

Enforcing Illegality: Israel's Military Justice in the West Bank

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1. Introduction

The present article presents a critical overview of the main legal questions which arise from the Israeli military justice system in the West Bank. It commences from the inception of the system, focusing on the domestic Israeli approach to its juridical configuration and the manner in which this informed the interpretation of international law and its applicability in the occupied Palestinian territory. The article then proceeds to analyse the sources of the system through the distinctive concentration of powers underlying its structure, in which legislative, executive and judicial prerogatives are entrusted to the Israeli military. The critical overview concludes with an investigation of the substantive law of the military justice system, and its interactions with the wider Israeli institutional apparatus exercising control over the territorial space and the population movement in the West Bank.

The analysis of the concrete operation of the system, through comparison with Israeli domestic law and its impact on the human rights of the Palestinian population, reveals a significant degree of incompatibility not only with international law, but – more profoundly – with the fundamental principles determining the parameters of the liberal-democratic model of justice in legal orders governed by the rule of law.

The legal landscape resulting from this overview indicates, on the part of Israel, more than merely the unintended consequences of legitimate security concerns and policies; rather, it suggests a precise choice,

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instrumental to, and a reflection of, a wider project of permanent territorial control pursued by the Israeli authorities in the West Bank. Thus, this practice is in direct contrast with the international legal principles governing occupation: non-acquisition of sovereignty, duties to administer the occupied territory for the benefit of the local population, and temporariness.¹

In addition, the military justice system, through the creation of a semblance of judicial review – both for the offences of the population under occupation and for the actions of the occupying forces – assumes the paradoxical function of legitimizing and protecting through penal sanctions the implementation of an illegal project.

2. *Establishing military courts of occupation while rejecting the Law of Occupation*

The Israeli military justice system is synonymous with the occupation: it was established on the third day of the Six Day War, by Proclamation No 3 of the Major General of IDF Forces in the West Bank. This order was then amended several times until, in 1970, it was replaced by Military Order 378 (Security Provisions Order [SPO]).

The applicability of international humanitarian law was explicit in this original order. In Article 35 of the SPO, in fact, it was stated that

‘a military court and its administration shall follow the provisions of the Geneva Convention of 12 August 1949 relating to the Protection of Civilians in War insofar as concerns judicial proceedings, and where this Order conflicts with the said Convention, the provisions of the Convention shall prevail.’²

¹ See A Gross, *The Writing on the Wall. Rethinking the Law of Occupation* (CUP 2017) 25 ff.

² Proclamation No 3 regarding Entry into Force of the Provisions of Security Order 7 June 1967, Compilation of Proclamations, Orders and Appointments of the IDF Command in the West Bank Area No 1 (11 August 1967) 3-5.



This provision was short-lived. At the end of 1967, Article 35 was substituted by a provision related to the calculation of the periods of detention in relation to sentences upon conviction.³ The disappearance of Article 35 was not accompanied by the introduction of any other explicit reference to international law in the legal instruments establishing the courts.⁴

This paradigm shift was not fortuitous. The removal of Article 35, in the initial stage of the occupation, is the result of a wider debate concerning the legal status of the West Bank and the applicability of international law.

The Military Advocate General (MAG) at that time, Meir Shamgar – who later served as president of Israel's High Court of Justice (HCJ) – assumed a central role in the preparation of the normative framework of the military justice system, and of the occupation itself. Shamgar, from the early 1960s, compiled texts and guidelines for the military containing legal materials, set of precedents of military proclamations and orders, and summaries of the municipal law in force in different countries neighbouring Israel, which provided the preparatory background for the orientation of the legal framework of the occupation.⁵ More importantly, the central arguments concerning the inapplicability of the law of occupation⁶ to the West Bank (which continue to have an enduring effect upon the legal discourse about the Israeli occupation) can be traced back to the preparatory work of Shamgar.

The intention to construct a legal doctrine legitimizing Israel's permanent dominion over the conquered areas, led Shamgar to argue that

³ Security Provisions Order (Amendment No 9) Judea and Samaria (Order No 144) 22 October 1967, Compilation of Proclamations, Orders and Appointments No 8, 303; for the Gaza Strip and Northern Sinai, 11 October; central Sinai, 31 December; Shlomo region, 29 November; Golan Heights, 3 October.

⁴ See Y Ronen, 'Blind in Their Own Cause: The Military Courts in the West Bank' (2013) 2 Cambridge J Intl Comparative L 746.

⁵ See M Shamgar, 'Legal Concepts and Problems of the Israeli Military Government: The Initial Stage' in M Shamgar (ed), *Military Government in the Territories Administered by Israel, 1967-1980: The Legal Aspects* (vol 1, Harry Sacher Institute for Legislature Research and Comparative Law 1982) 25 ff.

⁶ Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land (18 October 1907) (hereinafter Hague Regulations) Section III, arts 42-56; Geneva Convention Relative to the Protection of Civilian Persons in Time of War (12 August 1949) 75 UNTS 287 (hereinafter GC IV) Section III, arts 47-78; both treaties are available at <<https://ihl-databases.icrc.org/ihl>>.

Israeli control of the West Bank and Gaza did not constitute a form of occupation. The argument was founded upon the idea that occupation only exists when control over an area is acquired from a previous sovereign domain. On the contrary, according to Shamgar, the displaced rulers in 1967, Jordan and Egypt, were themselves occupants who had seized control after the first Arab-Israeli war of 1948. According to this interpretation, therefore, Israel was not occupying a territory, but ‘administering disputed areas’, with a *sui generis* legal status.⁷ Acknowledging Israel’s status as ‘occupant’, in fact, would have signified recognizing Jordan and Egypt as displaced sovereigns, potentially jeopardizing Israeli prospects to retain permanent control over the territories.⁸ This position resulted in the rejection of the applicability of the Fourth Geneva Convention of 1949 and of the law of occupation. The stance was later systematized and reaffirmed in the doctrine of the ‘missing reversioner’, re-laborating Shamgar’s vision and providing it with further (and dubious)⁹ international legal justifications.¹⁰

Despite the assertion that Israel had ‘decided to act *de facto* in accordance with the humanitarian provisions of the [Fourth] Geneva Convention’¹¹ (the provisions were never precisely identified), the hiatus between Palestinian land and Palestinians (as population) was thus legally constituted, laying the foundations for the enduring obstruction of their right to self-determination.¹²

⁷ See M Shamgar, ‘The Observance of International Law in the Administered Territories’ (1971) 1 *Israel YB Human Rights* 262-77.

⁸ See Shamgar, ‘Legal Concepts’ (n 5) 43.

⁹ As Dinstein argues, the position sustaining a status of ‘administration of disputed territories’ (rather than of occupation) appears ‘based on dubious legal grounds, considering that the Fourth Geneva Convention does not make its applicability conditional on recognition of titles’ (Y Dinstein, ‘The International Law of Belligerent Occupation and Human Rights’ (1978) 8 *Israel YB Human Rights* 107).

¹⁰ ‘The use of force by the contiguous Arab States having been illegal, it naturally could not give rise to any valid legal title. *Ex injuria jus non oritur*. [...] It would seem to follow that, in a case like the present where the ousted State never was the legitimate sovereign, those rules of belligerent occupation directed to safeguarding that sovereign’s reversionary rights have no application (YZ Blum, ‘The Missing Reversioner: Reflections on the Status of Judea and Samaria’ (1968) 3 *Israel L Rev* 283 and 293).

¹¹ Shamgar, ‘The Observance of International Law’ (n 7) 266.

¹² See A Cassese, *Self-Determination of People: A Legal Reappraisal* (CUP 1995) 238 ff.; and L Hajjar, *Courting Conflict: The Military Court System in the West Bank and Gaza* (U California Press 2005) 56 ff.



3. *One and triune: The military as legislative, executive and judiciary*

The Israeli military courts operate under the Security Provisions Order, itself amended more than one hundred times. It has also been supplemented through various additional orders concerning specific issues.

These orders have been incorporated into consolidated versions first in 1970,¹³ and again in 2009, in the Order presently in force.¹⁴ Since 2009, this last Order has already been amended more than twenty times.

This military legislation exists together with two other normative systems: the local criminal laws in force in the region before the occupation (for the West Bank mainly Jordanian Criminal Law), and the British Defense Emergency Regulations of 1945 enacted during the mandate.

The British regulations were drafted by the British mandatory power over Palestine as repressive measures against acts of terrorism. After the merger of East and West Bank in 1950, they were considered repealed and were never used. Ironically, they had been the object of vibrant condemnations by those who later become Israeli leaders when used against the armed Zionist organizations during the mandate. Future Justice Ministers and Judges defined them as 'anarchical and irregular',¹⁵ or 'unparalleled in any civilized country [for destroying] the very foundations of justice'.¹⁶ After 1967, however, Israel revived and reactivated these regulations.¹⁷

For what concerns the Jordanian laws, the powers and privileges they originally granted to the Jordanian Government have been progressively transferred to the military and commuted into prerogatives of the area

¹³ Security Provisions Order (Judea and Samaria) No 378, 1970, Compilation of Proclamations, Orders and Appointments No 21, 33.

¹⁴ Security Provisions Order [Consolidated Version] (Order No 1651) of 2009 available in English at <<http://nolegalfrontiers.org/military-orders/mil019ed2.html?lang=en>>.

¹⁵ HaPraklit 2/46, quoted in S Jiryis, 'The Arabs in Israel' (New York: Monthly Review Press 1976) 11–12, in Hajjar (n 12) 60.

¹⁶ Attributed to Y Shimson Shapiro, later Israel's Ministry of Justice, in the briefing paper of Al-Haq (Law in the Service of Men), 'Twenty Years of Israel Occupation of the West Bank and Gaza' (1987) 11.

¹⁷ R Shehadah, J Kuttah, *The West Bank and the Rule of Law* (International Commission of Jurists 1980) 24.

commander.¹⁸ The military orders, in addition, proclaim that Israeli military laws prevail over or supersede local laws still in force when there is a contradiction or an overlap. Military orders, therefore, remain the core applicable law in military courts.

All the mentioned orders are drafted by the MAG and enacted by the military commander of the region, who has 'supreme' legislative authority to issue, amend, and repeal military orders.

Overall, it is estimated that there have been over 2,500 military orders issued in the West Bank and the Gaza Strip since 1967, a number of which (in particular those related to settlements) remains unpublished.¹⁹

The MAG and the Area Commander enjoy significant powers over the appointment of the military judges. The procedure involves a selection committee, headed by the MAG, which appoints permanent judges from the ranks of the IDF's legal staff, while a selection committee, headed by the Deputy MAG, appoints reservist judges.

The MAG also has a central role in the prosecutorial hierarchy. The MAG supervises a legal advisor and a chief prosecutor of the region, who, in turn, coordinate the head prosecutors of the single military courts. While from an administrative perspective, the prosecution is considered to be separate from the judiciary, judges and prosecutors are members of the same IDF units,²⁰ and it leaves open the possibility that judges presiding over hearings might be inferior in rank to military prosecutors.

Importantly, claiming the authority to maintain public order, the IDF in the West Bank is also conferred with executive tasks, first of all arrest powers.

In this regard, the systematicity of arbitrary arrests and detention is the subject of a constant flow of denunciations from NGOs, condemning frequent physical and verbal abuses during arrest procedures, as well as torture and ill treatment during interrogations, of both Palestinian adults and children.²¹

¹⁸ *ibid* 29 ff.

¹⁹ K Cavanaugh, 'The Israeli Military Court System in the West Bank and Gaza' (2007) 12 *J Conflict Security L* (2007) 201.

²⁰ See Hajjar (n 12) 254.

²¹ See, *inter alia*, Amnesty International, 'Annual Report 2016/17' 202 ff. <www.amnesty.org/en/latest/research/2017/02/amnesty-international-annual-report-201617/>, and the joint report of B'Tselem and Hamoked, 'Backed by the System: Abuse



In relation to deprivation of liberty, in theory, Palestinians of the West Bank should be entitled to *habeas corpus*. In practice, there is no requirement that an arrest be preceded by a detention order, nor that the person be informed of the reasons for arrest at the time he or she is taken into custody, for up to 96 hours.²² At the same time, lawyer-client meetings are often prohibited as long as the detainee is under interrogation. A detainee can be held in custody for up to eighteen days without charge before being brought before a judge, while incommunicado detention – after SPO amendments in 2002 – can last up to twelve days. To stand trial without being held in custody, a detainee must request to be released on bail – a request that is very rarely granted. For the vast majority of detainees, the detention lasts until their case is concluded.

In the case of administrative detention, *praeter delictum* measures intended to thwart a prospective danger, no formal charge at all is issued against the suspect and often no evidence is disclosed in the hearings before military courts. Administrative detainees are thus, from the outset, denied the rights to which defendants in criminal proceedings are normally entitled. They do not know when they will be released (prompting different NGOs to denounce a form of psychological torture),²³ and there is no restriction on the length of time of their detention. The maximum six-month period of custody allowed by a single military commander's administrative detention order, is in fact renewable *sine die* through subsequent orders.

Appellate review of first instance military courts' decisions was only established in 1989, when, after the recommendation of Israel's High Court of Justice in the Arjub case,²⁴ a military court of appeals was established. The president of the military court of appeal, however, works under supervision of the MAG, thereby reproducing within this judicial

and Torture at the Shikma Interrogation Facility' (December 2015) <www.btselem.org/publications/summaries/201512_backed_by_the_system>.

²² See Security Provisions Order [Consolidated Version] (Order No 1651) of 2009, Chapter C, art 31 (A) and (C).

²³ See Addameer – Prisoners Support and Human Rights Organization, 'Induced Desperation: The Psychological Torture of Administrative Detentions' factsheet 26 June 2016 <www.addameer.org/publications/induced-desperation-psychological-torture-administrative-detention>.

²⁴ *Arjub v The Military Commander in the West Bank*, HCJ 87/85 PD 42(1) (1988) 353 ff.



body the issues of ‘non-political’ composition and independent operation affecting the lower levels of the system.²⁵

Judicial review of the military court system by civil courts is undertaken by Israel’s HCJ. This Court has on different occasions, and to various degrees, affirmed that the military government, and thus the military court system, derives its authority from the international law of belligerent occupation.²⁶ However, despite this recognition, in the vast majority of cases, the principles of judicial review have been derived from the rules of Israeli administrative law, rather than international law.²⁷ In other cases, the Court – as argued by Kretzmer – ‘has done its best to avoid ruling on the compatibility of actions or policies with international humanitarian law, either by relying on the distinction between customary and conventional law, or by glossing over the issue’.²⁸ In addition, the HCJ, as the final civilian appellate jurisdiction for military courts, has often based its balancing operations upon presumptions of proportionality, based on the idea that identification and delimitation of the military needs are unreviewable prerogatives of the military commander.²⁹ According to the Court, in fact, when ‘there is more than one way to satisfy the proportionality demand [...] a zone of proportionality (similar to a zone of reasonableness) should be recognized. Any means which the administrative body chooses from within the zone is proportional’.³⁰

As domestic court, therefore, the HCJ ‘does not substitute its own

²⁵ See Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention) (12 August 1949) 75 UNTS 287, arts 64 and 66.

²⁶ See *Abu Itta and Others v Commander of IDF Forces in the West Bank and Others*, HCJ 69/81 PD 37(2) (1983) 197, 228, 301; *Jamait Iscan v IDF Commander in Judea and Samaria* HCJ 393/82 PD 37(4) (1983) 785, para 23.

²⁷ See D Kretzmer, *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories* (State UNY Press 2002) *passim*.

²⁸ D Kretzmer, ‘The Law of Belligerent Occupation in the Supreme Court of Israel’ (2012) 94 *Intl Rev Red Cross* 215. See also the important reflection of M Koskenniemi, ‘Occupied Zone – A Zone of Reasonableness?’ (2008) 41 *Israel L Rev* 13-40.

²⁹ ‘The military commander is the expert regarding the military quality of the separation fence route. We are experts regarding its humanitarian aspects. The military commander determines where, on hill and plain, the separation fence will be erected. That is his expertise. We examine whether this route’s harm to the local residents is proportional. That is our expertise’ (*Beit Sourik Village Council v The Government of Israel* HCJ 2056/04 (2004) 807, para 48, English translation available at <http://elyon1.court.gov.il/files_eng/04/560/020/A28/04020560>.

³⁰ *ibid* para 42.



discretion for that of the military commander, but only examines whether the commander acted within the limits of his authority and within the margin of reasonable conduct'.³¹ Considering the aforementioned legislation, it is clear that the limits of the commander's authority and his margins of appreciation are nearly unlimited. The mentioned HCJ's jurisprudence has ratified and reinforced this discretion.³²

In sum, the Israeli military exercises absolute powers over Palestinians, cumulating legislative, executive and judiciary in the same hands. These absolute powers are not only displayed over a population that has never been called to approve them, nor to control them through political processes, but couple with a substantive law that pervasively and harshly regulates social, political and private life of the Palestinians (see *infra*).

4. Discriminatory legal dualism

The competency of the military courts is regulated by the SPO, which is silent on qualifications related to the *ratione personae* jurisdiction. Military courts originally embraced an interpretation of the SPO as empowering them to try, together with the Palestinian residents of the West Bank and Gaza, also Israeli nationals when charged with offences committed in the occupied territories.³³ Since the early 1980s, however, in open rejection of the principle of territoriality in the application of criminal law, Israeli nationals, residents and settlers have been prosecuted only under Israeli domestic law before Israeli courts. This policy of dual justice – established by explicit legislation of the Knesset³⁴ and upheld by

³¹ Ronen (n 4) 761.

³² As aptly summarized by Michael Sfar in his book review of Kretzmer's *The Occupation of Justice* (n 27), 'In almost every point where the court had to interpret international law, to establish the boundaries of authority, to declare the legality of a policy, [it] has chosen the path which strengthened the powers of the military commander, broadened the borders of his authority and legitimized his decisions. [It] dismissed legally well-established petitions in the cost of breaking basic tenants of legal interpretation and it even sacrificed the consistency of its own decisions when it had to' (M Sfar, 'Book Review. The Human Rights Lawyer's Existential Dilemma' (2005) 38 Israel L Rev 160-161).

³³ See *Military Prosecutor v Abu Janem, Gaza* 1238/69 'Selected Judgments of the Military Courts' (vol 1, 1969) 130 para 140.

³⁴ Art 2(a) of the Emergency Regulations (legal assistance) states that 'Israeli courts have jurisdiction to try according to Israeli law any person who is present in Israel and who committed an act in the Region, and any Israeli who committed an act in the PA, if

the HCJ jurisprudence³⁵ – has installed a structure of legal and jurisdictional discrimination, based on nationality, under which military courts enforce military law against Palestinians, while Israeli civilian courts apply domestic law to Israelis and settlers irrespective of whether the offences were committed in the occupied Palestinian territory.

If an Israeli citizen commits an offense in the West Bank, in fact, it is the Israeli criminal legal system that is applicable. The accused will be tried according to the Israeli criminal code and rule of procedure, and will be entitled to the right of due process granted by Israeli constitutional Law. As synthesized by Justice Barak's metaphor, while being in the Occupied Palestinian Territories, Israeli citizens carry in their 'backpack' Israeli criminal law.³⁶ Hence, it can be argued that settlers act not only as 'vectors' of territorial control, but also of jurisdictional annexation, by projecting the domestic law of the occupying power into foreign territory it occupies, despite its absence of sovereignty.

This dualism is accompanied by a significant difference in the position of the accused within the two systems. The difference is exemplified by the maximum period of detention before being brought to a judge (24 hours in Israeli domestic law, compared with 8 days under military orders), the maximum period of detention without access to a lawyer (48 hours under Israeli domestic law compared with 90 days under military orders), and the maximum period of detention without charge (30 days under Israeli domestic law compared with potentially unlimited imprisonment under renewable administrative detention orders).³⁷

Another significant example of this dualism is the differential treatment of minors. Under Israeli criminal law, a 'minor' is a person who has not yet turned 18. By contrast, until 2011, under military legislation minors had been divided into three age groups: 'child', under the age of 12; 'juvenile', between ages 12 and 14; 'young adult', between ages 14 and

those acts would have constituted an offence had they occurred in the territory under the jurisdiction of Israeli courts'. Section 2(c) states 'this Regulation does not apply on residents of the Region or the PA, who are not Israelis.'

³⁵ *Inter alia* see *Tsoba v State of Israel* HCJ 831/80 PD 36 (2) 169, 174.

³⁶ S Weill, 'Reframing the Legality of the Israeli Military Courts in the West Bank: Military Occupation or Apartheid?' in A Baker, A Matar (eds), *Threat: Palestinian Political Prisoners in Israel* (Pluto Press 2011) 136.

³⁷ I Misk, 'The Current Situation and Conditions of Imprisonment of Palestinians in Israeli Prisons and Detention Facilities' Paper presented at the UN International Meeting on the Question of Palestine (Vienna, 7 and 8 March 2011) table 2, at 4.



16. In other words, military legislations defined a Palestinian over the age of 16 as an adult. The 2011 amendment to the SPO changed the definition of 'minor', which now includes those who have not yet reached 18 years of age, but solely for the purpose of adjudication proceedings. For the purpose of all other proceedings – arrest, detention and interrogation – the age of majority is still 16. Military Order 132 also allows 12 year old children to be tried in military courts.³⁸

Further, the significant difference between the two systems in the formal position of the accused is compounded by the differences in the policies and practices of the enforcement of the law. This is the case, for example, of settlers' offenses against Palestinians, which very rarely lead to indictment and even more rarely to conviction.

Organisations analysing this issue report that 85.3% of investigation files are closed due the failure by police investigators to locate suspects or to collect sufficient evidence to support indictments; just 7.4% of investigations yielded indictments against suspects and just in one-third of these legal proceedings ended in the full or partial conviction of the defendants. In sum, the likelihood that a complaint submitted to the Israel Police by a Palestinian will lead to conviction of the suspect is just 1.8%.³⁹

In contrast, of those who are charged in the military courts' system, approximately 90 to 95% are convicted,⁴⁰ with some yearly records arriving at 99.74%.⁴¹

This dualistic legal system, in addition, openly contravenes the partitions resulting from the 'Oslo Two' agreements. Under the Interim Agreement concluded by Israel and the PLO in 1995, in fact, offences committed by Palestinians in Area A and B should have been excluded

³⁸ The Association for Civil Rights in Israel, 'One Rule, Two Legal Systems: Israel's Regime of Laws in the West Bank' (October 2014) 67 <www.acri.org.il/en/2014/11/24/twosysreport/>.

³⁹ See Y Din, 'Mock Enforcement: Law enforcement on Israeli civilians in the West Bank' (May 2015) <www.yesh-din.org/en/mock-enforcement-law-enforcement-on-israeli-civilians-in-the-west-bank/>.

⁴⁰ Hajjar (n 12) 3.

⁴¹ C Levinson, 'Nearly 100% of All Military Court Cases in West Bank End in Conviction, Haaretz Learns', *Haaretz* (29 November 2011) <www.haaretz.com/nearly-100-of-all-military-court-cases-in-west-bank-end-in-conviction-haaretz-learns-1.398369>.

from the jurisdiction of the military courts.⁴² The interim agreement required the transfer of responsibility to the Palestinian Authority to be ratified by the military commander through Proclamation No 7.⁴³ Under the terms of this Proclamation, however, it did not amend the definition of the term 'Region' (as the Agreement would have required), therefore, under domestic military law, 'Region' continues to mean the entire West Bank.⁴⁴ This has allowed the military courts to preserve jurisdiction over all acts which the military authorities consider harmful or intended to harm the security of the West Bank, included those committed in areas A and B, formally under Palestinian exclusive or concurrent jurisdiction.

5. *The substantive law of the military courts in the wider 'carceralization' of the West Bank*

According to UN sources published in 2008,⁴⁵ it is estimated that approximately 760,000 Palestinian men, women and children have been imprisoned by the Israeli military from 1967. For Palestinians NGOs,⁴⁶ the number is estimated to be more than 800,000, almost half of the total current population of the West Bank. These numbers indicate a policy of mass incarceration, and this raises the question of the connection between this policy and the substantive law enforced by the military courts.

Ratione materiae, the courts' jurisdiction encompasses any offence defined by enactments of the military commander, constituting the 'security legislation', and any offence under Jordanian law (applied residu-

⁴² Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip (28 September 1995) Annex IV Article I (1997) 36 Intl L Materials 557.

⁴³ Military Proclamation No 7 Concerning the Application of the Interim Agreement (West Bank) (1995), published in CPOA, No 164, 1923.

⁴⁴ See S Weill, 'The Judicial Arm of the Occupation: The Israeli Military Courts in the Occupied Territories' (2007) 89 Intl Rev Red Cross 403.

⁴⁵ See UN HRC 'Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, John Dugard' (21 January 2008) UN Doc A/HRC/7/17 at 19, para 45.

⁴⁶ See 'Over 800,000 Palestinians Imprisoned by Israel Since 1967, Says Erekat' *Haaretz* (April 2017) <www.haaretz.com/israel-news/.premium-1.586114>; see also Addameer-Prisoner Support and Human Rights Association, 'Palestinian Political Prisoners in Israeli Prisons' (General Briefing 2014) <www.addameer.org/advocacy/briefings_papers>.



ally to ordinary crimes). The security legislation establishes two categories of offences: those jeopardizing military interests or the safety of the territory, commonly identified as 'security offenses', and those against public order. These offenses effectively regulate every aspect of Palestinian life, targeting anything deemed to threaten Israeli security, through the prohibition of a wide spectrum of activities, extending from forms of political expression, association, protest and movement (in the security legislation), to violations of licensing provisions and traffic regulations (in the offences against public order).

In terms of respect of the general principles of criminal law in liberal-democratic legal systems, this legislation raises very serious concerns. Firstly, the substantive offences are characterized by very broad definitions, in violation of the principles of definiteness of the statutes and of precision of the types of offence, thus allowing extremely ample margins of judicial discretion. This indeterminacy, in addition, appears particularly worrisome when considered in relation to offences sanctioning mere expressions, far beyond the fundamental harm principle that should always govern and limit choices of criminalization.⁴⁷ For example, Article 215 of the SPO (consolidated version of 2009)⁴⁸ states

'A person who insults a soldier or *does any other act offending his honor* [emphasis added] or harming his position as a soldier shall be sentenced to one year imprisonment.'

The offence is further extended by Article 219 which criminalizes an individual who '*behaves in an insulting manner* [emphasis added] toward one of the IDF authorities in the Area or toward one of its symbols.' Much longer sentences are imposed, instead, on those who – conversely – support or 'express sympathy' to 'hostile' or 'unlawful' organizations. For example, Article 251 states

'A person who: (1) Attempts, orally or otherwise, to influence public opinion in the Area in a manner which may harm public peace or public order, or (2) Carries out any action or holds in his possession any object with the intention of executing or *facilitating the execution of an attempt* [emphasis added] *to influence public opinion* in the Area in a manner

⁴⁷ A Ashworth, J Horder, *Principles of Criminal Law* (7th edn, OUP 2013) 27 ff.

⁴⁸ For all the articles cited in this section see above (n 14).

which may harm public peace or public order, or (3) Publishes words of *praise, sympathy or support* for a hostile organization, its actions or objectives, or (4) Carries out an action expressing identification with a hostile organization, with its actions or its objectives or sympathy for them, by flying a flag, displaying a symbol or slogan or playing an anthem or voicing a slogan, or any similar explicit action clearly expressing such identification or sympathy, and all in a public place or in a manner that persons in a public place are able to see or hear such expression of identification or sympathy – shall be sentenced to *ten years imprisonment* [emphases added].’

In sum, waving a flag, singing, pronouncing a slogan publicly, or ‘*facilitating the execution of an attempt to influence public opinion*’ (all-encompassing formulation that renders impossible to determine what it does include) that could disturb public order, are all conduct deserving 10 years of imprisonment, if the flag, the song, the slogan can be ‘associated’ with or express ‘sympathy’ for an ‘unlawful association’. The list of unlawful associations contained in Regulation 84 of the Defence (Emergency) Regulations of 1945, contains not only dozens of students organizations, charities and NGOs, but continues to include the PLO, never erased from the list by Israel. Most members of the Palestinian Authority, therefore, are technically criminal members of an unlawful association, and all the public expressions of support for them could fall within the scope of application of this provision.

Secondly, upon conviction, the imposition of sentences is not guided by principles of coherence and proportionality. The procedure of sentencing is marked by an irrational severity and disproportionality in which neither a clear hierarchy nor a conception of aggravation are evident. For example, Article 212 of the SPO (consolidate version of 2009), states

‘a person who throws an object, including a stone 1) in a manner that [...] *may harm* traffic in a transportation lane [or] (2) At a [...] *property*, with the intent to harm the [...] property, shall be sentenced to *ten years imprisonment* [emphases added];’

Furthermore, if the object is thrown ‘at a moving vehicle with the intent to harm it, [the person] shall be sentenced to *twenty years imprisonment* [emphases added].’



Thirdly, and most importantly, the extension of criminal liability beyond the actual perpetrators to include potential accessories is formulated without defining an *actus reus*, nor a *mens rea* in relation to the conduct of the principal offender(s). A member of a group, in fact, can be punished on the sole basis of the membership, if other members – eventually without his knowledge or possibility to foresee their conduct – have committed certain offences. In this way, as a matter of fact, this legislation overcomes the fundamental principle of personality of the criminal liability, sanctioning individuals for mere proximity to other offenders.

The problem becomes even more concerning when considering that these forms of liability (without conduct and mental element) can give rise to life imprisonment. Article 231, in fact, states that

‘A member of a group in which one or more of its members, commit or committed, while members of the group, an offense under Section 230 [Carrying, holding and manufacturing weapons] shall be sentenced to *life imprisonment* [emphasis added].’

Alongside these extremes, the SPO prohibits various forms of solidarity and contact between Palestinians, all the times when ‘there is reasonable basis to suspect that [the other person] committed an offense or was engaged in any action aimed at harming public order’.⁴⁹ The SPO even criminalizes those who do not immediately denounce when there are ‘reasonable grounds to suspect that another person is committing or planning to commit an offense’ under the SPO.⁵⁰

The combined effect of the norms described generates a pervasive authoritarian interference in private and social life of the population. For example, a Palestinian will be liable every time he does not ‘immediately denounce’ a person when he has ‘reasonable basis to suspect’ that this person is going to ‘facilitate an attempt to influence public opinion in a manner that can harm public order’. In other words, the SPO engages in an overt over-criminalization of the occupied population in which the legal norms, rather than clearly demarcating criminal and non-criminal behaviour, render every single Palestinian potentially, and unwittingly, subject to a criminal penalty.

⁴⁹ See SPO, art 245.

⁵⁰ See SPO, art 261.

In sum, the whole substantive law enforced by the Military Courts reproduces an utterly authoritarian model of justice, which is not only at variance with the principles of international law, but also with the fundamental penal safeguards descending from the general principles of criminal law in every liberal legal order governed by the Rule of Law.

This substantive law should not be considered and assessed in isolation, since it is just one component of the wider and more complex Israeli policy and practice of military control over the West Bank. The SPO, in its Article 242, also subjects persons ‘entering restricted areas’ (identified as areas held by the IDF or serving a security purpose or used for essential services) or ‘wandering in the proximity of the area without being empowered to do so’ to ten years imprisonment. When analysing this kind of offences, it must be taken into account that Palestinians’ freedom of movement within the occupied Palestinian territory is ‘significantly restricted by a complex and multi-layered system of administrative, bureaucratic and physical constraints, including permit requirements, checkpoints, and physical obstacles impacting almost every aspect of daily life’.⁵¹

Military law, in fact, creates for Palestinian a draconian set of prohibitions to enter Israel, exit the West Bank, move from or to, or even simply reside in certain areas (such as the ones located between the Green Line and the separation wall)⁵² without a permit issued by the military. Thousands of Palestinians are convicted for violating the permit regime each year.

It is precisely the combined effect of offences related to illegal access or transit, policies of territorial erosion and fragmentation, together with the omnipresent and severe restrictions upon Palestinians’ freedom of movement, which indicates the actual impact of the military system as a whole on Palestinians’ lives. Maps and data recently made available by the UN Office for the Coordination of Humanitarian Affairs⁵³ offer an

⁵¹ UNHRC, ‘Human rights situation in the Occupied Palestinian Territory, including East Jerusalem, Report of the Secretary General’ (16 March 2017) UN doc A/HRC/34/38 at 14, para 61.

⁵² See Hamoked, ‘The Permit Regime Human Rights Violations in West Bank Areas Known as the ‘Seam Zone’ (March 2013) <www.hamoked.org/files/2013/1157660_eng.pdf>.

⁵³ UNOCHA, ‘West Bank Access Restrictions’ (January 2017) <www.ochaopt.org/content/west-bank-access-restrictions-january-2017>.



elucidative summary of this stifling control, articulated in an intricate net of 96 internal and border checkpoints, 72 road blocks, 124 road gates, 60 km of barriers, 24 km trenches, military bases and settlements actually resulting in Israeli military control over 42% of the entire territory.

Overall, the Israeli military rule over the West Bank, alongside mass incarceration, is deploying and multiplying on large scale devices to control space and movements typical of penitentiary regimes. An entire region, in other words, is being subjected to a progressive and historically unique process of permanent territorial 'carceralization',⁵⁴ in which more and more the dividing lines between ethnicity and enmity, offence and collective punishment, movement and displacement, surveillance and custody, security and segregation, are fading away.

6. *Conclusion: Courts of exception for endless occupation*

It appears that, from the outset, the military courts' system has been intended as a judicial arm of an autopoietic system, in which the *Grundnorm* was the military conquest, and the fundamental legislator was the military that determined its own authority on a *de facto* basis.⁵⁵ Whilst this has arguably always been the case of temporally limited military occupations, the international law of occupation was intended to intervene to avoid anomalies – both in terms of discipline, space and time – and limit arbitrariness of the powers deriving from such situations.

Occupation, as *a rule without sovereignty*, is both empowered and limited by international law as an exceptional regime for exceptional circumstances. Contemporary international law conceives sovereignty as conferred to the people, which substantiates their inherent right to self-determination.⁵⁶ Occupation, as a factual phenomenon, challenges and places a temporary obstacle on this nexus, by removing the connection

⁵⁴ In this regard, the situation described physically materializes the theoretical image of 'carceral archipelago' coined by Foucault (See M Foucault, *Discipline and Punish* (A Sheridan tr, Vintage Books 1995) 297).

⁵⁵ See Proclamation No 2 Regarding Regulation of Administration and Law (7 June 1967) Compilation of Proclamations, Orders and Appointments of the IDF Command in the West Bank Area No 1, 11 August 1967, available at <<http://nolegalfrontiers.org/military-orders/mil039ed2.html?lang=en>>.

⁵⁶ See Cassese (n 12) *passim*.

between sovereignty and territorial control (as opposed to formal entitlement thereto). It is, however, not merely a factual phenomenon, but also a normative state of affairs, since it exists and can be recognized, and organized, only through the suspension of basic principles of the rule of law. If this suspension becomes permanent, the exception becomes the rule, and its normative legitimation based on occupation law is arguably dissolved.⁵⁷

Occupation, thus, appears to be the legal regime of exception *par excellence*. It is the only one in which a foreign power can subjugate another population that has not granted it any legitimacy and authority, nor conferred to it any power to decide over extraordinary and emergency situations.⁵⁸ This being the case, occupation reproduces the contradictions of pre-modern foreign conquests, colonisations, and absolutism, whilst simultaneously exceeding it in the absence of any form of popular legitimation.

International humanitarian law attempts to contain and humanize this exception *par excellence* through a ‘search to bring *de facto* power within the compass of the law to think of it in terms of ‘authority’ instead of simple usurpation’.⁵⁹

This tension between the logic of power and conquest, on the one hand, and the language of law and authority, on the other, delineates the field of antagonist paradigms in which the law of occupation attempts to strike its balance, which can only operate insofar this law maintains a temporary ‘compromise’ between the two opposite instances.

If this tension is neutralized through the permanent conflation of the two polarities, however, there is no balance at all to strike, because is the ‘power and conquest’ binomial – which in the West Bank works as source and purpose of military legislation and jurisdiction – that dictates the ra-

⁵⁷ See O Ben-Naftali, AM Gross, K Michaeli, ‘Illegal Occupation: Framing the Occupied Palestinian Territory (2005) 23 *Berkeley J Intl L* 554; E Benvenisti, ‘The Security Council and the Law of Occupation: Resolution 1483 on Iraq in Historical Perspective’ (2003) 1 *Israel Defense Forces L Rev* 19.

⁵⁸ Occupation, therefore, would deserve an apposite treatise in the field of reflections developed with respect to art 48 of the Weimar Constitution and to the Schmittian conception of sovereignty. See G Agamben, *State of Exception* (Kevin Attel tr, U Chicago Press 2005) and Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (George Schwab tr, U Chicago Press 2005).

⁵⁹ Koskenniemi (n 28) 38.



tionales of the 'law and authority' logic. In this way, the Israeli authorities' continued effort of 'characterizing occupation in managerial terms as regular "government"' has progressively wiped out the sense of its exceptionality,⁶⁰ and temporariness.

In this context, the humanitarian idea of a 'benevolent occupant', careful to exercise its powers only in the measure strictly necessary to temporarily assure its security and the public order of the area,⁶¹ and to administer those powers in the interest of the local population,⁶² demonstrate a certain measure of impossibility and ingenuity.

Every legal apparatus, in fact, is designed and intended to serve a political project. Since the political project put forward by the Israel military-legal system is one of unlawfully prolonged occupation,⁶³ toward permanent territorial control, the courts' central role will remain that to serve as agency of dispossession of both basic human rights and territory of the Palestinian population, advancing Israel's 'creeping' annexation.⁶⁴

In this process, however, the rights of Palestinians are not the only juridical good at stake. The Israeli occupation, in fact, erodes the general normativity of the *jus ad bellum* principles underpinning the proper function of the law of occupation; namely, the prohibition of acquisition of territory through the use or threat of force against the territorial integrity of states. Failure to ensure the diligent application of this principle to the current set of facts undermines the credibility of international community and institution, and forecloses the activation of third state responsibilities of non-recognition of the unlawful territorial situation maintained by such illegal use of force.⁶⁵

In sum, the Israeli military justice system of occupation challenges separation and autonomy of *jus in bello* and *jus ad bellum* considerations,

⁶⁰ *ibid.*

⁶¹ See Hague Regulations, art 43.

⁶² See Hague Regulations, art 55.

⁶³ See V Azarova, 'Israel's unlawfully prolonged occupation: consequences under an integrated legal framework' European Council on Foreign Relations, Policy Brief (2 June 2017) <www.ecfr.eu/publications/summary/israels_unlawfully_prolonged_occupation_7294>.

⁶⁴ See OM Dajani, 'Israel's Creeping Annexation' (2017) 111 AJIL 51-56.

⁶⁵ See E Milano, *Unlawful Territorial Situations in International Law. Reconciling Effectiveness, Legality and Legitimacy* (Martinus Nijhoff 2005) 113 ff.; see also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) Separate Opinion of Judge Higgins [2004] ICJ Rep para 159.

realizing a regime in which the rejection of the applicability of the former emanates from, complements, and reinforces the persisting violation of the latter.

In this domain, hence, it is legitimate to doubt the effectiveness of legal analyses seeking to enhance the compliance of the military justice system to specific humanitarian obligations, without illuminating paths toward the end of the occupation and the abolition of the system itself, as judicial arm of a protracted *jus ad bellum* violation. A violation, moreover, legitimized precisely by conveying a semblance of law enforcement which at the same time obstructs victims' access to justice.⁶⁶

Following Moyn's reflection on civil libertarianism and endless war, the danger of merely humanitarian approaches is the implicit, and perhaps involuntary, demand for a 'cleaner and endless' occupation.⁶⁷ But endless occupation – as this analysis of the military justice system indicates – cannot be legally 'cleaned up', in order to justify and normalize the endless injustices it produces.

After five decades of Israeli occupation, therefore, the West Bank has become the exemplary terrain on which to evaluate the potential for international legal scholarship and institutions to realise the normative potential for dignity, justice and peace of international law, or if, on the contrary, they will render international law synonymous with the law of force, in which right is might, and the capacity for aggressive war – far from being restrained by law – is what shapes law itself.

⁶⁶ See B'Tselem, 'The Occupation's Fig Leaf: Israel's Military Law Enforcement System as a Whitewash Mechanism' (May 2016) <www.btselem.org/publications/summaries/201605_occupations_fig_leaf>.

⁶⁷ See S Moyn, 'Toward a History of Clean and Endless War' Just Security (9 October 2015) <www.justsecurity.org/26697/sanitizing-war-endlessness/>.

