

# **CRIMINAL JURISDICTION UNDER THE GAZA-JERICO AGREEMENT**

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# INTRODUCTION

In Cairo on 4 May 1994, on the basis of the Declaration of Principles on Interim Self-Government Arrangements,<sup>1</sup> Israel and the Palestinian Liberation Organization signed the Agreement on the Gaza Strip and Jericho Area (hereinafter the Agreement)<sup>2</sup> whereby the Israeli military forces undertook to redeploy within those areas.<sup>3</sup>

The arrangements embodied in the Agreement raise serious questions, most notably concerning the legal status of the areas covered by the Agreement, and, more specifically, whether or not these areas can continue to be regarded as occupied territory. Such questions need to be addressed in terms of the principles of public international law in general and the law of belligerent occupation in particular. The limited scope of this study does not permit consideration of all these broader issues. Rather an attempt will be made to assess, from the legal perspective, those arrangements relating to one main area of jurisdiction, criminal jurisdiction. The study will not discuss the law of criminal procedure.

The study consists of five chapters. Chapter one gives an overview of the international rules governing criminal jurisdiction with a view to clarifying the main principles and terms used in the discussion. Chapter two describes the criminal jurisdiction of the state of Israel and explores its approach in this field. In dealing with the relationship between Israeli jurisdiction and that of the territory of the Gaza Strip and Jericho Area, it is necessary to be familiar with the Israeli penal rules that regulate its relations with the society of states. Chapter three discusses the rules of international humanitarian law governing an occupier's conduct in respect of criminal jurisdiction, and examines briefly the conduct of the Israeli occupant in the

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<sup>1</sup> The Declaration of Principles on Interim Self-Government Arrangements signed on 13 September 1993 in Washington, D.C. between the Palestine Liberation Organization (PLO) and Israel. It aims to settle the Palestinian-Israeli struggle through two phases. The first lasts for five years and is to be accomplished through the establishment of a Palestinian Interim Self-Government, while the second is to be achieved through a permanent settlement based on Security Council Resolutions 242 and 338.

<sup>2</sup> For the text of the Agreement, see 33 *International Legal Materials* (1994) 622.

<sup>3</sup> According to the Agreement the Israeli military forces are obliged to withdraw from nearly 135 square miles (61%) of the area of the Gaza Strip and 30 square miles of the Jericho Area (those areas inhabited by Palestinians) and to be redeployed in other areas referred to as "the Settlements" and "the Military Installation Area".

light of these rules. Chapter four examines the powers of criminal jurisdiction vested in the Palestinian National Authority under the Agreement. Chapter five examines the powers that the Israeli military government has retained. Finally, the study draws some conclusions regarding the scope of changes introduced by the Agreement in the sphere of criminal jurisdiction and hence in the relationship with the Israeli occupant, as compared with the situation that existed previously, and the consequent implications.

## INTERNATIONAL RULES OF CRIMINAL JURISDICTION

Criminal jurisdiction can be regarded as one of the main components of state jurisdiction. It is worth starting by identifying its status within the jurisdiction regime. Jurisdiction represents a basic aspect and manifestation of sovereignty which is described generally as the constitutional doctrine of the legal competence of states. According to Mann, jurisdiction is "an aspect of sovereignty, it is coextensive with and, indeed, incidental to, but also limited by the state's sovereignty."<sup>4</sup> Jurisdiction can be defined as the entitlement of a state under international law to apply its domestic law to persons and property, or, as the "capacity of states under international law to prescribe or enforce a rule of law."<sup>5</sup>

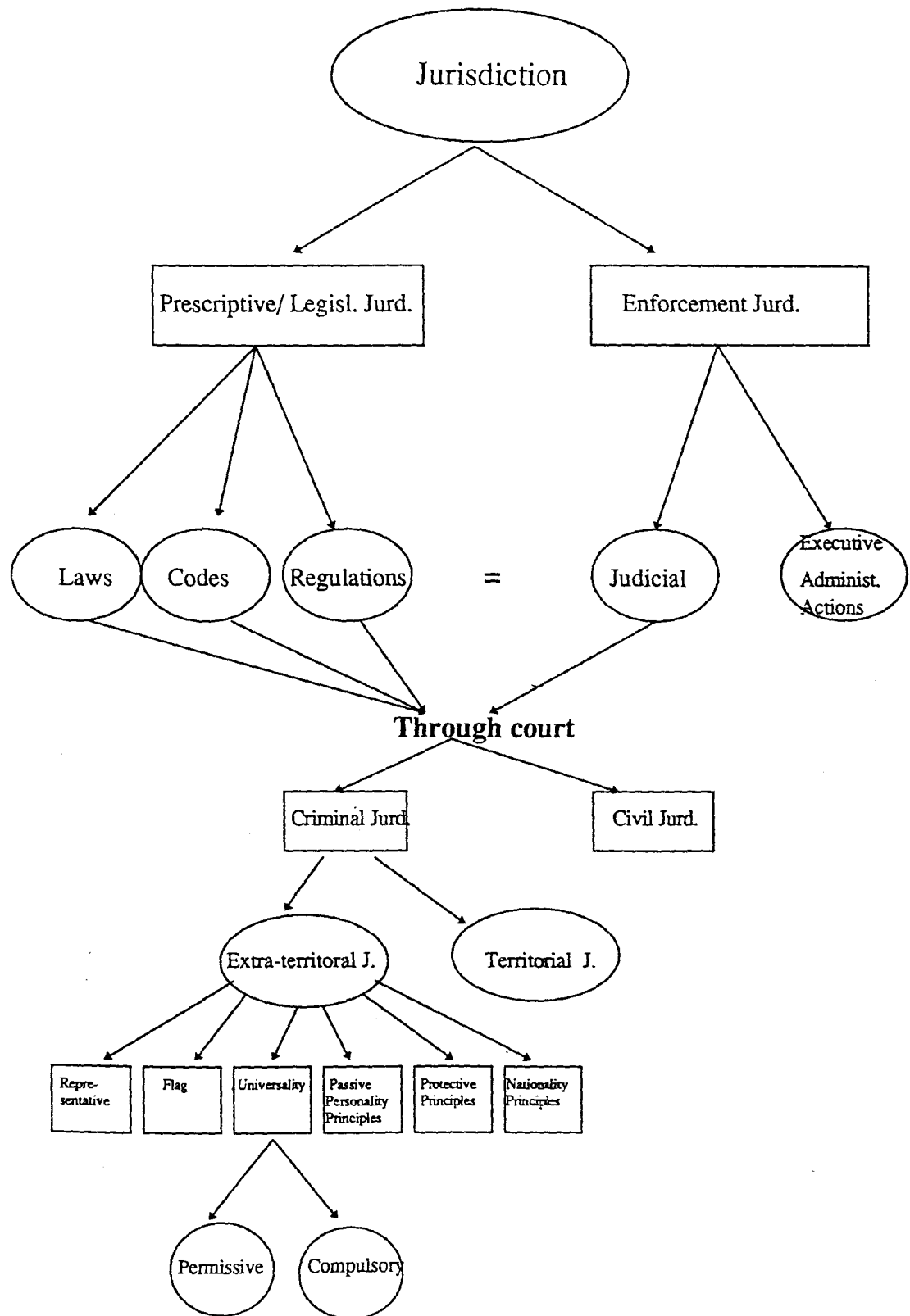
There are two forms of jurisdiction: prescriptive jurisdiction and enforcement jurisdiction. The former is the power to prescribe rules. It usually embraces legislative forms such as the enactment of civil and criminal codes, or regulations on tax and currency. Enforcement jurisdiction is the power to enforce the prescriptive jurisdiction by taking judicial actions through courts or by administrative (executive) actions such as arrest and seizure.<sup>6</sup> Thus, it contains both the judicial and the executive or administrative forms of jurisdiction. These two types of jurisdiction are inherently connected; neither of them can operate in the absence of the other. Criminal jurisdiction, the subject of this study, constitutes, together with civil jurisdiction the judicial form of jurisdiction which is determined by prescriptive jurisdiction. The following diagram shows the relation between all forms of jurisdiction:

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<sup>4</sup> Mann, "The Doctrine of Jurisdiction in International Law," III *Recueil des cours* (1964-I) p.9, p.30.

<sup>5</sup> American Law Institute, *Restatement, Second - the Foreign Relations Law of the United States*, 2nd ed. (St. Paul: American Law Institute, 1955) p. 20.

<sup>6</sup> See Bowett, "Jurisdiction: Changing Patterns of Authority over Activities and Resources," 53 *British Yearbook of International Law* (1982) p.1.



Since jurisdiction is strictly connected to sovereignty, it is obvious that a state has jurisdiction over its territory and the permanent population living there. Later, however, territorial jurisdiction was extended to include aliens or other persons enjoying diplomatic immunity. International law has since then expressed a profound concern with regard to criminal jurisdiction and realized the need to regulate it.<sup>7</sup> Besides that, it is well recognized that public international law envisages norms that control substantive aspects of criminal law and subsequently restricts the liberty of states in applying their criminal law. These norms will be elaborated below. However, what needs to be clarified in this context is whether a state is only eligible to exercise jurisdiction if international law specifies this or whether it can exercise such jurisdiction unless international law prohibits it. The Permanent Court of International Justice (P.C.I.J) in the *Lotus Case*<sup>8</sup> supported the latter approach when it ruled that Turkey had not broken international law on the basis that the burden lay on the state claiming that such exercise of jurisdiction was unjustified to show that it was prohibited by international law. One can suggest that the approach followed by the P.C.I.J is convenient and logical, and therefore it has been since then generally reflected in states' practice.

### 1.1 Principles of criminal jurisdiction

The courts of a state may exercise jurisdiction in respect of criminal acts under its law, not only over a state's own citizens or residents but also over others as stated above. The application of such jurisdiction is governed by rules in the form of principles. The legal literature on jurisdiction aims to identify and elaborate on those

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<sup>7</sup> In his comment on the *Lotus Case* P.C.I.J. Rep., Ser. A, No. 10, p. 73, Brierly referred to development in the application of criminal jurisdiction and stated: "International law did not start as the law of a society of States each of omniscient jurisdiction, but of States possessing a personal jurisdiction over their nationals and later acquiring a territorial jurisdiction over resident non-nationals. If it is alleged that they have now acquired a measure of jurisdiction over non-resident non-nationals, a valid international custom to that effect should surely be established by those who allege it." See Brierly, 44 *Law Quarterly Review* (1928) p. 154, pp. 155-56).

<sup>8</sup> The *Lotus Case* *ibid.*, refers to a collision on the high seas between a French and a Turkish ship resulting in the death of Turkish nationals. As a result, Turkey prosecuted for involuntary manslaughter the French officers alleged to be responsible for the accident. The Permanent Court of International Justice was asked by France to rule whether the Turkish measure was in conflict with international law and, if so, what reparation was due.



principles on which jurisdiction is generally based, and to consider whether these principles are adequate to function as the basis of jurisdiction or as a basis to determine the propriety of jurisdiction between states. These principles, that have emerged over years and vary in the degree of recognition they have received,<sup>9</sup> can be classified as territorial and extra-territorial.

### 1.1.1. Territorial jurisdiction

The territorial principle of jurisdiction describes the power of a state to establish jurisdiction over acts, persons or property on its own territory. According to this principle a state cannot prosecute an offender unless it has been proved that the offense was committed on its territory. This principle is clearly conceded by international law to all members of the society of states, as it is derived from the sovereign powers exercised by a state within its own territory. However, it does not follow that territorial jurisdiction is completely exclusive in its application to aliens, since the alien's state of origin retains its jurisdiction over its citizens under the nationality principle, and because diplomatic agents enjoy immunity from the criminal jurisdiction of the receiving state, except for actions taken in their personal capacities outside their official functions.<sup>10</sup>

Criminal law was originally based on the territorial principle, while other bases of jurisdiction are of more recent creation and even questionable.<sup>11</sup> Therefore, it is hard to find any state that does not base its criminal codes or ordinances on the

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<sup>9</sup> For example, Harris has referred to four principles: the nationality principle, the protective principle, the universality principle and the passive personality principle. See Harris, *Cases and Materials on International Law*, 4th ed. (London: Sweet & Maxwell, 1991) pp. 250-51). Brownlie has added to the previous principles, the principle of crime under international law. See Brownlie, *Principles of Public International Law*, 3rd ed. (Oxford: Oxford University Press, 1979) pp. 303-305); the European Committee on Crime Problems added to those mentioned by Harris, the flag, the representation principle and other forms of extra-territorial jurisdiction which do not fall under the aforementioned categories ( Council of Europe, *Extra-territorial Jurisdiction* (1990) pp. 9-15 ); the Harvard Research adopted the first three principles of extra-territorial jurisdiction and omitted the passive personality principle which was thought to be doubtful (29 *American Journal of International Law* (1935) Supp. p. 480. pp. 480, 519, 556, 563-579 ).

<sup>10</sup> See the Vienna Convention on Diplomatic Relations 1961, in particular Article 31. The number of states parties to the Convention, which entered into force in 1964, was 152 by 1991. See Harris, *supra* note 9, p. 319.

<sup>11</sup> See Beckett, "The Exercise of Criminal Jurisdiction over Foreigners," 6 *British Yearbook of International Law* (1925) p. 50.

territorial principle. The primacy of this principle can be shown by the fact that states usually make a distinction between this principle on the one hand and all other extra-territorial principles on the other. Furthermore, the latter are described as an exception or subsidiary to the former.<sup>12</sup> The territorial principle was thus regarded historically as the basis of jurisdiction in the English common law countries, in order to avoid interference in the internal affairs of the state where the offense occurs. However, in civil law countries such as Italy, France and Germany the universality principle is deep-rooted and has acquired the same importance as the territorial principle in the former countries.<sup>13</sup>

However, the high legal status of the territorial principle has not prevented the existence of different views regarding its interpretation and application, in particular those related to the determination of the place of the commission of the crime, and the implications of extra-territorial elements. The problem arises when a crime is committed on the territory of more than one state or across a frontier.

Many legal experts have attempted to tackle this problem. For example, it has been suggested that such crime be divided into two elements: the initiatory element (the physical commission of the crime) and the terminatory element (the consequences of the criminal act or where and when it is completed).<sup>14</sup> Some people prefer to establish jurisdiction according to the initial theory, since it is easier to apply, and it is convenient to try the offender in the state where he is present to avoid the necessity of extradition.<sup>15</sup> Others have tried to solve the problem through developing two concepts: subjectivity and objectivity. By virtue of these concepts, a state can claim jurisdiction either by referring to the physical presence of the offender in its territory when committing the offense, or to the fact that the harmful effects of his act were felt there or the last constituent element occurred there.<sup>16</sup> The constituent element is the direct element or component of the crime, as distinguished from the effects of the crime. But Akehurst has warned against abandoning the constituent element approach in favor of the effects approach, noting that once we

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<sup>12</sup> See Council of Europe, *supra* note 9, p. 21.

<sup>13</sup> Akehurst, "Jurisdiction in International Law," 46 *British Yearbook of International Law* (1972-73) p. 145, p. 163

<sup>14</sup> Williams, "Venue and the Ambit of Criminal Law," 81 *Law Quarterly Review* (1965) p. 518, pp. 518-19.

<sup>15</sup> *Ibid.*

<sup>16</sup> Hirst, "Jurisdiction over Cross-Frontier Offences," 97 *Law Quarterly Review* (1981) p. 80, pp. 80-81.

do that, we "embark on a slippery slope which leads away from the territorial principle towards universal jurisdiction."<sup>17</sup> Nevertheless, the terminatory theory should not be seen as the same as the objective territorial principle because it is possible to draw a distinction between them. This was expressed clearly by Hirst: "The harmful consequences of delinquent behavior may not be essential elements of the relevant offense at all." Therefore, according to him, the terminatory theory may coincide with either the subjective or the objective jurisdiction, depending on the way in which the offense is defined.<sup>18</sup> Another attempt was made to resolve the situation through classifying offenses as being either "conduct crimes" or "result crimes". The former consists only of the conduct of the offender and the surrounding circumstances, while the concept of the latter is based on the consequences of the offense.<sup>19</sup> It is true that some crimes are completed by conduct and others when further consequences occur, but drawing such a distinction for jurisdiction purposes is illogical, as Williams has suggested,<sup>20</sup> because the commission of crimes, as pointed out by Hirst, must not be established only on the basis of the place where they are completed.<sup>21</sup> In this context also, many European states who are members of the Council of Europe permit jurisdiction to be exercised on the basis of the doctrine of ubiquity, under which all the elements of an offense are deemed to have been committed in one place, although in fact only certain elements were committed in that place.<sup>22</sup>

Regardless of all difficulties and disputes regarding its application and interpretation, the territorial principle, and specifically its objective concept has received general support by state practice. This has been the case particularly after it was endorsed by the P.C.I.J in the *Lotus Case* as discussed above. It will retain this status because restoring and maintaining order or regulating various activities within the territory of a state is an essential function and task of any state.

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<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid.*, pp. 81-82.

<sup>19</sup> *Ibid.*, p. 82.

<sup>20</sup> Williams, *supra* note 14, p. 520.

<sup>21</sup> Hirst, *supra* note 16, p. 97.

<sup>22</sup> Council of Europe, *supra* note 9, p. 9.

### 1.1.2. Extra-territorial jurisdiction

Extra-territorial jurisdiction is complex and has given rise to fundamental differences in opinion, mainly regarding its interpretation and scope of application. In addition, the legal authors have provided different classifications regarding the principles governing this form of jurisdiction.<sup>23</sup> This research will highlight the main extra-territorial principles that are likely to be widely recognized and established. These principles are: nationality, passive personality, the protective principle and universality.

#### 1.1.2.1. The nationality or the personality principle

This principle governs the right of a state to prosecute its own nationals for offenses committed by them abroad. Nationality is not only an indicator of sovereignty or allegiance but also it is generally recognized as a basis for the exercise of extra-territorial jurisdiction. In fact, there is such variety in the practical application of this principle that one can assume the existence of several principles of nationality.<sup>24</sup> The problem that arises in this context is whether or not such a jurisdiction should be restricted. Different views have been expressed in this respect. For example, in Akehurst's view, the judicial jurisdiction of a state over its own nationals is unlimited.<sup>25</sup> On the other hand, Bowett and Mann are in favor of restricting the power of a state to exercise jurisdiction over its nationals within the territory of another state.<sup>26</sup> However, while one can say that a state is entitled to prescribe jurisdiction over its own nationals abroad, the enforcement of such jurisdiction is subject to other principles of public international law. The governing principle in this regard being that a state cannot enforce its domestic laws on the territory of another state without its consent.<sup>27</sup>

Generally, this principle is of limited application. It applies to certain

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<sup>23</sup> Council of Europe *supra* note 9.

<sup>24</sup> Council of Europe, *supra* note 9, p. 10.

<sup>25</sup> Akehurst, *supra* note 13, p.156.

<sup>26</sup> Bowett, *supra* note 6, pp. 7-8.

<sup>27</sup> On extra-territorial jurisdiction, see Mann, *supra* note 4, pp. 126-58 and Akehurst, *supra* note 13, pp. 179-212.

offenses, usually the most serious ones.<sup>28</sup> Such limited application must also avoid, in the case of dual nationality, the possibility of creation of double jeopardy.<sup>29</sup>

#### 1.1.2.2. The Protective principle - Security of the state

International law recognizes the right of a state to exercise jurisdiction over offenses committed abroad by aliens and seen as a serious threat to its vital interests, such as those affecting its security, territorial integrity or political independence. The rationale behind this principle is that such interests should not be left to other states to protect according to their assessment of the damage inflicted on the state affected.<sup>30</sup>

This principle is not contested. However, what is contested is the scope of its application. Practice has shown that some states have exceeded what could be justified as legitimate or required for the protection of their vital interests.<sup>31</sup> Therefore, there is a need to limit the application of this principle to the protection of what can objectively be regarded as a state interest. It is entitled to do so within its territory and over its own nationals. Thus it does follow that a state should refrain from jeopardizing the essential interests of other states whilst seeking to exercise its extra-territorial jurisdiction on the basis of the same concern and interest. In this regard Akehurst asserted that the protective principle of jurisdiction "loses all validity when it is used, not to safeguard the political independence of the state claiming jurisdiction, but to undermine the political independence of other countries."<sup>32</sup>

#### 1.1.2.3. The universality principle

By virtue of this principle states may exercise jurisdiction over certain

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<sup>28</sup> Council of Europe, *supra* note 9, p. 9.

<sup>29</sup> Harvard Research, *supra* note 9, pp. 525-27, 531.

<sup>30</sup> *Ibid.*, pp. 543-63; Bowett, *supra* note 6, pp. 10-11 and Akehurst, *supra* note 13, pp. 157-59.

<sup>31</sup> Several examples were given by Akehurst regarding the misuse of this principle. For example, a Jewish alien was convicted by a German court for having sexual intercourse with a German girl, on the grounds that his act threatened the racial purity of the German nation. See Akehurst, *supra* note 13, pp. 158-59).

<sup>32</sup> *Ibid.*, p.159.

crimes committed by anyone wherever they occur. It is applied to serious crimes where international norms regarding an offense justify its universal repression, and it has existed as a rule for centuries. The well known example is that of piracy.<sup>33</sup> This principle has been developed rapidly since the Second World War in international human rights law and humanitarian law to embrace other crimes such as crimes against humanity, crimes against peace and war crimes.<sup>34</sup> What should be noted in this context is that while in the case of piracy no state has territorial jurisdiction, other crimes, such as hijacking or the taking of hostages, where every state can or must prosecute, can be committed within the territorial jurisdiction of a state.

Universal jurisdiction can be either compulsory or permissive. For instance, in the case of war crimes, universality of jurisdiction is compulsory. In such a situation a state is under an obligation either to try the accused or to extradite him to a state which wishes to prosecute him. In the case of crimes against humanity or against peace, universal jurisdiction is permissive, whereby a state can prosecute or extradite if it wishes but it is not obliged to do so.<sup>35</sup>

#### **1.1.2.4. The principle of passive personality**

By virtue of this principle, jurisdiction is assumed by a state over crimes committed abroad against its nationals. It has little support in international law because it involves a very broad assertion of jurisdiction which may interfere with

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<sup>33</sup> See for example Akehurst, *ibid.*, pp. 160-66; Bowett, *supra* note 6, pp. 11-14; Harvard Research, *supra* note 9, pp. 563-92 and Rodley, *The Treatment of Prisoners Under International Law* (Oxford: Oxford University Press, 1987) pp. 96-107.

<sup>34</sup> See as an example, the Charter and the Judgment of the Nuremberg Tribunal, in particular Article 6 of the Charter which defined crimes against humanity, crimes against peace and war crimes; various resolutions of the General Assembly of the United Nations, such as the resolution whereby the International Convention Against the Taking of Hostages was adopted (GA Resolution 34/146 of 17 December 1979); the Geneva Conventions of 1949 (common Article 1); the Fourth Geneva Convention that has envisaged the principle of the universality applying to the High Contracting Parties in respect of grave breaches (Articles 146 and 147) and see most recently the Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia, which was established by Security Council Resolution 827 of 25 May 1993.

<sup>35</sup> The best treatment of the compulsory and the permissive universality of jurisdiction is to be found in Rodley, *supra* note 33, pp. 96-107.

the sovereign status of the state where the crime occurred.<sup>36</sup> According to Gilbert the "open ended nature" of this principle makes it hard to recognize its application even to combating terrorism mainly because a state may assert jurisdiction over such offenses under the protective principle which is more recognized.<sup>37</sup> Different states apply the principle in different ways. Some states apply it to all offenses, whilst others to serious ones only. There is an international trend towards its inclusion in conventions dealing with certain offenses, mainly terrorist activities.<sup>38</sup>

#### 1.1.2.5. Other extra-territorial principles

Some legal literature attempts to identify other forms of extra-territorial jurisdiction, notably the flag principle or what is referred to as the "floating island" theory, prosecution of crimes under international law and the representation principle.<sup>39</sup> In brief, according to the first principle, a state may establish jurisdiction over offenses committed on board vessels flying its national flag, irrespective of the nationality of the offender; by virtue of the second, over breaches of humanitarian law (Hague and Geneva Conventions); and according to the third, on behalf of another state if it has been authorized by that state to do so. These principles are less recognized internationally either because they complement other principles, as is the case with the flag principle and prosecution of crimes under international law which complement respectively the territorial and the universality principles, or/and because of their recent creation, as is the case with the representation principle.

#### 1.1.2.6. Conclusion

In sum, as regards what principles of jurisdiction can guarantee effective application of state jurisdiction, one can suggest, at the top of the hierarchy, the territorial principle in addition to any other recognized principle where the subject of

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<sup>36</sup> See Harvard Research, *supra* note 9, p. 597. Many prominent jurists such as Akehurst and Bowett ignore the passive personality principle when they discuss criminal jurisdiction. See Akehurst, *supra* note 13 and Bowett, *supra* note 6.

<sup>37</sup> Gilbert, *Aspects of Extradition Law* (Dordrecht: Martinus Nijhoff, 1991) p. 46.

<sup>38</sup> Council of Europe, *supra* note 9, p. 12.

<sup>39</sup> *Ibid.*, pp. 11-12 and Brownlie, *supra* note 9, p. 305.

the jurisdiction is in the custody of the state claiming jurisdiction.

## 1.2. Delimitation of legislative criminal jurisdiction

Certain principles of public international law restrict the legislative criminal jurisdiction of states. Most notable of these is the comity notion, which *de facto* regulates the relationship among states on the basis of reciprocity of equality and mutual respect for the integrity and vital interests of each state. This includes primarily observance of the principle of non-intervention which requires states to refrain from unjustified interference in the internal affairs of other states. This principle, which is based on respect for the doctrine of sovereignty, has been asserted by Article 2 (7) of the Charter of the United Nations, reiterated in various General Assembly Resolutions, in particular the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations.<sup>40</sup> It has also been recognized by the International Court of Justice, notably in the *Nicaragua Case*.<sup>41</sup> It is worth noting that the principle of territorial integrity is less relevant to the delimitation of jurisdiction than the principles of non-intervention or equality of states, since the assertion of jurisdiction rarely involves the use or threat of force. Nevertheless, it prohibits a state from exercising enforcement measures within the territory of another state without its consent.

To sum up briefly, the doctrine of sovereign equality obviously has implications for jurisdiction. This approach is well recognized by prominent writers.<sup>42</sup>

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<sup>40</sup> The Declaration contains provisions in addition to the principle of non-intervention concerning the refraining from use of force against the territorial integrity, political independence and equality of states. The Declaration was adopted by GA Resolution 2625 (XXV) of 24 October 1970. Reprinted at 65 *American Journal of International Law* (1971) p. 243.

<sup>41</sup> *Nicaragua v. U.S.* ICJ Reports 1984, p. 392. The International Court of Justice, at paras 202-210, provided an interesting elaboration on the principle of non-intervention in this case. See also Harris, *supra* note 6, pp. 827-837.

<sup>42</sup> See for example, Brownlie, *supra* note 9, p. 298; Akehurst, *supra* note 13, p. 145 and Mann, *supra* note 4, pp. 13-14.



## ISRAELI CRIMINAL JURISDICTION

The Israeli law on criminal jurisdiction is of course part of the law of the state of Israel as a whole. This study does not intend to trace the sources of the latter, which have been discussed in detail elsewhere.<sup>43</sup> However, one can say that any study of the sources of Israeli laws will certainly lead to the law of Palestine which was in force on the eve of the creation of Israel on 15 May 1948. The law of Palestine was a combination of Ottoman law, English law and the legislation enacted by the legislator of the British Mandate on Palestine. Thus, the law of Israel consists of the law of Palestine and legislation that has been enacted since May 1948.

The primary source of Israeli criminal law is found in the Criminal Code Ordinance of 1936,<sup>44</sup> enacted by the British Mandate administration. This in turn is based on English criminal law with some modifications to suit its application to Palestine. This Ordinance is still valid in Israel, except for those provisions that have been amended or repealed by the Israeli legislature.<sup>45</sup>

Needless to say, Israel, like any other state, exercises complete jurisdiction over crimes committed within its territory. Moreover, it was counted, mainly in the first two decades of its existence, amongst those states that base their jurisdiction on territoriality because it was highly influenced by English criminal law and by the English common law approach which is, as stated above, in essence territorial. However, this chapter will show *inter alia* how Israeli criminal law has been broadened to comprise extra-territorial principles of jurisdiction. It is not necessary to discuss Israeli territorial jurisdiction, since the focus here is on the sphere of jurisdiction which is affected by Israel's relations with other states. In addition, it is obvious that all offenses created by Israeli penal law, including those which constitute offenses if committed outside Israel, are punishable if committed within

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<sup>43</sup> See Baker, *The Legal System of Israel* (London: Sweet & Maxwell, 1961) pp. 49-52.

<sup>44</sup> The Criminal Code Ordinance of 1936 replaced the Ottoman Criminal Code. It consists of 400 sections divided into 44 chapters. The complete text of it was published in the *Palestine Gazette* (English Edition) of 1936, Supp. 1, p. 285.

<sup>45</sup> Bach, "Development of Criminal Law in Israel," 9 *Israel Law Review* (1974) p. 568.

Israeli territory.

## 2.1. Israeli extra-territorial jurisdiction

The Penal Law (Offences Committed Abroad) (Consolidated Version) of 1973<sup>46</sup> (hereinafter the Penal Law) regulates Israel's exercise of criminal jurisdiction outside Israeli territory. An examination of this statute demonstrates that Israel does appear to exercise, in addition to the territorial principle, all types of extra-territorial jurisdiction.

### 2.1.1. The universality principle of jurisdiction

The universality principle of jurisdiction has been envisaged by the Israeli legislature through the following laws:

1) The Crime of Genocide (Prevention and Punishment) Law of 1950.<sup>47</sup> This law was passed after relevant principles were laid down by the United Nations Genocide Convention<sup>48</sup> and the law actually reflects these principles. After defining "genocide" similarly to the definition in the Genocide Convention,<sup>49</sup> it criminalizes the commission of genocide and makes the death penalty the maximum sentence available for the perpetrator. It also holds any act of conspiracy, incitement, attempt to commit or complicity in genocide to be as culpable as the actual commission of the genocide. Finally, it asserts Israel's jurisdiction to prosecute a person suspected of committing any offense under this law abroad as if he had committed it in Israel.

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<sup>46</sup> 27 *Laws of the State of Israel (L.S.I.)* (1972-73) No. 15.

<sup>47</sup> 4 *L.S.I.* p. 101.

<sup>48</sup> The Convention on the Prevention and Punishment of the Crime of Genocide, adopted and opened for signature, ratification or accession by GA Resolution 260 (III) of 9 December 1948.

<sup>49</sup> The law provides a definition analogous to that stated in the UN Convention. Genocide, according to the law, can be defined as any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious groups: killing members of the group; causing serious bodily or mental harm to members of the group; inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent birth within the group; forcibly transferring children of the group to another group.

2) Section 78 of the Criminal Code Ordinance of 1936 (piracy).<sup>50</sup> By virtue of this law, any person who commits piracy or any related crime is "guilty of a felony and is liable to imprisonment for life".

3) The Dangerous Drugs Ordinance No. 17 of 1936.<sup>51</sup> This Ordinance declares as crimes a wide range of acts related to drugs, *inter alia* export, import, sale, manufacture, possession of dangerous drugs inside or outside the country.

4) Israel has also asserted universal jurisdiction under the Nazi and Nazi Collaborators (Punishment) Law, 1950, in the *Eichmann*<sup>52</sup> and *Demjanjuk*<sup>53</sup> cases.

### 2.1.2. Protective principle of jurisdiction

The protective principle of jurisdiction is of special concern in Israel. It was asserted essentially through section 2(a) of the Penal Law. This section empowers the Israeli courts to prosecute a person who committed abroad an act which would have been regarded as an offense if it had been committed in Israel and which "harmed or was intended to harm the State of Israel, its security, property or economy or its transport or communication links with other countries." Besides the general terms of sub-section (a), sub-section (b) has laid down, through various laws, specific offenses, committed abroad, that can be subject to Israeli jurisdiction on the same basis:

1) The insulting or the misusing of the State flag or emblem.<sup>54</sup>

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<sup>50</sup> *Supra* note 44, p. 313.

<sup>51</sup> *Ibid.*, p. 132.

<sup>52</sup> Eichmann was kidnapped in 1960 by Mossad from Buenos Aires, and was convicted and executed in Israel for the crimes he committed against Jews during the Second World War.

<sup>53</sup> John (Ivan) Demjanjuk was charged in the District Court of Jerusalem with grave breaches under the Nazi and Nazi Collaborators (Punishment) Law. He was convicted and sentenced to death. He appealed to the Supreme Court of Israel which ruled in Autumn 1993 that he was innocent.

<sup>54</sup> The Flag and Emblem Law, 1949. 6 L.S.I. p. 186.

- 2) Any violation of the State Seal Law, 1949,<sup>55</sup> which clarifies and regulates the documents to which the state seal may be affixed and the mode of affixing.
- 3) Commission of any of the following serious acts:<sup>56</sup> acts "prejudicial" to the armed forces such as mutiny in the armed forces and incitement to disobedience ; espionage which includes *inter alia* delivery of information to the enemy and contact with foreign agents; delivery of official information by public servants, holders of contract or by persons of trust; impairment of foreign relations; and conspiracy or attempt to commit any of the above offenses.
- 4) Offenses relating to seditious conspiracy or seditious intention aiming "to bring into hatred or contempt or to incite disaffection" against any of the official authorities.<sup>57</sup>
- 5) Intentionally false swearing.<sup>58</sup>
- 6) Forging an Israeli passport or *laissez-passer*, or using them unlawfully.<sup>59</sup>
- 7) Supplying false information with a view to obtaining a visa or an Israeli residence permit.<sup>60</sup>
- 8) Any violation of Regulation 8(a) of the Return Regulations, 1956.
- 9) Any offense committed under the Population Registry Law, 1965, such as unlawful use or altering of an identity certificate, and possession of an altered certificate.<sup>61</sup>

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<sup>55</sup> 4 L.S.I. p. 13.

<sup>56</sup> See the Penal Law Revision (State Security, Foreign Relations and Official Secrets) Law, 1957. 6 L.S.I. p. 186.

<sup>57</sup> See Sections 59-62 of the Criminal Code Ordinance of 1936, *supra* note 44.

<sup>58</sup> *Ibid.*, Section 120 of the Criminal Code Ordinance of 1936.

<sup>59</sup> Section 8 of the Passports Law, 1952. 6 L.S.I. p. 76.

<sup>60</sup> Section 12(2) of the Entry into Israel Law, 1952. 6 L.S.I. p. 159.

<sup>61</sup> 19 L.S.I. p. 288.

10) Any offense committed under chapter 11 of the Knesset Election Law (Consolidated Version), 1969, such as falsification of a voters' register or voters' list, interference with elections, unlawful voting, bribery and intimidation during the voting process.<sup>62</sup>

In addition, mention should be made of the Air Navigation (Offenses and Jurisdiction) Law, 1971.<sup>63</sup> Under this law Israel is entitled, *inter alia*, to establish jurisdiction over a person who commits on board a non-Israeli aircraft any act against the security of Israel.

Moreover, the Nazi and Nazi Collaborators (Punishment) Law, 1950,<sup>64</sup> deals with crimes against humanity and against Jewish people if committed "during the period of the Nazi regime, in any enemy country",<sup>65</sup> and war crimes if done "during the period of the Second World War". Israel invoked this law in the *Demjanjuk Case* and in the *Eichmann case*. However, this assertion of jurisdiction is not supported by international law because the victims were not Israeli nationals. For example, the Israeli view was contested by the courts of the United States in the *Demjanjuk* extradition cases. The judgment of these courts was in favor of Israel's right to exercise its jurisdiction over the accused not on the basis of the above law, but on the basis of the universality principle, by which any state, including Israel, can prosecute war criminals only if the state with territorial jurisdiction has abstained from so doing.<sup>66</sup>

In the *Eichmann Case*, the Jerusalem District Court argued (paragraphs 30-34) that the Jewish people was threatened in the Holocaust and then attempted to prove that the linking point between Israel and the Jewish people had been established due to Israel's creation and recognition as the state of the Jews. However such an argument is unlikely to be accepted under international law because of the

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<sup>62</sup> 23 L.S.I. p. 110.

<sup>63</sup> 25 L.S.I. p. 55.

<sup>64</sup> 4 L.S.I. p. 154.

<sup>65</sup> An enemy country in this law refers to Germany during the period of the Nazi regime; any other Axis states during the period of the Second World War with the Allied powers; and any territory which during the period of the Nazi regime was under German rule or under the rule of any other Axis state.

<sup>66</sup> Gilbert, *supra* note 37, p. 222.

fact that Israel did not exist at the time it claims that its vital interests were damaged.<sup>67</sup> The District Court, in addition to asserting the protective principle, expressed clearly (paragraph 30 ) its power to try the accused under the universality principle.

### 2.1.3. The nationality principle

Israeli courts may assume jurisdiction over an Israeli national, resident or public servant suspected of committing particular offenses abroad. Besides the offenses that are enumerated above under sub-sections (a) and (b) which are punishable whether the offender is an alien or an Israeli, section 3 of the Penal Law refers explicitly to the commission abroad of specific offenses by "a national, resident or public servant"<sup>68</sup> of Israel...". These offenses are elaborated in particular provisions such as the following:

- 1) Bribery as prohibited by the Penal Law Revision (Bribery) Law, 1952.<sup>69</sup> This prohibits bribery of any kind and for whatever purpose. This includes, for example, the taking of bribes in connection with functions performed on behalf of the state or any other local authority, or in connection with judicial functions.
- 2) Actions done by public officers in respect of corruption, as prohibited by chapter 12 (sections 106-115 ) of the 1936 Criminal Code Ordinance, which includes acts of extortion or oppression, receiving money to show favor, making false claims or issuing a false certificate; and in respect of other act, as prohibited by chapter 15 (sections 140-145) of the same Ordinance, [carried out by the officers against a public authority] such as frauds, breaches of trust, negligence, disobedience or insults to other public officers.
- 3) Theft offenses as defined in chapter 29 (sections 236-237) of the above

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<sup>67</sup> See the judgment of the Israeli District Court Of Jerusalem (1961) 36 *International Law Reports* 5 and the judgment of the Supreme Court of Israel (1961) 36 *International Law Reports* 277.

<sup>68</sup> The Penal Law adopted the definition of public servant as provided in the Criminal Code Ordinance of 1936, *supra* note 44, as any person holding any civil offices or appointed by law to hold any other offices or performing the duty thereof.

<sup>69</sup> 6 *L.S.I.* p.32.

Ordinance; offenses relating to "personation" as defined in chapter 43 (sections 374-379) of the Ordinance, such as false representation as some other person with a view to deception; and all types of offenses of deceit, blackmail and extortion.<sup>70</sup>

4) Bigamy. Section 5 of the Penal Law refers to offenses prohibited under the Penal Law Amendment (Bigamy) Law, 1959.<sup>71</sup> According to this law it is prohibited for a married man to marry another woman and similarly for a married woman to marry another man. Furthermore, in the case of dissolution of marriage against the wife's will, the husband is liable to punishment. Any offense committed under this law is liable to imprisonment for 5 years.

#### **2.1.4. The passive personality principle**

Israel also claims jurisdiction under the passive personality principle of jurisdiction. Section 4(a) of the Penal Law authorizes the Israeli courts to prosecute under Israeli law a person who committed abroad an offense under this law which "harmed or was intended to harm the life, person, health, freedom or property of an Israeli national or resident of Israel." Most notable is sub-paragraph (b) of the same section which, if the act occurred in a place under the jurisdiction of another state, limits the application of such jurisdiction to those acts that are also offenses under the law that applies in that place. One can note that the limited ambit of application, when the territorial jurisdiction of another state is involved, appears on the one hand to indicate Israeli respect for the sovereignty of the other state, and on the other to exclude the application of such a limitation to the Occupied Palestinian Territories over which Israel recognizes the jurisdiction of no other entity or state.

Moreover, the passive personality principle of jurisdiction can be found also in the Air Navigation Law (mentioned above) which permits Israeli courts to try a person who committed an offense on board a non-Israeli aircraft against an Israeli national or resident. This approach was expressed clearly by the Jerusalem District Court in the *Eichmann Case*, when the Court attempted to establish the linking-point between the nationality of the victims and the state of Israel.

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<sup>70</sup> 17 L.S.I. p. 153.

<sup>71</sup> 13 L.S.I. p. 152.

### 2.1.5. The flag principle

Israel has also extended its jurisdiction by application of the flag principle, as illustrated by the Air Navigation Law, to comprise offenses committed "on board an Israeli aircraft or in respect of a person or property on board an Israeli aircraft."

### 2.2. General observations

The above brief examination of the development of the bases of Israeli criminal jurisdiction demonstrates the basic changes that have been introduced. Most notable is the tendency to depart from the British legal tradition of criminal law, that was inherited by Israel and which is based on the territorial principle of jurisdiction. Israel has relaxed the application of this principle whilst adopting and enhancing the application of other principles. It is worth noting in this regard that all common law countries have extended their jurisdiction to some extent since 1945. In many cases the extension is based on treaties. As an example of the extension, the practice of the USA and the UK indicates the application of the nationality principle in respect of specific crimes such as treason, murder and bigamy.<sup>72</sup> But in the case of Israeli penal law and practice, the extension has significantly exceeded that of the common law countries. The extent of this departure has been shown above by the wide range of offenses that are prescribed under the nationality and protective principles. A historical examination of Israeli penal law shows that this trend has been inaugurated mainly since the early 1970s. In March 1972 the Israeli Knesset introduced the following amendment to section 15 of the Judicial and Administration Ordinance of 1948<sup>73</sup> which released the hand of the Israeli legislature from the cuffs of English legal tradition and interpretation.<sup>74</sup>

*All provisions in a law specifying that the law shall be interpreted in accordance with the principle of legal interpretation obtaining in England, and that expressions*

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<sup>72</sup> On the extension of the jurisdiction of common law countries, see for example, Brownlie, *supra* note 9, p. 300.

<sup>73</sup> Levy, "Criminal Responsibility: A survey of Developments in Israeli Legislation and Precedent," 9 *Israel Law Review* (1974) p. 580, p. 582.

<sup>74</sup> On the differences that emerged between the Israeli approach to jurisdiction and the English approach, see *ibid.*, p. 580 and Bach, *supra* note 45, pp. 568-70.



*used in it shall be used with the meaning attached to them in English Law, shall no longer be binding.*

We also have seen how the Penal Law of 1973 broadened the protective principle (section 2 of the Law), and how the passive personality principle (section 4) and the flag principle (section 1(4)) have been created. In this context, the best assessment of the development of the Israeli penal law was made by an Israeli legal figure<sup>75</sup> who declared, some 20 years ago, that Israeli criminal law is in "a period of flow " which is demonstrated by:

*1) The adoption by the courts of less strict canons of interpretation of criminal legislation; 2) The application of general doctrines, especially those of attempt, conspiracy<sup>76</sup> and complicity more widely than before; 3) The narrowing down of certain defences; 4) The creation of new offenses; 5) The broadening of the spatial (or territorial ) application of the criminal law.*

Another brief description was provided by another Israeli who described the developments in the sphere of criminal liability as:

*sporadic, lacking an overall scheme or systematic approach. Whilst legislative reform was slow in coming, precedent has created a haphazard plaidwork of theory and doctrine touching at random upon various aspects of responsibility, as and when presented by the cases which have come up for decision.*

Moreover, one can speculate that Israeli punitive measures such as

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<sup>75</sup> Bein, "Recent Developments in Israel Criminal Law," 12 *Israel Law Review* (1977) p.180.

<sup>76</sup> The origin of the offense of conspiracy in the Israeli Penal Law can be found in chapter 6 of the 1936 Criminal Code Ordinance. Conspiracy, according to the Code, includes *inter alia* preparation for commission of a crime with explosives, neglect to prevent certain offenses, and attempts to procure, solicit or incite the commission of an offense. The Code based conspiracy, as other offenses, on the territorial principle of jurisdiction, but its scope under the Israeli Penal Law has certainly been affected by Israel's extension of its territorial jurisdiction.

assassination and abduction, that have been continued in violation of the doctrine of territorial sovereignty,<sup>77</sup> are carried out in accordance with Israel's extensive interpretation of its extra-territorial jurisdiction.

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<sup>77</sup> As an example, PLO leader Abu Jihad was assassinated in Tunisia by Israeli Commandos on 15 April 1988; Sheikh Abd-al-Karim Obeid, a leader in the Lebanese Shia militia group was kidnapped from Lebanon by Israeli Troops in 1989, and since then has been in Israeli custody; another Shia leader, Mustafa Derani, was abducted from Lebanon in May 1994. (*The Guardian*, 23 May 1994 p. 11).

## CRIMINAL JURISDICTION UNDER THE ISRAELI BELLIGERENT OCCUPANT

The Israeli government does not officially recognize its status as an occupier in respect of the Occupied Palestinian Territories (hereinafter O.P.T.) and contests the applicability of the law of belligerent occupation, in particular the Fourth Geneva Convention, to these territories. However, it is an irrefutable fact that Israel is a belligerent occupant and bound by the relevant provisions of international humanitarian law. This fact has been continuously stressed and reaffirmed by the international community of states as well as by legal experts and authors.<sup>78</sup> Most notable is Security Council Resolution 681 of 1990 which called upon the High Contracting Parties to the Fourth Geneva Convention "to ensure respect by Israel, the occupying power, of its obligations in accordance with Article 1 thereof." Most recently, Security Council Resolution 904 of 18 March 1994 reaffirmed the applicability of the Fourth Geneva Convention to the O.P.T.<sup>79</sup> It is to be noted that Israel has accepted the applicability of the Hague Regulations as a matter of customary law only.<sup>80</sup> However, it is beyond the scope of this study to

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<sup>78</sup> For a discussion of the applicability of the laws of belligerent occupation to the West Bank and Gaza Strip and of how the Israeli position and its administration of the OPT violates international humanitarian law, see, for example, Cohen, *Human Rights in the Israeli-Occupied Territories 1967-1982* (Manchester: Manchester University Press, 1985) chaps. 3-5; Roberts, "Prolonged Military Occupation: the Israeli-Occupied Territories 1967-1988," in Playfair, ed., *International Law and the Administration of Occupied Territories* (Oxford: Oxford University Press, 1992) pp. 25-86; See also Qudus, "The Application of International Law in the Occupied Territories as Reflected in the Judgments of the High Court of Justice in Israel," pp. 87-124; Playfair, "Playing on Principle? Israel's Justification for its Administrative Acts in the Occupied West Bank," pp. 205-240 and Greenwood, pp. 241-266, "The Administration of Occupied Territory in International Law," also in Playfair ed.

<sup>79</sup> The resolution was published in 33 *International Legal Materials* (1994) pp. 548-49.

<sup>80</sup> The Applicability of the Hague Regulations was confirmed by the Israeli High Court of Justice (H.C.J.) in several cases, for example see: *H.C.J. 606/78*, and *H.C.J. 390/79*.

address general issues or other issues related to the Israeli administration of the O.P.T., since it is concerned only with one aspect of this administration, that of criminal jurisdiction. But before moving to that, it is essential to provide an overview of the position of the law of belligerent occupation regarding criminal jurisdiction.

### 3.1. Criminal jurisdiction under belligerent occupation

Criminal jurisdiction under an occupation is determined by the penal law of the occupied territory, which is part of the local law of such territory. It is governed also by the law of belligerent occupation itself which in certain circumstances entitles the occupier to amend the law that is in force prior to the occupation. Before elaborating on this issue, it may be useful to draw attention to some basic principles of international law concerning the conduct of the occupant in the territory which it occupies.

It is not contested that the belligerent occupant under international law does not have and cannot claim sovereignty over the occupied territory. The legitimate government retains its sovereignty after it has been displaced, but sovereignty is suspended during the occupation period.<sup>81</sup> Since the inauguration of contemporary international law immediately after the Second World War, the use of force does not give the occupier such a title of sovereignty.<sup>82</sup> Even prior to this however, the annexation of occupied territory was prohibited before the end of conflicts.<sup>83</sup> The primary consequence of this prohibition is to maintain the territorial *status quo* until the final status is determined, hopefully by a peaceful settlement.<sup>84</sup>

These principles are based on another principle which presumes the temporary nature of the occupation. This temporality, according to Oppenheim, stems from the fact that the authority of the occupant is only *de facto* and not a

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<sup>81</sup> Schwarzenberger, *International Law as Applied by International Courts and Tribunals*, Vol II (London: Stevens, 1968) pp. 167-77. See also Pictet ed., *Commentary to the IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (Geneva: ICRC, 1958) pp. 45-51 and 273-76.

<sup>82</sup> See, for example, UN Security Council Resolution 242, and the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States 1970 *supra* note 40.

<sup>83</sup> Greenwood, *supra* note 78, p.245.

<sup>84</sup> Schwarzenberger, *supra* note 81, pp. 166-77.

matter of right.<sup>85</sup>

The fact that the occupant is not entitled to claim sovereignty over the occupied territory imposes obligations and duties upon it. It has to behave in a certain manner set forth in the relevant conventions and international norms,<sup>86</sup> to avoid introducing major changes that may alter the *status quo* of the occupied territory. However, international law permits the occupant to administer the occupied territory since it is *de facto* in authority, "...with the consequence that all administrative acts which he carries out in accordance with the laws of war and the existing local law must be recognised by the legitimate government after the occupation ceases."<sup>87</sup> It is worth noting that international law does not specify the structure of such administration. This means that the occupant is not only authorized to provide for a government in the occupied territory, but to adopt administrative structures that enable it to carry out effectively its obligations towards this territory and its inhabitants.<sup>88</sup>

The administration of occupied territory, like any other governmental administration, involves exercising some powers of criminal jurisdiction which is governed by the legislative power of the occupant. The power of the occupant in the sphere of criminal jurisdiction is subjected to such general restraints envisaged expressly or implicitly by the law of military occupation. Such restraints are found basically in Article 43 of the 1907 Hague Regulations and Articles 64 and 65 of the 1949 Fourth Geneva Convention.

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<sup>85</sup> Oppenheim, "The legal relations between an occupying power and the inhabitants," *Law Quarterly Review* (1917) pp. 363-64.

<sup>86</sup> The relevant provisions are in particular the Hague Regulations on Land Warfare of 1907, the Fourth Geneva Convention of 1949 Relative to the Protection of Civilians in Time of War, and Section III of Part IV of Protocol I of 1977.

<sup>87</sup> Oppenheim, *supra* note 85, p. 363.

<sup>88</sup> Greenwood, *supra* note 78, pp. 246, 252-53.

### 3.1.1. Article 43 of the Hague Regulations<sup>89</sup>

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

The first sentence of Article 43 acknowledges the fact that the occupant has taken direct control of enemy territory and the authority of the displaced legitimate power has *de facto* fallen into the hands of the occupant, while the displaced power retains its sovereignty. Article 43 sets down general legal guidelines for the conduct of the occupant rather than a clear rule. Its ambiguous language as well as the vague and the broad meaning of its wording have left wide room for interpretation.

However, it appears from a literal interpretation of the Article that the occupant can take measures including enacting legislation or modifying existing laws subject to certain limitations. Such measures can be taken only if they are required for reasons of security or the military necessity of the occupant<sup>90</sup> or for ensuring the interests and the welfare of the population of the occupied territory.

In accordance with the last part of the Article, the occupier is not compelled to respect the laws in force if he is "absolutely prevented" by reason of either of the two considerations mentioned above.

In other words, Article 43 can be interpreted with regard to criminal jurisdiction or penal law as follows: the Article embodies both a permissive and a prohibitory aspect. The first part of it provides as a restricted rule a general permission to the occupant to "take all the measures in his power" *inter alia* those related to criminal law on condition that this is done for the purposes of the restoration and ensurance of "public order and civil life". The second part however

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<sup>89</sup> For the interpretation of Article 43, see Schwenk, "Legislative Power of the Military Occupant under Article 43, Hague Regulations," 54 *Yale Law Journal* (1944-5) pp. 393-416 and Playfair, *supra* note 68, pp. 105-38; and unpublished research by the writer of this study concerning the legislative power of the occupant submitted to the Law Department at Essex University in March 1994.

<sup>90</sup> It is suggested and accepted widely that the term "public order" referred to in Article 43 means security, general safety or military necessity. (See, Schwenk, *ibid.*, p.398. Moreover the Fourth Geneva Convention uses the term "security" without defining it. (See Articles 27, 41, 52, and 64).

prescribes, as a rule, the duty to respect the laws, including the penal law, in force in the occupied territory, "unless absolutely prevented". It is also required that each part be read in conjunction with the other. This can be indicated by the following reading of the Article: the occupant cannot amend the existing criminal law if such interference is not required for reasons of military necessity of the occupier or the protection of interests of the local population.

In addition, while the first part of Article 43 was designed to reflect the *de facto* authority of the occupant in the occupied territory, the second part was designed to express the *de jure* authority of the displaced government. It served to remind the occupant of the paramount principle of international law that the occupant must not operate to transfer sovereignty to itself, although administrative authority has actually passed into its hands. Article 43 according to Pictet's Commentary on the Fourth Geneva Convention "is not applicable only to the inhabitants of the occupied territory; it also protects the separate existence of the state."<sup>91</sup> Article 43 was drafted carefully in a form intended to balance and observe the interests of both sides equally.

### 3.1.2. Fourth Geneva Convention

The Fourth Geneva Convention contains a number of articles relating to the legislative power of the occupant in general and its legislative powers in relation to penal law in particular. These articles have interpreted in functional terms the very general terms of Article 43. Most relevant are Articles 64, 65 and 66.

Article 64 of the Fourth Geneva Convention appears to reaffirm and complement the main rule expressed by Article 43 regarding respect for the existing laws and the exceptions thereto. Moreover, the first part of it refers expressly to penal law. It reads:

*The penal laws of the occupied territory shall remain in force with the exception that they may be repealed or suspended by the occupying power in cases which constitute a threat to its security or an obstacle to the application of the present Convention.*

According to the ICRC, which is the main source of authoritative interpretation of the Geneva Conventions, the express reference to the penal laws by

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<sup>91</sup> Pictet, *supra* note 81, p.273.

the Diplomatic Conference was made because these laws were not "sufficiently observed during past conflicts."<sup>92</sup> The second part specifies the grounds on which the occupier is entitled to exercise legislative power which undoubtedly affects the sphere of penal laws and hence criminal jurisdiction. These grounds or conditions are:

*to fulfil its obligations under the Fourth Geneva Convention, to maintain the orderly government of the occupied territory, and to ensure the security of the occupying power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communications used by them.*

Article 65 of the Convention prohibits the enforcement of the enacted penal provisions before their publication. Article 66 permits the occupier to prosecute offenders who committed criminal offenses promulgated by the occupant under the second paragraph of Article 64, in "its properly-constituted non-political military courts" on condition that these courts sit in the occupied territory.

### **3.1.3. A prolonged occupation<sup>93</sup>**

It is worth noting that during an extended occupation international law actually imposes more responsibilities on the occupier to give greater weight to the interests of the inhabitants of the occupied territory as compared to its own security needs for the following reasons:

- 1) The applicability of international humanitarian law is not confined only to a short-term occupation but, in the language of Common Article 2 of the Geneva Conventions, applies "to all cases of partial or total occupation."
- 2) In a prolonged occupation there is a need for change on a large scale because of the way in which circumstances change over time.<sup>94</sup> There is a need to introduce

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<sup>92</sup> Pictet, *ibid.*, p. 335.

<sup>93</sup> It is suggested that an occupation can be described as prolonged if it lasts more than five years and continues while hostilities are significantly reduced. See Roberts, *supra* note 78, p. 29.

<sup>94</sup> See Greenwood, *supra* note 78, pp. 262-65.



economic and social changes to fulfil the growing needs of the protected persons whose lives should not "freeze" at the point when the occupation occurred.

3) The principle that human rights law and certainly the rules of justice must be respected during an occupation has been stressed by several resolutions of the U.N. since the late 1960s, while some international courts and tribunals have emphasized the applicability of human rights law either implicitly or explicitly.<sup>95</sup> Furthermore, the applicability of multilateral treaties to an occupied territory has been widely accepted and supported.<sup>96</sup>

It is thus logical to say that the more the occupant is able to assert its control and restore public order, the less necessary the occupant will find it to stress security needs and to address these needs in terms of amending jurisdiction or penal codes.

### **3.2. The Israeli occupant's conduct regarding criminal jurisdiction**

The judicial system in the O.P.T., like every other aspect of Palestinian life, has been affected significantly by the hundreds of military orders that have been issued since the commencement of the occupation in June 1967.<sup>97</sup> These orders have amended to a large extent the existing local laws.<sup>98</sup> The effect of these amendments upon the legal system of the O.P.T. including the functioning of all types of courts are beyond the scope of this study, and have been described in detail elsewhere.<sup>99</sup>

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<sup>95</sup> Roberts, *supra* note 78, pp. 53-54.

<sup>96</sup> See, for example, ICJ advisory opinion regarding Namibia, *ICJ Reports* 1971, p.16, p. 55; and see also, Meron, "Applicability of Multilateral Conventions to Occupied Territories," 72 *American Journal of International Law* (1978) pp. 542-57 and Cohen, *supra* note 78, pp. 2-20 and 65-71.

<sup>97</sup> The Israeli Military Legislation issued mainly in the form of military orders, in a series. By the end of 1993, the number of these orders exceeded 1400 for the West Bank, and 1100 for the Gaza Strip. Although these orders have been issued separately for the West Bank and the Gaza Strip with different numbers, they have the same content.

<sup>98</sup> See Shehadeh, "The Legislative Stages of the Israeli Military Occupation," in Playfair, *supra* note 78, pp. 151-67.

<sup>99</sup> Shehadeh, *Occupiers Law: Israel and the West Bank*, revised ed. (Washington, D.C.: Institute for Palestine Studies, 1988) pp. 76-100; International Commission of Jurists

Since the first day of the Israeli occupation, legislative, judicial and administrative powers in the O.P.T. have been assumed by the Military Commander of the West Bank and the Military Commander of the Gaza Strip.<sup>100</sup> The judicial system of the O.P.T. is controlled by the Israeli military administration through an Israeli officer appointed in the West Bank by Military Order (hereinafter M.O.) 412 and who is entitled, by virtue of this order, to assume all the powers and privileges vested in the Minister of Justice under Jordanian law which is applicable to the West Bank. He is also vested, by virtue of M.O. 528, with the powers of the Bar Association.

Most significant is the extension of Israeli territorial jurisdiction over the O.P.T. This extension has been achieved gradually, smoothly and in stages. It started with the need to overcome some practical problems related to the execution of judgments between the two separated legal systems of Israel and the O.P.T. This was accomplished by M.O. 348 of 1969 which has supplemented or incorporated similar provisions enacted in Israel by the Minister of Justice regarding the service of documents from an Israeli court in the O.P.T.<sup>101</sup> According to this order, the serving of a document on a person in the O.P.T. shall be "in the manner prescribed for the service of process" in Israel whether or not the action attributed to the person has any linking point with Israel. Such an approach contradicts what is prescribed by Regulation 467, applied in Israel, which requires, if the accused is a non-Israeli resident or citizen, some connection between the action and Israel.<sup>102</sup>

Later on, other developments occurred for different purposes when the Minister introduced amendments to the Civil Procedure Regulations to resolve the problem of jurisdiction regarding the Jewish settlers residing in the O.P.T.<sup>103</sup> The

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(ICJ), *Inquiry into the Israeli Military Court System in the Occupied West Bank and Gaza, Report of a Mission* (Geneva: ICJ, 1989) and ICJ and the Centre for the Independence of Judges and Lawyers (CIJL), *The Civilian Judicial System in the West Bank and Gaza: Present and Future, A report of a Mission* (Geneva: ICJ, 1994).

<sup>100</sup> Military Proclamation No. 2, 7 June 1967 and its counterpart for the Gaza Strip. In this study we will refer to military orders in respect of the West Bank, but all these orders have their counterparts in the Gaza Strip.

<sup>101</sup> Section 2(a) of the 1969 Regulation No. 467, issued under the Courts Law, 1957. See Nathan, "Israeli Civil Jurisdiction in the Administered Territories," 13 *Israel Yearbook on Human Rights* (1983) p. 90.

<sup>102</sup> Nathan, *ibid.*, p. 93.

<sup>103</sup> Regulation 4B of the Civil Procedure Regulations of 1979, issued under the Courts Law, 1957.

Court in Jerusalem was authorized to rule or decide on what was to be done regarding an action falling within the jurisdiction of an Israeli court, where there is no "appropriate forum under these regulations or under any other law."

Several military orders have, on the one hand, enhanced the process of extension of Israeli jurisdiction over the O.P.T. and, on the other, transferred jurisdiction away from the local Palestinian courts on vital matters and over Israelis who commit offenses within the O.P.T. It is required under M.O. 164 that permission be obtained before submitting a complaint against any officer, the military or the state of Israel. The power of the local courts to hear appeals against administrative decisions was transferred by M.O. 172 to military objections committees set up by the military government, while M.O. 841 empowers the military commander of an area or the Legal Advisor to the Military Government to stop court proceedings in respect of any civil or criminal case "if they think that there is no public interest served by the investigation or the trial." At the same time, the Israeli military courts, established by Proclamation No. 3, are empowered under M.O. 378 to exercise concurrent jurisdiction over criminal matters, including those not necessarily of a security nature. The military courts have heard drugs cases and cases where Palestinians suspected of collaboration were accused of murdering Palestinians, with a view to protecting the suspected collaborators.<sup>104</sup> It is worth noting that local Palestinian courts do not have jurisdiction over Israeli settlers,<sup>105</sup> who are tried either by criminal courts based in Israel or by Israeli military or settlement courts based in the O.P.T.<sup>106</sup> The purpose of such transfer of jurisdiction is to protect settlers either by refraining from prosecuting the offender, or by imposing light sentences.<sup>107</sup>

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<sup>104</sup> See ICJ and CIJL, *supra* note 99, pp. 45-46 and Shehadeh, *supra* note 99, p. 85.

<sup>105</sup> In fact, the prevention of the local courts from trying Israelis was not proclaimed by a military order. However, this was expressed in a circular issued in 1984 by the Officer in charge of the Judiciary with a view, as he claimed, to avoiding the problem of not executing the judgments of the local courts in the West Bank against the Israelis. The Officer states in the circular, which was addressed to all courts and prosecutors in the West Bank, that these courts "should not register any criminal case against holders of Israeli identity cards unless written authorization is obtained from me."; in practice these courts have not examined such cases. See Shehadeh, *supra* note 99, p. 93.

<sup>106</sup> Rules concerning the establishment, functioning and the power of the settlements' courts are set down in M.O.s 783, 892 and 1058.

<sup>107</sup> See Shehadeh, *supra* note 99, pp. 184-92. Shehadeh also describes at pp. 92-3 how sentences imposed by the settlements' courts are determined by unpublished regulations, making it impossible to know either the extent of the courts' jurisdiction or the penalties which they may impose.

It is worthy to point out that the Jordanian Penal Law of 1960, which is still valid in the West Bank, empowers the local courts to exercise jurisdiction over a foreigner who commits any offense prescribed by the law within the territory of the country as defined by the law.<sup>108</sup> Such power has not been affected by the Israeli amendments because it appears that it does not conflict with Israeli interests.

To sum up, Israel has extended its territorial jurisdiction over the Jewish settlements in the O.P.T. The Israeli military courts exercise jurisdiction over security and criminal offenses whether committed by Israelis, Palestinians or foreigners. The jurisdiction of the local Palestinian courts in criminal matters has been significantly undermined, so as to apply in effect only to Palestinians, excluding those files closed by M.O. 841, and to foreigners within the new delimitation of jurisdiction.

Obviously, measures such as the application of Israeli jurisdiction or law to Israelis residing in the O.P.T. as well as settlements are prohibited under international law because they represent acts of sovereignty, as stated above, and may change the *status quo* of the O.P.T. Notwithstanding the clarity of this provision, some Israelis, who purport to provide the Israeli occupation with legal justifications, have attempted to undermine such measures by suggesting for example that the above Regulations be seen "as a simple jurisdiction measure, a measure which extended the civil jurisdiction over the residents [the Jewish settlers - R.S.] of the Administered Territories [the official Israeli reference for the O.P.T. - R.S.] but not over the Territories as such." However, drawing such a distinction between the "residents" and the "Territories" is inappropriate especially when the number of those settlers in the O.P.T., including East Jerusalem, has exceeded 284,000 living in more than 175 settlements.<sup>109</sup> Thus, Israeli jurisdiction and law are not applied to Israeli individuals as such but to a Jewish community with an established structure and territory.

The extent to which the conduct of the Israeli occupant, in the sphere of the judicial system in general and criminal jurisdiction in particular, is compatible with the above guidelines and rules set down in the Hague Regulations and the Fourth

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<sup>108</sup> See in particular Article 7 and 8 of the Jordanian Penal Law of 1960 No. 16. The law empowers the Jordanian courts to exercise jurisdiction on the basis of the territorial, nationality, personality, flag and protective principles of jurisdiction. ( See Said, *The General Principles of Crime in the Jordanian Penal Law*, Arabic ed. (Amman: University of Jordan, 1981) pp. 15-16 and 78-87.

<sup>109</sup> Report on Israeli Settlements in the Occupied Territories, (Foundation for Middle East Peace, Washington, D.C.) Vol.3 No.6, Nov. 1993, pp.4-5.

Geneva Convention, has been considered by various parties, including impartial investigation missions. They have generally concluded that the Israeli occupant has failed to comply with these guidelines because it has given priority to its own broad interests as against the interests of the inhabitants of the O.P.T. and almost all the measures taken have been intended to serve, and in fact have served, the occupant's own needs and interests.<sup>110</sup> It is not surprising that the Israeli occupant has behaved in such a manner, given the recent revelation that Israel contests the fact that the occupant is obliged under international law to serve the interests of the inhabitants of the occupied territory.<sup>111</sup>

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<sup>110</sup> See ICJ, and ICJ and CIJL reports, *supra* note 99, and specifically the 1994 Report pp. 41-42 and Shehadeh *supra* note 99, pp. 76-100.

<sup>111</sup> The Israeli view in this respect was expressed in a letter to the International Commission of Jurists in February 1994. ( See ICJ and CIJL, *supra* note 99, p. 41.

## PALESTINIAN CRIMINAL JURISDICTION UNDER THE GAZA-JERICHO AGREEMENT

Any assessment of the criminal jurisdiction which the Palestinian Authority (hereinafter PA) is entitled to exercise by virtue of the Agreement on the Gaza Strip and the Jericho Area (hereinafter the Agreement) will be made in this study in light of the relevant rules and principles set forth in international law and will not be restricted to the boundaries drawn by the provisions of the Agreement itself. Such an approach is necessary to avoid a narrow analysis. It is also the only way to measure the extent of the PA's jurisdiction as compared to that of a sovereign state.

An examination of the relevant provisions on criminal jurisdiction<sup>112</sup> shows that the Agreement has excluded extra-territorial jurisdiction in respect of the PA and is based generally on territorial jurisdiction which itself is subjected, as we will see, to significant limitations.

Since territorial jurisdiction relates to a defined territory, it is vital first of all to identify the territory that is under the PA jurisdiction. According to Article 5 section 1(a) of the Agreement, this territorial jurisdiction covers the Gaza Strip and Jericho Area as delineated on the relevant maps "except for Settlements and the Military Installations Area". The territorial jurisdiction, under the same provision, encompasses land, subsoil and territorial water but it does not include either airspace or zones outside the territorial water such as the exclusive economic zone. A literal interpretation of the quoted sentence suggests that within the Gaza Strip and Jericho Area there are areas (military installations and settlements) that are excluded from the PA jurisdiction. These areas are still in fact occupied directly by the Israeli military forces and subject to their jurisdiction. The Agreement appears to use the term "the territory" to refer to the Gaza Strip and Jericho as including the Settlements and the Military Installation Area. Therefore, for the purpose of this study and in order to avoid ambiguity, the term "Territory" that is used below refers to the areas that are within the territorial jurisdiction of the PA and where the Israeli troops have been redeployed. Article 5 section 1(a) follows well established

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<sup>112</sup> Article 3 of the Agreement and Articles 1 and 2 of the Protocol Concerning Legal Matters. See Appendices I & II.

standards in including within the PA jurisdiction land, subsoil and territorial water. However, the agreement gives rise to problems regarding criminal jurisdiction which can be classified as the following:

#### **4.1. Inadequate territorial jurisdiction**

As noted earlier, territorial jurisdiction means that a state can assume jurisdiction over all criminal offenses committed on its territory regardless of the nationality of the offender except for certain circumstances related to diplomatic immunity. It is worth noting that such jurisdiction is not only exercised by sovereign states but applies also to other entities which do not have this status, such as the autonomous areas or other entities of federal or confederate systems.<sup>113</sup>

Accordingly, the jurisdiction of the PA should cover all the offenses committed within the territory, subject only to internationally-recognized limitations. However, the Agreement does not appear to empower the PA with this degree of authority. The Protocol Concerning Legal Matters (hereinafter the Protocol)<sup>114</sup>, in the first part of section 1 of Article 1, attempts to correspond with the international standard regarding territorial jurisdiction when it states: "The criminal jurisdiction of the Palestinian Authority covers *all* offenses committed in the areas under its territorial jurisdiction" (emphasis added). But this power is weakened by the second part of the section and other provisions that impose significant limitations on the territorial jurisdiction of the PA in respect of offenses committed by Israelis or foreigners and in the sphere of penal legislative power.

##### **4.1.1. Immunity for the Israelis**

Israelis and to a great extent their property are entitled to immunity from PA jurisdiction. This is expressed clearly in several provisions. Article 5, section 1, para. (c) of the Agreement provides that "the personal jurisdiction extends to all persons ... except for Israelis unless otherwise provided in this Agreement." We will see that the limitation "unless otherwise provided" does not reduce significantly the "immunity" of the Israelis. More elaboration is provided in the Protocol, Article 2, section 2, para. (c) which explains "immunity" in decisive terms:

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<sup>113</sup> For example, neither Scotland nor Northern Ireland is a state but they exercise complete territorial jurisdiction over all offenses committed within their respective territories. See *R. v Baxtes*, [1992] 1 Q.B. p. 1.

<sup>114</sup> The Protocol is attached to the Agreement as Annex 3.

*The Palestinian Authorities shall not arrest or detain Israelis or place them in custody. Israelis can identify themselves by presenting Israeli documentation.*

In the case of an Israeli suspected of committing a crime within the Territory, generally the Palestinian Police, under the second part of the above paragraph, only have power to notify the Israeli authorities. Exceptionally, two Palestinian police may "if necessary" detain the suspect while ensuring the protection of the suspect and all those involved in the incident until the arrival of the Israeli troops. It appears that such a slight measure which may last for minutes<sup>115</sup> is one of the circumstances referred to by the phrase "unless otherwise provided".

In case of Israeli property being used in the commission of a crime, the PA can, according to para. (d) of the same section, take the necessary measures against the property provided such property "presents an immediate danger to public safety or health". Here again, the Palestinian police are not empowered to act until the arrival of the Israeli military forces who must be notified immediately after the occurrence of the crime. This case represents another situation where the phrase "unless otherwise provided" operates.

With regard to transfer of Israeli suspects and defendants to the PA, the Protocol contains ambiguous provisions. Article 2, section 7, para.(a) allows the Israeli authorities, in response to a PA request, to arrest and transfer "a non-Israeli" who is present in Israel and suspected or convicted of committing an offense within PA jurisdiction. It is obvious that the provision excludes Israelis. On the other hand, para. (d) of the same section talks about transferring "non-Palestinian" suspects, which logically includes Israelis and foreigners. But one may suggest that it probably includes foreigners only because 1) the main provisions of the Agreement and the Protocols exclude Israelis from PA jurisdiction; 2) it is not likely that the section on transfer, which seemingly is intended to supplement and reflect the substance of the Agreement, can authorize what is denied by that substance; 3) para. (d) suggests the inclusion of Israeli suspects implicitly and deals with suspects only, and it presumably complements para. (a) which explicitly excludes them and deals with suspected, charged or convicted persons.

Regardless of this ambiguity, the Protocol imposes restrictions if the subject matter of the transfer requested by the PA is not a Palestinian. The request must be

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<sup>115</sup> The Gaza Strip and the Jericho Area are a small area of territory, see *supra* note 2. In addition the Israeli troops use the lateral roads within the Territory.



made by the Attorney-General or on his behalf, and must include evidence against the suspect, and the punishment for the claimed offense must be at least seven years under the Palestinian law<sup>116</sup> (Protocol, Article 2, section 7, para. (d)). Such conditions, as we will see, do not apply on the other side.

It is worth noting that the Agreement used the term "transfer" rather than "extradition", which illustrates the intention to avoid using terms that are referred to in treaties concluded between sovereigns who enjoy the same legal status.

#### **4.1.2. Restricted jurisdiction over foreigners**

While the Agreement does not deny the PA jurisdiction over foreigners who commit crimes within the Territory, it has subjected this jurisdiction to some limitations. These limitations are of two types:

(1) Strict limitation is manifested in cases where the offense is committed by a foreigner crossing the Territory in transit to or from Israel on certain roads. In this case the PA cannot arrest or question the offender. Such measures can be taken only by the Israeli authorities, who are required to notify the PA and are empowered to determine whether or not further legal proceedings are required. Such a measure having been approved, the PA can at this stage take appropriate legal proceedings in respect of the subject matter. (Protocol, Article 1, section 6, para. (a)).

2) More limited restrictions are imposed where the offense is committed in the Territory by a foreigner who is not in transit to or from Israel on certain roads. In such cases, the PA can detain or arrest the foreigner, but it is under an obligation to inform the Israeli authorities and to facilitate their meeting with the suspect with a view to assisting in resolving any functional problem that may arise from the offender being an alien. (Protocol, Article 1, section 6, para. (b)).

#### **4.1.3. Limited legislative jurisdiction <sup>117</sup>**

Enforcement jurisdiction cannot operate without the existence of

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<sup>116</sup> In Gaza, the applicable law is Penal Law No. 74 (1936) enacted by the High Commissioner of the British Mandate Government. In Jericho, the Jordanian Penal Law No. 16 (1960) is applied.

<sup>117</sup> See Appendix II on the legislative powers of the Palestinian Authority under the Agreement.

prescriptive or legislative jurisdiction, although the latter may exist without an enforcement jurisdiction. For example, a state may prescribe jurisdiction in respect of an offender who is abroad but it cannot enforce this jurisdiction in the absence of extradition, or unless he or she is in the territory of the state. Similarly, criminal jurisdiction, as an aspect of enforcement jurisdiction, cannot operate without the existence of penal law as part of the legislative jurisdiction. Under international law, a state has complete power to exercise legislative jurisdiction including enacting penal laws or codes and to enforce them within its territorial jurisdiction.<sup>118</sup>

Consequently, one would assume the entitlement of the PA to exercise such a legislative jurisdiction within its territorial jurisdiction. However, such power is not granted by the Agreement which restricts, through Article 7, this power to the extent that any enacted law requires, in the final analysis, Israeli approval before entering into force. Article 7 envisages in general terms the right of the PA to promulgate legislation, but subject to requirements whereby the newly enacted legislation, including penal codes, before entering into force should be submitted to a joint committee called the Legislation Subcommittee (section 3) Article 7. Within 30 days of the submission Israel has the right to raise its disagreement on the basis that the legislation in question exceeds the jurisdiction of the PA or is otherwise inconsistent with the Agreement. Such a basis of objection is fair if it intends to ensure the exercise of legislative power by the PA within its jurisdiction and not to control the substance of the enacted legislation. The Legislation Committee has to decide on the issue. If it fails to reach a decision, another joint body consisting of two judges is authorized to decide on the issue (section 5). If again no settlement is reached, the issue is to be transferred to the Liaison Committee for resolution within 30 days. At the end, if no reconciliation or compromise has been reached, (bearing in mind that such a settlement relies upon the agreement of both sides), the legislation will not enter into force pending the decision of the Liaison Committee (section 8). In other words, the Israeli authorities enjoy the right of "veto" with respect to the penal law of the PA as well as any other law or regulation.

Most notable is section 9 of Article 7 which reads:

*Laws and military orders in effect in Gaza or the Jericho Area prior to the signing of this Agreement shall remain in*

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<sup>118</sup> It is worth noting that the extra-territorial legislation is likely to be strictly limited, and even in contradiction to principles of international law. See Akehurst, *supra* note 13, pp. 179-90.

*force, unless amended or abrogated in accordance with this Agreement.*

This provision deserves proper discussion, which is beyond this study. However, in brief, it should be noted that the provision asserts that all legislation in force prior to the Agreement including Military Orders, as a rule, provides the basis for the functioning of the PA in the transition period, and will continue to operate as the governing framework for vital aspects of the lives of Palestinians in the Territory. This is despite the fact that the military legislation of the Israeli occupant has to a great extent exceeded the legislative power to which the belligerent occupier is entitled under international humanitarian law<sup>119</sup> and has, as illustrated above, introduced unjustified changes in the sphere of criminal jurisdiction against the interests of the Palestinians. Most significant is that the possibility of abrogating or amending this legislation is limited and depends on Israeli acquiescence, as clarified above.

Undoubtedly, such an essential constraint on the legislative power of the PA will significantly affect its penal law and criminal jurisdiction. It is difficult to anticipate how the legislative jurisdiction will operate under these constraints, since this depends on whether or not the Israeli authorities will in practice tolerate legislative reform and to what extent the performance of the PA in this area will correspond to Israeli considerations. Such issues will be clarified in the near future, but it is relevant to point out some incidents in this regard which indicate that this matter will not proceed smoothly. The PA, through its President, Yasser Arafat, issued a few weeks after the signing of the Agreement a proclamation whereby he purported to cancel the laws introduced by the Israeli occupant and give effect to the laws, regulations and orders that were in force prior to the occupation. The Israeli authorities, presumably on the basis of section 8 above, responded promptly and angrily: "These claims by any Palestinian authorities have no grounds, because any legislation needs the approval of Israel."<sup>120</sup> Moreover, the draft of the Basic Law for the PA states the following:

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<sup>119</sup> The author's research paper, *supra* note 80, demonstrates how Israeli military legislation has gone beyond what is permitted by international humanitarian law. See also Shehadeh, *supra* note 99, pp. 151-67.

<sup>120</sup> *The International Herald Tribune*, 25 May 25 1994, p.2.

Article 7 para.1:

*This basic law shall be the supreme law of Palestine in the transitional period and any other law which is inconsistent with any of its provisions shall be null and void.*

Article 107:

*Laws, regulations and decisions in force in the Gaza Strip and the West Bank before the coming into effect of this Basic Law shall remain in force to the extent that they do not conflict with the provisions of this law, until they are amended, repealed or replaced in pursuance of this or any other law.*

This provision, to the contrary of the above announcement, does not repeal the military laws explicitly. However, implicitly this provision attempts to undermine the status acquired under section 8 above of military laws which conflict with the Basic Law. While the presumption concerning the validity of the existing laws is under the terms of the Agreement section 8, for the Basic Law or any other Palestinian law it is the two provisions quoted above. No information is available about the Israeli reaction in respect of the Basic Law in general and this provision in particular. Nevertheless, one can speculate that it will be similar to the reaction to Arafat's proclamation. To date, the draft Basic Law remains a draft as such, and no attempt has been made to put it into effect.

#### **4.2. Absence of extra-territorial jurisdiction**

As has been shown in the first chapter, international law has recognized the right of a state to extend its territorial jurisdiction beyond its boundaries under particular circumstances as expressed in certain principles which vary in the recognition they have acquired internationally. In fact, all states claim today extra-territorial jurisdiction, and Israel in particular, as we have seen in chapter 2, claims this type of jurisdiction to a great extent.

The Agreement, as we noted previously, does not include extra-territorial jurisdiction in respect of the PA. This exclusion is not stated clearly. The only phrase that can be seen as relevant to this exclusion is found in Article 5, section 1, para. (b) of the agreement which excludes foreign relations from the functional

jurisdiction of the PA. This issue will be clarified in practice if the PA attempts to claim extra-territorial jurisdiction, for example, over a Palestinian who committed abroad an offense prescribed under its penal law, (in other words invoking the nationality principle of jurisdiction), or prosecute a foreigner who committed abroad a crime against a resident of the Territory (on the basis of the passive personality principle). In such cases, the reaction of the concerned foreign state in particular and other states including Israel in general is essential in order for the PA's ability to assume such jurisdiction to be clarified.

To sum up briefly, the jurisdiction of the PA is based solely on territoriality according to the Agreement, which has ignored or excluded completely extra-territorial jurisdiction. However, even territorial jurisdiction is incomplete and subjected to primary restrictions; it applies efficiently and properly only over Palestinian offenders. The picture building up of this jurisdiction, as severely undermined, will be completed in the following chapter.

## ISRAELI CRIMINAL JURISDICTION UNDER THE GAZA-JERICHO AGREEMENT

We have seen in chapter 2 how Israel has significantly expanded its territorial jurisdiction to include all principles of extra-territorial jurisdiction and has sometimes exercised jurisdiction on an unrecognized basis such as in the case of the Nazi and Nazi Collaborators (Punishment) Law. We have seen also in chapter 3 how the Israeli occupant has extended the application of its criminal jurisdiction and laws to the O.P.T. contrary to international law, and given itself a wide range of powers in the sphere of criminal jurisdiction to serve its own needs and interests.

Significantly, the relevant provisions of the Agreement demonstrate that Israel has not relinquished its powers in main aspects of criminal jurisdiction, as will be illustrated in this chapter.

### 5.1. Exclusive jurisdiction over Israelis.

The Agreement, as clarified earlier, prevents the PA from establishing its jurisdiction over offenses committed by Israelis within its territorial jurisdiction. Such jurisdiction, according to the Protocol (Article 1, section 2) can be exercised solely by Israel. Under this power Israel can, in the presence of the Palestinian police, arrest and detain an Israeli suspected of committing an offense falling within its jurisdiction who is present in the Territory (Protocol, Article 1, section 4 and Article 2, section 3, para. (a); and Israel will investigate with the Palestinian police offenses committed jointly by an Israeli and a resident of the territory. (Protocol, Article 2, section 2, para. (b). Furthermore, the Israeli insistence on continuing to apply its laws and jurisdiction to Israelis in the O.P.T. can be seen in Article 5, section 3, para. (b). This states that Israel's adherence to international law, in pursuing the legislative, judicial and executive powers of the military government, shall not "derogate from Israel's applicable legislation over Israelis *in personam*." What is significant in this provision is that Israel seeks to guarantee the continuity of its conduct in respect of settlers and settlements if such conduct is seen to be contrary to international law.

As stated above, Israel claims jurisdiction, on the basis of the nationality principle, over its citizens or residents who have committed abroad specific crimes

prescribed in its penal law. No problem arises with that under international law, as long as Israel does not enforce this jurisdiction outside its territory against the wish of the concerned territory, and does not claim exclusive jurisdiction over the offender, in other words denying the right of others to exercise their territorial jurisdiction over the Israeli offender. Israeli penal law recognizes this reality and has preserved respect for the territorial jurisdiction of other sovereigns. We have noted in chapter 2 how Israeli penal law has confined the application of Israeli jurisdiction, under the passive personality principle, to acts that are regarded as offenses under the law applying in the place of commission. However, even if Israel wishes to use the nationality principle to assert jurisdiction over all offenses committed by Israelis in the Territory, this does not justify, from the perspective of public international law, its insistence on preventing the PA from asserting jurisdiction over Israelis. One could suggest that the reasons why the PA does not have jurisdiction include Israeli concern for the protection of the settlers from due process, since Israel itself has refrained, as discussed above, from taking proper judicial measures against settlers who have committed criminal acts; and or Israel's desire to avoid recognizing complete territorial jurisdiction in the Territory to avoid the possibility of the emergence of a Palestinian sovereign entity (a state). Israel wishes to keep more cards in its hands for the future "final status" negotiations. By claiming exclusive jurisdiction over any Israeli offender, Israel has retained the power it has been exercising throughout the years of occupation.

## **5.2. Exclusion of the Settlements and the Military Installation Area**

The Agreement not only excludes Israelis who commit crimes in the Territory from the jurisdiction of the PA but it asserts territorial exclusion as well. The Agreement, as it has been clarified above, excludes Jewish settlements and military installations areas in the Gaza Strip and Jericho area from the territorial jurisdiction of the PA. This means that by virtue of the Agreement Israel will continue to apply its laws and jurisdiction to settlers residing in areas within the Gaza Strip and Jericho as was the case prior to the Agreement, and over all offenses committed within the area under the direct control of the Israeli forces. (Protocol, Article 1, section 2).

## **5.3. Jurisdiction over non-Israelis in areas in the Territory**

Besides the Settlements and the Military installation Area which are

excluded from the Territory, the Agreement declares some areas within the Territory as a "security perimeter". In these areas, which are referred to as the lateral roads and the yellow areas, Israel will carry out military activities and security responsibilities.<sup>121</sup> Israel has the power to arrest in the "security perimeter" a non-Israeli who is suspected of committing an offense there (Protocol, Article 1, section 4, para. (b)(1) and to hand him over if the offense was not committed against Israel or Israelis. But if the offense was committed against Israel (invoking the protective principle) or Israelis (invoking the passive personality principle) then Israel can detain the offender pending the decision of the Legal Committee on the "appropriate forum for prosecuting such a suspect". (Protocol, Article 1, section 4, para. (b)(2). In other words, Israel is entitled under the Agreement to take enforcement measures in parts of the territory on the basis of the protective and the passive personality principles.

#### **5.4. Validity of the military criminal legislative jurisdiction**

As mentioned above, the military orders as well as other laws in force in the Territory prior to the Agreement will remain in force unless repealed and amended by the Agreement. Amendment or annulment, as explained above, is not attainable unless Israel refrains from opposing it. This means that any change made by the PA to the criminal law framework created by the military orders<sup>122</sup> in several areas including legal proceedings, the nature and scope of criminal offenses, and criminal liability requires Israeli acceptance. It should be noted in this regard that under the Agreement (Articles 12 and 18) the PA and Israel are both required to take legal measures to prevent acts of hostility, including incitement, against Israel or Israeli targets. But the Agreement does not create or specify the offenses relating to such acts, which means that there may be a need to enact criminal offenses or indeed to revise and amend the existing ones. This would include not only security offenses but normal criminal offenses as well.

It is noticeable that most of the provisions whereby the Israeli occupant has retained these powers which restrict the territorial jurisdiction of the PA include the phrase "without derogating from the territorial jurisdiction of the Palestinian Authority." However, the mere presence of such a phrase in the provisions, mainly

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<sup>121</sup> See Article 4 the Protocol Concerning Withdrawal of Israeli Military Forces and Security Arrangements.

<sup>122</sup> M.O. 378 in the West Bank and its counterpart for the Gaza Strip defines at least 30 criminal offenses, most of them of a security nature.



in those which empower Israel to exercise exclusive jurisdiction over Israelis in the Territory, does not change the fact that such powers are serious infringements on the territorial jurisdiction of the PA. How could one accept, for example, the Israeli assertion of exclusive jurisdiction over offenses committed by its nationals in the Territory as not derogating from the territorial jurisdiction of the PA? If such an assertion is not a derogation, what is such derogation? In this regard it is irrelevant and inappropriate to say that Israel has acquired these powers with the free consent of the PLO (the Palestinian side that concluded the Agreement with Israel), because Israel as an occupant had already been enjoying these powers against the Palestinians' will. Israel has actually refused to relinquish its powers in this realm which in itself constitutes a good attestation that Israel has not under the Agreement recognized a territorial jurisdiction for the PA. On this issue, the Palestinian negotiator could not in fact persuade or oblige Israel to relinquish such powers, thus the Palestinian side was obliged to accept this position. Such coerced acceptance should not be seen as a consent which presumes the free choice of the concerned parties. It is not analogous, for example, to the recent consent of Argentina to receive members of Israeli intelligence to investigate the bombing of the Jewish center in Buenos Aires in July 1994.<sup>123</sup> In addition if such enforcement measures were based on treaty, it would be logical to assume that such a treaty should be based on reciprocity and mutual respect, which does not exist in this case. Therefore, the "non-derogating" phrase is in itself a derogation from the territorial jurisdiction of the PA.

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<sup>123</sup> *The Guardian*, 20 July 1994, p. 10.

## CONCLUSION

The Gaza-Jericho Agreement has raised serious issues in the sphere of jurisdiction in general and criminal jurisdiction in particular, not only because jurisdiction is linked to sovereignty and constitutes one of the fundamental manifestations of statehood, but also because it has put on the agenda of public international law and the law of belligerent occupation an interesting subject relating to the legal status of an occupied territory under such unique arrangements.

The discussion and information provided above demonstrates that Israel as a state has abstained from establishing its relations with the Territory on a basis similar to those regulating its relations with the society of states, presumably because of its persistent reluctance to see the creation of a Palestinian state. Israel, as an occupier, has failed, in the sphere of criminal jurisdiction, to comply with the international standards governing the conduct of the occupant.

The military government of the Israeli occupant has retained, by virtue of the Agreement, significant powers in the sphere of criminal jurisdiction. It has not relinquished its jurisdiction over settlements and Israelis in the Territory, nor over any crimes committed against it or its nationals in specific areas within the territorial jurisdiction of the PA, nor over foreigners under particular circumstances. It continues to control legislative jurisdiction through enjoying the upper hand in the legislation issue as a whole. On the other hand the PA is given complete jurisdiction over Palestinians in the Territory except for the offenses committed in the "security perimeter" and limited criminal jurisdiction over foreigners. It should be borne in mind that prior to the Agreement the local Palestinian courts in the Territory had exercised similar criminal jurisdiction over Palestinian and foreign offenders except in the case of security offenses and certain other offenses, as discussed above. In addition, the Agreement has vested in the PA the power of the Officer in Charge of the Judiciary in respect of the administration of justice within its jurisdiction.

Accordingly, while the Agreement pretends to delineate and recognize a territorial jurisdiction for the PA, it does not in fact empower the PA to exercise proper criminal jurisdiction within this Territory. The wide range of powers retained by the military government in respect of the Territory suggests that, under the agreement, Israel does not in fact recognize a proper territorial jurisdiction for the PA. Such a fact cannot be concealed by repetition of the phrase "without derogating...." in several provisions of the Agreement because the "derogation" or indeed the denial of a territorial jurisdiction for the PA occurs exactly in the areas to

which the phrase refers.

From the above, at least from the criminal jurisdiction perspective, it appears that the military government has transferred some powers to the PA to administer within the framework already established by the Israeli occupant without having the power to introduce basic changes in this framework, even in issues related solely to Palestinians. This major constraint stems presumably from the fact that "the withdrawal of the military government shall not prevent it from continuing to exercise the powers and responsibilities specified in this Agreement." (Article 3, section 4 of the Agreement). These powers are legislative, judicial and executive (Article 5, section 3, psts (b)).

Consequently, if the military government, under the arrangements set forth in the Agreement, continues to exercise all these powers, notably to have a veto in the legislative sphere, one of the main expressions of authority for any governing body, then nothing should prevent the assertion that the Territory is *de facto* under the control of the Israeli military occupant regardless of the form of this control under the new arrangements. Since Israel is not transferring either complete independent capacity to make new criminal law or complete territorial jurisdiction, it should not be allowed to evade from its international responsibility as a belligerent occupant by passing on accountability to the PA. The powers transferred are consistent with the continued existence of the status of the belligerent occupant. Thus, the territory of the Gaza Strip and Jericho Area retains its status as occupied territory, and consequently Israel, the occupier, should comply with its obligations under international law. However, it does not follow that the PA is exempted from any legal responsibility in respect of protection of human rights and fundamental freedoms, for example, but it is reasonable to say that its responsibility should be, for matters within its effective powers, proportionate to its authority.

On another level, the Agreement has not created new criminal offenses, but it has laid down the basis for their creation. The Agreement commits both Parties to take legal measures to prevent hostile acts, including incitement, against each other.<sup>124</sup> This means that both Parties are required to define such offenses. It is worth pointing out in this regard that in creating criminal offenses and the complementary criminal procedure,<sup>125</sup> the parties must observe the standards

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<sup>124</sup> Articles 12(1) and 18 of the Agreement.

<sup>125</sup> The protection of human rights in criminal procedure requires adherence to the requirements set forth in international human rights law, in particular the Universal Declaration of Human Rights of 1948 and the International Covenant on Civil and Political Rights of 1966. These instruments envisage various requirements for the observance of human rights in the sphere of criminal proceedings such as those related to a fair and

envisaged by both international human rights law and humanitarian law that they have pledged to adhere to in implementing the Agreement.<sup>126</sup> However, some of the measures taken by the PA have failed to give effect to these standards.<sup>127</sup>

Finally, since the Agreement is valid only for the duration of the interim period, and the final status of the OPT will be determined in negotiations on the permanent settlement, it is vital to consider the issues addressed above in any future negotiations, in order that effective and full jurisdiction be realized.

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impartial trial, legal counsel for the defendant, the presumption of innocence, and pre-trial detention.

<sup>126</sup> Article 14 of the Agreement reads: "Israel and the Palestinian Authority shall exercise their powers and responsibilities pursuant to this Agreement with due regard to internationally accepted norms and principles of human rights and the rule of law."

<sup>127</sup> On the basis of its obligation under the Agreement to preserve security, on 14 August 1994, the security forces of the PA detained more than 35 activists of the Islamic Resistance Movement, Hamas, after Hamas claimed responsibility for the killing of a Jewish settler in the Gaza Strip. See *The Independent*, 16 August 1994, p. 12 and *The International Herald Tribune*, 16 August 1994, p. 4. A Palestinian suspected of collaborating with Israel died in July 1994 in the custody of the PA as a result of torture, which is strictly prohibited under human rights law as well as international humanitarian law. See Al-Haq, *Press Release No. 73*, 9 June 1994 and *The International Herald Tribune*, 11 July 1994. On 27 July 1994, the PA banned distribution of the *Al-Nahar* daily newspaper because, according to an official of the PA, it had "a line that contradicts the national interests of the Palestinian People." See *The International Herald Tribune*, 6-7 August 1994, p. 4; and Palestine Human Rights Information Center, *An Open Letter to Mr. Arafat from the Palestine Human Rights Information Center*, 31 July 1994.

# Appendix I

## Article V of the Agreement

### Jurisdiction

1. The authority of the Palestinian Authority encompasses all matters that fall within its territorial, functional and personal jurisdiction, as follows:

a. The territorial jurisdiction covers the Gaza Strip and the Jericho Area territory, as defined in Article I, except for Settlements and the Military Installation Area.

Territorial jurisdiction shall include land, subsoil and territorial waters, in accordance with the provisions of this Agreement.

b. The functional jurisdiction encompasses all powers and responsibilities as specified in this Agreement. This jurisdiction does not include foreign relations, internal security and public order of Settlements and the Military Installation Area and Israelis, and external security.

c. The personal jurisdiction extends to all persons within the territorial jurisdiction referred to above, except for Israelis, unless otherwise provided in this Agreement.

2. The Palestinian Authority has, within its authority, legislative, executive and judicial powers and responsibilities, as provided for in this Agreement.

3. a. Israel has authority over the Settlements, the Military Installation Area, Israelis, external security, internal security and public order of Settlements, the Military Installation Area and Israelis, and those agreed powers and responsibilities specified in this Agreement.

b. Israel shall exercise its authority through its military government, which, for that end, shall continue to have the necessary legislative, judicial and executive powers and responsibilities, in accordance with international

law. This provision shall not derogate from Israel's applicable legislation over Israelis **in personam**.

4. The exercise of authority with regard to the electromagnetic sphere and airspace shall be in accordance with the provisions of this Agreement.

5. The provisions of this Article are subject to the specific legal arrangements detailed in the Protocol Concerning Legal Matters attached as Annex III. Israel and the Palestinian Authority may negotiate further legal arrangements.

6. Israel and the Palestinian Authority shall cooperate on matters of legal assistance in criminal and civil matters through the legal subcommittee of the CAC [a joint Civil Affairs Coordination and Cooperation Committee.]

Appendix II  
Articles I and II of Annex III to the Agreement  
(Protocol Concerning Legal Matters)

Article I  
Criminal Jurisdiction

1. The criminal jurisdiction of the Palestinian Authority covers all offenses committed in the areas under its territorial jurisdiction (hereinafter, for the purposes of this Annex, "the Territory") subject to the provisions of this Article.
2. Israel has sole criminal jurisdiction over the following offenses:
  - a. offenses committed in the Settlements and the Military Installation Area subject to the provisions of this Annex; and
  - b. offenses committed in the Territory by Israelis.
3. In exercising their criminal jurisdiction, each side shall have the power, *inter alia*, to investigate, arrest, bring to trial and punish offenders.
4. In addition, and without derogating from the territorial jurisdiction of the Palestinian Authority, Israel has the power to arrest and to keep in custody individuals suspected of having committed offenses which fall within Israeli criminal jurisdiction as noted in paragraphs 2 and 7 of this Article, who are present in the Territory, in the following cases:
  - a. The individual is an Israeli, in accordance with Article II of this Annex; or
  - b. (1) the individual is a non-Israeli suspected of having just committed an offense in a place where Israeli authorities exercise their security functions in accordance with Annex I, and is arrested in the vicinity in which the offense was committed. The arrest shall be with a view to transferring the suspect, together with all evidence, to the Palestinian Police at the earliest opportunity.
    - (2) In the event that such an individual is suspected of having committed an offense against Israel or Israelis, and there is a need for

further legal proceedings with respect to that individual, Israel may retain him or her in custody and the question of the appropriate forum for prosecuting such a suspect shall be dealt with by the Legal Committee on a case-by-case basis.

5. In the case of an offense committed in the Territory by a non-Israeli against Israel or an Israeli, the Palestinian Authority shall take measures to investigate and prosecute the case, and shall report to Israel on the result of the investigation and any legal proceedings.

6. a. Tourists in transit to or from Israel through the Gaza Strip or the Jericho Area, who are present on the Lateral Roads or on the main North-South road crossing the Jericho Area (Route No. 90), may be arrested or questioned only by the Israeli authorities which shall notify the Palestinian Authority. Where the Israeli authorities conclude that an offense under the prevailing law has been committed, and that further legal proceedings in respect of the tourist are required, such proceedings shall be taken by the Palestinian Authority.

b. Where such a tourist present outside these areas is detained or arrested by the Palestinian Authority, it shall notify the Israeli authorities immediately and shall enable them at the earliest opportunity to meet the detainee and to provide any necessary assistance, including consular notification, requested by the detainee.

7. Nothing in this Article shall derogate from Israel's criminal jurisdiction in accordance with its domestic laws over offenses committed outside Israel (including in the Territory) against Israel or an Israeli with due regard to the principle that no person can be tried twice for the same offense. The exercise of such jurisdiction shall be subject to the provisions of this Annex and without prejudice to the criminal jurisdiction of the Palestinian Authority.

## Article II Legal Assistance in Criminal Matters

### 1. General

a. Israel and the Palestinian Authority shall cooperate and provide each other with legal assistance in criminal matters. Such cooperation shall



include the arrangements detailed in this Article.

b. For the purpose of this Article, "Israeli military forces" may include Israel Police and other Israeli security forces.

c. Documents served by one Party in the territory under the responsibility of the other, shall be accompanied by a certified translation into the official language of the other Party.

## 2. Cooperation in Criminal Matters

a. The Israel Police and the Palestinian Police shall cooperate in the conduct of investigations. Subject to detailed arrangements to be agreed upon, such co-operation shall include the exchange of information, records and fingerprints of criminal suspects, vehicle ownership registration records, etc.

b. Where an offense is committed in the Territory by an Israeli acting jointly with an individual under Palestinian personal jurisdiction, the Israeli military forces and the Palestinian Police will cooperate in conducting an investigation.

c. The Palestinian authorities shall not arrest or detain Israelis or place them in custody. Israelis can identify themselves by presenting Israeli documentation.

However, where an Israeli commits a crime against a person or property in the Territory, the Palestinian Police upon arrival at the scene of the offense shall immediately notify the Israeli authorities through the relevant DCO [District Co-ordination Office]. Until the arrival of the Israeli military forces the Palestinian Police may, if necessary, detain the suspect in place while ensuring his protection and the protection of all those involved and shall prevent interference with the scene of the offense, collect the necessary evidence and conduct preliminary questioning.

d. Without derogating from the jurisdiction of the Palestinian Authority over property located or transported within the Territory, where the property is being transported or carried by an Israeli, the following procedure shall apply: The Palestinian authorities have the power to take any measures necessary in relation to Israeli vehicles or personal belongings where such vehicle or belongings have been used in commission of a crime and present an immediate danger to public safety or health. When such measures are taken the Palestinian authorities shall immediately notify the Israeli authorities through the relevant DCO, and shall continue to take the necessary measures until their arrival.

3. a. When an Israeli is suspected of committing an offense and is present in the Territory, the Israeli military forces shall be able to arrest, search and detain the suspect as required, in the presence of and with the assistance of the Palestinian Police.

b. When an Israeli commits an offense and is present in the Yellow Areas or on the Lateral Roads and their adjacent sides as defined in Annex I, the Israeli military forces may, without derogating from the territorial jurisdiction of the Palestinian Authority, arrest, search and detain the offender and shall notify the Palestinian Police immediately, provide it with all necessary information, and coordinate wherever possible.

4. When an offense is committed in side a Settlement, and all those involved are Palestinians of the Gaza Strip or the Jericho Area or their visitors, the Israeli military forces shall notify the Palestinian Police immediately and shall hand over the offender and the collected evidence to the Palestinian Police unless the offense is security-related.

#### 5. Restraining Orders

Each side shall execute orders issued by the competent organ of the other side restraining a person under jurisdiction of that side from travelling abroad.

#### 6. Summons and Questioning of Witnesses

a. where the statement of a witness who is an Israeli or other person present in Israel is required for a Palestinian investigation, the statement shall be taken by the Israel Police in the presence of a Palestinian Police officer in an Israeli facility at an agreed location.

b. Where the statement of a non-Israeli witness present in the Territory is required for an Israeli investigation, the statement shall be taken by the Palestinian Police in the presence of an Israeli police officer in a Palestinian facility at an agreed location.

c. In exceptional cases, each side may take a statement requested by the other side itself, without the presence of the requesting side.

#### 7. Transfer of Suspects and Defendants

a. Where a non-Israeli suspected of, charged with or convicted of an offense that falls within Palestinian criminal jurisdiction is present in Israel,

the Palestinian Authority may request Israel to arrest and transfer the individual to the Palestinian Authority.

b. Where an individual suspected of, charged with or convicted of an offense that falls within Israeli criminal jurisdiction is present in the Territory, Israel may request the Palestinian Authority to arrest and transfer the individual to Israel.

c. Requests under subparagraphs a. and b. above shall specify the grounds for the request and shall be supported by an arrest warrant issued by a competent court.

d. Where the request is for the transfer of a suspect who is not a Palestinian requested by the Palestinian Authority:

(1) the arrest warrant shall be only issued pursuant to an application made by or on behalf of the Attorney-General, confirming that there is reasonable evidentiary basis that the offense was committed by the suspect;

(2) the offense must be punishable by not less than 7 years' imprisonment under the law of the requesting side.

e. (1) Individuals suspected of offenses punishable by less than 7 years' imprisonment shall be interrogated by the investigating side in a facility of the other side or at an agreed location.

(2) Interrogation shall take place in the presence of a police officer of the other side.

(3) Upon the request of the investigating side the other side may detain the suspect in custody pending and during the questioning.

(4) Where the presence of the suspect is required for any objective reason such as confronting witnesses and identification of site, the suspect shall be transferred for that purpose only.

f. (1) Both sides, upon receipt of a request in accordance with this Article, shall effect the arrest and transfer the requested.

(2) If the individual requested is detained in custody or is serving a prison sentence, the side receiving the request may delay the transfer to the requesting side for the duration of the detention or imprisonment.

g. No person shall be transferred in respect of an offense punishable by capital punishment unless the requesting side undertakes that capital punishment shall not be imposed in the case.

h. (1) Both sides shall take all necessary measures to ensure that the treatment of individuals transferred under this Article complies with the applicable legal arrangements in Israel and in the Territory and with internationally accepted norms of human rights regarding criminal

investigations.

(2) Suspects transferred under this paragraph shall have the right to be assisted during the investigation period by any advocate of their own choice.

i. Each side may, upon the request of the other side, detain, for no more than seven days, an individual in respect of whom a request for arrest and transfer is to be made, pending the submission of such a request.

j. The transfer of foreigners by Israel to the Palestinian Authority under this Article shall be subject to the applicable conventions to which Israel is a party and in coordination with the foreigner's state of origin.

k. Both sides may agree that an individual convicted in the courts of one side shall serve his sentence in a prison of the other side, subject to arrangements and conditions to be agreed between the sides.

8. Assistance in the Execution of Court orders for the Purposes of Investigation

a. Israel and the Palestinian Authority shall execute orders issued by each others' courts for the purposes of investigations (e.g., search warrants, orders for production of documents and seizure orders), subject to the provisions of local law.

b. Where, for the purposes of an investigation, Israel or the Palestinian Authority requires that tests or examinations (such as fingerprinting or blood analysis) be effected in relation to an item situated in territory under the responsibility of the other side, that side shall effect the tests or examinations required and transfer the results to the side conducting the investigation. Where these results are not sufficient for the purposes of the investigation, arrangements shall be made for the transfer of the item to the side conducting the investigation.

9. Legal Assistance in the Conduct of Judicial Proceedings

a. Summons and subpoenas issued by an Israeli court in respect of defendants and witnesses present in the Territory, shall be effected through the Palestinian Authority which shall be responsible for the service of summons, and the execution of subpoenas by the Palestinian Police. Subpoenas issued in respect of an Israeli defendant or witness shall be executed by the Israeli military forces in the presence of and with the assistance of the Palestinian Police.

b. Summons or subpoenas issued by a Palestinian court in respect of

defendants and witnesses present in Israel shall be effected through the Israel Police who shall be responsible for the service of summons and the execution of subpoenas.

c. Where the evidence of an Israeli witness is required in connection with proceedings conducted by a Palestinian court, the evidence of the witness shall be taken at a Palestinian court situated at an agreed location close to one of the crossing points, and the witness shall be accompanied by representatives of the Israeli military forces together with the Palestinian Police.

d. Where the evidence of a witness is required in connection with proceedings conducted by a court of one side, such a request will be notified to the authorities of the other side to summon the witness.

Appendix III  
( Article VII of the Agreement)  
Legislative Powers of the Palestinian Authority

1. The Palestinian Authority will have the power, within its jurisdiction, to promulgate legislation, including basic laws, laws, regulations and other legislative acts.
2. Legislation promulgated by the Palestinian Authority shall be consistent with the provisions of this Agreement.
3. Legislation promulgated by the Palestinian Authority shall be communicated to a legislation subcommittee to be established by the CAC (hereinafter "the Legislation Subcommittee"). During a period of 30 days from the communication of the legislation, Israel may request that the Legislation Subcommittee decide whether such legislation exceeds the jurisdiction of the Palestinian Authority or is otherwise inconsistent with the provisions of this Agreement.
4. Upon receipt of the Israeli request, the Legislation Subcommittee shall decide, as an initial matter, on the entry into force of the legislation pending its decision on the merits of the matter.
5. If the Legislation Subcommittee is unable to reach a decision with regard to the entry into force of the legislation within 15 days, this issue will be referred to a board of review. This board of review shall be comprised of two judges, retired judges or senior jurists (hereinafter "Judges"), one from each side, to be appointed from a compiled list of three Judges proposed by each.

In order to expedite the proceedings before this board of review, the two most senior Judges, one from each side, shall develop written informal rules of procedure.
6. Legislation referred to the board of review shall enter into force only if the board of review decides that it does not deal with a security issue which falls under Israel's responsibility, that it does not seriously threaten other significant Israeli interests protected by this Agreement and that the entry into force of the legislation could not cause irreparable damage or harm.