

Palestine: the legal dimension of migration

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Introduction

Migration law covers the regulation of entry, residence and settlement, border-crossing and departure, sanctions for the transgression of such rules, as well as the protection of migrants through the legal regulation of their rights, often proclaimed on the international level and sometimes incorporated in national law.¹ The legislative position of the PA is anomalous on both counts. First, the regulation of migration implies the sovereign control of borders, which the PA does not currently exercise. Second, conformity with international standards on the status of migrants and refugees and citizenship issues, presumes accountability and statehood, which Palestine does not enjoy. In other words, the PA is not competent to sign treaties since it is not a sovereign authority with a legal character under international law, due to the absence of a state.² Furthermore, the PA did not pass legislation or enforce decisions in these domains, because of the occupation.

Despite this basic legal anomaly, under the Agreements between Israel and the Palestine Liberation Organization (PLO), the PA exercises three limited forms of jurisdiction: i) territorial jurisdiction over parts of Occupied Palestinian Territories (OPT); ii) personal jurisdiction over Palestinians of the West Bank and the Gaza Strip; and iii) functional jurisdiction in civil affairs, transferred to the Authority by the Israeli military and civil authorities. Within these limitations, the PA exercised legislative authority through the Council nominated by the Executive Committee of the PLO, and then by the Palestinian Legislative Council (PLC) elected in 1996.³

The PA adopted several laws that unified existing bodies of legislation; however, legal reform took place without a coherent agenda or objectives. The lack of sovereign powers and the absence of an independent Palestinian state meant total Palestinian dependency on the unilateral Israeli transfer of powers and on financial aid from the international community. For years these two components guaranteed the survival of the PA, but since the victory of Islamic Resistance Movement (Hamas) in the second legislative elections on 25 January 2006 this has come to a complete halt.⁴ Legislative elections were followed by hard negotiations between rival Palestinian factions that ended up without any agreement on two key issues: the reference to the PLO in the governmental programme and the acceptance of the previously endorsed agreements. The quartet made aid conditional on recognising

1 Khadija Elmadad, La nouvelle loi marocaine du 11 novembre 2003 relative à l'entrée et au séjour des étrangers au Maroc et l'émigration et immigration irrégulières, CARIM-AS 2004/01, p. 1. Available at: http://www.carim.org/publications/CARIM-AS04_01-Elmadmad.pdf.

2 Indeed, the PLO as the sole representative of the Palestinian people has legal character under international law and is the only authority competent to sign 'treaties' 'on behalf of the PA'.

3 See www.pal-plc.org (in Arabic). The PLC is sometimes referred to as the Palestinian Parliament.

4 For the first time since the establishment of the Palestinian Authority (PA) over parts of the Occupied Palestinian Territories (OPT), a non-PLO-member party, an anti-Oslo group and an armed resistance partisan, has a majority in the PLC (74 seats over 132). It shares the top of executive hierarchy with the PA president, Mahmoud Abbas (Abu Mazen), elected one year earlier, and a Fatah member, chairman of the Executive Committee of the PLO. Following the death of Yasser Arafat on 11 November 2004, Raouhi Fattouh, the then PLC president, was sworn in as Palestinian Authority president on an interim basis, according to the BL (Art. 37). The Fatah-Hamas dialectic was preceded by internal Fatah divisions, the most important being the division of the two important responsibilities of former president Arafat to two persons: Mahmoud Abbas was designated Chairman of the PLO Executive Committee while Farouk Kaddoumi was designated the head of Fatah.

Israel, the rejection of violence and the acceptance of previous agreements, including the Road Map. Israel suspended contacts with PA officials, halted the transfer of Palestinian Value Added Tax (VAT) and customs taxes, and closed the civil liaison offices.

In March 2006, Hamas formed the tenth Palestinian government headed by Isamel Haneyyeh.⁵ Since then, over 165,000 public sector workers/civil servants have not been paid,⁶ and the humanitarian outlook for the OPT is extremely bleak.⁷

Political impasse, security chaos, financial crisis and economic decline have led to a generalized sense of uncertainty. This has been accompanied by further Israeli restrictions on the movement of Palestinians in the West Bank. By the end of June 2006, following the Palestinian commando operation in Gaza and the capture of an Israeli soldier, Israel launched a large military operation in Gaza and detained some Hamas members of the PLC and the government.⁸ The Palestinian institutions were paralyzed following the strike declared by public employees at the beginning of September 2006. Since Hamas came to power, no legislation had been passed by the PLC.

The first section deals with the content and limits of the Authority's legislative powers and the confusing mixture of legal provisions from different legal systems in Palestine. This is followed by a section dealing with the constitutional framework of the PA and the future Palestinian state and the way international law is considered in the Palestinian constitutional system. The third section considers the legislation adopted by the PLC. The fourth section examines areas where the PA has no jurisdiction or where it intentionally avoids legislating in a context of political instability and in the absence of a Palestinian state, and the fifth section considers those sectors related to migration where Palestinian legislative intervention may be needed.

The incomplete nature of legislative powers in territories under PA control

In October 1993,⁹ the PLO Central Council delegated the PLO Executive Committee (EC) to form the 'Council' of the PA, and nominated the Chairman of the Executive Committee, Yasser Arafat, as its President. In 1994 Arafat issued Decree No. 1 concerning the 'Continuation of the Laws, Regulations and Rules Operative in the Palestinian Territories (West Bank and Gaza Strip) before and since 5 June 1967' until replaced by unified PA legislation. The decree came into force on 20 May 1994—the day of its ratification—but ignored all military orders and declarations in force in the oPt since 1967. Notwithstanding the international law of occupation, there are sectors where regulation is still carried out by military orders and declarations. Subsequently Law No. 2/1995 revoked some resolutions and military orders thus implying that *other* orders should remain in force unless specifically revoked or replaced. To avoid further misunderstanding, the President adopted Law No. 5/1995 on the 'Transfer of Authorities and Powers', ratified on 20 May 1995, but retroactively effective as of 19 May 1994, that is, one day before Decree No. 1/1994. This suggests that all previous legislation, *including military orders*, will remain in force unless revoked or replaced by Palestinian legislators. The Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip (*hereinafter* Interim

5 The PLC confidence vote took place on 29 March 2006.

6 Until the time of writing.

7 This situation justified the revision of Consolidated Appeal Process (CAP) launched by United Nations and select non-governmental organizations have taken the unprecedented step of revising their appeal for humanitarian assistance to Palestinians from USD 215 million to 384 million. Available at: [http://ochadms.unog.ch/quickplace/cap/main.nsf/h_Index/Revision_2006_oPt/\\$FILE/Revision_2006_oPt.doc?OpenElement](http://ochadms.unog.ch/quickplace/cap/main.nsf/h_Index/Revision_2006_oPt/$FILE/Revision_2006_oPt.doc?OpenElement)

8 Until the moment of writing, five Palestinian ministers and more than thirty PLC members are under Israeli administrative detention.

9 PLO Central Council resolution, in its session of 10–12 October 1993.

Agreement)¹⁰ foresees the amendment or abrogation of military orders (Art. XVIII),¹¹ but the Council cannot exceed the powers transferred to it. Since the establishment of the PA, Palestinian judges have started to apply Palestinian law where this exists and avoided enforcing military orders.¹²

Following the establishment of the PA on parts of the West Bank and Gaza Strip (the ‘Autonomous Territories’), Palestinians were able to exercise legislative power, but the exercise of this power by the ‘Council’ was strictly regulated by the Interim Agreement.¹³ This suggests that the BL *is not* the highest law of the land, but that the agreements with Israel are.¹⁴ Moreover, the legal documents from previous jurisdictions—Ottoman, British, Egyptian (Gaza), Jordanian (West Bank) and Israeli—remain in force, although they are often contradictory or overlapping; the main task of PA institutions, in particular the PLC, is the harmonization of texts in the Palestinian legal system. Until the unification of laws, judges applied the existing law/laws according to their discretion.¹⁵

There is a difference between the West Bank and Gaza Strip: the Egyptian forces in control of Gaza (1948–1967) did not annex the territory and always treated it as a distinct body, so that although partially influenced by Egyptian legislation, most British legislation remained in force or was amended by the Egyptian Governor.¹⁶ The West Bank, by contrast, was annexed to the Emirate of Transjordan to form the United Kingdom of Jordan and in 1952 the Jordanian Parliament, with an equal number of

10 ‘Also referred to as ‘Oslo II’, signed in Washington on 28 September 1995. See: http://www.palestine-un.org/peace/p_g.html

11 Articles III and IV deal with the structure and size of the Council. According to the Interim Agreement the ‘Council’ was supposed to enjoy ‘both legislative power and executive power’.

12 There are three basic problems. First, the territorial and functional jurisdiction of the Palestinian courts do not apply to Israeli citizens, i.e. Israeli citizens in Israel and Israeli settlers in the OPT (Art. XVII (2.c)). Second, Palestinian courts have no power to enforce their decisions on zones under direct Israeli control (Area C), and only limited powers in zones under exclusive civil control (Area B). Third, Israeli military courts continue to apply Israeli military orders.

13 ‘Legislation... which exceeds the jurisdiction of the Council or which is [...] inconsistent with the provisions of the Declaration of Principles (DOP), this Agreement, or of any other agreement that may be reached between the two sides during the interim period, shall have no effect and shall be void ab initio’ (Art. XVIII).

14 This is an example of the on-going debate between international law defenders and constitutional law defenders, regarding the relationship between international law and constitutional law and which takes precedence. The BL, although adopted in conformity with the Interim Agreement, is deemed the highest law of the land and its provisions are the sole limitation on the Palestinian legislator. Thus, under the international law of treaties any incompatibility with Israeli–Palestinian agreements shall be the responsibility of the PLO and its counterpart in the agreements, and more precisely, the responsibility of the President of the PA, who, according to the Israeli–PLO Agreements, is not empowered to pass legislation in contradiction with the agreements. However, since the adoption of the BL in 2002, and despite the provisions of Interim agreement concerning legislative procedures, the presidential veto over legislation can be overridden by a two-thirds majority vote in the Legislative Council (Art. 47 that became Art. 41 in the amended BL of 2003). It is surprising to notice that the BL makes no reference to the Israeli–Palestinian agreements or to the applicability of international law in general in the Palestinian legal system. Furthermore, as mentioned in its Introduction, the drafters of the BL find its origin in the will of the Palestinian people and not in the Interim Agreement. The theoretical superiority of the BL is, however, challenged by *de facto* control of most of the OPT by Israeli forces, including complete control of borders and passage to and from different parts of territories under PA control, as will be presented in successive sections.

15 Despite the plurality of legal texts, the real obstacle is not the different legal texts applied in Palestinian territories, but the legal culture generated by the different legal systems.

16 In 1953 Law 621/1953 promulgated the BL for the Territory under Egyptian Forces Control in Palestine. Article 45 stated that the 1922 Palestinian Order in Council should remain in force unless incompatible with present law. Accordingly, the first Constitution drawn up by the British for Palestine is theoretically in force in Gaza where it does not contradict the BL. Nevertheless, according to the BL, the only limit to the powers of the Palestinian legislator is the BL itself (Art. 47). This means that the only text of constitutional rank in the territories under PA control is the BL, and not subject to the Palestinian Order in Council, the Jordanian Constitution, or the Egyptian BL for Gaza. On the contrary, the Palestine Order in Council was expressly abrogated in the West Bank by Jordanian Constitution of 1952. It was amended several times and remained valid in the West Bank. No successive texts abrogated the text in Gaza, although the Israeli occupation rendered many of its provisions void.

representatives from the two banks of the River Jordan, adopted a new Constitution, which replaced the Palestine Order-in-Council of 1922 and its amendments (Art. 129.2).¹⁷ However, when Israeli forces entered the West Bank and Gaza in 1967, they declared the assumption of powers under Declaration No. 1/1967 (abrogated by Law 2/1995). In this way the Israeli occupation began to change legislation applicable in the territories under its control through military orders and declarations.

The Palestinian constitutional system

The exercise of legislative power by the PA should be read in the light of the resolutions, charters, and declarations made by the PLO, in particular the Palestinian National Charter of 1968,¹⁸ and the Declaration of Independence (Algiers, 1988).¹⁹ In fact, PLO documents remain valid and constitute a general framework in the Palestinian struggle for statehood and self-determination. The reference to the Declaration of Independence is made in the BL itself, but there is no direct reference to it in the Palestinian Charter.

On the other hand, the Draft Palestinian Constitution (DPC) will be adopted after the establishment of the state but will not substitute the Palestinian Charter; the later, indeed, can be abrogated exclusively by the body that adopted it, i.e. the Palestinian National Council (or the Palestinian Central Council). Nevertheless, it is worth mentioning that the DPC talks about an ‘Advisory Council’,²⁰ which some of the members are Palestinians of the diaspora. This means indirectly that the PLO and PA institutions will be substituted by the state institutions.²¹ Accordingly, the establishment of a Palestinian state may end the current duality in the institutions representing the Palestinian people; it will be the Palestinian state, if established, rather than the PLO, that enjoys legal character under international law and wields exclusive power to incorporate the institutions that administer Palestinian territories under PA control.

Amended Basic Law of 2003²²

The PLC approved the BL in its third reading on 2 October 1997, but it was only ratified by the President of the PA on 29 May 2002 and came into force on 7 July 2002.²³ Following the creation of

17 Jordanian Constitution of 1952, OJ 1039 of 8/1/1952, p. 3. This expressly abrogated the Jordanian Constitution of 1946 and the Palestinian Order-in-Council.

18 This replaced the 1964 Charter, available at: http://www.palestine-un.org/plo/pna_two.html. Palestinian National Charter of 1968, available at: http://www.palestine-un.org/plo/pna_three.html. See also Amendment of Palestinian National Charter of 24 April 1996 available at: http://www.palestine-un.org/plo/pna_one.html.

19 Declaration of Independence of 1988, available at: http://www.palestine-un.org/plo/doc_two.html.

20 The third draft of Palestinian Constitution, available at: <http://www.pcpsr.org/domestic/2003/nbrowne.pdf>

21 In all three drafts of the Palestinian Constitution, reference is made to a council representing the interests of the Palestinians (something that the BL ignored completely). However, in the early drafts, as rightly outlined by Nathan Brown, ‘the body was referred to as the “National Council”, and implicitly seemed to be identical to (or eventually the successor to) the “Palestinian National Council,” the constituting body of the PLO. It served as the upper house of the Palestinian parliament, though its role was not well defined’. The provision of the third draft changed remarkably from early drafts in giving bases of this council in the constitution itself and not the PLO and in the fact of being converted to an ‘advisory council’, distinct from the National Council of the PLO. Nathan Brown then concluded, ‘One cost of detaching the body from the PLO will be to leave the relationship between the PLO and the new state of Palestine more ambiguous. The overlap and hazy distinction between the PNA and the PLO has been a frequent complaint of Palestinian reformers; the constitution offers no clear provisions for the role or fate of the PLO’. See Nathan Brown, ‘The Third Draft Constitution for a Palestinian State: Translation and Commentary’, PSR, 2003, pp. 41–43. Available at: <http://www.pcpsr.org/domestic/2003/nbrowne.pdf>.

22 The amended Basic Law of 2003 is available at: http://www.pnic.gov.ps/arabic/law/law_basic.html. The 2002 version of BL is available at: http://www.pnic.gov.ps/arabic/law/law_20.html.

23 The President of the PA justified his refusal to endorse the BL on the grounds of the transitional character of the PA and the absence of a Palestinian state. Observers criticized the President for not having done so, considering the real reason to

the office of Prime Minister in 2003, the BL was amended in line with changes made in the Palestinian political system, and was again amended in 2005 when the new electoral system came into force.²⁴

The supremacy of the BL over other laws is confirmed in Article 47, which stipulates that legislative power shall be exercised within the limits of its provisions. Laws, regulations and decisions in force in the OPT prior to the establishment of the PA, remain in force, unless incompatible with the BL (Art. 119), or until amended or repealed (Art. 18).

The BL guarantees the basic human rights and freedoms (Art. 10) for ‘individuals’, that is, citizens *and* foreigners: personal liberty (Art. 11); freedom of residence and movement (Art. 20); the right for detainees to be informed of the reasons for their detention in a language they understand (Art. 12); and the freedom of belief, worship and the performance of religious functions (Art. 18). It adopts a duality between *civil* and *shari’a* (religious) courts, where the latter has jurisdiction in matters governed by *shari’a* and ‘personal status’ laws (Art. 101).

On the contrary, the BL does not deal with the question of Palestinian citizenship, but provides that it shall be regulated by a specific law (Art. 7),²⁵ and confirms that: ‘No Palestinian may be deported from the homeland, prevented or prohibited from returning to or leaving it, deprived of citizenship, or handed over to any foreign entity’ (Art. 28).

The idea of having a BL was developed following the Declaration of Independence in Algiers in 1988 but the first drafts circulated after the Declaration of Principles on Interim Self-Government Arrangements (*hereinafter*, Declaration of Principles).²⁶ The BL is not a constitution for a sovereign state, but a transitional legal document, superior to other laws, that will be replaced by a constitution, once the state is established. According to the provisions of the BL it shall apply during the interim period and may be extended until the new Constitution of the State of Palestine is enforced (BL, Art. 115). In preparing for future statehood, and as part of Palestinian obligations under the Road Map, three drafts of the Palestinian Constitution were drafted.²⁷

The BL was silent on key issues such as borders, refugees and statehood, since they are dependent on the successful outcome of permanent status talks with Israel, but the Constitution cannot avoid tackling them, since this should follow the creation of a state.²⁸ The draft constitution differed from the BL since it is intended to follow the creation of the Palestinian state and included regulations regarding the state, such as the right of asylum (Art. 32).

Constitutional protection of human rights

The Interim agreement contains limitations to the PLC’s right to legislate. The PLO, surprisingly, committed itself in the Interim Agreement to the respect of ‘internationally-accepted norms and

(Contd.)

be the fear of having his powers limited. For more details regarding the circumstances related to the adoption of the BL and the preparation of the DPC, see Asem Khalil, *The Enactment of Constituent Power in the Arab World: the Palestinian Case*, PIFF, Helbing & Lichtenhahn, 2006, pp. 216–21, and Asem Khalil, *Which Constitution for the Palestinian Legal System*, PUL, 2003, pp. 89–102. Available at: http://www.profpito.com/Th_se_Lateran_Compl_te.pdf.

24 An unofficial version is available at: <http://www.pnic.gov.ps/arabic/law/8-2005.html.html>.

25 A draft citizenship law circulated in the early years of PA (1995) even before the election of the first PLC, but was never adopted. The problematic issue of citizenship depended largely on the issue of negotiation with Israel and to possible realization of Palestinian rights to return.

26 The Declaration of Principles of 13 September 1993; called also Oslo I: http://www.palestine-un.org/peace/p_a.html

27 The third draft to which we make reference here was prepared in March 2003. Available at: <http://www.pcpsr.org/domestic/2003/nbrowne.pdf>

28 The problem is that constitution-making is a step towards statehood, while the determination of those elements will depend largely on the outcome of permanent status talks with Israel, and thus on the creation of a Palestinian state. This, indeed, justifies the insistence on a Palestinian right to return and to Palestinian nationality and citizenship (Arts. 12, 13).

principles of human rights and the rule of law' (Art. XIX). The accelerated preparation for a BL that proceeded and followed the creation of the PA was in part the result of the desire of many Palestinians had to ensure the protection of human rights in territories under PA control. However, the PLO had committed earlier to the principles and purposes of the United Nations, and to the Universal Declaration of Human Rights, specifically in the declaration of independence in 1988.²⁹

The BL and DPC contain similar provisions relating to basic human rights but each has tackled the issue of conformity to international law with regards to human rights in a different way.³⁰ The BL provides that basic human rights and freedoms shall be binding and respected (BL, Art. 10.1), and that the PA shall work without delay to become a signatory to regional and international declarations and covenants which protect human rights (BL, Art. 10.2). As a guarantee, the BL stipulates the need to establish by law an independent commission for human rights (Art. 31). However, international law, charters, and treaties, will not be enforced directly in the Palestinian legal system, unless converted into law. This duality in the approach to international law seems unchangeable in the DPC; however, in the later, the state of Palestine, according to the DPC, abides by the Charter of the League of Arab States (Art. 2) and the UN Charter (Art. 3); and shall also abide to the Declaration of Human Rights (Art. 18). The DPC also states that 'the rule of law and justice' shall be the basis of governance (Art. 9). The authorities have the constitutional obligation to defend public and individual rights and freedoms (Art. 20). In the DPC there is a continuous reference to human rights, in strict relation with good governance, RL, and independence of judiciary, with respect to the International law standards.

Laws and regulations with a potential impact on migration

The PA, within its territorial, functional and personal limited jurisdiction, has legislated in various sectors in relation to migration, including the regulation of settlement and residence of foreigners, their integration and rights, and—albeit partially—the relationship of Palestinians of the diaspora with their country of origin.

The regulation of residence and settlement

According to *Labour Law* No. 7/2000³¹ it is illegal to discriminate between workers in Palestine (Art. 16). The Ministry of Labour can issue an authorization to work in Palestine for non-Palestinians (Art. 14) and such authorizations are dealt with by ministerial regulation. Based on Article 15, the Council of Ministers adopted Decision No. 45/2004 on granting work permits to non-Palestinian workers.³² It is worth noting that Social Insurance Law No. 3/2003³³ is applicable,

29 'State of Palestine proclaims its commitment to the principles and purposes of the United Nations, and to the Universal Declaration of Human Rights... It will join with all states and peoples in order to assure a permanent peace based upon justice and the respect of rights so that humanity's potential for well-being may be assured, an earnest competition for excellence may be maintained, and in which confidence in the future will eliminate fear for those who are just and for whom justice is the only recourse'.

30 Until now, the Palestinian adherence to international law in relation to human rights, has been voluntary and unilateral since the PA cannot adhere to international covenants due to its lack of sovereignty.

31 This substitutes previous legislation in force in the West Bank and Gaza, abrogating Labour Law No. 21/1960 and the amendments applicable in the West Bank, Labour Law No. 16/1964 applicable in Gaza and all other provisions contradicting the new law. The Council of Ministers adopted a series of decisions, and the Minister of Labour adopted Decisions and Instructions implementing this law. Decisions Nos. 4, 14–17, 21–24/2003, Nos. 4, 16, 45–49, 145, 166–169 of 2004. Ministry of Labour Nos. 1, 2, 3 and Instructions No. 1/2004 and Nos. 1–7/2005.

32 Four conditions were presented in this decision: 1) the absence of competition with national workers; 2) a need for a foreigner work instead of a national; 3) the relevant qualifications and experience for the job for which the license is requested; 4) that the Ministry of Labour may impose a condition of reciprocity (Art. 2), and is not required to give grounds for rejection (Art. 4). If the application is accepted, a license is granted for one year (Art. 5).

33 Social Insurance Law No. 3/2003, available at: http://www.pnic.gov.ps/arabic/law/law_14.html.

inter alia, to workers covered by labour law (included foreign workers) and applies in accidents during working hours.

Under the *Civil Status Law* No. 2/1999,³⁴ any change in civil status that occurs in foreign countries for a Palestinian is deemed valid if made according to the laws of the state (Art. 9). The Palestinian legislators forwards the notification to a Palestinian delegation or to the civil administration when there is no delegation in the country in question.

Palestinian legislation stipulates the conditions for adopting official foreign resolutions, decisions, and documents (*Execution Law* No. 23/2005, Arts. 36–39). The only condition of such application of foreign regulations is the national interest and the non contradiction to existing Palestinian laws.

Traffic Law No. 5/2000³⁵ regulates the issuing of international driving licenses (Art. 29), the recognition of foreign permits (Art. 30), and their substitution (Art. 31). The Palestinian Car Club is authorized to issue international driving permits in accordance with international traffic treaties (Vienna, 1968). Foreign driving permits can be used in Palestine, or substituted by Palestinian ones, under reciprocal agreements.

According to *Civil and Commercial Procedures Law* No. 2/2001,³⁶ Palestinian courts have general jurisdiction to examine civil and commercial cases against Palestinians wherever they reside and on foreigners domiciled or resident in Palestine, excluding cases relating to real estate outside Palestine (Art. 27). As for the Israeli citizens, the Palestinian courts, has no jurisdiction. This is in line with the Israeli–Palestinian agreements which always excluded Israeli citizens from any persecution under Palestinian court system unless they so choose.³⁷

In criminal cases against foreigners, the recently adopted *General Intelligence Law* No. 17/2005³⁸ requires that they receive assistance in contacting the nearest representative of their country of origin; it also permits General Intelligence to inform representatives of the country or countries concerned (Art. 15). The Attorney General can issue legal decisions, at the request of the chief of General Intelligence, forbidding the movement of foreigners to and from the country (Art. 11).

Integration and the rights of foreigners

The *Law Promoting Investment in Palestine* No. 1/1998³⁹ was designed, *inter alia*, to provide guarantees for actual and potential investors in Palestine (Art. 2). It prohibited nationalization, the confiscation of projects, and the seizure, freezing or confiscation of funds except through the courts (Art. 7). Freedom to invest in any sector of the Palestinian economy was the rule and only the law

34 The law abrogated the Jordanian Law on Civil Status No. 32/1966 and replaced the Egyptian (Gaza) Law No. 11/1962 on Changes in Data Concerning the Name or Title Reported in the Registers of Births. This law was amended by Law No. 6/2001.

35 Traffic Law No. 5/2000 available at: http://www.pnic.gov.ps/arabic/law/law_traffic.html.

36 Law on Civil and Commercial Procedures No. 2/2001 (<http://www.pnic.gov.ps/arabic/law/>) replaced all previous legislation and regulations in civil and commercial procedures, and was subsequently amended by Law No. 5/2005 without any changes in the above presented provisions.

37 As for foreigners who are not legally resident in Palestine, there are three areas in which the Court has jurisdiction: 1) when a foreigner has chosen Palestine as their domicile; 2) in cases related to money held in Palestine; a contract drawn up, executed, or to be executed, in Palestine; bankruptcy declared in Palestine; 3) prosecution against a group, one of whose (foreign) members is domiciled or resident in Palestine (Art. 28). If the foreigner does not appear on the fixed day, and the Court is unable to pass judgment, the Court itself declares its incompetence to pursue the case (Art. 30).

38 General Intelligence Law No. 17/2005 is one of the more recent pieces of legislation adopted by Palestinian legislator in the framework of reforms in the security sector and stipulates the limits to General Intelligence acting in relation to Human Rights; the guarantees are ‘those provided by Palestinian laws and principles of international law in this domain’ (Art. 13). Available at: <http://www.pnic.gov.ps/arabic/social/law23.html>.

39 Law Promoting Investment in Palestine No. 1 /1998 available at: http://www.pnic.gov.ps/arabic/law/law_15.html. This replaced Law No. 6/1995 on Investment in Palestine and was subsequently amended by Law No. 2/2004.

could deal with exceptions (Art. 3). The law guarantees the unrestricted transfer of financial resources outside Palestine (Art. 11), and stipulates that no one should be discriminated against in enjoying the advantages and exemptions provided by the law (Art. 6.1). This antidiscrimination clause covers also the foreigner investors.⁴⁰

A particularly important law was adopted recently on *Charitable Associations and Non-Governmental Organizations Law* on No. 1/2000.⁴¹ This law provides a general framework for freedom of association and abrogates preceding Ottoman (Gaza) and Jordanian (West Bank) legislation (Art. 43). It regulates duties and rights of charitable associations and NGOs including foreign ones (Arts. 34–39). It is worth noting that, on the contrary of pre-PA legislation, the above law does not require authorization to set up an association but only registration with the Ministry of the Interior. The right of association, included in the BL, is ruled by the above law that regulates registration procedures, conditions for acceptance and refusal. The law does not impose limitations with regard to the nationality of the founders or members of the association. However, the distinction between Palestinian and foreign NGOs or associations depends on where they are based and the proportion of Palestinians in the association; in the latter case the NGO main office is outside the Palestinian territories or the majority of their members are not Palestinians.

In 2003 the Council of Ministers issued Decision No. 9/2003 implementing Law No. 1/2000 based on Article 26 of the BL that guarantees the freedom to set up trade unions, associations, societies, clubs and popular institutions in accordance with the law. Foreign associations working in social affairs in Palestine, especially those with headquarters outside Palestine, or mainly staffed by foreign nationals, are dealt with in Articles 24–34. All foreign associations are required to apply to the Ministry of the Interior for registration (Art. 24.2).⁴² In the case of a rejection the applicant can apply to the courts (Art. 33). In the Palestinian context, there is one unique level of administrative jurisdiction, which is the High Court of Justice. On the contrary, if registration is granted, the association then has moral personality (Art. 35). It should be noted that Article 17 presented different scenarios to prove Palestinian nationality for the purposes of this decision.⁴³

It is worth noting that the *Palestinian Child Law* No. 7/2004⁴⁴ refers to the right to *Palestinian* citizenship for newborn *Palestinian* children (Art. 18); however, it states that a ‘Palestinian child’ has the right to Palestinian citizenship without specifying the conditions of eligibility: any child born in

40 In the case of disputes arising between investors and the PA, either party may initiate negotiations. If these fail, the parties can seek independent arbitration or recourse to the Palestinian courts (Arts. 39–40). The duration and procedures of the first part of this dispute settlement are left to regulations and decisions issued by the Council of Ministers (Art. 46). Investment incentives are developed in Chapter Four of the law (Arts. 22–38). Exceptional ‘most favoured status’ treatment can be granted to investors on the basis of nationality, pursuant to bilateral or multilateral trade or investment agreements (Art. 6.2).

41 Law on Charitable Associations and Non-Governmental Organizations No. 1/2000, available at: <http://www.pnic.gov.ps/arabic/law/ngo.html>.

42 Insurance Law No. 20/2005 requires foreign insurance companies to apply for permission to practice in Palestine through the branch of an insurance company registered in Palestine and subject to a reciprocal agreement (Art. 89), and imposes basic conditions on that branch of the foreign insurance company (Art. 90). A foreign company shall not deduce more than 5% of taxable income gained in Palestine, for administrative expenses in its central seat (outside Palestine) (Art. 91), and companies must maintain minimum guarantees for all their insurance activities (Art. 92). Available at: <http://www.pnic.gov.ps/arabic/law/10-2005.html>.

43 According to the decision, a Palestinian is the holder of an Identity card (ID) issued by the Palestinian Ministry of the Interior (green card), or by the Israeli occupation civil administration (orange for West Bank residents and red for Gaza Strip) or issued for Jerusalemites (blue). Those who do not have an ID but have a foreign passport with a visa or permission of stay (not necessarily valid at the time of the demand) with a birth certificate that prove that the person or one of their parents or grandparents was born in mandatory Palestine before 15 May 1948; or with a birth certificate that proves that the person or one of their parents or grandparents was born in the Gaza Strip or the West Bank (including Jerusalem); or a certificate of valid marriage with a Palestinian (man or woman). In any case, the above regulation does not apply to those holding an Israeli citizenship.

44 Child Law No. 7/2004 available at: http://www.pnic.gov.ps/arabic/law/law_24.html.

Palestine irrespective of whether either or both parents are Palestinian? The Child Law (as the BL itself) leaves these details to a specific law to be adopted in the future (much attended and controversial Citizenship law).⁴⁵

Relationships with the country of origin

The PA's lack of a legal character under international law has had repercussions on the legal framework of migration in Palestine, mainly on the relationship between Palestinian expatriates and their country of origin. Moreover, at times the Palestinian right to statehood was partially based on the UN General Assembly Resolution No. 181/1947⁴⁶ and on a people's right to self-determination. International law, resolutions and institutions are particularly relevant for the Palestinians, and elements related to migration may be influenced by them: a case in point being Palestinian refugees, their re-integration into their country of origin, absorption into the country where they have settled, or indeed, into a future Palestinian state.

However, the *Diplomatic Corps Law* No. 13/2005⁴⁷ marks a break from the classical way of treating Palestinian diplomatic missions abroad, which was mainly the competence of the PLO's Political Department. The PLC adopted a law beyond its competence: foreign affairs, which is left to the PLO, the only representative of the Palestinian people, and subject of international law.⁴⁸

This law is likely to have a key impact on how diplomatic missions are administered and their personnel nominated as the Ministry of Foreign Affairs not only participates in the formulation of foreign policy, but also executes it. The Ministry also represents Palestine in foreign countries and consolidates the relationship with states and international organizations. It oversees diplomatic missions politically, administratively, and financially (Art. 3). Another impact will be the relationship between Palestinian expatriates and their country of origin since the Ministry should attempt to promote the interests of Palestinians living abroad, and to strengthen the links between them and their homeland (Art. 3.5).

The law also regulates the nomination, promotion and training of diplomats. Nomination is left to the President on the recommendation of the Minister of Foreign Affairs (Art. 7). It is worth mentioning that there is no reference to the head of the PLO's political bureau, who had had a key role in the nomination of Palestinian representatives abroad. One of the conditions of being a diplomat is to be Palestinian national but the law does not specify who exactly is Palestinian.⁴⁹

Sectors related to migration where the PA did not legislate

There are areas relating to migration where the PA did not legislate, at times intentionally, as in personal status and nationality or citizenship, where pre-PA constitutional documents, laws and regulations remain in force. In other areas, the PA is not competent to adopt legislation since it is not a sovereign authority with legal character under international law. The only authority competent to sign 'treaties' remains those subject to international law so that the PLO signed agreements 'for the benefit

45 The law rules on a child's right to know their parents (Art. 20) and to maintain contact with both in the case of separation or divorce (Art. 21), but is silent on the issue of custody, which is left to legislation on personal status. The PA did not legislate in this area which is dealt with under personal status regulations (BL, Art. 101).

46 Also referred to as the Partition Plan; available also at: http://www.palestine-un.org/res/2_181.html

47 Diplomatic Corps Law No. 13/2005, available at: <http://www.pnic.gov.ps/arabic/law/25-8-2005.html>.

48 It may be useful to mention that the PA acts as a state like entity. The way it treats the 'foreign representations' to the PA shows that. According to Income Tax law (No. 17/2004), for example, it is stated that the salaries of non-Palestinians diplomatic functionaries representing foreign countries in Palestine were to be exempt from income tax, on the basis of a reciprocal agreement (Art. 7.2). Available at: <http://www.pnic.gov.ps/arabic/law/17-2004.html>.

49 See the Council of Ministers Decision No. 9/2003 (Art. 17) previously presented in this report.

of the PA'.⁵⁰ However, several international actors and organizations accorded special consideration to the PA.⁵¹ As a result the Authority started to play a quasi-state role, rather than that a liberation movement. The PA, mainly through its foreign ministry, began to negotiate agreements with states and international organizations.⁵²

There are other areas where Israel, the occupying authority, is the *de facto* holder of sovereign powers and the sole regulatory authority in matters of border control and entry or termination of stay. In these areas military orders, such as No. 5/1970 on the general entry permit for Israeli and foreign residents (in force in the West Bank), and its amendment in 1974 in which conditions of entry and stay are strictly regulated to and from territories under Israeli control, remain in force. In addition, border-crossing and movement to and from and within the West Bank and Gaza were partially regulated by the Interim Agreements.⁵³ Many of these provisions were *de facto* changed in the wake of the second *intifada* when Israeli forces resumed complete control of borders. Accordingly, any tentative Palestinian legislation in these domains cannot be enforced and previously enforced legislation, although *de jure* valid, becomes *de facto* void of its content.⁵⁴

Possible legislative interventions

There are several key areas where the Palestinian legislator will need to intervene in the future, namely the question of Palestinian citizenship, the rights of foreign spouses and the status of the children of mixed marriages, the distinction in legal status between citizens and non-citizens, entry and termination of stay, and the question of Palestinian refugees and their country of origin. Some of these issues will have to be resolved within a general framework of political compromise and a peace agreement, based on the 'two states' solution. Others will need to take into consideration international human rights provisions and national declarations that form jointly the basis of the Palestinian struggle for independence and statehood.

As regards *Palestinian citizenship*, in Gaza, British legislation on nationality theoretically remained in force, but was replaced by Jordanian legislation in the West Bank. Nevertheless, issuing (Israeli) occupation identity cards to residents of the West Bank and Gaza is another delimitation to citizenship laws. In fact, several elements show that the destination of those Palestinians possessing ID cards is to become future Palestinian citizens. Other Palestinians who do not have ID cards, although Palestinian nationals (and who would, according to Palestinian charter and Declaration of Principle, be entitled to citizenship) will not automatically be granted Palestinian citizenship unless within the framework of a

50 A case in point being the Euro-Mediterranean Interim Association Agreement on Trade and Cooperation which came into force in 1997. OJL 187 16.7.1997, pp. 3–135. Available at: <http://europa.eu.int/eur-lex/>

51 This change of attitude is expressed in two ways: through political and diplomatic recognition of the PA and the opening of representative offices for foreign countries in Ramallah, enjoying a status similar to foreign ambassadors in the territories under PA control. In addition, most funds and aids passed through PA institutions which made PLO personal and institutions dependent to PA money. The attitude of PA and its personal has also changed, the case of the diplomatic law, presented in previous section, being a good example. The electoral victory of Hamas and its coming to power have changed the attitude of international community towards the PA.

52 For example, Council of Ministers' Decision No. 81/2004 on the European Neighborhood Agreement which made the Minister of Foreign Affairs responsible for continuing negotiations with the European counterpart.

53 Arrangements for coordination between Israel and the Council regarding passage to and from Egypt and Jordan, as well as any other agreed international crossings, are set out in Annex I (Art. XXX). Cross-border circulation is regulated in Annex I (Art. IX), and Appendix 5 regulates joint Palestinian–Israeli border control.

54 International law (Art. 43, 1907 Hague Regulations) sets limits on the occupying country's power to alter laws in force in the occupied country. It may only do so where this is necessary to maintain 'public order and civil life', the welfare of the local population, or to ensure security. How Israel defines 'security' and interprets these limits may mean that a restriction imposed by the occupying authorities becomes an absolute extension of powers. Under military occupation, these powers may lead to limitations on freedom of movement. Restrictions imposed on occupants should be in accordance with the general obligation of states to respect a people's right to self-determination.

permanent peace agreement and following the creation of the state. The way in which the concept of Palestinian citizenship has developed and the problematic legal issues relating to Palestinian citizenship and nationality pose a challenge to Palestinian legislator.

The issue of the *rights of foreign spouses and the status of the children of mixed marriages* calls for a comprehensive solution to the duality between regular and religious/*shari'a* courts and the existing legislation on personal status. The *shari'a*/religious courts are based on the Ottoman *millet* system, consolidated under the British mandate, and the jurisdictional separation between *shari'a* or religious courts and regular courts has been adopted by the Palestinian Order-in-Council. This constitutional duality has been maintained in the BL and the DPC.

In the Occupied Palestinian Territories the normal *distinction between citizens and non-citizens* (foreign-national) with respect to rights and duties, and thus regulations, expands to three rather than two categories: those holding West Bank and Gaza Strip identity cards ('Palestinian citizens'), foreigners, and Israeli citizens who *always* fall under Israeli jurisdiction *wherever* they are, in Israel, the West Bank or Gaza. In addition, there are the Jerusalemites (Palestinians of East Jerusalem) who hold different ID cards and who are considered non-Israelis with permanent residence in Israel.

Entry and termination of stay are dealt with under Israeli legislation and international law of occupation, but are affected by the political instability and tend to be ambiguous. Following the Oslo Agreements, special arrangements regulated Israeli-Palestinian control of border-crossings in the West Bank and Gaza (Allenby and Rafah). During the second *intifada* Israel resumed complete control of borders and re-occupied several Palestinian cities in the 'Autonomous Territories', leaving many of these arrangements inactive. Gaza airport was destroyed by Israeli military forces and Palestinians were banned from using Israeli airports. At the borders, people holding a West Bank or Gaza identity card and in possession of a foreign passport are treated as other Palestinians and cannot invoke their foreign citizenship.⁵⁵ Following the withdrawal of Israeli forces from Gaza in 2005, the Israelis and Palestinians reached an agreement regulating passage via Egypt, giving control to Palestinians under EU supervision using Israeli video camera surveillance.

The solution of the *Palestinian refugee problem and their relationship with their country of origin* is a pre-condition for the settlement of the Israeli-Palestinian conflict. There is an urgent need for a comprehensive study of scenarios for settlement or return in accordance with international law, PLO key documents and texts, and Israeli national law.

Conclusion

The PLC has no powers regarding Palestinian refugees and borders and that the Palestinian courts have no power to enforce decisions on migration and freedom of movement, on zones under direct Israeli control (Area C), and only limited powers in zones under exclusive civil control (Area B). The theoretical superiority of the BL is thus challenged by de facto control of most of the OPT by Israeli forces, including control of borders and passage to and from parts of territories under the PA's control. Thus, any tentative Palestinian legislation in these domains cannot be enforced and previously enforced legislation, although de jure valid, becomes de facto void of its content. Regulating the issues of borders, refugees and citizenship will depend on the successful outcome of permanent status talks with Israel, settlement of the Israeli-Palestinian conflict and an end to military occupation rather than on the introduction of specific legislative texts by the PA.

55 For example, a West Bank or Gaza Strip ID holder with US citizenship cannot use Ben-Gurion Airport but must pass through Allenby Bridge.