
Stephan Sina, Der völkerrechtliche Status des Westjordanlandes und des Gaza-Streifens nach den Osloer Verträgen

Summary

The current status of the Westbank and the Gaza Strip under public international law is substantially determined by the extensive and detailed interim provisions of the Oslo Accords. These agreements stay in force until the conclusion of a permanent status agreement, although the five years period envisaged in the Declaration of Principles as well as the one year period provided in the Memorandum of Sharm el-Sheikh have meanwhile expired. The Oslo Accords constitute binding agreements under public international law. Any remaining doubts about the general capacity of national liberation movements to conclude such agreements have been removed in this particular case by the implicit recognition of that capacity of the PLO as evidenced by the content and the form of conclusion of the Oslo Accords.

The primary aim of the interim provisions is the establishment of a Palestinian Interim Self-Government Authority in the Westbank and the Gaza Strip. Initially appointed by the PLO, the members of this Palestinian Authority were elected by the Palestinian people in the Westbank and the Gaza Strip in January 1996. The Palestinian Authority has legislative as well as executive powers. Its executive powers are exercised by a separate committee, the Executive Authority, headed by the elected Ra'ees. There is also an independent Palestinian judiciary. The Palestinian self-government is organized as a mixture of a presidential and a parliamentary system, although in practice authority is concentrated in the hands of the Ra'ees of the Executive Authority and Chairman of the PLO Arafat.

The far-reaching jurisdiction of the Palestinian Authority according to the Oslo Accords is composed of territorial, personal and functional jurisdiction. Territorial jurisdiction comprises generally the areas in the Westbank and the Gaza Strip from which Israeli forces have been withdrawn or redeployed, at present about 40% of the Westbank and 70% of the Gaza Strip. The third and last phase of the further redeployments of Israeli forces has not yet taken place. Functional jurisdiction covers all the powers and responsibilities transferred from the Israeli occupation authorities to the Palestinian Authority in accordance with the Oslo Accords, particularly powers and responsibilities for security and public order, civil affairs, legal

and economic matters. The extent of the functional jurisdiction of the Palestinian Authority, especially in the field of security and public order, corresponds to the division of the Westbank and to a lesser extent also of the Gaza Strip into specific areas by the Oslo Accords. Its widest extent is in area A and the largest part of the Gaza Strip, where the Palestinian police is responsible for internal security as well as for public order, while in area B the police assumes only the responsibility for public order for Palestinians. The functional jurisdiction of the Palestinian Authority is at its smallest degree in Area C, where it does not comprise any security powers and only reduced civil powers. The personal jurisdiction of the Palestinian Authority, meaning the scope of persons under its functional and generally also its territorial jurisdiction, applies to Palestinians, foreign nationals and only exceptionally to Israelis.

The Israeli military government retains authority over areas and persons not under the jurisdiction of the Palestinian Authority as well as over powers and responsibilities not transferred to it. That means that the military government continues to assume direct authority within the Palestinian Territories. By contrast, the Israeli Civil Administration in its previous function has been abolished. The Israeli military government retains extensive powers and responsibilities especially in matters of internal security. The Oslo Accords also provide for the continued extraterritorial application of Israeli legislation in the Palestinian Territories, especially in relation to the Jewish settlements.

The division of powers and responsibilities between the Palestinian Authority and the Israeli military government in the Oslo Accords is supplemented by an extensive cooperation and coordination mechanism through joint committees. The Joint Liaison Committee at the top of this system also serves as the highest joint organ for the settlement of disputes by negotiation. By contrast to the subordinated joint committees, the Palestinian side of the Liaison Committee consists of representatives of the PLO, not of representatives of the Palestinian Authority.

The notion of "self-government" is the starting-point of the examination of the juridical nature of the Palestinian self-government. As shown by a comparison of the Oslo Accords with the Framework Agreement of Camp David and by a study of the current autonomy arrangements in the world drawn up in the context of the latter agreement, this notion entails a far-reaching political autonomy in the Israeli-Palestinian context. This autonomy is basically territory-orientated, yet limited by the principle of personality. The territorial

autonomy also applies to the areas of the Westbank and the Gaza Strip not under the “territorial jurisdiction” of the Palestinian Authority in the sense of the Oslo Accords. Compared to the current forms of autonomy, the Palestinian autonomy is special in that it is granted to the population of a non-state territory against an occupation power.

There are several sources of authority for the powers and responsibilities of the Palestinian Authority. The Oslo Accords are not directly valid in the local law of the Westbank and the Gaza Strip as an interim constitution for these areas. Nonetheless, large parts of the Accords have been incorporated into the local law of the Palestinian Territories via proclamations of the Israeli military government. In addition, the Oslo Accords form the source of law for the Palestinian autonomy on the level of public international law in the relationship between Israel and the PLO. But there are not enough grounds to assume that the parties intended to endow the Palestinian Authority with rights and duties directly applicable in international law.

Whether the powers and responsibilities of the Palestinian Authority rest on a grant of self-government by the Israeli military government depends primarily on the continuation of the Israeli occupation of the Westbank and the Gaza Strip. From the military point of view, the Israeli forces are still controlling the whole of the Palestinian Territories despite their withdrawals and redeployments from parts of these Territories. On the other hand, by transferring powers and responsibilities to the Palestinian Authority, Israel has given up its paramount authority over these Territories, since neither the Oslo Accords nor the military proclamations issued for their implementation foresee an indirect Israeli control over the functions transferred or contain a clause allowing the military government to resume direct authority over the respective functions. The authority of the Israeli military government is thus reduced to the assumption of the functions of government not transferred to the Palestinian Authority. Nonetheless, to maintain occupation in the sense of article 42 of the 1907 Hague Regulations it is sufficient that the foreign state is still exercising any kind of governmental function in the territory concerned, as is evidenced by the wording of article 6 section 3 of the Fourth Geneva Convention and by the purpose of this convention. The Israeli military government is still exercising governmental functions in every part of the Westbank and the Gaza Strip, including area A and the majority of the Gaza Strip with respect to which Israel retained the option to intervene for the security of Israelis and Jewish settle-

ments under certain conditions according to the Interim Agreement. The Westbank and the Gaza Strip are thus still occupied in their entirety. But as the authority of the military government does not extend to the jurisdiction of the Palestinian Authority, it is not the legal source for the powers and responsibilities of the latter.

The right of peoples to self-determination is a further source of authority for Palestinian self-government. In the light of Israel's accession to the UN Covenant on Civil and Political Rights in 1991, which states in article 1 that all peoples have the right to self-determination, Israel removed last doubts about the existence of this right for the Palestinian people by recognizing the Palestinians as a "people" in the letter of Rabin to Arafat dated September 9, 1993. The authority of the Palestinian Authority is derived from the will of the Palestinian people as indirectly expressed by the decision of the PLO for the establishment of the Palestinian Authority in the Oslo Accords and directly by the confirmation of this decision in the elections for the Palestinian Council and the Ra'ees. As far as the relation with Israel is concerned, the introduction of Palestinian autonomy means a provisional partial realization of the right to external self-determination. The Palestinian self-government is thus protected by public international law independently of the Oslo Accords.

The Palestinian Authority is a distinct subject of international law with a restricted capacity to acquire rights and duties. According to article IX.5 of the Interim Agreement, as a general rule the Palestinian Authority is not endowed with the capacity to conduct foreign relations. The capacity of the Palestinian Authority to acquire rights under international law is limited by this provision to certain categories of agreements concluded by the PLO for the benefit of the Palestinian Authority. Dealings of the Palestinian Authority with foreign states and international organizations for the purpose of implementing these agreements do not confer any capacity under international law upon the Authority. In practice, this restriction of the Authority's capacity under international law is largely respected. As an exception, foreign states have been concluding their agreements with the Palestinian side directly with the Palestinian Authority instead of the PLO, especially in the field of donor assistance. But these agreements are void, since the capacity to conclude international agreements on behalf of the Palestinian Territories is not vested in the Palestinian Authority, but has been retained by the Israeli military government. The Palestinian Authority does not maintain official diplomatic relations with foreign states, neither through the representative offices in

the Palestinian Territories nor via the PLO offices in the respective states. Although the observer status of "Palestine" has been enhanced in the UN General Assembly and in the International Telecommunication Union, it still does not amount to full membership. Nor do the various international contacts of the Palestinian Authority via official visits from abroad, participation in conferences and membership in private international organizations enlarge the international law capacity of the Authority.

As the authority of the Palestinian Authority also extends to nationals of foreign states, the Palestinian Authority is obliged to respect the international minimum standard within its jurisdiction, like a state. The resulting responsibility of the Palestinian Authority under international customary law for injuries to foreign nationals is compatible with the continuation of the Israeli occupation, as evidenced by article 29 of the Fourth Geneva Convention and by article 28 section 1 of the Draft Articles of the International Law Commission on State Responsibility. Due to the inability of the Palestinian Authority to conduct diplomatic relations, injured states have to contact Israel in order to exercise their right to diplomatic protection towards the Palestinian Authority. However, this does not lead to an indirect Israeli responsibility, since the theories developed for comparable constellations are neither convincing nor confirmed by international practice.

The Palestinian Authority is also bound to respect human rights within its jurisdiction. Under the local law of the Palestinian Territories this results from the incorporation of article XIX Interim Agreement, which obliges both sides to respect in principle all human rights laid down in international conventions, into the domestic law via Military Proclamation No. 7. On the other hand the Palestinian Authority is also bound by the human rights provisions from those international conventions that Jordan introduced into her domestic law until the end of her rule over the Westbank, and which still form part of the local law of this area. Under customary international law, the Palestinian Authority is obliged to respect the minimum human rights standard within its jurisdiction like a state.

As a matter of principle, Israel's responsibility for the human rights of Palestinians is reduced to the remaining spheres of authority of the military government. Beyond that, however, Israel retains a certain responsibility for the human rights situation within the jurisdiction of the Palestinian Authority stemming from the former's long-lasting overall control over the Palestinian population. Israel assumed this responsibility by introducing human rights provisions into the Oslo

Accords, and is still obliged to assume it as far as Israel still has any influence within the Palestinian Authority's area of jurisdiction. The Israeli Supreme Court is continuing to permit judicial review of measures of the occupation authorities. In cases concerning the implementation of the Oslo Accords into Israeli domestic law, the Court has so far exercised judicial self-restraint due to the political nature of these agreements. Finally, Israel remains committed to reporting on the human rights situation in the Palestinian Territories before the Committees of the respective international conventions as far as the authority of the Israeli military government is concerned. With respect to the Palestinian jurisdiction, voluntary unofficial reports of the Palestinian Authority may be taken into consideration.

The legal status of the Palestinian Authority as the elected representative of the Palestinian people residing in the Westbank and the Gaza Strip is also based on the Palestinian right to self-determination, which is assumed by the Authority as an organization of the Palestinian people within her autonomous area of jurisdiction. In so far, the establishment of the Palestinian Authority has started a process at the end of which the PLO will be completely superseded by a Palestinian State or any other political organization freely elected by the Palestinian people. Until that point, as the international representative of the Palestinian people, the PLO remains responsible for the further realization of the Palestinian right to self-determination, especially in the negotiations with Israel. The relationship between the Palestinian Authority and the PLO may be described as one of dynamic cooperation between two distinct Palestinian organizations endowed with the assumption of the right to self-determination of the Palestinian people.

Until now, the Palestinian self-governing entity in the Westbank and the Gaza Strip does not constitute a state. It only meets two of the criteria of statehood under international law, the criteria of a defined territory and the criteria of a permanent population, if one is willing to consider these criteria apart. But, due to the powers and responsibilities retained by the Israeli military government and to the fragmentation of the areas under Palestinian territorial jurisdiction, the Palestinian Authority as the Palestinian government does not exercise overall, exclusive and independent governmental authority over that territory and its population. Furthermore, the Palestinian Authority is not able to conduct foreign relations. The capacity of the PLO in this field cannot replace this lack of governmental power, since that capacity is inferior to the foreign relations capacity of states and be-

cause the Oslo Accords prohibit the PLO to conduct foreign relations on behalf of the Palestinian Authority.

These lacks of effective internal and external governmental authority cannot be compensated for by the Palestinian people's right to a state of their own, which has increasingly been recognized as part of their right to self-determination. According to the Guinea Bissau precedent, the compensatory effect of that right only takes place where, unlike the Palestinian case, effective statehood is undoubtedly about to emerge within a very short period of time. Nonetheless, combined with the international standing of the PLO, the Palestinian self-governing regime has a special status under international law which is oriented towards statehood and thus may be described as a state *in statu nascendi* in a wide sense.

