

## Selected articles on international humanitarian law

# The judicial arm of the occupation: the Israeli military courts in the occupied territories

**Sharon Weill\***

Sharon Weill is a Ph.D. candidate in International Law at the Geneva academy of international humanitarian law and human rights and is working on a research project at the University Centre for International Humanitarian Law.

### **Abstract**

*Since the beginning of the Israeli occupation more than 200,000 cases have been brought before military courts, where Palestinian civilians have been prosecuted and judged by the military authorities. However, despite the large number of judicial decisions, this jurisprudence has not received the attention it merits. Academic researchers and NGOs have usually examined the procedural rights of the accused and have only rarely dealt with other legal matters. This article aims to examine the preliminary issue of territorial jurisdiction. Through the analysis a process of judicial domination is revealed. It is a domination that facilitates extensive control of the military authorities over the Palestinian civilian population through their judicial powers.*

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The principle of equality of arms, inherent to any fair trial process, acquires a physical dimension in the Israeli military courtroom in the occupied territories. Arms are present all around – with the numerous soldiers on guard, military prosecutors and judges in uniform. They are almost everywhere, apart from the place reserved for the defence. Here the only arm is a lawyer, who for the most part

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hardly speaks Hebrew, has limited knowledge of Israeli law and has even less trust in Israeli military justice.

Since the military legal system was put in force by Israeli occupying forces in the Palestinian occupied territories it has judged hundreds of thousands of Palestinian civilians. Between 1993 and 2000 alone, the period of the Oslo peace process, more than 124,000 people were prosecuted in military courts.<sup>1</sup>

The first five military courts were established in 1967, in Hebron, Nablus, Jenin, Jericho and Ramallah.<sup>2</sup> Since then the number of courts has been reduced or enlarged according to security and political considerations.<sup>3</sup> However, despite the flood of cases since the second intifada, only two courts of first instance and one court of appeals function today. They are responsible for administering justice in matters under their jurisdiction for the entire West Bank. Whether they alone can handle this task remains highly questionable.<sup>4</sup>

1 Netanel Benisho, "Criminal law in the West Bank and Gaza", *IDF Law Review*, Vol. 18 (2005), p. 299, at p. 300 (in Hebrew). According to Adalah, the Legal Centre for Arab Minority Rights in Israel, "since 1967, Israel has arrested close to 700,000 Palestinians ... With the outbreak of the second intifada and in its wake, the number of prisoners rose dramatically. Data from the Israel Prison Service indicates that at the end of October 2006 the total number of Arab prisoners classified as "security prisoners" was about 9,140, including 289 Palestinian citizens of Israel. Over 98% of them have been tried in military courts." Available at <http://www.adalah.org/newsletter/eng/apr07/ar3.php> (last visited 1 May 2007). According to Lisa Hajjar, "since 1967, hundreds of thousands of Palestinians have been arrested ... of those who are charged, approximately 90 to 95 percent are convicted. Of the convictions, approximately 97 percent are the result of plea bargains." Lisa Hajjar, *Courting Conflict: The Military Court System in the West Bank and Gaza*, University of California Press, Berkeley, 2005, at p. 3.

Although numerous and complex legal questions having a vital impact on the liberty of thousands of people arise through the military judiciary process, only a few academic studies on it have been conducted. Several reports which dealt with procedural rights of suspects and accused persons have been published, but they have not been updated. See *Israël et Territoires Occupés: Justice Militaire*, Amnesty International, London, 1991; *The Military Court System in the West Bank*, B'tselem, Jerusalem, 1989 (in Hebrew); *Routine Torture: Interrogation Methods of the GSS*, B'tselem, Jerusalem, 1998; Jordan J. Paust, Gerhard von Glahn and Gunter Woratsch, *Inquiry into the Israeli Military Court System in the Occupied West Bank and Gaza*, International Commission of Jurists, Geneva, 1989; Raja Shehadeh, *The West Bank and the Rule of Law*, International Commission of Jurists, Geneva, 1980. For other publications see Moshe Drori, "Double criminal jurisdiction in the Administered Territories", *Hapraklit*, Vol. 3 (1979), p. 386 (in Hebrew); Moshe Drori, "The legal system in Judea and Samaria: A review of the previous decade with a glance at the future", *Israel Yearbook of Human Rights*, Vol. 8 (1978), p. 144; Uzi Amit-Kohn et al., *Israel, the Intifada and the Rule of Law*, Israel Ministry of Defence Publication, Tel Aviv, 1993; Amnon Rubinstein, "The changing status of the "Territories" (West Bank and Gaza): from escrow to legal mongrel", *Israel Law Review*, Vol. 8 (1988), p. 59; Amnon Rubinstein, "Israel and the Territories: jurisdiction", *Iyunei Mishpat*, Vol. 14 (3) (1989), p. 415 (in Hebrew); Meir Shamgar, "Legal concepts and problems of the Israeli military government: The Initial Stage", in Meir Shamgar (ed.), *Military Government in the Territories Administered by Israel, 1967–1980: The Legal Aspects*, Harry Sacher Institute for Legislative Research and Comparative Law, Jerusalem, 1982, p. 13; Uri Shoam, "The principle of legality and the Israeli military government in the Territories", *Military Law Review*, Vol. 153 (1996), p. 245; Raja Shehadeh, *Occupier's Law: Israel and the West Bank*, Institute for Palestinian Studies, Washington DC, 1985; Raja Shehadeh, *From Occupation to Interim Accords: Israel and the Palestinian Territories*, Kluwer Law International, London, 1997.

2 Order Concerning Establishment of Military Courts (No. 3), 7 June 1967, published in *Collection of Proclamations, Orders and Appointments of the Military Commander in the West Bank Region* (hereinafter CPOA), Israeli Defense Forces No. 1, p. 25.

3 Benisho, above note 1, p. 302.

4 See e.g. a report of 5 October 2005: "Offer Israeli military court transferred 200 out of 500 Palestinian detainees to administrative detention without trial; the court said it does not have the time to prosecute them". Available at [http://www.kibush.co.il/show\\_file.asp?num=8897](http://www.kibush.co.il/show_file.asp?num=8897) (last visited 20 March 2006). I

This article aims to examine the preliminary issue of jurisdiction of the military courts that allow application of the Israeli military legal system to the Palestinian civilian population. Although rules of jurisdiction may be viewed as a technical matter, this is seemingly one of the most fundamental questions. All further procedures, which may end with persons being deprived of their liberty, depend on the preliminary decision whether a legal dispute is under the authority of that particular law and judicial system. Therefore, even when a legal process functions strictly according to international rules of fair trial, it can still profoundly violate individual rights simply by deciding to enforce a law when it is beyond its authority. Without respecting the limits of jurisdiction, a legal system may thus become a tool for legitimating domination and punishment under the hegemony of the rule of law instead of regulating justice.

## Regulation of military courts in occupied territories

### International humanitarian law

International humanitarian law regulates the legal environment of occupied territories, based on the general concept that the local legal system, including the law and the judicial authority, continue to be in force as they were prior to the occupation.<sup>5</sup> This reflects a fundamental concept of international humanitarian law, namely that occupation is a temporary situation and the occupying power is not the new sovereign of the territory. Consequently, civilian life should continue as much as possible to be conducted as it was prior to the occupation, and the occupying power is forbidden to extend its own legal system to the territories it is occupying.<sup>6</sup>

### *The maintenance of local law and courts*

Article 43 of the Hague Regulations imposes a general obligation on the occupying power to ensure public order and safety while respecting, unless it is absolutely necessary to do otherwise, the law in force prior to the occupation. This rule prevents the occupying power from extending its own legal system over the occupied territories and from “acting as a sovereign legislator”.<sup>7</sup> Article 64(1) of

happened to be present that day in the court; because of the lack of time (eve of the Jewish New Year) and the large number of arrests, the court decided to place those people in administrative detention on a collective basis. There was no individual procedure.

- 5 Article 43 of the Hague Regulations annexed to the Hague Convention respecting the Laws and Customs of War on Land (No. II of 1899 and No. IV of 1907) (hereinafter Hague Regulations) and Article 64 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, 12 August 1949 (hereinafter Fourth Geneva Convention).
- 6 *Final Records of the Diplomatic Conference of Geneva of 1949*, Vol. II, Section A, Federal Political Department, Berne, repr. in 2005, p. 640.
- 7 Marco Sassoli, “Legislation and maintenance of public order and civil life by occupying powers”, *European Journal of International Law*, Vol. 16 (4) (2005), p. 661, at p. 668; Jean S. Pictet (ed.), *IV Geneva Convention relative to the Protection of Civilian Persons in Time of War: Commentary*, ICRC, Geneva, 1958, pp. 335–7.

the Fourth Geneva Convention reaffirms this fundamental principle by stating that local penal law remains in force. As an exception to the general rule Article 64(1) provides for two specific conditions under which the occupying power may suspend or repeal the local penal legislation: if local law constitutes a threat to security, or if it is an obstacle to the application of the Convention. Article 64(1) thereby spells out more precisely the term “unless absolutely prevented”, which appears in Article 43 of the Hague Regulations regarding penal legislation.<sup>8</sup>

Local courts continue to function and to apply local criminal law in offences committed by the inhabitants that do not involve the occupying forces.<sup>9</sup> This reflects the principle that protected persons will be judged by their own regular judges and legal system, without being subjected to alien doctrines of law. Intervention by the occupying power in the local administration of justice is authorized only for reasons of security, for the application of the Convention, and for “the necessity for ensuring the effective administration of justice”.<sup>10</sup> The ICRC *Commentary* points out that even if the occupying power has interfered in the composition of local courts, it is the local penal law that should be enforced.<sup>11</sup>

### *The authority of the occupying power to legislate*

Article 64(2) of the Fourth Geneva Convention gives a more detailed provision on the authority of the occupying power to legislate, which is generally authorized in the said Article 43. It sets three conditions under which such legislation is authorized: for the application of the Convention, to maintain order and for the occupying power’s own safety. However, this authority may be exercised only when it is essential to achieve any of these conditions. The ICRC *Commentary* indicates that the legislative capacities of the occupying power are very extensive and complex, but that these varied measures must not under any circumstances serve as a means of oppressing the population.<sup>12</sup>

### *The authority of the occupying power to establish its own military courts*

Article 66 of the Fourth Geneva Convention lists three requirements for the function of military courts: they must be properly constituted, non-political, and located in the occupied territories (while the court of appeal should only preferably be located there). The authority to establish them is granted for the

8 According to Sassoli, “Article 64 certainly provides a *lex specialis* regarding the situation in which an occupying power is absolutely prevented from respecting penal law” (ibid., p. 670). For the relation between Article 43 of the Hague Regulations and Article 64 of the Fourth Geneva Convention see also Gerhard von Glahn, *The Occupation of Enemy Territories: A Commentary on the Law and Practice of Belligerent Occupation*, University of Minnesota Press, Minneapolis, 1957, p. 115; Raymond T. Yingling and Robert W. Ginnane, “The Geneva Conventions of 1949”, *American Journal of International Law*, Vol. 46 (1952), p. 393, at p. 422.

9 Von Glahn, above note 8, p.108.

10 Fourth Geneva Convention, Article 64(1).

11 Pictet, above note 7, p. 336.

12 Ibid., p. 337.

enforcement of penal laws promulgated by the occupying power in accordance with Article 64(2).

Article 66 recognizes the right of the Occupying Power to bring offenders before its own military courts for the purpose of punishing offences against such measures [according to Art. 64(2)] ... the legislative powers of the occupying forces are thus reinforced by judicial powers designed to make good the deficiencies of the local courts, should this be necessary.<sup>13</sup>

Here Pictet seems to have added a requirement for the jurisdiction of military courts, namely that the local tribunals be inadequate to enforce the law enacted by the occupying power. This requirement, however, is not laid down in Article 66. Although it appears in Article 64(1) for empowering the occupying power to intervene in the functioning of local courts, it seems to apply to local courts with regard to their jurisdiction over the enforcement of local laws. So when the local legal procedure is inadequate to enforce local laws, the occupying power can intervene in the local legal system – that is, can make changes in the courts' structure, replace judges and so on. But as Article 66 deals with the enforcement of new penal laws enacted by the occupying power, the condition laid down in Article 64(1) does not necessarily have to apply here too. In my view military courts are competent to try violations of penal law enacted by the occupying power without additional conditions concerning the local jurisdiction. In contrast, the jurisdiction of local courts over offences enacted by the occupying power is not evident. Although it may be interpreted that local courts are also competent to enforce the occupying power's legislation, under Article 66 the occupying power, not the local courts, seems to have first say in choosing the place of jurisdiction.

#### International human rights law<sup>14</sup>

Only few provisions deal specifically with trials under military jurisdiction. As they mostly concern enforced disappearances, they have a limited scope of application.<sup>15</sup> More relevant are the general rules of fair trial, which are regulated by Articles 14 and 15 of the 1966 International Covenant of Civil and Political Rights (ICCPR) and other

<sup>13</sup> Ibid., pp. 339–40.

<sup>14</sup> For the applicability of human rights law to occupied territories see *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*, Advisory Opinion, ICJ Reports 2004, para. 112 (hereinafter *Wall case*). For theoretical approaches see Al Haq, *The Applicability of Human Rights Law to Occupied Territories: The Case of the Occupied Palestinian Territories*, Ramallah, 2003. Of interest is that although the official position of the state of Israel is the non-applicability of human rights law in the occupied territories, the Israeli High Court nevertheless applied it. See for example HCJ 3239/02, *Marab et al. v. The IDF Commander in the West Bank*, 57(2) PD (Reports of the Israeli High Court of Justice), p. 349 (2003), excerpted in the *Israel Yearbook on Human Rights*, Vol. 34 (2004), p. 307; the entire English version is available on the Internet site of the Israeli High Court of Justice: [www.eylon1.court.gov.il/eng/verdict/framesetrch/html](http://www.eylon1.court.gov.il/eng/verdict/framesetrch/html) (last visited 29 April 2007).

<sup>15</sup> UN Declaration on the Protection of All Persons from Enforced Disappearance; Article XI of the Inter-American Convention on Forced Disappearance of Persons, Article 16(2).

human rights instruments.<sup>16</sup> According to these rules, military jurisdiction should be compatible with the obligations for the administration of justice and with the requirement of being independent and impartial. As a common feature of almost every military legal system is that the judges are members of the armed forces, and as they furthermore remain subject to military discipline, under which they are evaluated for their future promotion, and are more generally under the authority of the executive power, it is highly questionable whether military courts can reach the level of independence and impartiality required by human rights law and the legal doctrine of the separation of powers.<sup>17</sup> Indeed, all treaty bodies took the approach of deeming the trial of civilians in military courts unlawful, because in most cases these do not comply with the obligation of independence and impartiality:<sup>18</sup>

[Military courts] could present serious problems as far as the equitable, independent and impartial administration of justice is concerned ... While the Covenant does not prohibit such categories of courts nevertheless the conditions which it lays down clearly indicate that the trying of civilians by such courts should be very exceptional ...<sup>19</sup>

Military courts are often used to try civilians. On that subject, the United Nations Special Rapporteur on the independence of judges and lawyers concluded that “international law is developing a consensus as to the need to restrict drastically, or even prohibit, that practice”.<sup>20</sup>

## The relations between human rights law and international humanitarian law

International humanitarian law constitutes *lex specialis*, which prevails over any other general law.<sup>21</sup> Therefore the provisions of Articles 64 and 66 of the Fourth Geneva Convention concerning the judgment of civilians in military courts in occupied territories will be applicable, and will prevail over other rules of human rights law. Nonetheless, human rights law remains relevant. The authorization

16 For a complete list of these instruments, see Louise Doswald-Beck and Robert Kolb, *Judicial Process and Human Rights: Texts and Summaries of International Case-law*, International Commission of Jurists, N.P. Engel, 2004, p. 119.

17 See for example ECHR, *Sahiner v. Turkey*, Case No. 29279/95, ECHR 552, 25 September 2001, para. 40. Article 66 of the Fourth Geneva Convention also requires military courts to be non-political. However, the independence requirement seems to be greater under human rights law, as in international humanitarian law it was foreseen that the judges would belong to the armed forces and therefore would not be entirely independent in the sense of human rights law and the separation of powers doctrine.

18 Doswald-Beck and Kolb, above note 16, p. 66.

19 General Comment No. 13 on Article 14 ICCPR, UN Human Rights Committee (12 April 1984), UN Doc.HRI/GEN/1/Rev.1.

20 United Nations Special Rapporteur, UN Doc. E/CN.4/1998/39/Add.1, para. 78, cited in Federico Andreu-Guzmán, *Military Jurisdiction and International Law: Military Courts and Gross Human Rights Violations*, Vol. 1, International Commission of Jurists/Colombian Commission of Jurists, Geneva, 2004, p. 10.

21 *Wall case*, above note 14, para. 106. See also *Legality of the Threat of Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, para. 25; Louise Doswald-Beck and Silvain Vité, “International humanitarian law and human rights law”, *International Review of the Red Cross*, No. 293 (March–April 1993), p. 94.

granted by international humanitarian law is strictly limited to the explicit regulations of the Fourth Geneva Convention; in all other situations not covered by them the general rule of human rights law should apply, namely that civilians should in principle be tried not in military courts but in civil courts.

### The Israeli military courts in the Palestinian occupied territories

On 7 June 1967, the day the occupation started, Military Proclamation No. 2 was issued, endowing the area commander with full legislative, executive, and judicial authorities over the West Bank and declaring that the law in force prior to the occupation remained in force as long as it did not contradict new military orders.<sup>22</sup> Exercising this authority, the military commander enacted the criminal legislation. This was done almost entirely under the Security Provisions Order (No. 378) of 1970<sup>23</sup> (hereinafter SPO), which still serves today as the criminal code of the West Bank. It has been elaborated over the years, and amended more than ninety times. Through its ninety-seven provisions the SPO establishes military courts, outlines their area of jurisdiction and lays down procedural provisions; regulates the arrest of, search for and detention of suspects and accused persons; and establishes a list of crimes and punishment. Other orders, such as the Rules of Criminal Responsibility Order<sup>24</sup> and the Order Concerning Punishment,<sup>25</sup> are complementary criminal regulations absent from the SPO.

Two types of first-instance courts were established: presided over by a panel of three judges or a single judge.<sup>26</sup> The two have the same competence in jurisdiction but differ in the level of punishment they may impose: a single judge is competent to impose a limited punishment of up to ten years imprisonment,<sup>27</sup> while a three-judge panel may impose any punishment.<sup>28</sup> A recent amendment of 2004, which is perceived by the military authority as a reform in the structure of military courts, provides that all judges of a first-instance court must have legal training.<sup>29</sup> Before this amendment it was required that of the three-judge panel

22 Military Proclamation No. 2 Concerning Regulation of Authority and the Judiciary (West Bank) (1967), published in CPOA, No. 1, p. 3 (hereinafter Proclamation No. 2), Article 3.

23 Security Provisions Order (Consolidated Version) (West Bank) (No. 378) (1970), published in CPOA, No. 21, p. 733.

24 The Rules of Criminal Responsibility Order (No. 225) (1968), published in CPOA, No. 12, p. 467 (hereinafter Rules of Criminal Responsibility). One of the most astonishing articles in this order is Article 13, which states that a married woman is criminally responsible for her acts also if her husband was present during the commission of the offence.

25 Order Concerning Punishment (No. 322) (1969), published in CPOA, No. 18, p. 645.

26 SPO, Article 3A.

27 SPO, Article 4A(d). Before the 1995 amendment No. 65 of the SPO, a single judge could impose a punishment of only up to five years' imprisonment.

28 The only restriction is for capital punishment, imposition of which demands a minimum rank of the officer-judges (SPO, Article 47(a)(8)). However, capital punishment has never been executed by a military court.

29 Amendment No. 89 to Article 4 of the SPO (Order No.1550) (2004), as yet unpublished. See Benisho, above note 1, pp. 311–12; Haim Shibi, "The military general attorney: the Israeli review of military acts is better than the American", *Halishka*, Vol. 69 (2004), p. 3, at p. 6 (in Hebrew).

only the presiding judge must be a lawyer, while the two other judges could be ordinary officers.

Today only two military courts of first instance are functioning: the Salem court, situated in area B near Jenin, and the military court in Ofer camp, situated in area B near Ramallah.<sup>30</sup> These two courts have to deal with thousands of files each year. In April 1989, following the recommendation of the Israeli High Court of Justice,<sup>31</sup> a court of appeals was established. The Military Court of Appeals is also situated in Ofer camp, and its rulings guide the lower courts.<sup>32</sup>

### The territorial definition of the occupied territories

In September 1995 the interim agreement between the state of Israel and the Palestine Liberation Organization was signed. It was the continuation of a peace process which had started with the Declaration of Principles in 1993, in which the Palestinian Authority (PA) was established. The interim agreement transferred several powers to the PA, according to three areas of control that were established:

- *Area A* (the autonomous territories) was placed wholly under the control of the PA except for foreign affairs;
- *Area B* (the occupied territories) was placed under mixed control of the Israeli army, which remained responsible for security matters, and of the PA, which assumed responsibility for internal public order;
- *Area C* consisted of Israeli settlements, military bases and the areas connecting them with the Green Line (the dividing line between Israel and the occupied and autonomous territories) and to each other, which were kept under complete control of the Israeli army.<sup>33</sup>

As a number of leading scholars have recognized, it is assumed that the interim agreement has put an end to the Israeli military occupation in area A, that came wholly under the control of the PA.<sup>34</sup>

The transfer of responsibilities to the PA according to the interim agreement was endorsed by the military commander through military Proclamation No. 7.<sup>35</sup> This endorsement rendered the interim agreement binding

30 For the definition of area B see text below.

31 HCJ 87/85, *Arjub v. The Military Commander in the West Bank*, 42(1) PD, p. 353 (1988).

32 Article 4B of the SPO regulates the structure of the Military Court of Appeals. Although no regulation defines the relations between the Military Court of Appeals and the military courts of first instance, since the Israeli legal tradition is based on the common law system it seems that the precedents of the Court of Appeals are binding for lower courts.

33 Israeli–Palestinian Interim Agreement on the West Bank and the Gaza Strip, Washington DC, 28 September 1995 (hereinafter the interim agreement), Article XIII, Section 1.

34 Yoram Dinstein, “The international legal status of the West Bank and the Gaza Strip – 1998”, *Israel Yearbook on Human Rights*, Vol. 28 (1998), p. 37, at p. 45; Eyal Benvenisti, “Responsibility for the protection of human rights under the interim Israeli-Palestinian agreements”, *Israel Law Review*, Vol. 28 (1994), p. 297, at p. 313.

35 Military Proclamation No. 7 Concerning the Application of the Interim Agreement (West Bank)(1995), published in CPOA, No. 164, p. 1923 (hereinafter Proclamation No. 7).



in the occupied territories.<sup>36</sup> However, the proclamation was not identical to the interim agreement. Among other gaps,<sup>37</sup> Proclamation No. 7 did not amend the definition of the “Region”. Under domestic military law the term “Region” therefore remains defined as the entire West Bank, just as it was first defined by Proclamation No. 2 in 1967.<sup>38</sup> This retention of the meaning it had prior to the Oslo peace process has the legal implication that every provision that uses the term “Region” is still in force over the whole Region, including area A, which is supposed to be under the sole authority of the PA.

## The jurisdiction of the Israeli military courts

The rules of jurisdiction of the Israeli military legal system allow its application to the Palestinian civilian population in criminal and security matters. Because the occupation is a special situation in which civilians may be tried by a military legal system, these rules of jurisdiction must strictly respect their limits of authorization as defined by international humanitarian law; any trespass of these limits must be avoided, as is required also by human rights law. The following section analyses the rules of territorial and extraterritorial jurisdiction and their implementation by the Israeli military legal system, in order to examine whether the involvement of military justice is legitimate.

### Territorial jurisdiction

The most fundamental principle of criminal jurisdiction prescribed by public international law is the principle of territorial jurisdiction. It defines the right of a state to regulate behaviour and enact criminal legislation within its territories. According to Bowett, this basic principle should be regarded as axiomatic.<sup>39</sup> Two kinds of jurisdiction are identified – legislative jurisdiction that defines whether

36 In the Israeli legal system (military and civil), according to the dual approach international agreements bind the courts only if they are endorsed by domestic legislation. (For more details on the dual approach see Lassa Oppenheim, *International Law*, 8th edn, Longmans, London, 1955, p. 53.) Accordingly, in the Waffa case the High Court of Justice ruled that it is the proclamation and not the interim agreement that is legally binding in the Region (HCJ 2717/96, *Waffa v. Ministry of Defence*, 50(2) PD p. 848 [1996], at p. 853).

37 Article 4a of Proclamation No. 7, above note 35, transfers all legislative, administrative and judicial powers to the PA “as prescribed in the interim agreement”. Thus the new responsibilities of the PA were fully endorsed by Proclamation No. 7. However, the powers of the military commander were defined more widely than agreed in the interim agreement (above note 33). Article 6a(5) of Proclamation No. 7 declares that the military commander retains responsibility for internal security and public order wherever Israel has security control (i.e. area B). The military commander thereby created a situation of parallel jurisdiction over ordinary criminal issues in area B, exceeding the power granted by the interim agreement to which the Israeli government had agreed. Does a bilateral international agreement, such as the interim agreement, bind the military commander? It would seem to do so, for in democracies the army is subordinate to the government and therefore is bound by its decisions.

38 Article 1 of Proclamation No. 2 defines the “Region” as the West Bank region.

39 Derek W. Bowett, “Jurisdiction: changing patterns of authorities over activities and resources”, *British Yearbook of International Law*, Vol. 53 (1982), p. 1, at p. 4.

and in what circumstances a state has the right of regulation and enforcement jurisdiction that relates to the capacity of a state to act in order to enforce its jurisdiction. Legislative jurisdiction and enforcement jurisdiction are two distinct competences; a state that may be entitled to exercise its prescriptive jurisdiction is not necessarily entitled to enforce it.<sup>40</sup> Since states are entitled to territorial sovereignty, a state is not entitled to enforce its jurisdiction over the territory of another state without the express consent of the host state.<sup>41</sup> Thus the principle of territoriality makes jurisdiction possible, but also contains it within states' territorial boundaries.

The territorial jurisdiction of the occupying power is regulated by Article 42 of the 1907 Hague Regulations:

The occupation extends only to the territory where such authority has been established and can be exercised.

In the context of the Israeli military occupation, the general principle of territorial jurisdiction was not explicitly prescribed by the military commander. However, with the introduction of the general principles of criminal law by the Rule of Criminal Responsibility Order (1968) it was presumed. Article 2 granted the military court jurisdiction over offences committed in the Region.<sup>42</sup>

The Rule of Criminal Responsibility Order provides two additional rules with regard to territorial jurisdiction:

Rule (a): There is no requirement that the offence be entirely committed in the Region; it is sufficient that it be partly committed there in order to establish territorial jurisdiction over the offence (Art. 2).

Rule (b): The liability of each perpetrator and accomplice is prescribed in detail. For territorial jurisdiction over an offence and all its participants, it is enough that one of them was present in the Region during the commission of the offence. As according to Arts. 15 and 16 they are all equally responsible for its commission, the military court may establish its territorial jurisdiction over all perpetrators, through only one person, even if the others were never present in the territories of the Region.

These two rules, which expand territorial jurisdiction beyond the borders of the Region, should not be regarded as unique.<sup>43</sup> Most criminal codes recognize

40 F. A. Mann, "The doctrine of jurisdiction in international law", *Recueil des Cours* 111 (1964-I), p. 9, at p. 13; Malcom N. Shaw, *International Law*, 5th edn, Cambridge University Press, Cambridge, 2003, p. 576; Vaughan Lowe, "Jurisdiction", in Malcolm D. Evans (ed.), *International Law*, Oxford University Press, Oxford, 2003, p. 332; Michael Akehurst, "Jurisdiction in international law", *British Yearbook of International Law*, Vol. 46 (1972), p. 145.

41 Thus under public international law it is illegal to apprehend persons in third states in order to bring them to trial in a domestic court. However, although such apprehension breaches international law and violates the human rights of the person abducted, it does not necessarily impede the possibility of holding a judicial procedure against that person, once brought to the state. This doctrine, named *male captus, bene detentus*, is practised in Israel. See the *Eichmann* case: HCJ 336/61, *Eichmann v. State of Israel*, 16(3) PD, p. 2033 (1961), at p. 2067; and the *Bargouti* case: S.C.C 1158/02, *The State of Israel v. Marwan Ibn Hatib Bargouti* (2002), para. 37.

42 Zvi Hadar, "The military courts", in Shamgar, above note 1, p. 191.

43 Arnold H. Loewy, *Criminal Law*, 4th edn, West Publishing Company Minnesota, Nutshell series, 2003, p. 246.

them. However, although the territorial rules described above may be perceived as neutral definitions well accepted in criminal doctrine, their de facto enforcement by military courts in the unique territorial situation of the Region resulted in a far-reaching extension of territorial jurisdiction, which normally could not have been exercised on such a scale.

Unlike a situation between two states, where the borders are well defined and defended, the situation in the Region is much less clear. In the eyes of the Israeli authorities the territorial boundaries between Israel and the occupied territories – the ‘Green Line – are not strictly binding, and definite borders have never been officially declared. This vagueness was internationally recognized by the interim agreement, which places area C wholly under Israeli control. This de facto annexation of a part of the land, the fact that the PA is not an independent state, the ongoing control of the army over the whole Region with regard to foreign relations and the major security concerns – especially since the second intifada, which gave rise to vast army operations inside the PA territories – all these aspects, in addition to strong ideological and political views on “Greater Israel” of an important segment of the Israeli population and governments,<sup>44</sup> have obscured the conception of Israel’s territorial boundaries. This perception is reflected in the military legal procedure, where the legal territorial borders, have become as vague and extended as the physical ones.

The enforcement of the rules (a) and (b) above well demonstrate this argument. When a person crosses a border he or she enters the territory of another state. But in the case of the state of Israel, the “Region” and the PA territories, it is not so simple. The interim agreement created a complex territorial reality by establishing three areas of control. As a result of this new situation, virtually no territories of the state of Israel (within the “Green Line”) border directly on the PA territories without having area B or C in between. Any criminal leaving the PA territories to commit an offence in Israel must cross area B or area C, both of which are under the territorial jurisdiction of the military courts. In cases when these areas, are only “transit territories” owing to the complex territorial patchwork, which otherwise would not be involved, the territorial definition enables military courts to establish their territorial jurisdiction over the offence by the legal fiction that part of the offence was committed there. Although the real territories in which the offence was committed are Israel and the PA territories, because the offenders have committed continuous offences by crossing area B as transit territories, military courts assume jurisdiction over the commission of the whole offence. As the PA is surrounded by areas under Israeli military control, all offences committed in Israel and initiated in the PA territories automatically establish the authority of the military legal system through the rule of territorial jurisdiction. These territorial constructions in accordance with the interim agreement are therefore a convenient tool for enlarging territorial jurisdiction of military courts over “regular” (non-security)

44 Ilan Pappé, *History of Modern Palestine*, Cambridge University Press, Cambridge, 2004, p. 196.

criminal offences. In this way the military court has assumed jurisdiction over car thieves and drug dealers,<sup>45</sup> and also over their accomplices who never left area A.

Rule (b), according to which military courts assume jurisdiction on the basis of the territorial principles over all perpetrators of an offence, is routinely enforced, even when a distinct violation of the self-controlled territorial boundaries of the PA is thereby incurred. Entering area A of the PA in order to arrest a person is a matter of routine.<sup>46</sup> As the territorial borders are not perceived as strictly binding, and as Israel holds much more power than the PA, Israel encounters virtually no obstacles to the arrest or abduction of Palestinians in area A; the entire army is available to assist in this mission. During the legal procedure, complaints of abductions are not considered seriously and do not in any case have any impact on the legal process, as the doctrine *male captus, bene detentus* has been recognized and applied by Israeli civil and military legal systems.<sup>47</sup>

Respecting strict borders of jurisdiction does not imply that suspects should not be prosecuted. If there is sufficient evidence for prosecution, they certainly should be tried. But this legal procedure has to be conducted by the appropriate forum: the civil judicial system. This distinction is not merely technical. Huge differences exist between the regulation and the practice of the legal procedure in Israeli military and civil courts.<sup>48</sup> Nevertheless, as demonstrated, the military courts have enlarged their jurisdiction to include even simple criminal offences committed by Palestinians. This wide enforcement would have been impossible if instead of an occupied territory there were a state with definite and binding borders. Thus the enforcement of legitimate rules of territorial jurisdiction in the specific circumstances of the “Region” allowed expansion of the area of application of the military legal system, which took over the civilian sphere: this is the “*judicial domination*” of Israeli military justice over Palestinians.

This phenomenon of expanding judicial control is practised not only by the enforcement of territorial rules but also through the extension of extraterritorial jurisdiction rules, as shown in the following section.

45 Military Court of Appeals (MCA)/111/00, *Al Matzri v. The Military Prosecutor, Selected Judgment of Military Courts* (hereinafter SJMC), No. 11, p. 140.

46 For daily reports of those arrests look at [www.kibush.co.il](http://www.kibush.co.il), under the section “Life under occupation - flashes from the occupied territories”.

47 Above note 41.

48 Under military justice the rights of the suspect/accused are less safeguarded, as the legislation, which is enacted by the military commander, is almost exclusively concerned with upholding security interests. Therefore important legal differences appear at all stages of the legal process, starting with the provisions for arrest and investigation and continuing through the rules of evidence right up to the degree of punishment that can be imposed.

It is beyond the scope of this article to deal with the law applied by military courts (jurisdiction *ratione materiae*). In general, they apply criminal orders enacted by the military commander (in most cases for security offences, but not only) and local Jordanian law.

## Extraterritorial jurisdiction

In addition to the principle of territoriality, international law prescribes four other principles of jurisdiction: the principle of universality, the principle of active personality, the principle of passive personality and the protective principle. These principles are in effect exceptions to the general rule of territoriality, as they allow for extraterritorial jurisdiction under their specific circumstances. As the protective principle is the main basis for extraterritorial jurisdiction in the occupied territories, the following part deals with this principle in detail.

### *The protective principle*<sup>49</sup>

The protective principle entitles sovereign states to exercise jurisdiction over persons who have committed acts against their security or vital interests abroad.<sup>50</sup> Whereas there is no doubt about the validity of the principle under public international law, its scope is less definite. No explicit limits have been defined by public international law.

The doubts relating to the scope of the [protective] principle are two. The first is that states may claim such jurisdiction in relation to conduct which is not generally regarded as criminal at all. The second is that offences may be so vaguely and broadly defined ... [that] an accused person may not realize he is committing [one].<sup>51</sup>

Because of the lack of explicit limits to its definition, the protective principle may easily be open to abuse in its prescription and enforcement. However, as its enforcement in third states may lead to conflict of jurisdiction and also clash with other fundamental principles such as territorial sovereignty and equality of states, as well as individual rights, all authors suggest that states must not expand it to objectives other than protecting truly vital interests.<sup>52</sup> Abuses in legislation must be strictly avoided. Moreover, even when a state may have a legitimate protective interest, its enforcement in third states does not go without saying. It should be greatly circumscribed by the delicate balance of international relations and other fundamental considerations with which the enforcement of the protective principle clashes.<sup>53</sup>

Most extraterritorial provisions enacted by the military commander derive from the protective principle. The most important rules are the following:

49 For a complete examination of the protective principle, see Akehurst, above note 40, p. 158; Mann, above note 40, p. 94; Bowett, above note 39, p. 10.

50 Bowett, *ibid.*, Mann, *ibid.*; Shaw, above note 40, p. 592

51 Bowett, above note 39, p. 11.

52 *Ibid.*, pp. 10–11; Shaw, above note 40, p. 591; Akehurst, above note 40, p. 158.

53 “Even where there is a basis in international law for exercising jurisdiction, principles of comity often suggest that forbearance is appropriate ... States are obliged to consider and weigh the legitimate interests of other states when taking action that could affect those interests.” Comment by the US State’s department in the context of civil jurisprudence. However, it seems relevant also for criminal affairs. Cited in Bowett, *ibid.*, p. 21.

*Article 7(c) of the SPO.* At the beginning of the occupation, cases that lacked any territorial link with the Region were rejected.<sup>54</sup> The military court ruled that in order to establish jurisdiction over extraterritorial offences an explicit law was needed.<sup>55</sup> In 1973 an extraterritorial provision was therefore introduced by the military commander, who conceived his legislative authority as including competence to enact extraterritorial laws:

A Military Court shall also be competent to try ... anyone who committed an act outside the Region which would constitute an offence had it been committed within the Region and the act harmed or was designed to harm the security of the Region or public order therein.<sup>56</sup>

This extraterritorial legislation, reflecting the protective principle, protects security concerns as well as public order interests of the Region, and allows the criminal law of the occupied territories to be applied to a person in a third state. The offender may be “anyone” who committed the offence outside the West Bank. Thus, through this new provision a considerable range of offences concerned with assisting in the commission of offences, attempting, inciting or conspiring to commit an offence, membership of unlawful organizations and others became triable by the military courts, even when no part of the offence was committed within the Region.<sup>57</sup>

*Article 7(d) of the SPO.* According to the interim agreement, as adopted by the military commander in Proclamation No. 7, area A became the responsibility solely of the PA, including security matters. As this matter was not regulated in the Proclamation, and as extraterritorial jurisdiction requires explicit legislation,<sup>58</sup> it remained questionable whether military courts had extraterritorial jurisdiction over area A. On the one hand, it was impossible to apply Article 7(c) to offences committed in area A, as this area remained by definition in the Region and they therefore did not constitute an offence committed “outside the Region” as required by Article 7(c). On the other hand, judges found it hard to accept that the protective principle could be implemented vis-à-vis any third state, but not vis-à-vis area A, where security offences were more likely to be perpetrated:

Is it seriously imaginable that an offence which was committed in the territories of the PA, and which harmed and was designed to harm the territories under the responsibility of the military commander in the Region, will not be under the jurisdiction of military court in the Region?<sup>59</sup>

54 Ramallah (RAM)/160/68, *The Military Prosecutor v. Wildman*, SJMC, No. 1, p. 377; RAM/78/69, *The Military Prosecutor v. Bakir*, SJMC, No. 1, p. 450.

55 RAM/78/69, *The Military Prosecutor v. Akrash*, SJMC, No. 1, p. 450.

56 Order No. 517 (Amendment No. 7 to the SPO) (1973), published in CPOA, No. 33, p. 1272.

57 Hadar, above note 42, p. 193.

58 *Military Prosecutor v. Akrash*, above note 55.

59 MCA/375/03, *Eit v. The Military Prosecutor* (2003) (unpublished), at p. 4. The same idea was expressed in MCA/29, 28/98, *Raduan v. The Military Prosecutor*, SJMC, No. 11, p. 1 (1998), at p. 13.

Therefore, on 28 September 1997, two years after the interim agreement was signed, Article 7(d) of the SPO was introduced in order to extend jurisdiction over security offences committed in area A:<sup>60</sup>

A Military Court shall also be competent to try, as provided in section (a), anyone who committed an offence in area A, which harmed or was designed to harm the security of the Region.

*Specific orders.* In addition to Articles 7(c) and (d) of the SPO, which are more general in scope, other extraterritorial provisions were enacted by the military commander. These are provisions which deal with specific offences, such as the Order Concerning the Prohibition of Training and Contact with Hostile Organization outside the Region (Order No. 284)-1968<sup>61</sup> and the Order Concerning Dangerous Drugs (No. 558).<sup>62</sup>

### The military commander's competence to enact extraterritorial provisions

The Israeli military system has taken it for granted that the military commander has the same authority as a sovereign state to enact extraterritorial provisions in light of the protective principle.

Through extraterritorial provisions the military commander sought to protect his authority from hostile acts planned or carried out against him outside the bounds of his rule. The protective principle is well recognized by international law ... and by the Israeli High Court of Justice. Therefore the military commander, who is the legislator in the Region, was competent to enact extraterritorial orders if guided by considerations of security and public order.<sup>63</sup> (1974)

When a serious harm is caused to its civilians, a state can not stay indifferent. There can be no dispute over this issue. The state has to react, even in an extraterritorial way, in order to protect its interests ... This principle enables the Military Commander in the Region to enlarge its jurisdiction even outside the territories of the Region.<sup>64</sup>

However, it is not so obvious that an occupying power can impose criminal provisions affecting individuals beyond its territorial jurisdiction, as states may do. The occupying power is not the sovereign of the territories.<sup>65</sup> It exercises only temporary rights as empowered by international humanitarian law, and lacks the entitlements of sovereign states. The following argument, which is set

60 Order No. 1455 (Amendment No. 80 to the SPO) (1997), CPOA, No. 177, p. 2354.

61 Order Concerning the Prohibition of Training and Contact with Hostile Organization outside the Region (No. 284) (1968), published in CPOA, No. 16, p. 582 (hereinafter Order Concerning Hostile Organization).

62 Order Concerning Dangerous Drugs (No. 558) (1975), published in CPOA, No. 34, p. 1335.

63 Gaza (G)/1410/74, *The Military Prosecutor v. Jayi et al.*, SJMC, No. 4, p. 25, at p. 30. Excerpted in *Israel Yearbook on Human Rights*, Vol. 7 (1977), p. 259.

64 *Eit* case, above note 59, p.3.

65 Sassoli, above note 7, p. 664.

forth in three stages, seeks to address this issue and to propose a possible approach.

*1. Does the regulation of jurisdiction require an explicit authorization or a non-prohibiting rule?*

To verify whether the military commander is competent to enact extraterritorial legislation this preliminary question has to be answered. In the *Salem* case,<sup>66</sup> which is a recent and very detailed decision of over thirty pages, the military court raised this question. It clearly rejected the approach holding that an explicit authority for regulating jurisdiction is required. According to the military court, it is the limitation on the commander's authority that requires an explicit provision. As no limit is introduced with regard to extraterritorial legislation, the military court ruled that the commander is authorized to enact extraterritorial provisions even if he is not the sovereign of the area. The military court emphasized that this authorization is deduced from the general authority of Article 43 of the Hague Regulations, which sets no limits to such legislation.

The military court's ruling seems to follow the line taken by the Permanent Court of Justice in the *Lotus* case (1927) regarding states' jurisdiction:

Far from laying down a general prohibition to the effect that States may not extend the application of their laws and jurisdiction ... [to] acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules.<sup>67</sup>

However, this decision, rendered in 1927, has been criticized by a considerable number of scholars in the light of states' practice.<sup>68</sup> According to Lowe, objecting states never indicated a prohibiting rule, but claimed that they had "no right" to exercise such jurisdiction: "States' practice is consistently based upon the premise that it is for the state asserting some novel extraterritorial jurisdiction to prove that it is entitled to do so."<sup>69</sup> Indeed, as indicated by Akehurst, almost all scholars list specific heads of jurisdiction, thereby implying that all other types are illegal (and they do not state the general presumption that all jurisdictions are legal, listing the illegal ones that are prohibited).<sup>70</sup>

Thus it appears that modern international law has developed differently since the *Lotus* case of 1927, and it has become accepted that international law regulates claims of jurisdiction, as categorically stated by Mann:

The existence of the State's right to exercise jurisdiction is exclusively determined by *public international law* ... Joseph Beale made this very clear,

66 Ofer/3887/02, *The Military Prosecutor v. Salem* (2003) (unpublished). Available in Hebrew at the military court's internet site: [http://elyon1.court.gov.il/idf\\_yesha/verdict/search\\_idf\\_yesha/verdict\\_by\\_misc.html](http://elyon1.court.gov.il/idf_yesha/verdict/search_idf_yesha/verdict_by_misc.html) (last visited 27 May 2007).

67 PCIJ, Series A, No. 10, 1927, p. 19.

68 Mann, above note 40, p. 33; Lowe, above note 40, p. 335.

69 Lowe, *ibid.*, p. 336.

70 Akehurst, above note 40, p. 167.



when he stated that “the sovereign can not confer jurisdiction on his court or his legislature when he has no such jurisdiction according to the principles of international law”.<sup>71</sup>

If we follow this modern approach in the case of the legislative authority of states, which are sovereign in their territories, it can be easily inferred that it also applies to an occupying power’s authority to regulate questions of jurisdiction; it can hardly be assumed that an occupying power’s legislative competence is wider than a state’s authority. Thus it appears that an explicit authorization to regulate issues of jurisdiction is also required in occupied territories.

## *2. Does international humanitarian law provide an explicit authorization for extraterritorial jurisdiction?*

If extraterritorial jurisdiction requires explicit authorization, it is necessary to examine whether the law of belligerent occupation provides it.

Arie Pach, a former Israeli military prosecutor, proposed to interpret Article 64(2) as including extraterritorial prescriptive jurisdiction.<sup>72</sup> This proposal seems doubtful. As Article 64 remains silent on this issue, it is appropriate to interpret it according to the general rule of criminal jurisdiction – that is, the principle of territoriality – and not according to its exception. In addition, Article 154 of the Fourth Geneva Convention explicitly states that the provisions of the Convention are supplementary to the Hague Regulations. Article 64 should consequently be read as not contradicting Article 42 of the 1907 Hague Regulations, which asserts that “The occupation extends only to the territory where such authority has been established and can be exercised.” Thus no explicit (or implicit) rule of international humanitarian law allows extraterritorial jurisdiction, rather the contrary.

## *3. Analogy from the right of sovereign states?*

As the law of belligerent occupation does not empower the occupying power to exercise extraterritorial legislative jurisdiction to justify the military commander’s competence to enact such legislation, the military courts referred to public international law. They certainly did borrow a rule – the protective principle, which is normally applicable by sovereign states – for their legal system in the occupied territories. This reasoning should be questioned. It is not obvious that extraterritorial jurisdiction competence based on the protective principle can be imported from the sphere of international law to the law applying in occupied

71 Mann, above note 40, p. 11. “The application of international law to regulate claims to criminal jurisdiction is generally conceded”. Bowett, above note 39, p. 5.

72 “Article 64 seems to include explicitly and clearly extraterritorial jurisdiction for security reasons.” Arie Pach, “Human rights in West Bank military courts”, *Israel Yearbook on Human Rights*, Vol. 7 (1977), p. 222, at p. 238. This interpretation was also suggested by the military court. See e.g. the *Akrash* case, above note 55.

territories. Public international law regulates legal matters between states, and international humanitarian law regulates the temporary control of an occupying power over an occupied area of land and people. These two distinct sources of laws differ in their subjects of application and in their substance.

The jurisdiction rules of public international law were undoubtedly designed to apply to states. Moreover, it seems that states were a founding concept in the formation of these rules. Fundamental principles of international law such as state sovereignty, equality, reciprocity and non-violent interstate relations were necessarily taken into account in elaborating the rules of jurisdiction. However, these principles do not regulate the relations between an occupying power and an occupied territory: sovereignty, equality and reciprocity simply do not exist. It seems hard, therefore, to apply to occupied territories, which constitute a completely different subject of application, rules specifically formed to regulate states' jurisdiction in a given legal environment.

The protective principle can serve as a good example illustrating why a rule which was formed to apply to states, and whose formation was affected by other principles of international law that bind states, is not properly applicable in an occupied territory, where the occupying power is not bound by the same governing principles.

As stated above, the enforcement in third states of extraterritorial legislation based on the protective principle depends on a balancing test which takes, besides protective interests, other principles of international law into account. The state's protective interest is not an absolute right; through the balancing test the danger of abuses is thus limited. In addition, in my view, not only enforcement jurisdiction but also the initial competence to enact extraterritorial provisions according to the protective principle took this balance into account when it was promulgated by public international law without definite limits. It seems that this formation was possible only because that balance provided a guarantee against abuses of legislative competence and not only against abuses in enforcement. In domestic legal systems, and more specifically in the branch of criminal law, the two competences (legislative and enforcement) are equal. All provisions against criminal acts have to be enforceable, as this is the *raison d'être* of criminal law. It could then be reasonably expected that a state will enact only extraterritorial criminal provisions that it can enforce. The fact that according to public international law not all extraterritorial provisions can automatically be enforced is not a coincidence: it has substantial implications for the essence of legislative competence, and is not merely a matter of implementation.<sup>73</sup> It aims to set limits to abuses in the legislation: if states have enacted provisions that are too abusive on the basis of the protective principle, their enforcement will be impossible.

73 See Bowett, above note 39, p. 24. In order to resolve the problem of concurrent jurisdictions (which may contain abuses) he suggested the balance test, because "agreeing on the principles of jurisdiction and their limits" seems not to be achievable. Those limits may be understood as limits to the initial legislative jurisdiction, and not necessarily to the enforcement.

In the occupied territories the limiting balance does not function in the same way as it does between states, as legal relations are different. Principles such as sovereignty, equality and reciprocity do not exist and therefore will not set limits to the enforcement of a provision, as will the balance test for states. Thus the usual guarantees against abuses in legislation (which is the main concern of the protective principle) do not operate. Consequently, if the enforcement of extraterritorial jurisdiction is not limited by the balancing test, which no longer applies, the legislative authority itself should be questioned because of the great danger of abuse. Otherwise, applying only the legislative jurisdiction without limits on the enforcement may turn extraterritorial jurisdiction into a tool for domination and not necessarily for protection. And this seemingly is exactly what happens in the case of extraterritorial jurisdiction of the Israeli occupying power. It applies a rule from another branch of law without taking into account all the complexity thereof that brought about the formation of the rule itself, which could now be used almost without limits, especially when in Israeli military courts illegal abductions do not void the legal procedure.

In addition to international balances, during occupation domestic limits which normally restrict abuses are missing, too; all legislative powers are in the hands of the military commander, who is also the executive. There is no separation of powers, and this constitutes another danger of abuse.

The normal result of an excess of jurisdiction is a protest by the national State of the accused. No example is known of protests being made by any other State, so it would seem that a State could claim jurisdiction over a stateless person with impunity.<sup>74</sup>

### The limits of extraterritorial legislation

As argued above, it appears that the occupying power has no competence to enact extraterritorial legislation. However, important considerations, mainly concerning security interests, may support the opposite view. Nevertheless, even when assuming that the military commander is granted extraterritorial legislative authority based on the protective principle, this authority is not absolute. It must protect strictly vital interests. The following section aims to examine whether the limits imposed by international law and the interim agreement were respected by the Israeli military commander when enacting extraterritorial rules.

### Public international law

It seems to us, that ... extraterritorial jurisdiction is possible only with regard to "classical" and obvious security offences, i.e., offences whose prevention is

74 Akehurst, above note 40, p. 169.

75 Above note 55, p. 464.

necessary to protect the physical security of the occupying power and its forces, as well as that of the administration (the *Akrash* case, 1969).<sup>75</sup>

### *Security of the region*

The *Abu Higla* case<sup>76</sup> dealt with a member of the Fatah organization from Syria who infiltrated into Israel in 1979 by crossing the Jordanian border. His intention was to capture hostages or to carry out a terrorist attack. Examining its jurisdiction according to Article 7(c) of the SPO, the military court ruled that

The expression “security of the Region” is not identical to the security of the State of Israel, so that there is no automatic jurisdiction of the court in the Region to try acts committed abroad against the State of Israel or the Jewish people ... The Region is a territorial unit possessing its own legal system, quite separate from that of the State of Israel.<sup>77</sup>

If the military commander is entitled to enact extraterritorial provisions, it seems necessary to respect at least this fundamental distinction, which should serve as an obligatory limit. But this was not always the case, as demonstrated by the Order Concerning Hostile Organizations. This Order applies only to residents of the Region; it prohibits arms training outside the Region<sup>78</sup> and any contact with a hostile organization.<sup>79</sup> A hostile organization is defined as “a person or a group of persons whose aim is to harm the public security, the IDF [Israeli Defence Forces] or the public order, in Israel or in an area controlled by the IDF”.<sup>80</sup> Thus this order also protects the interests of the state of Israel. Nevertheless, as cited above, the military court itself found that “the Region is a territorial unit possessing its own legal system, quite separate from that of the State of Israel”. Security interests of the state of Israel are protected by Israeli domestic extraterritorial jurisdiction, and should not be covered by military jurisdiction. The commander is responsible only for the security of the Region, and cannot expand his authority over Israeli domestic concerns. It therefore seems that by defending the direct security interests of the state of Israel, the military commander exceeds the authority granted to him to protect the security interests of the Region. Moreover, as observed by the military court in the case of *Dir Bazia*, this order does not require the extraterritorial offence to harm the security of the Region. It means that all military training or contacts with a “hostile organization”, for whatever reason, are criminally chargeable in the Region’s military courts. This appears to be an abuse of extraterritorial jurisdiction based on the protective principle. And indeed the military court ruled that

76 Nablus (NB)/5193/81, *The Military Prosecutor v. Abu Higla*, SJMC, No. 6, p. 581. Excerpted in English in *Israel Yearbook on Human Rights*, Vol. 19 (1989), p. 384.

77 *Ibid.*, p. 385.

78 Order Concerning Hostile Organization, above note 61, Article 2.

79 *Ibid.*, Article 3. The definition of “contact” includes contact with a person who is reasonably suspected of acting on behalf of a hostile organization.

80 *Ibid.*, Article 1.

The only logical and reasonable interpretation of the Order Prohibiting Armed Training outside the Region is that the training should be accompanied by a criminal intent to use it against the security of the Region.<sup>81</sup>

Even so, this limit should be incorporated in the order itself and not left open to the interpretation of the military court, as the interpretation may be modified.

### *Public order – a vital interest?*

Article 7(c) of the SPO provides for extraterritorial protection against acts designed to harm the security of the Region or public order there.<sup>82</sup> The main difficulty of this enactment is that the scope of the term “public order”, without any restriction, is very broad. It may encompass almost the entire criminal code. The danger of laws enacted in a wide manner is that they are open to abuse.<sup>83</sup> In addition, when the offence is defined too broadly or vaguely, it is a violation of the general principle *nullum crimen sine lege*, as individuals may not be aware they are committing a crime.<sup>84</sup> To respect the limit imposed by public international law, the military commander apparently should have limited the scope of this term within the definition of the provision, preventing it from being open to abuse and from providing the military courts with an opportunity to interpret it too broadly.

The Order Concerning Dangerous Drugs, which is a specific provision criminalizing drug offences, may illustrate how using this term in order to justify extraterritorial legislation may lead to serious abuses of the protective principle. The order imposes criminal responsibility for violations of its provisions even if committed outside the Region (Article 38). Persons not resident in the Region could be prosecuted only if the offence was also illegal in a third state where it was committed. This provision does not exist for Palestinians. If a truly vital public interest of the occupied territories is protected by this order, then its discriminatory implementation by a law distinguishing between residents and non-residents is not possible. It is hard to see what vital interest is protected when the order criminalizes even minor drug offences abroad. However, as drug offences harm public order (to varying degrees), the legislator, on the basis of the indefinite scope of the term “public order”, was nevertheless able to enact this order. It definitely seems to exceed the scope of a “vital interest”, which according to the protective principle is the only interest that legitimates the enactment of extraterritorial legislation.

81 RAM/4252/82, *The Military Prosecutor v. Dir Bazia*, SJMC, No. 6(2), p. 421. Excerpted in English in *Israel Yearbook on Human Rights*, Vol. 19 (1989), p. 389. In this case the accused, who was a resident of Ramallah, underwent military training in Amman in 1979 in order to qualify for service as a guard in the Muslim Brotherhood organization's headquarters in Amman. He claimed in his defence that he had no intention of harming the Region, and was acquitted.

82 Unlike Article 7(d) of the SPO, which protects only security concerns.

83 Akehurst, above note 40, p. 158.

84 Bowett, above note 39, p. 11.

### *The interim agreement*

Besides the general limits provided by public international law, specific limits were set by the interim agreement.

*Article 7(c) of the SPO.* In the *G'abri* case (1999)<sup>85</sup> the accused was charged with offences contrary to the SPO-1970 that were committed in Iran. The military court ruled that the interim agreement had not modified jurisdiction over offences committed “outside the Region,” and that the meaning of the term “Region” remained as it was before. Thus, with regard to Article 7(c) of the SPO, the military court was competent to try any offence which harmed or was designed to harm the security or the public order of the entire West Bank, including the security and public order of area A. This result contradicts the interim agreement, and seemingly even the intention of Israel and of the military commander as expressed by the president of the Military Court of Appeals in the *Raduan* case.<sup>86</sup>

*Article 7(d) of the SPO.* Article 7(a) of Annex IV to the interim agreement recognizes Israeli extraterritorial jurisdiction:

Without prejudice to the criminal jurisdiction of the Council ... Israel has in addition ... criminal jurisdiction in accordance with its domestic laws over offences committed in the [PA territories] against Israel or an Israeli.<sup>87</sup>

Although the interim agreement recognizes extraterritorial jurisdiction, it is the extraterritorial jurisdiction of the state of Israel that was recognized, and not that of the military commander. However, this distinction between Israeli domestic and military extraterritorial jurisdiction was not made by military courts. The said article from the interim agreement was cited in the *Raduan* case as confirmation that “the clear intention of the sides to the agreement was keeping the principle of extraterritorial jurisdiction over offences committed in the PA”, in order to justify the legislation of Article 7(d) of the SPO. Nevertheless, a more accurate understanding of this provision is that the authority to exercise extraterritorial jurisdiction belongs to Israeli civil courts through implementation of parliamentary legislation, and not to military legislation and courts.

As shown above, even assuming that the Israeli military commander is entitled to enact extraterritorial provisions based on the protective principle, it seems that he has exercised the authority it confers upon him by exceeding the limits set by public international law and by the interim agreement. These enactments, which actually reflect concern about abuse of the protective principle, gave the military courts jurisdictional powers going beyond the legitimate bounds of the law and of the occupied territories, in order to facilitate *judicial domination* over the Palestinian population.

85 G/235/99, *The Military Prosecutor v. G'abri*, SJMC, No. 12, p. 255.

86 Above note 59, p. 15.

87 Article 7(a) of Annex IV to the interim agreement.

## The enforcement of extraterritorial jurisdiction exercised by the military courts

At first, the judicial domination was initiated by expanding legislation; however, its sophisticated development, which slowly emerged and led to vast and deep-rooted implementation, was possible only because of the even wider exercise of that law by military courts, which by their interpretation law made a major contribution to *borderless judicial domination*.

### *Interpretation*

As the military courts' jurisdiction depends on the interpretation of the term "security of the Region", it is given a meaning so broad that even the Military Court of Appeals queried it. This occurred, for instance, in a case concerning a drug offence committed in area A; the Military Court of Appeals stated that the classification, by the court of first instance, of a drug offence as a security offence "is not that evident".<sup>88</sup>

Another example of extension of the term "security" is the *Raduan* case. The appellant was convicted of illegal possession of weapons, an offence committed entirely in the PA territories. He claimed that he was doing an arms deal for economic interests, that the weapon was in his possession for only a few hours, and that as he did not intend to harm in any way the security of the Region and although he might be a criminal, the military court was not competent to judge him because he did not commit a security offence. The military court rejected his claim and ruled that regardless of the motives (which may be economic or criminal) for their possession: "any illegal possession or illegal use of arms counts as harm to security".<sup>89</sup> This ruling was cited in the *Shaleh* case<sup>90</sup> and the *Eit* case,<sup>91</sup> and apparently constitutes the guideline: any illegal possession of arms is an extraterritorial security matter.

This interpretation seems to go far beyond the scope of a legitimate extraterritorial jurisdiction – that is, protection of vital interests. It transforms all "regular" criminals who use weapons during their criminal activities (e.g., a robbery) into terrorists who harm the security of territories beyond those of the PA.

88 MCA/10/11/02, *Zu'hrub v. The Military Prosecutor* (2002) (unpublished). However, it was not explicitly ruled that it is not a security offence! In this particular case the Military Court of Appeals convicted the accused on another basis, so it did not have to decide on this issue. It should be stressed that not all convicted persons can reach the Court of Appeal, and in the routine work of the courts it is very probable that other cases are still decided in the same way.

89 *Ibid.*, p. 16.

90 G/376/00, *The Military Prosecutor v. Shaleh*, SJMC, No. 12, p. 332, at p. 339.

91 Above note 59.

### *Limits?*

Military courts regularly reject attempts to limit their jurisdiction, basing their decisions on the broad military legislation that enables them to disregard the limits imposed by public international law or by the interim agreement.

In the *Eit* case the defence tried to set a limit to the jurisdiction of the military court. It was claimed that if an act is legal in area A, the military court could not establish its jurisdiction by defining that act as dangerous for the Region; the argument states that if an act is legal in the PA territories, its prosecution in military courts contradicts the principle of *nullum crimen sine lege*. This claim is relevant, especially since the accused had never left the PA territories but was arrested there by soldiers and brought to trial after an investigation, as often happens.

The military court ignored this claim, but it seems to be an interesting one, especially with regard to the offence of membership of an illegal organization. Akehurst noted that jurisdiction in relation to conduct which is not generally regarded as criminal is problematic. However, as the protective principle aims to protect states from acts which are often not illegal in other states, the practice of states did not support that approach (taken by the defence).<sup>92</sup> A suggested solution for this situation is the doctrine of the *primary effect*.<sup>93</sup> According to that doctrine, a state can claim jurisdiction only if the *primary* effect of the accused person's act was to harm a vital interest of the state. Applying this doctrine, the charge of membership of an illegal organization could be prosecuted only if the primary effect of this membership was to harm the security of the Region. Therefore it seems that this offence, which is prosecuted on a wide scale, could be questioned in many cases. One example is the case of *A'lian*, a female member of Islamic Jihad, who was accused of being the head of the women's organization at Bethlehem University. She claimed that as her activity was authorized by the PA the military commander was prevented from deciding otherwise, as her activities had never gone beyond the territorial borders of the PA. In addition, she claimed that her activities had nothing to do with the violent branch of the organization and that all her activities were social work. The military court rejected the latter claim and the relevance of the PA's authorization, and referred strictly to Article 7(d) of the SPO.<sup>94</sup>

### **Conclusion**

This article has attempted to show how the military legal system expands its jurisdiction according to territoriality doctrines, and how this expansion has led to

92 Akehurst, above note 40, p. 168.

93 *Ibid.*, p. 159.

94 MCA /16/03, *A'lian v. The Military Prosecutor* (2003) (unpublished). Available in Hebrew at [http://elyon1.court.gov.il/files\\_idf\\_yesha/03/160/000/a47/03000160.a47.HTM](http://elyon1.court.gov.il/files_idf_yesha/03/160/000/a47/03000160.a47.HTM) (last visited 27 May 2007).



extensive control by the military legal authorities and facilitated a judicial domination of the army over the Palestinian civilian population.

There is in fact an invasion of the military legal system over civilian domains. Due to this expansion of jurisdiction, matters which should be under the jurisdiction of a civil court (Palestinian or Israeli) are in many cases dealt with under the Israeli military system – a system that enjoys less independence and impartiality and does not effectively safeguard the individual rights of accused persons and suspects.<sup>95</sup> This interference by the military legal system, taking broader territorial control than is authorized by international humanitarian law, is no more legitimate than any other kind of military domination merely because it is affected by a legal system. Once this legal system is not restricted by the rules of international humanitarian law and international human rights law, its legitimacy in administering justice no longer exists, and the illegitimate domination it imposes is as violent as any other aggressive act that an army may perpetuate. This domination by the army seems to be even more dangerous because it appears to be under the guise of the rule of law.

However, the expansion of territorial jurisdiction is merely one phase of this method. The issue of jurisdiction needs to be placed in its wider judicial context: before appearing before the military court, suspects are often arrested and abducted from the PA territories, and then interrogated without access to a lawyer or a judge for a longer time than is allowed in a civil procedure. In many cases the defendants do not have access to all the evidence and are prosecuted according to military orders, in which the definition of the offences and degree of punishment are broader than in the civilian criminal code. After their conviction they are deported from the occupied territories to serve their sentences in prisons situated in Israel, which makes it almost impossible for their families to visit them.

In this article the examination of territorial jurisdiction reveals the process of *judicial domination* in its first stage; it is clearly apparent, however, in the exercise of other kinds of jurisdiction.<sup>96</sup> It will be of interest to pursue this research through other stages of the judicial procedures in order to reinforce this observation and illustrate how *judicial domination* functions in all phases of the judicial process.

95 Regarding the impartiality of the Israeli military judges, Hajjar's observation (which seems to characterize more broadly any other military system that judges its enemy) is that "law enforcement in the occupied territories is not disinterested; it is provided primarily by soldiers, most of whom, by all accounts, are deeply hostile to and suspicious of Palestinians". Hajjar, above note 1, p. 112. Before 2004 it was not necessary for all the judges to have a legal background, and they were just regular officers, usually also very young.

96 This article is a part of wider research that I pursued for my master's thesis. There I examined three types of jurisdiction exercised by the Israeli military authorities in the occupied West Bank: territorial jurisdiction, jurisdiction *ratione materiae*, and jurisdiction *ratione personae*.