into a new phase with the outburst of the Palestinian uprising in December of 1987, commonly known today as the First Intifadah.  

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 in leading to the Madrid Summit in 1991, and then in the secret negotiations that took place in Oslo, Norway, where ultimately the Oslo Peace Accords were signed between Israel and the Palestine Liberation Organization (PLO). These accords brought both parties to recognize each other and led to the establishment of a semi-sovereign entity, the Palestinian Authority, 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. In addition, in 2005 Israel has unilaterally disengaged from the Gaza Strip, effectively bringing the Gaza Strip under total

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79 Id., at 259.
82 Although the Israeli-Egyptian 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 will first enter into interim agreements and after some time 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 reach peace between Israel and the Palestinians. Indeed the Oslo Peace Accords adopted this phased peace process as its strategy. See Shehadeh, supra note 59, 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 will only be over persons, and that this will also be the permanent solution. Gabay, supra note 71, at 258.
control of the PA. However, as intra-Palestinian clashes erupted between the two main parties, Hamas and Fatah, the government in the Gaza Strip is now in the hands of Hamas and separated from the West Bank dominated by the Fatah.

Major transformations in the status of the Palestinian Territories have evidently taken place since the Six-Day War of 1967 until present day, and if the past is any measure, much will yet occur until a peace settlement is reached between the Israelis and the Palestinians. However, to sum up the major developments of the relations between Israel and the PT so far, we perceive how the PT has moved from total territorial control by Israel to becoming a territorial entity of its own, though 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 towards the PT, Israeli courts were attuned to these developments. Nor could it 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 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.

84 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).
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 section, the official policy of the State of Israel with regard to the Palestinian Territories in the first decade or so after the 1967 Six-Day War was to establish full territorial and governmental control over them. In addition, the Palestinian Territories were not regarded as “regular” occupied territories, subject to the norms of international law, but as territories administered by the State of Israel for the time being, awaiting the determination of their permanent status in a future peace settlement. A logical consequence of such premises for the field of personal jurisdiction of Israeli courts over defendants present in the PT would be to regard the PT as part of Israel for jurisdiction purposes. If territorial notions of personal jurisdiction are primarily concerned with physical power over the defendant’s person and the need of avoiding undue infringement on the sovereignty of a foreign state, then why should a defendant present in the PT be considered any different from the one present inside Israel? Through the IDF, Israel has 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 can 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, some three months after the war, was just the opposite. The case of Sandoka v. Sandoka dealt with an alimony and maintenance action filed by a Gaza wife and her children against the husband and father, also a resident of Gaza. The case was filed before the Israeli court soon after the Six-Day War.

85 See also JOHN QUIGLEY, THE CASE FOR PALESTINE: AN INTERNATIONAL LAW PERSPECTIVE 174-5 (revised and updated edition, 2005); TESSLER, supra note60, at 466.
86 See Cohn, supra note 49.
War ended when the wife together with 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 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, it was 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.”

Since Israeli sovereignty, as the 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 the state’s jurisdiction. This case was recognized by one Israeli scholar as drawing a strict border between Israel and the West Bank and Gaza Strip, in spite of Israel’s military control.

But the Israeli Ministry of Justice acted fast, issuing a special set of rules for the service of process in all the territories occupied by Israel during the Six-Day War, including the PT, the Rules of Procedure (Service of Documents in the Administered Territories), 1969, (SDAT, 1969). Three important provisions were made in these rules. The first pertains to the definition of “Region” (ezor), defined in Rule 1 as being “each of the territories held by the Israel Defense Forces”. The second and most important provision is contained in Rule 2(a) under which service of any official

88 Id. at 357.
89 Id. at 357-9.
91 KT 2482, 458. 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 66, at 25.
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. These later rules, as shown earlier, provide for service on any present defendant without the need of any form of leave. The third provision worthy of notice is the coda added in Rule 2(b), providing that all documents served in accordance with Rule 2(a) must be accompanied with an Arabic translation of all documents.

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 will be “administered”.92 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 entail 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.93 The proceedings dealt with an action filed by a Dutch company against a Gaza defendant before the District Court of Jerusalem. The cause of action had to do with 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 4% then the Dutch importer would be entitled to sell the oranges and claim the loss from the Gaza exporter. Eventually, this turned out to be the case, bringing the Dutch company to initiate a monetary claim against the Gaza

92 See supra, 1.
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. More so, in serving the Gaza defendant with the process, the Dutch plaintiff served the defendant directly without obtaining a 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 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. Though he recognized the basic legal principal that service of process outside the jurisdiction usually necessitates the leave of court, no such leave is required when service is effectuated in the PT. In light of SDAT, 1969 Justice Sussmann went on to proclaim, service can be made directly to a defendant that happens to be present in the PT, since the ordinary rule of service to a defendant present in Israel has been extended to these Regions. As to the annexation argument, the judgment made clear that all the court was concerned with was the extent of personal jurisdiction authority over a defendant that happens to be present in what was defined to be the “Region”, and nothing more.\(^{94}\)

The *Al-Khir* decision was severely criticized in a note published soon after it was rendered.\(^{95}\) The essential point pressed in the note was that the Court in *Al-Khir* strayed from the guiding principles of personal jurisdiction doctrine in respect of foreign defendants previously established in Israeli Supreme Court judgments. These judgments were heavily influenced by English law, and stipulate that when personal jurisdiction is assessed against an absent defendant, the assessment is to be cautious and guarantee the existence of a sufficient nexus (one that is explicitly specified in the

\(^{94}\) Id. at 15.

\(^{95}\) Baruch Bracha, *Hamtsa’at Mismakhim la-Shtakhim ha-Mukhzakim*, [Service of Documents to the Held Territories], 4 MISHPATIM 119 (1972) (in Hebrew).
rules for service outside the jurisdiction) before personal jurisdiction is established. 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 them into consideration. Indeed, the end result of the *Al-Khir* decision is viewing a defendant present in the PT as if present in Israel.\(^96\) The note suggested that the SDAT 1969 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.\(^97\)

The Israeli Supreme Court was not swayed by this criticism. A short time after rendering its judgment in *Al-Khir*, it rendered another decision 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 the jurisdiction. This took place in the case of *Shourafa v. Wechsler*,\(^98\) in which an Israeli resident brought summary proceedings in Israel against a resident of Gaza to collect a dishonored cheque. The court concluded that the proceedings should be dismissed for both the defective nature of articulating the cause of action by the plaintiff and for the fact that the court seized with the proceedings lacked proper venue (local jurisdiction).\(^99\) Nonetheless, the Court added that in light of *Al-Khir*, there was no lack of personal jurisdiction, given that the defendant was properly served under SDAT, 1969. As to the doctrinal reason why no leave for service outside the jurisdiction is required when SDAT, 1969 rules are applicable, the Court explained this as “simple”. According to the Court, leave for service outside the jurisdiction is required because of the potential infringement on the

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\(^96\) Goldstein & HaCohen, supra note 12, at 67 (“It should be noted that due to special regulations in this regard [supposedly referring to SDAT, 1969], for purposes of service of process the territorial limits of Israel include the territories administered by Israel since the 1967 Six Day War.”)

\(^97\) Bracha, supra note 95, at 126, 129; see also Benvenisti, supra note 66, at 24, 67, n. 134.

\(^98\) CA 211/73, [1974] IsrSC 28(1) 512.

\(^99\) Id. at 515-8.
sovereign powers of the foreign state in which the defendant is present when he or she are brought under the personal jurisdiction authority of local courts by virtue of being served with the opening summons. But given the current status of the “Administered Territories”, the court explained, all sovereign powers that existed over them are suspended under international law. 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. 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 a leave for service outside the jurisdiction.\textsuperscript{100}

In spite of its marginal effect on the outcome of the case at hand, this rationale had a profound doctrinal influence on affirming the personal jurisdiction grip of Israeli courts over defendants present in the PT.\textsuperscript{101} The far-reaching significance of this process came to light a few years later in a groundbreaking judgment concerning the jurisdictional capacity of Israeli courts to issue interim injunctions in respect of property located in the PT. The relevant case is that of \textit{Bank Leumi le-Yisrael Ltd. v. Hirschberg}.\textsuperscript{102} 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 operates 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 the Israeli court. According to the RCP, such attachment orders can be issued as part of the enforcement of a monetary judgment. The Israel Supreme Court

\textsuperscript{100} \textit{Id.} at 517.
\textsuperscript{102} CA 179/77, [1978] IsrSC 32(1) 617.
affirmed the grant of this attachment order, although acknowledging the well-established international law principle under which one sovereign state cannot undertake enforcement actions in the territory of another sovereign state without the express consent of the latter.\textsuperscript{103} 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 over the undermining of established norms of international law.\textsuperscript{104}

However, the doctrinal innovation of the \textit{Al-Khir} decision was not enough in order to achieve the jurisdictional expansion it sought, for there was still another hurdle to overcome.

\textbf{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 has it, proper “local jurisdiction”,\textsuperscript{105} even when the court is otherwise competent to deal with the action.\textsuperscript{106} This requirement effectively prevented Israeli courts from entertaining most PT-related actions. For unlike the doctrine developed in \textit{Al-Khir}, local jurisdiction under Israeli rules of civil procedure requires that the judicial district seized with the action have a nexus with the action to be able to adjudicate the case. So although an Israeli court

\textsuperscript{103} On this principle see generally \textsc{Ian Brownlie}, \textsc{Principles of Public International Law} 306-8 (6th ed., 2003).

\textsuperscript{104} \textit{Hirschberg}, IsrSC 32(1) at 620-1.

\textsuperscript{105} Though, at times, the term “territorial jurisdiction” is used. See \textsc{Goldstein & Hacohen}, \textit{supra} note 12, at 6.

may have personal jurisdiction over a defendant resident in the PT, it would 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 Magistrates’ Courts.\textsuperscript{107} 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, 1984 (and the Rules preceding them) provide a detailed set of provisions for litigants for choosing between the courts of the different venue districts.\textsuperscript{108} In general, 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 forum of a certain district (in which case the stipulation overrides 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 concerning which the action is brought, or the place of the act or omission concerning which the action is brought. 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 is dismissed. This happened in \textit{Shourafa v. Wechsler}, where dismissal was based on the finding that the Jerusalem district did not have any nexuses for adjudicating the case as far as local jurisdiction was concerned.\textsuperscript{109}

\begin{footnotesize}
\begin{enumerate}
\item[\textsuperscript{107}] \textsc{Goldstein & HaCohen}, supra note 12, at 61.
\item[\textsuperscript{108}] \textit{Id.} at 62-63.
\item[\textsuperscript{109}] The Supreme Court’s ruling in \textit{Shourafa v. Wechsler} was preceded by a district court decision in Summons (Jer) 1149/68 Hamdan v. Shaheen, [1968] 64 IsrDC 91, where it was also found that the seized court lacked local jurisdiction authority, notwithstanding that the defendant, a resident of Bethlehem, was properly served with the opening summons. Interestingly, it seems that the court first
\end{enumerate}
\end{footnotesize}
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 state 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. In a special military order issued in 1968 it was provided that Israeli citizens injured in motor vehicle accidents in the West Bank could bring their claims before an Israeli court in which the Israeli insurance agency overseeing the activities of local West Bank insurance companies has its principal place of business. But this order was found to be invalid by the District Court of Haifa. 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 could not prescribe for such courts when and under what circumstance they can have local jurisdiction. The real change was to take place only after the Israeli Supreme Court decided to voice its dissatisfaction with the lack of coordination between the rules of personal jurisdiction and those of local jurisdiction. This took place in Mantsura v. Cohen. 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, in which the plaintiff claimed compensation for an alleged tort that was also committed in Kiryat Arba. The District Court of Jerusalem dismissed the action after finding that it lacked local jurisdiction. The Supreme Court affirmed the decision, clarifying once again that

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seized with the action 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 (sue sponte), and the defendant, once failing to raise an objection to the court’s supposed local jurisdiction authority early in the proceedings, is deemed to have waived any argument on the issue. See GOLDSTEIN & HA COHEN, supra note 12, at 64.

110 Summons (Hi) 3650/74 Amr v. Mana’a, [1975] 5736(1) IsrDC 156.
111 CA 301/77, [1978] IsrSC 32(3) 405.
while service of process establishes personal jurisdiction when served on the defendant present in the PT, it does not necessarily establish local jurisdiction. Justice Sussmann, President of the Supreme Court, ends 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 in respect of Jewish settlements in the Administered Territories, but it is for the legislature to provide a solution.”

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. With this amendment the courts of Israel effectively consolidated their jurisdictional authority over defendants present in the PT. 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 literature. This time, however, it was a sitting judge that cautioned against the combined effect of Al-Khir and the venue amendment: Judge Eli Nathan of the District Court of Jerusalem. It is also worth noting that before his appointment to the bench, Judge Nathan was a senior

112 Id. at 407.
113 At present, the relevant provision is contained in Rule 6 of CPR, which reads as follows: “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.”
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 is that the extension of personal jurisdiction authority of Israeli courts over residents of the PT is essentially a breach of international law. Nathan’s basic normative assumption is that the actions of the State of Israel in the PT are governed by the international law of belligerent occupation.115 This body of law includes the relevant provisions of The Hague Regulations as well as Articles 64-66 of the Fourth Geneva Convention.116 These norms prohibit the belligerent occupant from extending its sovereign powers over the administered territories or over its inhabitants.117 Nathan concludes 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, runs against international law.118

Nathan’s argument is a novel one 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.119 In essence a state is free to allocate to its courts the volume and type of personal jurisdiction capacity it sees proper.120 If states nevertheless work to restrict personal jurisdiction allocated to their courts they do so

115 Id. at 102
116 Id.
117 Id. at 107.
118 Id. at 115.
119 Some authorities have provided that a state derives its jurisdictional authority in all spheres of law from the norms of international law. See J.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, 111 RECUEIL DES COURS 1, 10-11 (1964-I) (“The existence of the State’s right to exercise jurisdiction is exclusively determined by public international law”); F.A. Mann, The Doctrine of Jurisdiction in International Law Revisited After Twenty Years, 186 RECUEIL DES COURS 1 (1984-III).
out of local concerns, some of which may of course take into consideration issues of foreign relation.\textsuperscript{121} Nathan manages to establish that international law does impose limitations on personal jurisdiction in respect of the population of an occupied territory when such jurisdictional powers are allocated to the courts of a belligerent occupant. 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.\textsuperscript{122} Nathan’s thesis detaches the issue of personal jurisdiction of Israeli courts in respect to the PT 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.\textsuperscript{123}

In practice, this argumentation, even when combined with the criticism mounted in respect of the \textit{Al-Khir} decision, did not suffice to bring a change in the basic rules governing the personal adjudicative authority of Israeli courts over residents of the PT. \textit{Al-Khir} proved to be effective in guiding Israeli courts to establish their personal jurisdiction authority over PT-present defendants.\textsuperscript{124} In fact, when Judge Nathan himself presided over a case in the District Court of Jerusalem, he abided by the \textit{Al-Khir} precedent without questioning either its validity or its wisdom.\textsuperscript{125} 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

\textsuperscript{122} Nathan, \textit{supra} note 114, at 111
\textsuperscript{123} \textit{Id.} at 111, 115
\textsuperscript{125} Originating Summons (Jer) 748/82 Jabbour v. Hanitan, [1982] IsrDC 5743(1) 499.
occupant itself.\footnote{126}{BENVENISTI, supra note 66, at 25.} What has evolved under this guiding premise, as Eyal Benvenisti shrewdly puts it, is the axiom that the state is permitted to do what its army cannot.\footnote{127}{Id. at 26.}

C. Evaluation of Stage I

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

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 end result of the Al-Khir decision was to “simply wipe out, for purposes of personal jurisdiction, the pre-1967 [Israeli] borders.”\footnote{128}{Id. at 24. Already in the Al-Khir proceedings themselves it was argued permitting direct service of process on the defendant, without the need to secure the leave of the court beforehand in accordance with the ordinary rules governing service outside the jurisdiction, then for all intents and purposes Israel is to be regarded as having annexed the PT.} Indeed, in terms of the transient rule of personal jurisdiction, especially after the 1979 amendment of the rules on venue, this assessment is accurate.\footnote{129}{See GOLDSTEIN & HACOHEN, supra note 12, at 67.} 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 is asked to establish personal jurisdiction against a defendant that is not present in Israel or in the PT, and that 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, 1984. As mentioned earlier, this procedure conditions the grant of leave for service outside the jurisdiction upon establishing the existence of a nexus from a list stipulated in RCP, 1984, Rule 500, such as the fact that the defendant happens to have his 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 all and any connections to the PT. The *Al-Khir* decision brought with it a substantial expansion of Israeli personal jurisdiction in respect of the PT, but only in circumstances when service of process is sought in the PT. When the defendant happens to be absent from the PT and the plaintiff seeks to obtain leave for service outside the jurisdiction, a nexus with the PT is 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.

**Observation 2: Presence or service, which comes first?**

In assessing the meaning and significance of *Al-Khir*, one point seems to have escaped the scrutiny of both the courts and the scholars who have discussed the decision. This has to do with the functional relationship between the power to serve process on the defendant and the assessment whether personal jurisdiction exists. The *Al-Khir* analysis pre-supposes the existence of a legal axiom according to which if procedural power to serve the defendant with process is said to exist, then, upon

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130 However, the plaintiff might not need to take this route for acquiring personal jurisdiction against the absent defendant if service can be made on another person present in Israel or the PT who is related to, or operates on behalf of, the defendant when direct service was made to the latter. Such circumstances are detailed in a special section of the RCP, and if established will also be applicable to representatives of the defendant that are present either in Israel or the PT.
service, personal jurisdiction is established. But in looking into 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 happens to be present in the sovereign territory of said state, and does not exist if the defendant happens to be absent from this territory.\(^\text{131}\) Only after undertaking this initial inquiry can courts know whether the defendant can be served with process or not.\(^\text{132}\) 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 under territorial jurisdiction. The mode of service was simply the corollary of this inquiry. Indeed, in light of the fact that personal jurisdiction, to be acquired, demanded actual service on the defendant, and such service was pre-conditioned by different requirements depending on the whereabouts of the defendant, one could reasonably be led to the impression that

\(^\text{131}\) See Collier, supra note 22, at 71. The United States Supreme Court made this very clear in its landmark decision on personal jurisdiction in Pennoyer v. Neff, 95 U.S. 714 (1878). Discussing the boundaries of states’ personal jurisdiction, the Court observed:

“The several States of the Union are not, it is true, in every respect independent, many of the rights and powers which originally belonged to them now vested in the government created by the Constitution. But, except as restrained and limited by that instrument, they possess and exercise the authority of independent States, and the principles of public law to which we have referred are applicable to them. One of the principles is, that every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory. As a consequence, every State has the power to determine for itself the civil status and capacities of its inhabitants… The other principles of public law referred to follow from the one mentioned; that is, that no State can exercise direct jurisdiction and authority over persons or property without its territory. The several States are of equal dignity and authority, and the independence of one implies the exclusion of power from all others. And so it is laid down by jurists, as an elementary principle, that the laws of one State have no operation outside of its territory, except so far as is followed by comity; and that no tribunal established by it can extend its process beyond that territory so as to subject either persons or property to its decisions.” (Id. at 722)

This same notion of presence in the sovereign territory of the forum state as the initial qualifying factor for deciding jurisdiction is also characteristic of the English doctrine. Presence within the forum state under the English view was taken to mean allegiance to the forum state and thus made the defendant amenable to the process of the forum state. See Zelman Cowen, Transient Jurisdiction: A British View, 9 J. Pub. L. 303 (1960).\(^\text{132}\) The Australian High Court highlighted this point in its decision Laurie v. Carroll, (1958) 98 C.L.R. 310, 322-3:

“The defendant must be amenable or answerable to the command of the writ. His amenability depended and still depends upon nothing but presence within the jurisdiction.”
personal jurisdiction depended on whether there exists a mode for service of process. This, however, is only the impression – but 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. It 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 the court drew in *Al-Khir* between service of 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.133

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

The remark ending the Supreme Court’s judgment in *Mantsura v. Cohen* 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,134 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 as serving Israeli plaintiffs.135 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 with proper nexus. And as subsequent developments amply showed,

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134 See supra, note 112.
Palestinian plaintiffs would take advantage of this amendment as much as Israeli settler plaintiffs, even when their adversaries were other Palestinian litigants. So in practice the 1979 amendment did not realize merely what Sussmann’s remark in *Mantsura v. Cohen* 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 Convniens Doctrine**

**A. General**

From the early 1980s and onwards, a growing number of civil actions originating in the PT found their way into Israeli courts. As was demonstrated in the preceding section, the flow of cases was facilitated, from the jurisdictional point of view, by the combined effects of the SDAT, 1969 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 establishes local jurisdiction in Jerusalem courts if and when such jurisdiction is lacking in any other local jurisdiction district in Israel. Interestingly, a large portion of this 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, a steadily-increasing population at the same period. It is easy to see why the

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136 See infra, Part IV.
latter group of litigants should seek adjudication in Israeli courts. Like settlers in other countries, both ideologically and practically Israeli settlers in the PT wanted to maintain their ties to Israeli civil institutions in spite of their physical re-location to the PT.\(^{137}\) 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: “[t]he judiciary is the only national institution that continues to function in the occupied territories.”\(^{138}\) 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 towards government officials),\(^{139}\) and were charged with corruption.\(^{140}\) They operated under very poor conditions,\(^{141}\) being understaffed,\(^{142}\) poorly equipped,\(^{143}\) and operated by judges whose judicial pronouncements were less than inspiring.\(^{144}\) It is no wonder, therefore, that plaintiffs strove to have their claims litigated before Israeli civil courts, which have traditionally enjoyed a reputation of

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\(^{139}\) Id. at 36.


\(^{141}\) See BENVENISTI, supra note 66, at 23, 28.

\(^{142}\) SHEHADH & KUTTAB, supra note 138, at 37 (noting the problem of having to suspend proceedings because of the unavailability of a clerk to take record).

\(^{143}\) Id. at 38 (noting the unavailability of even a coin-operated photocopier making it necessary for “an 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 bus clerks at the court to accompany him to a commercial photocopying center.”)

\(^{144}\) Id. at 43, 44.
being relatively efficient (though less so in recent years), well equipped and clean of corruption.\textsuperscript{145}

The second factor 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,\textsuperscript{146} and recourse to the Court of Cassation in Amman from West Bank courts was abolished.\textsuperscript{147} Of the 39 judges employed by Jordan prior to 1967, only eight continued their judicial functions.\textsuperscript{148} 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.\textsuperscript{149} According to the prevalent view, such representation gave legitimacy to Israeli actions,\textsuperscript{150} and under the conditions the local courts were operating, “a lawyer cannot hope to help his client obtain justice or get a fair trial…”\textsuperscript{151} Consequently, a Palestinian plaintiff who decided to initiate legal proceedings against another Palestinian resident, would, after weighing the options,

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\textsuperscript{145} See RAJAH SHEHADEH, STRANGERS IN THE HOUSE, COMING OF AGE IN OCCUPIED PALESTINE 138 (2002).
\textsuperscript{146} SHEHADEH & KUTTAB, supra note 138, at 28.
\textsuperscript{147} Id. at 18-9. 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.” ISRAEL NATIONAL SECTION OF THE INTERNATIONAL COMMISSION OF JURISTS, supra note 36, 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), and within that chapter a whole section 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; stamping the card on leaving the Region constitutes approval. This privilege is unique, since international law does not confer on inhabitants of an occupied territory a right to leave, particularly to go to a state at war with the occupant.” (Id. at 85).
\textsuperscript{148} ISRAEL NATIONAL SECTION OF THE INTERNATIONAL COMMISSION OF JURISTS, supra note 36, at 23 (explaining that “a number of local judges had left the Region. Several refused to resume their duties and others chose to retire”).
\textsuperscript{149} Id. at 23.
\textsuperscript{150} SHEHADEH & KUTTAB, supra note 138, 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 140, at 265.
\textsuperscript{151} SHEHADEH & KUTTAB, supra note 138, at 41.
\end{flushleft}
probably prefer to forgo the afore-mentioned malfunctions in the local court system, by filing the action before an Israeli civil court. In terms of political identification, Israeli courts were seen as not much different from the local PT courts, given the fact that the latter were controlled by the military government, but more efficient and trustworthy. Also from the 1980s on, 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 before Israel’s Supreme Court in its capacity to apply judicial review standards in respect of actions undertaken by Israeli government organs.\footnote{See SHEHADEH & KUTTAB, supra note 134, at 25-26; ISRAEL NATIONAL SECTION OF THE INTERNATIONAL COMMISSION OF JURISTS, supra note ****, at ix-x; 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, supra note ****, at 109; Roberts, supra note 5, at 88-95; 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 ****, at 124.} 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 soon aroused discomfort among the Israeli courts.\footnote{153 Though it should be noted that in respect of 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 towards judicial review petitions was motivated, inter alia, in order 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, 372 (Itzhak Zamir and Allen Zysblat eds., 1996).} 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.\footnote{154 On the problem of docket congestion in the Israeli court system see generally: DIN VE-HESHNON HA-VA’ADA LE-BDIKAT HA-MIVNE VE-HA-SAMKHUYOT SHEL BATEI HA-MISPAT [REPORT OF THE COMMITTEE TO OVERVIEW THE STRUCTURE AND THE POWERS OF THE COURTS] (1980) (in Hebrew); DIN VE-HESHNON HA-VA’ADA LE-BDIKAT MIVNE BATEI HA-MISPAT HA-REGILIM BE-YISRAEL [REPORT OF THE COMMITTEE TO OVERVIEW THE STRUCTURE OF GENERAL COURTS IN ISRAEL] (1997) (in Hebrew). See generally, Forum, Al ha-Reforma be-Ma’arekhet Batei ha-Mishpat [On the Reform in the Court System], 8 MEHKAREY MISPAT 9 (1990) (in Hebrew).} Thus also functionally, it is understandable that courts in Israel would
come to realize the burdensome effect of PT-related litigation. They already had more than they could handle in terms of local Israeli cases.

Another important factor that contributed to this discomfort was the growing realization within the discipline of international civil litigation that forum shopping as a phenomenon should be resisted.\textsuperscript{155} 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 seized with the action. 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.\textsuperscript{156} The practice of forum shopping becomes tainted when the plaintiff seeks litigation in a forum that has no meaningful tie with either the parties to the litigation or the underlying cause of action. In such a case the court as well as the defendant can rightly object to the change of forum work to have it annulled.

Logically, though, such transgressive forum shopping is not supposed to take place. The personal jurisdiction rules in \textit{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 state exists in order to establish jurisdiction. Such rules, which are called at times “exorbitant” rules of personal jurisdiction, have become the prime facilitators of negative forum shopping.


\textsuperscript{156} Id. at 139-140.
because they afford plaintiffs with an opportunity to create personal jurisdiction when no meaningful ties exists between the forum and the case at hand.\footnote{See Kevin M. Clermont & John R.B. Palmer, \textit{Exorbitant Jurisdiction}, 58 M.E.L.REV. 474 (2006). Though 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 or not, see L.I. De Winter, \textit{Excessive Jurisdiction in Private International Law}, 17 INT’L COMP. L.Q. 706, 712-3 (1968).} One of the common law rules of personal jurisdiction that has been singled out as 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 territory.\footnote{See Kurt H. Nadelmann, \textit{Jurisdictionally Improper Fora}, in \textit{XXTH CENTURY COMPARATIVE AND CONFLICTS LAW} 321, 328-9 (Kurt H. Nadelmann et al. eds., 1961).} Therefore, it is once more understandable why Israeli courts felt uneasy about the heavy influx of cases from the PT; for personal jurisdiction was often established merely by virtue of service of process on a defendant who happened to be present in the PT in many cases that had no meaningful tie with the State of Israel.

Another important development in this period 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 will be able to have some form of representation in the civil administration. Though not much has been realized in this respect, this change seemed to have signaled to Israeli courts that Israeli official policy is now more in favor of having local civil matters of the Palestinian population in the PT being handled by local PT institutions, including the local courts.

Ultimately, Israeli courts resorted to the \textit{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 invested in them only in exceptional circumstances. 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 towards 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 personal jurisdiction doctrine of Israeli courts towards PT-related civil litigation in this second stage of development, running from the early 1980s until the mid 1990s, 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 best suited Israeli sovereign interests.

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

Initially, courts were apprehensive towards motions intended to bring them to decline a jurisdictional power they possess by due right. The existence of jurisdictional power was taken to imply the existence of a duty to adjudicate the case on the merits. This notion was enshrined in a frequently quoted Latin maxim: *judex tenetur imperitri judicium sum* (a court with jurisdiction over a case is bound to decide it). 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 the English Court of Appeal case of *St. Pierre v. South American Stores*

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According to the standards that were set there, a mere balance of convenience is not sufficient to stay the pending proceedings. 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”. Since Israeli courts generally follow English common law precedents in private international law, this pronouncement was also taken to represent the Israeli attitude in respect of the latitude courts had in Israel to decline jurisdiction. However, when the Israeli courts first came to apply these standards, they allowed themselves rather more latitude, and considered all the relevant contexts of the case, instead of limiting the inquiry to how oppressive and vexatious the proceeding in Israel are to the defendant. The first case was that of Hakhamov v. Schmidt. The defendant moved to have the proceedings in Israel stayed, given the fact that 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, the Israeli Supreme Court stated that the governing principles were those of St. Pierre, and ultimately the Court stayed the action. However, had the Court followed the St. Pierre standard fully, it is doubtful whether it would have rendered the stay, for St. Pierre allows little leeway. Thus 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 reasonably connected to Israel, and could certainly be regarded as

\[\text{Hakhamov v. Schmidt}^{163}\]

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161 Id. at 398.
164 Goldstein, *supra* note 162, at 261.
sufficient for the plaintiff to file the action in Israel in the first place. The same approach, liberal in terms of *St. Pierre*, was displayed some twenty years later in *Perlmutter v. Perlmutter*, also based on *lis alibi pendens* grounds. 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.

Another important development at about the same time was the loosening of the *St. Pierre* standard in English law itself. The first step came in the 1973 *Atlantic Star* case, and the second in 1978, in *MacShannon v. Rockware Glass Ltd.* By the end of this process it was observed that a re-formulation of the English standard to decline jurisdiction had taken place, making the English law inquiry now turn on whether there is another clearly more appropriate forum for litigation in which justice can be done. This new English development was eventually picked up in an Israeli law review article published in 1980 by Professor Stephen Goldstein. 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 much different from the already elastic American doctrine of *forum non conveniens*.

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166 CA 100/76, [1976] IsrSC 30(3) 355.
167 Id. at 358-60. The case dealt with 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 only temporary. While in Germany, the mother initiated custody proceedings before a German court. After learning of this, the father initiated proceedings in Israel, which the mother asked the Israeli court to stay in light of the already ongoing proceeding of the German court. Id. at 357-8.
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.

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. The threat of forum shopping in Israel by PT residents was imminent, and only wide discretion to decline jurisdiction, instead of the limited *St. Pierre* standard, could stem the tide. But how could courts tailor their discretion powers in dealing with PT-related civil actions, and what difference would (and should) it make to Israeli courts if the plaintiff was an indigenous Palestinian resident of the PT or an Israeli settler?

The first to tackle these questions was a decision handed down in 1982 by Eli Nathan, in his capacity as Judge of the District Court of Jerusalem, in the case of *Jabbour v. Hanitan*. 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 first was the alleged tortfeasor and the second was 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

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172 Id. at 411-2. *See also* GOLDSTEIN & HACOHEN, supra *note* 12, at 67.
173 *See* BENVENISTI, *supra* note 66, at 28 (noting the flexible criteria adopted by Israeli courts in identifying the natural forum in PT-related civil actions)
174 *See* Goldstein, *supra* note 162, at 260-1.
175 Originating Summons (Jer) 748/82, [1982] IsrDC 5743(1) 499.
of action have any substantial connection to Israel. 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. This move towards 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. Given the fact that Judge Nathan himself 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 rendering of this decision, 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 these territories without the issuance of an explicit order in this respect as required by law. It was similarly inconceivable, Judge Nathan added, that by making the amendment, Israel meant to

176 Id. at 503, 506-7.
177 Id. at 507.
178 See supra note 114.
179 Jabbour, IsrDC 5743(1) at 505.
undermine the working of the local courts in the “Administered Territories”, especially as to their being the natural forum of local citizens in respect of PT-based civil litigation.\textsuperscript{180}

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,\textsuperscript{181} he concluded that the 1979 amendment was intended to serve the Israeli settlers of the PT, so that in the event they needed recourse to an Israeli court they would have it.\textsuperscript{182} This policy, in his view, was not relevant for the indigenous Palestinian residents of the PT, whose natural forum remained the local PT courts.\textsuperscript{183}

Judge Nathan dismissed the plaintiff’s claims about adjudication before local West Bank courts as being inefficient, rigid and sometimes arbitrary.\textsuperscript{184} These, Judge Nathan claims, do not form “a true grave wrong to the plaintiff but maybe only some inconvenience that could be overcome.”\textsuperscript{185} The only factor that Judge Nathan was willing to take into consideration had to do with the fact that medical experts, apparently from Israel, might be called upon to give testimony before the local PT court, which might prove impracticable. If this proved to be the case, he would be willing to renew the adjudication of the case before the Jerusalem court.\textsuperscript{186}

\textsuperscript{180} Id.
\textsuperscript{181} Primarily in Cohen v. Mantsura, IsrSC 36(1) 222. At the end of his decision, the President of the Supreme Court at the time, 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 [i.e. supra note 158].” Id. at 226.
\textsuperscript{182} Jabbour, IsrDC 5743(1) at 505-506.
\textsuperscript{183} See BENVENISTI, supra note 66, at 28.
\textsuperscript{184} Jabbour, supra note 182 at, 506-7.
\textsuperscript{185} Id. at 507.
\textsuperscript{186} Id.
Judge Nathan’s decision in *Jabbour v. Hanitan* can be considered another watershed in the development of the personal jurisdiction doctrine of Israeli courts towards 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 happen to be Palestinian residents of the PT, and the underlying cause of action also happens to be based in the PT, then the natural forum was identified to be that of the local PT courts.\(^ {187}\)

The first major decision by the Israeli Supreme Court to adopt Judge Nathan’s course of analysis was in *Abu Attiya v. Arabtisi*.\(^ {188}\) 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, which issued a policy covering the employer's liability through its West Bank branch, but 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 of the litigants “backyard”, i.e. Ramallah. On appeal the Supreme Court affirmed the decision.

In its decision the Supreme Court explicitly ruled that there is no longer any need to adhere to the *St. Pierre* standard. Instead, a court in Israel can decline its jurisdiction when it identifies the natural forum for the pending litigation as lying


\(^{188}\) CA 300/84, [1985] IsrSC 39(1) 365. However, in a short published decision of the Supreme Court there is a clear sign that in respect of 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 stay of action is to be relegated to the local PT courts without the need to apply the pre-modern standard of *St. Pierre*. CA 588/83 Al-Rayis v. The Arab Insurance Company [1984] IsrSC 38(3) 495.
elsewhere. In making this assessment the 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 as to where the prospected litigation among them is to take place. In practice, this standard has become the Israeli version for the *forum non conveniens* doctrine. Of particular importance are two observations the Supreme Court made in respect of the PT. First, the court validated the conception already set forth in *Jabbour v. Hanitan* 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 had to do with cases that included among its contexts what was termed as a “significant Israeli factor”, in which case the *forum non conveniens* analysis was turned on its head. As to what could constitute such a significant factor, the court gave as an example a case where “one of the parties was an Israeli citizen or resident”. This approach effectively protects Israeli settlers of the PT from being denied recourse to Israeli courts, since they usually embody such a personal connection, namely being 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, though its holdings essentially affirmed what had already been decided in *Jabbour v. Hanitan*. From now on, in cases where all 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,

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189 It should be noted that there was some disagreement among the judges as to whether all the factors that are relevant to the American version of the doctrine will also be relevant in the Israeli practice. While one Justice, Tova Strassberg-Cohen, opined that Israeli, like American courts, should take into consideration public interest factors and choice of law evaluations, Justice Aharon Barak seemed to have some reservations about these factors. *Abu Attiya*, IsrSC 39(1) at 377-9, 386.
enabling courts to decline their jurisdictional powers. On the other hand, when the case had a significant Israeli factor, courts could refrain from applying the doctrine. This included cases when the plaintiff was a Palestinian resident of annexed East Jerusalem.

The liberal standard for declining jurisdiction was pushed one step further in another Supreme Court case, that of Abu Jakhla v. The East Jerusalem Electric Company. 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. Different in this case, however, was the fact that the action was filed against the East Jerusalem Electric Company with main offices in annexed East Jerusalem, officially incorporated under Israeli laws. In light of these attributes, it was argued that the case had a “significant Israeli contact” and therefore the motion to decline jurisdiction on the basis of the forum non conveniens doctrine should be dismissed. The Court rejected this argument, ultimately applying the forum non conveniens doctrine. In a decision authored by Meir Shamgar, by now the President of the Supreme Court, it was noted that the East Jerusalem Electric Company’s relation with Israel is of a “formal” nature. In this respect Justice 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. Moreover, it was noted that the bulk of the company’s operations was in the West Bank. Other important factors that the court

192 CA 2705/91 [1993] IsrSC 48(1) 554.
193 Id. at 576
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 PT local courts.\textsuperscript{194}

In observing the evolution of the discretionary power of courts in Israel to decline jurisdiction, especially after \textit{Abu Jakhla}, one can certainly sense the great doctrinal leap that took place in comparison with the original point of departure set by the \textit{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 grant courts jurisdiction on the basis of being the forum of the defendant’s domicile. 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.\textsuperscript{195} Yet \textit{Abu-Jakhla}, working within the broad discretionary powers articulated by Israeli courts to decline jurisdiction, was prepared to hear a \textit{forum non conveniens} claim from a local defendant and ultimately sanction it. So at the end of this stage Israeli courts were able to implement 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.

\section*{C. Evaluation of the Second Stage}

**Observation 1: The appropriateness of the PT forum as an alternative forum**

A basic requirement in almost all \textit{forum non conveniens} inquiries is the availability of an adequate alternative forum for litigation in which the plaintiff can bring the action.

\textsuperscript{194} \textit{Id.}

\textsuperscript{195} For a detailed critical assessment of the defendants’ domicile as the basis of jurisdiction, see Arthur Taylor von Mehren, \textit{Must Plaintiffs Seek out Defendants? The Contemporary Standing of Actor Sequitur Forum Rei}, 8 King’s College L.J. 23 (1997).
against the defendant. It is generally assumed that a defendant who fails to prove that there exists such an alternative forum will not be entitled to a dismissal or a stay on *forum non conveniens* grounds. As a result the forum seized with the action will need to adjudicate it on the merits. 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 in respect of the *forum non conveniens* doctrine when the alternative forum was a PT court and those set when 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. So that although in the first stage the West bank and Gaza Strip were denied any foreign sovereign attributes, some of these sovereign attributes were gained within the confines of the *forum non conveniens* doctrine.

Adopting a more critical view, however, one might wonder as to 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. On the contrary, given the resignation of most

197 Id. at 26-27.
199 *See* SHEHADEH & KUTTAB, *supra* note 134, at 11. In his personal memoir Raja Shehadeh had this to say about how laws were shaped in the PT: “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
Palestinian judges from the local courts soon after the Six-Day War, and the 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 had this to say:

“…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.”

So in forming their comity considerations towards 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 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, can thus be seen as a corollary configuration of this self-regarding comity consideration. Probably the most representative, yet extreme, version of how comity consideration towards the PT disappears altogether when the action contains a strong interest of an Israeli litigant, is found in a judgment rendered by the District Court of Jerusalem in Hijalah v. Judea and Samaria Company (JSC). A large area

Bank – Jordanian, British Mandate, and Ottoman – and had canceled, amended, and supplemented them as it pleased.” SHEHADEH, STRANGERS IN THE HOUSE, supra note 145 at 135.

200 Abu Attiya, IsrSC 39(1) at 382 (per Justice Strassburg-Cohen). Interestingly, Justice Strassburg-Cohen cites no enactment of the Israeli Knesset by which Israel made it clear that residents of the “Region” are to have their actions litigated before local PT courts. Indeed, it is doubtful whether at the time this decision was rendered, 1985, there was any such enactment by the Israeli legislature.

201 Summons (Jer.) 2967/87 (1988, unreported).
of land was allegedly bought by JSC from Hijalah for the purpose of establishing a Jewish settlement in the West Bank. After construction on the land by Jewish settlers started, 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 to pursue land registration in its name in the land registry. The respondent, on the other hand, claimed that the action taken by the claimant and other local residents about the unbinding effect of the transaction is a conspiracy on their part designed to evade the consequences of a valid sale agreement. The present 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 initiated before the Nablus court. Ultimately, the court issued the anti-suit injunction and in doing so also rejected the argument of forum non conveniens made on part of 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 a significant Israeli factor. The proceedings in Hijalah indeed contain such a factor given the fact that JSC’s shareholders and the settlers who bought the land parcels from it were Israelis. Moreover, the 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. 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, the court there was first willing
to form its position without giving JSC the opportunity to be heard. An assassination
attempt was made to the attorney representing JSC, and the courthouse in Nablus was
set on fire. In addition, some years after the action was initiated before the Nablus
court, the military commander issued a special order by which local courts in the PT
were no longer authorized to adjudicate actions made in respect of land subject to the
process of first registration of title.203

What we see evolving is again a dual construction, this time of the standard of
alternative adequate forum: one standard when the litigants are local Palestinian and
another when Israeli interests are at stake. This brought Amnon Rubinstein, a pre-
eminent Israeli jurist, to characterize the Hijalah decision as representing most bluntly
how jurisdictional rules developed by Israeli courts were aligned with the reality that
came to exist in the PT. 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.204

**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. The Lockformer*,205 in
which it was pronounced that due to modern advancements in transportation and

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203 The Order is reproduced in DINEI HA-TIKHNUN, BNIYA VE-HA-MEKARKE’IN BE-YEHUDA VE-HA-
SHOMRON [PLANNING, BUILDING AND LAND LAW IN JUDEA AND SAMARIA] 548 (Aharon Mishnayit

204 Rubinstein, *supra* note 90, at 456. On the dual legal system that developed in the PT see generally

205 IsrSC 52(1) at 114.
communication services courts should be less willing to decline their personal jurisdiction when undertaking a *forum non conveniens* inquiry. Consequently, there is now a stronger presumption in favor of adjudication 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.”

*Ha-Geves* has had a substantial impact on the application of the *forum non conveniens* doctrine in Israel evr since uts pronouncement. 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 at fault and a poor design of legal policy. For one thing, the very same reasons mentioned by the court could equally be used to

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206 Id. at 114.
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 in a fortuitous nexus. The required context still largely hinges on a territorial relation with the forum, but more and more this context is shown as weak and attenuated precisely because of modern means of communications and transportation. For example, is the forum where 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 where personal jurisdiction can be accidentally established. 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 that 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 court house where the action was originally filed. As shown earlier, this did not prevent the Israeli Supreme Court from staying the proceedings on

209 Id. at 153-154.
forum non conveniens grounds, taking an extra step towards broadening the scope of the forum non conveniens doctrine in the process.

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, then 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,210 where it was pronounced that a foreign plaintiff’s recourse to an American court deserves less deference than when recourse is made by an American plaintiff.211 For in the case of a foreign plaintiff there is an underlying presumption that it is more likely that filing the action in an American court can turn out to be a case of forum shopping than when the plaintiff is American.212 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

211 Id. at 266 (“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.”).
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 the *Piper Aircraft*, primarily the argument that by limiting access of foreign plaintiffs to American courts, American courts are turning their backs on actions conducted by American corporations or their subsidiaries outside the US. And in the context 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 their efforts 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 standard of the *forum non conveniens* doctrine 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, it was announced by the Israeli and the Palestinian representatives that

“[i]t is time to put an end to decades of confrontation and conflict, recognize […] mutual and political rights,

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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…"

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

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, from today’s perspective we can indisputably say that not much has been accomplished. Since the signing of the Declaration of Principles, the relationship between the two sides deteriorated as violence escalated and many innocent lives were 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. The most...
important agreement for our purposes on personal jurisdiction is the Interim Agreement on the West Bank and the Gaza Strip, 28 September 1995 (“Interim Agreement”). Besides its regulation of central governmental institutions within the Palestinian Authority and creating a general framework for the interim period, 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 chapter. In the following section, I will assess the doctrinal significance of these arrangements for the personal jurisdiction of Israeli courts towards 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. 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. In the 1995 Interim Agreement the West Bank was divided into three areas: A, B and C.\textsuperscript{224} Area A initially comprised some 4% of the West Bank and 19% of the Palestinian population, and included the major cities of the West Bank (other than Hebron, in respect of which a special arrangement was drawn).\textsuperscript{225} In Area A the Palestinian Authority was to have control over security and municipal matters. Area B included Palestinian populated zones outside the major cities comprising 23% of the West Bank and 68% of the Palestinian population. In Area B the PA was to have control over municipal matters while 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.\textsuperscript{226} Though Areas A and B contained the vast majority of the Palestinian population of the West Bank and Gaza,\textsuperscript{227} they only contained roughly one third of PT land.\textsuperscript{228}

The Palestinian Authority 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 Palestinian Authority as an independent sovereign entity. For example, even in

\begin{footnotesize}
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\item[\textsuperscript{224}] The Gaza Strip was not subject to this territorial classification. In practice, from the Oslo Accords until the disengagement of Israel from Gaza in 2005, the Gaza Strip was divided into two areas, one under PA control and the other under IDF control. See Omar M. Dajani, \textit{Stalled Between Seasons: The International Legal Status of Palestine During the Interim Period}, 26 DEN. J. INT’L L. & POL’Y 27, 63 (1997)
\item[\textsuperscript{225}] NIGEL PARSONS, THE POLITICS OF THE PALESTINIAN AUTHORITY: FROM OSLO TO AL-AQSA 111 (2005)
\item[\textsuperscript{226}] See SHEHADIEH, supra note 59, at 37. It should be noted that according to the terms of the Oslo II Agreement, even in Area C all powers and responsibilities as to the Palestinian population “not related to territory” were to be transferred to the PA. See Oslo II Agreement, Annex III, Art. IV.
\item[\textsuperscript{227}] Weiner, supra note 222, at 604
\item[\textsuperscript{228}] See Bisharat, supra note 140, at 258.
\end{itemize}
\end{footnotesize}
territory designated as area A, the Palestinian Authority had no control over foreign relations and external security, such matters remaining in the hands of the IDF.229

As noted before, the most important agreement on the issue of personal jurisdiction is the Interim Agreement. More specifically, in the context of this article, it is the 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 deal with 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.230 However, the Protocol does have one important provision that eventually impacted the doctrine personal jurisdiction of Israeli courts toward Palestinian litigants. Article VI of Annex IV deals with the service of documents. 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 state.” Accordingly, service of process to a Palestinian defendant in an action brought before an Israeli court was now under the responsibility of the PA. But it was not clear as to whether this provision was intended to provide an exclusive procedure for the service of process. Moreover, it is doubtful whether this provision alone would have been able to change current doctrine. Israeli law takes the position that for an international

229 Weiner, supra note 222, at 660; Fassberg, supra note 57, at 319; 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 (1994).
230 See Fassberg, supra note 57, at 320.
agreement to become part of Israeli municipal law, special incorporating legislation of
the Knesset needs to be enacted.\footnote{See} \footnote{HCJ 2717/96 Ali v. Minister of Defense [1996] IsrSC 50(2) 848, 851-2.}

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 Law for
the Extension of Emergency Regulations (Judea, Samaria and the Gaza Strip –
Jurisdiction over Crimes and Judicial Assistance), 1967 (LEER, 1996).\footnote{SH 517, 20 (1967) (Isr). The relevant 1996 amendments were published in SH 1556, 34 (1996) (Isr).} \footnote{LEER, 1996, Section 1.} This
enactment provided a new definition of the term “Region”, which excluded, for the
purposes of the enactment, areas of “Judea and Sameria and the Gaza Strip,” which
are regarded as territories of the “Palestinian Council”.\footnote{Id. Section 7.} Another important
provision in this enactment authorizes the Israeli Minister of Justice to issue
regulations in respect of the service of official documents of Israeli-initiated civil
proceedings in the “Region”.\footnote{KT 5947, 278.}

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 (“1999 Emergency Order”).\footnote{KT 5947, 278.} This enactment
establishes a detailed mechanism for the judicial assistance generally prescribed in
LEER, 1996. According to Section 3 of the Order, an official document that is
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. 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, will not be 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.

(a) 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 Gaza Strip without the need to secure the leave of the court, was made possible under SDAT, 1969. 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”. 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 other territory other than the West Bank and Gaza Strip.\(^{236}\) This should not be taken to mean that the Oslo Peace Accords had no effect on SDAT, 1969. In fact, one can point to two major changes brought 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.\(^{237}\) The very essence of the Oslo Peace Process in general, and of the Interim Agreement in particular, was to have the IDF redeployed in the PT so that the

\(^{236}\) As noted earlier, the Golan Heights and East Jerusalem were territories that were annexed to Israel. The Sinai Peninsula was returned to Egypt as part of the Israeli–Egyptian peace process. The only region that had the potential of not being 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.

\(^{237}\) See Benvenisti, *supra* note 223, at 548 (arguing that after the Israeli withdrawal, with the exception of the settlements, Israel will remain without authority to act within the territories from which it had withdrawn).
Palestinian Authority could take control of most areas populated by Palestinians. This is true for the territories designated as Area A, in which the Palestinian Authority 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, 1969, and as a result direct service of process as sanctioned in *Al-Khir* is no longer possible in such an area.

The second form of influence the Interim Agreement had was the new definition of the term “Region” now adopted in LEER, 1996. As previously noted, this enactment provides for a new definition that explicitly excludes the territories of the Palestinian Council. Given the additional fact that this enactment dealt with legal assistance generally, it could thus be reasonably taken to afford a new definition of the term “Region” that superseded that included in SDAT, 1969. Consequently, not only will areas designated as Area A now be excluded from the term “Region”, but also 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 to apply the *Al-Khir* precedent to PT-related civil litigation among Palestinian residents. Substantial areas inhabited by the Palestinian population are no longer considered to be a “Region” for the purpose of SDAT, 1969, and therefore cannot be served, at least not in a direct fashion as before, with the process of an Israeli court.238

The Israeli Supreme Court has not yet spoken on the subject. However, the Magistrates’ Court in Jerusalem rendered two separate decisions (authored by the same judge) holding that neither Area A239 nor Area B240 can be considered today as a

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238 See Fassberg, supra note 57, at 322 n.12.
240 PCC (Jer. Magistrates’ Ct.) 1421/01 Abd El-Hamid v. Far’un (June 24, 2001, unreported).
“Region” under SDAT, 1969 thus making the Al-Khir judgment inapplicable in respect of these two areas.

Ironically, the end result is that the SDAT, 1969 with their provision mandating the translation of every document served according to them into Arabic, are applicable today only to Area C, largely inhabited by Israeli settlers!241

But still, this position does not solve the question of the scope of personal jurisdiction of Israeli courts in PT-related civil litigation. 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 Palestinian Authority. In light of these developments, how should Israeli courts proceed when asked to establish personal jurisdiction against a defendant residing in areas held by the Palestinian Authority?

The most authoritative decision on this issue is that of the District Court of Haifa in Makhoul v. The Arab Bank.242 Here the court essentially held that to effectuate service of process in areas held by the Palestinian Authority the plaintiff now needs 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 being the heir to the estate of the person (his father-in-law) who originally deposited the sum, and asked the court to have the claim certified as a class action, supposedly in an effort to bind the defendant bank with the prospected judgment in future similar

241 See PCC (Jer. Regional Lab. Ct.) 2061/00 Shirlin v. Youssef (April 28, 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 Ma’aleh Adumim - an Israeli settlement east of Jerusalem, located in Area C).
242 PCC (Hi) 3475/00, [2001] IsrDC 5770(1) 913.
adjudications. The defendant bank was established in Mandatory Palestine in 1930, and after 1948 re-located its activities to Jordan. The plaintiff 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 Palestinian Authority, the Arab Bank established a number of branches in the PT, including in Ramallah, which branch, according to the claim made by the plaintiff, received all of the original deposits and documents of the Jaffa branch. In filing the claim, the plaintiff was all the more confident about his chances of recovering the money, given the fact that by then Israel and Jordan had signed a peace treaty ending the state of hostility that existed between them.\footnote{Treaty of Peace Between the State of Israel and the Hashemite Kingdom of Jordan, Oct. 26, 1994, Isr.-Jordan, 34 I.L.M. 43 (1995).} However, the plaintiff could not establish personal jurisdiction against the bank, and so was unsuccessful this time around as well.

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 of the bank’s attorney the documents were returned to the plaintiff’s attorney by registered mail. Then the documents were 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 afterwards, 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 personal jurisdiction of Israeli courts towards PT based defendants: (a) is service of process in a PA-held territory, without the plaintiff first securing leave of the court seized with the action, sufficient to establish personal jurisdiction? And (b) can the Israeli Judicial Assistance Officer effectuate service of process in a manner outside 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 a leave of court according to Rule 500 of RCP, 1984 is necessary. The court went on to add that service of process outside the jurisdiction is not merely a technical issue, but a substantive one, and in granting the leave the court is supposed to be sensitive to values pertaining to the sovereignty of foreign courts and comity. In this context, the court attached particular importance to the fact that the Arab Bank’s headquarters are based in Amman, Jordan.

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 a leave of court in accordance with Rule 500. In any case, in the eyes of the court, the provisions of the 1999 Order itself were not carried out. As mentioned before, the Israeli Judicial Assistance Officer sent the statement of claim directly to the defendant bank instead of first sending it to his Palestinian counterpart. In the end, since leave for service outside of jurisdiction was not requested, and since service was not carried out in accordance with the 1999

244 *Makhul*, IsrDC 5770(1) at 916-917.
245 *Id.* at 917.
246 *Id.*
247 *Id.*
Emergency Order, conditions that the court regards as supplementary and cumulative, the court deemed itself as lacking personal jurisdiction to deal with the action.\textsuperscript{248}

The position taken by the Haifa District Court deserves further reflection, a step I take more fully later on in this section. For now, suffice it 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 to PA-governed territories one needs to do so through the judicial assistance channel as prescribed in the Emergency 1999 Order. Such a restriction does not exist in Israeli law in respect of service in any other foreign jurisdiction.

But realization soon crystallized that what the Haifa District Court did in \textit{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 Intifada 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, though in obiter dicta, that given the present reality of the relationship, the 1999 Emergency Order is not to be regarded as prescribing an exclusive means for service of process in the PA-held territories.\textsuperscript{249} 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,

\textsuperscript{248} Id. at 918.
\textsuperscript{249} PCC (TA) 3069/03 Merck Frosst Canada & Co. v. Birzeit Palestinian Pharmaceutical Company (April 29, 2003, unreported).
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 newspaper that is widely circulated in the PT.

Though this amendment allows the Israeli Officer for Legal Assistance to effectuate service of process unilaterally in a rather undemanding form, the fact that Israel undertook the effort of amending 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 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 the Israeli jurisdiction250 – would have sufficed.

Before reflecting further on the Makhul decision and the new structure of personal jurisdiction of Israeli courts in PT-related civil litigation, one other matter needs to be assessed: the impact of the Oslo Accords on the discretionary power of Israeli court to decline jurisdiction in PT-related civil actions.

C. The Discretion to Stay PT-Related Civil Actions

Another issue that must be addressed in respect of the Israeli doctrine of personal jurisdiction in PT-related civil actions, concerns the power of Israeli courts to decline jurisdiction in 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, 1996 provides a general rule stating that an

250 See General Electric Corp., IsSC 42(4) at 767.
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 Palestinian Authority, solely on the grounds that a PT resident is the defendant or party to the action in any other manner. This provision is of an unusual character. Instead of first providing 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 Palestinian, the Israeli court is expected to deal with the action rather than to decline jurisdiction. This implication becomes stronger in light of the fact that Section 2B(b) of the same enactment specifies those instances where the court, in spite of the foregoing, can decide to decline its jurisdictional powers. This can happen when one of the following circumstance 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.

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 towards 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*. The 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 a Palestinian courts in dealing with land disputes between Israeli settlers and local Palestinian owners, which the same court had embraced some years earlier in the *Hijala* case. The court observed that in light of the Interim Agreement and the Israeli legislation that followed, the local Palestinian courts of the West Bank are to be regarded as a legitimate and qualified tribunal for adjudicating land disputes including those to which an Israeli is 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, but in light of the new legal reality, litigating a claim brought by an Israeli over land situated in the West Bank before a local Palestinian court, which is still assumed to be a possible recourse even in respect of 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 in respect of the land purchase be litigated in the local courts of the jurisdiction where the land is situated.

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251 CC (Jer) 1820/96 (September 12, 1998, unreported).
252 *Supra* note 201.
Another important development concerns the entitlement of the Palestinian Authority to claim sovereign immunity against civil proceedings initiated against it before Israeli courts. 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. In response, the PA requested the Israeli courts to dismiss such action based on the doctrine of sovereign immunity. In one major decision dealing with such actions, the District Court of Jerusalem regarded the question of whether the PA is entitled to sovereign immunity or not as a question pertaining to Israel’s foreign relations, and therefore beyond the court’s ability to decree. The court could apply sovereign immunity to the PA only after the Ministry of Foreign Affairs had settled this matter officially. Another important decision rendered by this same court takes a more conclusive view, eventually granting the PA sovereign immunity. This took place in the decision of *Agudat Midreshet Alon Moreh v. The State of Israel* rendered in 2006. The plaintiff in this action was an organization that obtained a judgment from an Israeli court against a Palestinian defendant who allegedly defaulted in a land sale contract. The land was located in Area A but was purchased by the plaintiff 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

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253 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: LCA 7092/94 Her Majesty the Queen in Right of Canada v. Edelson, [1997] 51(1) IsrSC 625 (1997).


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

256 In a subsequent appeal, the Supreme Court managed to sidestep the issue of sovereign immunity in light of the fact that the appellants did not relate in their appeal to the question of whether the PA is entitled to claim sovereign immunity or not, but only to the question whether the alleged actions of the PA are of a governmental character or not. PCA 4060/03 Palestinian Authority v. Dayan (IsrSC, July 17, 2007, not yet reported). However, it should be noted that in a proceeding before the District Court of Tel-Aviv–Jaffa, the Legal Advisor of Ministry of Foreign Affairs issued a certificate that was eventually submitted before the court in which it was stated that the PA is not entitled to sovereign immunity in a proceeding raising the same questions as in *Noritz, supra* note 257. See CC (TA) 704/97 Dan v. Palestinian Authority (November 30, 1999, unreported).

257 PCC (Jer) 1008/06 (April 23, 2006, not yet reported).
Palestinian Authority are responsible towards it in torts for it not being able to execute the judgment. The Palestinian Authority 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 Palestinian Authority possesses sufficient sovereign attributes (exclusive control over a territory, a police force, elected government bodies, international status) that entitles it to sovereign status and immunity, this although the court admitted that the Palestinian Authority has 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 to the actual sovereign functions possessed by the concerned entity. Moreover, it seemed unfair to the court that the Palestinian Authority would be held responsible as a governing authority yet at the same time be denied sovereign immunity.

This decision is another important ruling by an Israeli court that elevates the jurisdictional status of the Palestinian Authority. As in Makbul and Al-Afifi, the court took a position that essentially treats the Palestinian Authority 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.

D. 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.\textsuperscript{258} No doubt this outcome is to be partially attributed to poor negotiation skills on the part of the Palestinian delegation.\textsuperscript{259} But probably it also had to do with the working assumption of Oslo Peace Accords, according to which the established Palestinian entity is to only have such jurisdictional authority as is delegated to it by the Israeli side, with the Palestinian side acquiescing to such an assumption.\textsuperscript{260} The residual powers when such authority is not transferred will lie in the hands of the IDF.\textsuperscript{261} This is the “delegation paradigm”. The rationale of this paradigm has to do with the status of authority in the PT prior to the agreements. Since such authority was totally within the hand 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 un-balanced, where one side is taken to possess the “whole” and the other side is to possess only what is given.\textsuperscript{262}

The breakdown of the Oslo Peace Process and its fitful revival, most recently in the Annapolis Conference, provides food for thought. It might be helpful to realize 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

\textsuperscript{258} Shehadeh, supra note 65, at 558.
\textsuperscript{259} See SHEHADEH, supra note 59, at 29, 30, 71, 72.
\textsuperscript{260} Raja Shehadeh, Questions of Jurisdiction: A Legal Analysis of the Gaza-Jericho Agreement, 23 J. PALESTINE STUD. 18, 22-23 (1994).
\textsuperscript{261} Shehadeh, supra note 65, at 558.
\textsuperscript{262} This also explains why it was 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 Palestinian Authority. In practice what this meant was the existence of a formal obligation on the part of the Palestinian Authority to implement existing military order in the laws of the West Bank and Gaza Strip as well as 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 Israeli 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 Fassberg, supra note 57, at 320 n.8; Kieth C. Molkner, Legal and Structural Hurdles to Achieving Political Stability and Economic Development in the Palestinian Territories, 19 FORDHAM INT’L L.J. 1419, 1429-1431 (1996); Bisharat, supra note 140, at 263.
balanced and just. For if negotiations are designed to produce a sustainable relationship under which the other side is expected to act as an equal, reason also lends one to believe that this side is to 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 on whether the Palestinian Authority should be viewed as a sovereign state, partly for the sake of deciding whether the Palestinian Authority is entitled to claim sovereign immunity. The general tendency is to deny the Palestinian Authority the status of a sovereign state and, as a result, to deny sovereign immunity. Two American courts have explicitly taken this view. In light of this general sentiment, the Israeli decisions of *Makhul* and *Agudat Medreshet Elon Moreh* re-emerge as particularly bold. The *Makhul* decision was prepared to treat the Palestinian Authority as a foreign sovereign state for the purpose of service of process and *Agudat Midreshet Elon Moreh* recognized the entitlement of the Palestinian Authority to sovereign immunity. Since Israel is the state most involved with the Authority and in the PT, one would have expected that its courts will take a tougher stance than that taken by foreign, less connected 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

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265 Id. at 244. See also Fassberg, supra note 57, at 320, n.7
Palestinian Authority 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 in respect of PT – related civil actions has no doubt been a dynamic one. In this article I 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, I think that this finding lies in the correlation between these different stages and Israeli official policy in respect of the PT generally. When this policy was for establishing total control over the PT, personal jurisdiction doctrine took an expansionist course of development thereby affording Israeli courts with 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 PT) as a burden with initiatives taken place for granting some form of autonomy to the local Palestinian population in the civil administration, personal jurisdiction doctrine evolved affording Israeli courts more discrecional authority to filter in PT – related civil disputes; and when the PT emerged as a semi-sovereign entity under the Oslo Peace Process, personal jurisdiction doctrine also 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 be still susceptible to general consideration of sovereignty, territorial control and international comity, notwithstanding the modern shift 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 is more to discuss in reference to neighboring topics in the field of private international law, such as choice of law and recognition and enforcement of judgments. In addition, much could also be said on the development of Palestinian private international law in this context. 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.