Legal Dualism

The Absorption of the Occupied Territories into Israel

Eyal Benvenisti

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The West Bank Data Base Project

The West Bank Data Base Project is an independent research group established in 1982 to study and analyze demographic, social, spatial, legal, economic, and political conditions in the West Bank and Gaza. The project, which is directed by Dr. Meron Benvenisti, is funded by the Rockefeller and Ford foundations and administered by the Brookings Institution, Washington, D.C. A continuously updated, computerized data base and its own research are the basis for the Project's publications, including maps showing present and projected developments in the region.

About the Author

Eyal Benvenisti is a graduate of the Hebrew University and received his doctorate from the Yale Law School. Dr.

Benvenisti teaches at the Hebrew University, Jerusalem.

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by
Eyal Benvenisti

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E.B.
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Preface

This paper examines the various methods by which Israeli law is being applied to the occupied territories and their inhabitants. Whether through extensive lawmaking by the military authorities, through extraterritorial prescription of Israeli laws, or through caselaw of the Israeli courts, large segments of the law of the territories have become Israeli law. This is an outcome of a lengthy step-by-step process. Nothing was effected overnight. All the moves that were taken were claimed to be in accordance with the framework of the belligerent occupation under international law, more specifically, with the 1907 Hague Regulations Respecting the Laws and Customs of War on Land.[1] Although Israel has never formally recognized that its status in the territories is that of a belligerent occupant, it still justifies its acts there by resorting to the framework prescribed by international law.

If the test for annexation is the application of the whole body of laws to another territory, coupled with an indication of the intention to permanently retain it, then the legal absorption of the territories does not amount to annexation. Not *all* the Israeli laws have been applied there, and the military government is still formally responsible for the territories.[2] The status of that government is still a temporary one, as it was more than twenty years ago.[3] In the wake of the Palestinian uprising, and King Hussein‘s renunciation of Jordanian claims to the West Bank, voices in the political community in Israel have been urging the annexation of Judea and Samaria (the biblical names for the West Bank and Gaza). But no such decision has been taken. One conclusion from my survey is that Israel does not need it. As this paper will show, the pre-June 1967 borders have faded for almost all legal purposes that reflect Israeli interests. However, with regard to

the interests of the local population, especially those concerning civil rights, those borders still exist. The veil of military government provides a convenient legal tool to explain the unequal treatment of communities.

In this paper I report on the legal situation of the territories from the point of view of the positive law that is in effect there. I will not deal with aspects of international law. My aim is to establish a factual account of the Israeli experience of occupation. With regard to the nature of international law of belligerent occupation, the president of the Israeli Supreme Court, Justice Meir Shamgar, once commented:

> “Within the dualistic framework of the legal data and the political data – two separate elements which are too often tangential and even overlap – there is conspicuous interaction which directly influences the fashioning and interpretation of rules of international law. It fosters subjective outlooks and at times contributes to the still existing lack of unanimity and clarity which is one of the characteristics of some of the rules we are dealing with. In relation to the factual data, actual and apparent, persuasive answers are most difficult to arrive at because international society lacks *impartial* fact-finding procedures; in relation to the legal problems, there is far too often little prospect of reaching an authoritative interpretation of the international legal status or of the relative legal rights and duties of the parties concerned.”[4]

The Israeli law prescription with regard to the territories is documented; therefore material disputes about facts are unlikely in this context. It is hoped that this paper will serve as a basis for a discussion concerning the legality of the situation under international law.

The first topic concerns the territorial law of the Jewish settlements in the territories. The reason I chose to begin with this issue is that the lands allocated to those settlements are excluded for almost all legal purposes from the rest of the territories under military rule. The second chapter deals with the personal law of the Israelis in the territories (inside and outside of the jurisdiction of the settlements), and examines how the Arab residents are affected by it. The third chapter examines the Israeli laws that apply to the Arab population and assesses the contribution of the Israeli High Court of Justice in this area. But before we begin, a short introduction to the lawmaking process of the military government is required.

1. Introduction to Security Enactments: Lawmaking by the Military Government

The legal system of the territories is composed of two tiers.

The first one comprises military legislation, called "security enactments." It subordinates the second tier, which includes the laws that were in force in the region before the beginning of the occupation. The Order Concerning Interpretation[5] provides that ' 'security enactments supersede any law [i.e., any law effective in the region in the eve of the occupation][6] even if the former does not explicitly nullify the latter.' '[7]

It further determines the internal hierarchy of the security enactments. This hierarchy is not determined according to its type (order, regulation, announcement, licence, etc.), but according to the rank of its maker: the commander of the Israel Defence Forces in the region is empowered to enact primary legislation; other army commanders, and since 1981 the head of the Civil Administration,[8] issue secondary enactments.

The Israeli *Manual for the Military Advocate in Military Government* instructs the authorities on how to make laws.[9]

There are issues of form, according to which every enactment should be translated in to Arabic, carry a consecutive number, and be published in an official series available to everyone, etc. There are also issues of substance, which determine, *inter alia,* that the enactments must not be inconsistent with international law (with "special attention

being paid to the norms of the Hague Regulations and the Fourth Geneva Convention"),[10] and that they should not be retrospective.

In the basic statement that established the military government, the Promulgation Concerning Law and Administration (the West Bank Region) (No.2), 5727–1967, the military commander announced that the publication of enactments can be made "in any manner I may deem fit."[11]

The practice, however, has been more or less in line with the manual's instructions. The various instruments are first circulated as stenciled copies to those who appear on the mailing list of the authorities (anyone may ask to be placed on the list). At a later stage the instruments are published in pamphlets[12] which can be obtained through the publisher in Tel Aviv or in some bookstores.[13] Unfortunately, not all the enactments are published in this way. Some very important enactments, including those concerning the Jewish settlements, which will be described below, and the maps that formed an integral part of certain orders, did not appear in these publications. Moreover, despite the manual's guidelines, only the orders of the military commander of the area carry consecutive numbers which make it possible to keep track of them. With regard to other enactments, one cannot be sure that one is keeping abreast of the legal changes they prescribe.

The military authorities do not, as a rule, act without legal authorization. Most of the time they get the authorization prior to taking action. They tend to use the local law, and if it is not suitable, they amend it or enact a new law. The military lawmaker has, accordingly, been very prolific. By October 1988, 1,256 orders had been promulgated in the West Bank (including amendments to existing orders). To this number one must add the innumerable, and unnumbered, regulations, announcements, licences, and other enactments, many of them signed by the area commander and having the same force as the orders themselves.

2.
The Prescription of Israeli Laws to the Jewish Settlements

There are several methods whereby the Israeli legal system is applied to the settlements in the West Bank and Gaza and to their inhabitants. Their cumulative effect is to equalize the status of Jews in the territories with that of other Israelis, without changing the legal status of the territories or that of the indigenous Arab population, and without shattering the myth of a military government that complies with international law. This situation was required in order to facilitate the Jewish urban settlement in the West Bank in the late Seventies and early Eighties. The promise of massive population of the area has been conditional on attracting Israelis who were motivated mainly by economic and not ideological reasons. It was not enough to open the pre-1967 borders for free movement of Israelis in the territories. This new type of settler would not have agreed to make the move if his legal status had been changed. At the same time, the ideological settlers, headed by Gush Emunim, a highly influential group within the Israeli body politic, insisted on identical legal standing for political and ideological reasons. The Israeli government also had strong interests in applying Israeli law to the settlements. Its policy has been one of encouraging settlements, and at the same time it has wanted to continue to exercise control over the settlers as over all other Israelis.

The same outcome could have been achieved by a general statute of the Knesset applying extraterritorially all the Israeli laws to the settlements and their residents. For obvious reasons, other – much more complicated – methods were

preferred by the Israeli government. These sometimes almost evasive techniques will be explored below.

2.1. Introduction of Israeli Laws Through the Security Enactments:The Municipal System as a Framework for the Incorporation of Israeli Laws

This part deals with the prescription of Israeli laws through the legislation of the military authorities in the territories. The major tool that was used in this respect took advantage of the basic communal arrangement of Israeli life in the territories – the municipal units of the settlements.

The enactments of the military authorities created a special status for the lands they had obtained. Unique rules regulate their administration and the means of conferring rights in them. A special municipal system regulates the activities of those present on these lands. In those areas, which consist of 39% of the West Bank area, and 15% of the Gaza area, where only Israelis live,[14] an Israeli legal order has been established. These areas have become subject to Israeli law, adjudication and administration.[15]

Several methods have been used to obtain these large portions of land. It is not within the scope of this survey to analyze these methods. They could have been declared absentee property or state land, or requisitioned for military or for public purposes, or declared "closed military zones" by the army. Some of the land might have been privately purchased from the owners. But the end result is the same. The lands, and those living on them, are subject to the same unique legal system as the settlements, a system that imports Israeli law and excludes any influence of the otherwise applicable local laws.

As the settlements became more populated, and especially as urban settlements drew in less homogeneous communities,

the necessity to regulate communal life through a municipal system became more and more apparent. This municipal system, itself a replica of the Israeli municipal system, served as a framework for that purpose. In later stages, however, it has become the framework for the introduction of many Israeli laws, and has thus facilitated the establishment of a ""state within a state."

Jordanian law provides a satisfactory system of municipal order for both towns and villages. This system, however, has not satisfied the interests of the Jewish settlers. They viewed themselves as Israelis, they were familiar with the Israeli systems, and they expected these to be enacted in their settlements. The first move in this respect was the promulgation of the Order Concerning the Administration of Kiryat Arba.[16] The second large urban settlement that has been populated since the late Seventies, Ma'ale Adumim, was also dealt with through a special order.[17] After more urban settlements had been established, and while others were being planned, the military commander issued a general order providing for municipal systems in the Jewish urban settlements.[18] With the prior promulgation of a similar order concerning the agricultural settlements,[19] all the Jewish settlements could now follow the Israeli system of municipal order.[20]

Both the Local Councils Order and the Regional Councils Order provide only the framework for further legislation. They define the jurisdictional boundaries the municipalities (through maps that are attached to the orders), and declare that the IDF commander in the region is empowered to establish municipal legal systems in the defined territories.[21] The jurisdictional boundaries of the local councils reflect the actual and planned boundaries of the urban settlements, all within the lands secured by the authorities. The jurisdictional boundaries of the regional councils comprise either contiguous or non-contiguous areas. The contiguous boundaries of the councils in the Jordan Valley and the Dead Sea include all the territory *except* Arab-owned areas. The non-contiguous boundaries, in the case of the rest of the regional councils, include only the

lands secured by the authorities. In sharp contrast to the regular notion of municipal boundaries, these boundaries have significant legal and political meaning. The two orders declare:

(a) The commander of the Israel Defence Forces in the region may prescribe in bylaws rules for the administration of the local [and regional] councils, and to specify in it orders concerning powers and administrative procedures and orders concerning the disposition of the affairs of the residents of the councils.
(b) For the purpose of the proper administration of the local [and regional] councils and for the purpose of disposing of their residents' affairs, the commander of the region may establish a "court for domestic affairs"; that court's jurisdiction, the law according to which it shall adjudicate, its composition, as well as any other provision necessary for the proper function of the court shall be determined in the bylaws.' '[22]

The orders were signed by the commander of the region of Judea and Samaria (the Regional Councils Order on March 20, 1979, and the Local Councils Order on March 1, 1981). The bylaws under both orders were signed by the same person on the same dates. As mentioned above,[23] every enactment of the area commander has the same legislative effect. The orders did not give that commander new powers that he did not have before; but, on the other hand, they did not limit his powers.[24] What, then, was the reason for this two-step legislation?

Both orders provide for the publication of the bylaws according to the discretion of the commander of the region.[25] In both bylaws the commander ordered them to be published by their announcement on the bulletin board of each council's office.[26] Thus the commander is relieved of the otherwise applicable practice of translating the bylaws into Arabic, circulating them to those on the mailing list and subsequently publishing them in the compilation of enactments. Those who do not have access to the councils' offices, like Palestinians or others who live far away, will not be able to obtain them.

Intentionally or not, the two-step legislation (which is really, as we shall see below, three-step legislation) makes it difficult to keep track of the evolving changes in the legal status of the settlements and the settlers. Indeed, this legislative method has prevented many from grasping all the implications of this arrangement.[27]

The regime enacted by the bylaws is similar to the Israeli municipal system. This outcome is achieved in two ways. Firstly, the bylaws are fashioned according to the existing Israeli laws with regard to municipalities and regional councils. The process of election to the local institutions is similar to the Israeli one,[28] and the local authorities have all the powers granted under Israeli legislation to such entities. Secondly, many provisions in the bylaws explicitly incorporate Israeli legislation, sub-legislation and other acts. This incorporation does not ""freeze" the Israeli law to the date of the bylaws; rather, it provides that any changes in those laws will automatically take effect within the local municipalities. Thus, for example, the rules that regulate the process of accepting personnel to the Israeli local administration are incorporated as a living body of rules in the bylaws.[29] So are the rights of the local and regional councils to allow their taxpayers to pay the annual municipal tax in instalments,[30] to collect interest on outstanding debts,[31] to exempt from taxation,[32] and to determine the fines for violations of local regulations.[33]

The bylaws compare the status of those municipalities to those of Israeli municipalities, but go beyond Israeli laws in the municipal framework. They also give the councils powers that their Israeli equals derive from the Israeli Licensing of Businesses Law, 5725–1965.[34] This law empowers the municipalities to regulate almost all of the commercial activity within their jurisdiction. It also gives the municipality power to prosecute and punish violators of the law. The penalty for conducting business without a licence can be imprisonment for up to six months,[35] and for disregarding an administrative or judicial closure order it can amount to two years in jail.[36]

In fact the councils in the territories exercise even more power than Israeli ones. Chapter 10(a) of both bylaws, added to them on March 15, 1983, allows the local authorities, *inter alia,* to enter or break into premises and seize property for outstanding debts stemming from non-payment of taxes or water or sewage bills, all without resort to courts. These most severe powers are copied from an Israeli law that deals with certain taxes owed to the government, and whose provisions do not apply to municipal taxes.[37] Other provisions in the bylaws empower the local authorities to restrict or prohibit the sale of pork, and to seize and confiscate this kind of meat.[38] In Israel the Supreme Court has denied such a power to municipal authorities,[39] and the prohibition had to be introduced through legislation.

The last example, the provision relating to pork, gives us an opportunity to assess the flexibility of this legal system. In paragraph 2 of the Local and Regional Orders cited above[40] the powers of the military commander include the vague power to specify in the bylaws ″orders concerning the disposition of the affairs of the residents of the councils." The regulation of pork sales does not fit easily even into this very broad proposition. But no question of *ultra vires* can arise: the bylaws are not subordinate legislation.They are issued by the same authority, the highest in the system of security enactments. This example demonstrates that the framework of the municipal and regional councils is a potent tool to transplant Israeli law in large areas of the West Bank without political complications. The preferred status of the security legislation[41] ensures the neutralization of the local and regional legal systems from other laws applicable in the territories.

Even the regulations issued by the councils are elevated, for the purposes of paragraph 8 of the Order concerning Interpretation,[42] to the level of a security enactment of the military commander of the region.[43]

In an amendment to both bylaws of May 22, 1983, yet another method of incorporation, even more drastic, was introduced. This time it was through the jurisdictional

provisions of the court for domestic affairs. The amendment extended the court‘s jurisdiction and provided for the application of a large number of Israeli laws. Moreover, the commander of the IDF in the region delegated powers to certain Israeli authorities to act directly in the settlements. To assess this issue we turn to the local court system of these councils, the courts of domestic affairs.

2.1.1 The Court for Domestic Affairs

The court system comprises courts of first instance, and a court of appeal (paragraph 125). Until now, the commander has established in the West Bank two courts of first instance:[45] one in Kiryat Arba (with jurisdiction over four local councils[46] and three regional councils[47]), and the other in Ariel (with jurisdiction over five local[48] and three regional councils[49]). The domestic court of appeals was established by nominating acting judges from the Jerusalem District Court to serve as its judges; and the president of that court has been nominated the president of the domestic court of appeals.[50] The judges to both instances are appointed by the commander (after consulting the ″competent authority," a person appointed by the commander mainly for that purpose).[51]

The judges who qualify for the job are the *acting* judges of the Israeli courts: judges of the Israeli magistrates‘ courts can be appointed to the first instance; judges of the Israeli district courts, to the court of appeals.[52] Formally, they are to enjoy independence of the military administration.[53] They are not dependent on the latter financially, since as acting judges in Israel, they are compensated by the Israeli authorities. The commander has no power to elevate any of the judges from a domestic court to the appeals court. Thus, although they could be removed from office by the commander, they do enjoy independence from the authorities.

This strange appointments system was the only one open to the military authorities who wanted to assimilate as much as possible from the corresponding Israeli civil courts. Only the

fact that the judge in the domestic court is at the same time an acting judge in the Israeli system can bestow on that court the likeness of an Israeli court. Yet the arrangement is questionable from the point of view of Israeli law. From this perspective, the nomination of the judges by the military commander amounts merely to a private invitation to hold office, extended personally to each judge by an authority external to the Israeli system. According to the Basic Law: Adjudication, judges are not allowed to engage in other activities except by law or with the permission of both the president of the Supreme Court and the minister of justice.[54] This limitation represents firstly the obvious interest that the judge shall fulfil his or her duties as a public official, and secondly the deeper interest in controlling the extracurricular activities of the judges. Holding office as a domestic court judge is no exception: judges should get the prior permission of those two functionaries. Thus the whole arrangement of the domestic courts, although formally a non-Israeli system, must get the approval of the president of the Supreme Court and the minister of justice, in the form of individual permits to judges. It is arguable that the organized, activity of the Israeli judges in the domestic courts, as well as the approval of their service by individual permits (if such have been sought and given), is inconsistent with Israeli law. Under Israeli law, the jurisdictional boundaries of the State of Israel, within which “the law, *the adjudication,* and the administration” of the State of Israel are exercised,[55] do not include the territories. The organized ″extracurricular” activity of Israeli judges in the territories may well be incompatible with those jurisdictional boundaries.

The domestic court of appeals is the highest court in this system. An interesting question concerns the jurisdiction of the Supreme Court of Israel sitting as a High Court of Justice over the former‘s decisions. Little doubt exists with regard to the letter‘s competence to nullify jail orders issued by the domestic system, in a petition of *habeas corpus*.[56] No more problematic is the questionwhether the High Court can review other decisions of those courts. The High Court has already decided that it has jurisdiction over the military personnel who

exercise public executive functions in the territories in the name of the military government.[57] It has also assumed jurisdiction over tribunals that operated in the territories by virtue of security enactments[58] (although jurisdiction was not disputed in those cases). According to the theory that the High Court has jurisdiction over the bodies that exercise powers which derive from security enactments, it seems that the domestic courts fall into this category, and their decisions may be contested by the highest judicial authority of Israel, as those of any other Israeli tribunal.[59]

The similarities between Israeli and domestic courts are not confined to the identity of the judges, or to the appeal procedures. In the courtroom, the representatives of the IDF commander, or of the municipal authorities, are the same Israeli officials who represent the attorney-general in Israeli courts.[60] The Israeli procedures with regard to the questions of whether or not to indict a suspect, and whether or not to stay criminal proceedings,[61] decisions normally taken by the attorney-general, are in the territories incorporated in the proceedings of the domestic affairs court.[62] The same problem concerning the point of view of Israeli law, which was raised with regard to the judges' ability to change their hats, so to speak, and become "domestic" judges on a private basis, exists also in the case of the Israeli attorney-general and his staff, as well as in the case of other Israeli officials acting by virtue of the municipal bylaws.

The bylaws provide further that the Israeli laws of procedure and evidence (including the precedents of the Israeli courts)[63] shall govern proceedings in the domestic courts.The Israeli criminal code gives Israeli courts the authority to detain accused persons. Thus, by implication, the domestic courts receive the same powers.[64] Court fees are also determined according to the tables that apply to the fees in the Israeli civil courts.[65]

2.1.2 The Jurisdiction of the Domestic Courts: Personal Jurisdiction

The persons under the jurisdiction of these courts are the following.

In civil proceedings:

(1) Persons who are registered in the Israeli Population Register and either reside in the relevant territory (West Bank or Gaza), or whose place of business or employment is in a local or regional council.[66]
(2) A corporation that is controlled by a person under (1) above.
(3) Local and regional councils, a union of councils, or other corporations established in or according to the orders;
(4) The military commander or those who act in his name or on his behalf.
(5) Those who have consented to the litigation.
(6) Under certain circumstances the courts would have jurisdiction over non-settler Israelis who have not consented to the litigation.[67]

In criminal proceedings only the first three categories can be prosecuted.[68]

2.1.3 The Jurisdiction of the Domestic Courts: Subject Matter Jurisdiction (and Substantive Law)

It is here that the true scope of the municipal system emerges. The principle is that jurisdiction[69] is defined not by specific situations, such as a dispute over property situated within the jurisdiction, or a financial claim of so many shekels, but through the laws that the domestic court is empowered to apply. Thus every jurisdictional grant entails also the substantive law to be applied, and no considerations of choice of law may rise.

The laws that the domestic courts can and must apply (in both civil and criminal proceedings) are:[70]

(1) Certain security enactments, including the orders with regard to traffic rules; guarding the settlements and educational institutions; and Jordanian planning law (as amended by the security orders) - all provided that the issue under litigation arose within the jurisdiction of the councils.
(2) The local and regional bylaws, and in criminal proceedings also offences against regulations enacted by the councils.
(3) Every other matter covered by the schedules annexed to the local bylaws. The last mentioned schedules form the third and, at the moment, final method of incorporating Israeli laws in the settlements without arousing internal and international awareness. There are six schedules which represent six general fields of law (entitled "welfare law," "statistics law," "personal status law," "education law," "health law," and "labour law"). Each schedule contains laws that are incorporated in their entirety, including every sub″legislation, announcement, licence or any other administrative instrument, and including any changes that shall take effect in Israel from time to time. In this way, 29 living Israeli laws have been incorporated.

The schedules do provide for certain procedural changes in these laws to accommodate them to the social conditions of the legal system of the settlements. The changes are, however, only nominal. The "state," for example, is replaced by the "commander of the IDF in the region," and the title of the competent courts is changed to the domestic court. There is no change of substantive law.

Schedule 3 is the most significant from the point of view of the individual settlers. It applies to them the Israeli laws of personal status that regulate, among other things, adoption, marriage (including the age of marriage, the ownership and administration of communal property, and the duty to financially support members of the family), and questions of

legal competence, guardianship, and inheritance. The domicile of the settlers for the purpose of these laws is also determined. The schedule creates an unrebuttable presumption that these people are domiciled in Israel.[71] In other schedules the Israeli requirements with regard to education and the practice of medical, psychological and related occupations are imposed. In the ″labour law" schedule, the Israeli order with regard to minimum wages is extended to employers and employees who are settlers.

Schedule 3, apart from applying the Israeli substantive law as mentioned, does further extend the jurisdiction of the domestic courts to include also non-settler Israelis who have not consented to the litigation.[72] The domestic court is granted the jurisdiction to resolve questions of custody over the person and property of the family‘s children, even though they (and the other spouse) reside outside the territory, provided that ″a necessity to act [according to that law] has arisen in the area."[73] Similarly, in adoption proceedings, the court gains jurisdiction if the person who is adopting is a settler, notwithstanding the fact that the other parties, including the adopted child and his or her natural parents, are non-settlers.[74] Similar extended jurisdiction is provided also in proceedings concerning a deceased‘s estate.[75]

Some of the provisions clearly derogate from the initial intention stated in the constituting orders. According to the latter the establishment of the domestic court was intended to ″the proper administration of the councils and to dispose the affairs of their residents."[76] Even if one gives this already broad proposition the broadest interpretation, there are some issues that it will not cover. For example, some laws impose on residents of the councils duties towards non-residents provided that the latter appear on the Israeli Population Register.[77] The granting of jurisdiction over non″settlers, which I discussed above, seems also to be outside of the scope of the declared goal. However, as I have mentioned, there can be no legal consequences to these derogations as they are all legislated by the Commander, the highest authority in the region. Nevertheless they show that, despite the innocent

facade of the Local and Regional Orders, the arrangement goes far beyond regulating the daily simple problems of life in municipal communities.

The domestic courts are empowered also to assume the functions of the Israeli small claims court. Thus they can adjudicate small-scale contract and tort cases.[78]

It is interesting to note that the important role of the domestic court and the extensive incorporation of Israeli laws have not been noticed by the Israeli public. The title of the court led many to believe that it had powers equivalent to the Israeli domestic affairs court, a tribunal of very limited powers.[79] In reality, the settlement court's powers include some which are allocated in Israel to the district court, the highest court of first instance. The failure to notice these facts could probably be attributed to their very limited circulation.[80] Mr. R. Shehadeh, of the Palestinian group Al-Haq/Law in the Service of Man, reports that they have tried in vain to obtain a copy of the bylaws.[81] In my case, a copy has been obtained through personal contacts.

2.1.4 Recognition and Enforcement of the Judgments of the Domestic Courts

Criminal matters:

The execution of the domestic court's judgments in criminal cases is prescribed in Bylaw 139(b), according to which judgments and decisions in such cases shall be executed in the same manner that Israeli judgments and decisions are executed in Israel.[82] Detention and imprisonment orders issued by domestic courts will probably be executed in Israel by the Israeli authorities, as the Israeli law provides for such cases.[83]

Civil matters:

Within each region the judgments of the domestic courts have the same effect as Israeli judgments have in Israel. The commander has established execution bureaus besides each domestic court of first instance. They act according to Israeli law, and the judges have the powers that are given in Israel to those who head these bureaus.[84]

In addition, the judgments of the domestic courts can be executed in Israel, or in the other region,[85] as if it were issued by an Israeli court[86] (or, correspondingly, by a court in the other region).

2.1.5 Delegation of Executive Powers to Israeli Officials

The schedules of the bylaws serve not only to extend the jurisdiction of the domestic courts and to compare the rights of settlers to those of Israeli residents, but also to give Israeli administrative officials direct powers over the settlements with regard to the laws mentioned in the schedules.[87] Following this authorization the director-general of the Israeli Ministry of Education and Culture has integrated the educational institutions of the settlements into his ministry.[88] The director of the Employment Agency has established a labour exchange to take care of employment in the settlements.[89]

This general delegation of power follows prior examples of explicit delegation of powers to certain Israeli bodies. Prominent among them is the general grant of police powers to the Israeli police, which may act in the territories independent of the military authorities.[90]

From the point of view of Israeli law, the activities of Israeli officials in the territories seem to be incompatible with the definition of the legal boundaries of the State of Israel. These boundaries confine the powers of the Israeli administration to the area within Israel.[91]

2.2 Other Security Legislation with Regard to Settlers

There are other orders that deal specifically with the settlements or the settlers. The Order Concerning Religious services[92] deals with the establishment of religious councils in the Jewish local and regional councils to provide religious services for the settlers. The Order Concerning Jurisdiction of Rabbinical Courts[93] empowers the head of the Civil Administration in the region to establish a rabbinical court system, identical to the Israeli one, which will have jurisdiction over matters of marriage and divorce of Jews who reside in the region.[94] These courts are to apply the law and procedure pertaining in the rabbinical courts within Israel, i.e., the Jewish Halacha.[95]

The military orders impose on settlers the duty to guard the settlements and educational institutions there.[96] Guards on duty are authorized *inter alia* to detain people who refuse to provide sufficient information for identification, or arrest those who try to hide and cannot reasonably explain their behaviour, as well as those suspected by the guards of committing a crime punishable by not less than five years‘ imprisonment.[97]

In another order, the Israeli minimum wage, and the general adjustment of wages to the cost-of-living index, are automatically extended to benefit all those who work in the settlements.[98] There are no minimum wage or index adjustments in other work places in the territories.

With regard to licensing provisions, the orders have recently started to exempt those who have equivalent Israeli licences from obtaining similar ones from the military government.[99]

3. Extraterritorial Prescription of Israeli Law

While the first part dealt with the application of Israeli laws by the military commander on a territorial basis, this part describes extraterritorial application of Israeli laws on the personal level, as they affect Israelis when they are in the territories. The objectives of this prescriptive effort, like the objective of the technique described earlier as regards the settlements, is to ensure the equal status of the settlers with that of other Israelis, and to place them beyond local laws and indigenous legal proceedings.

All three branches of the Israeli government participate in this process. The Knesset by legislation, the executive by regulations and by implementation of policies, and the judiciary by determining the Israeli law as governing the transactions of Israelis in the territories.

3.1 Extensions of Israeli Laws through Legislation

There are two kinds of Israelis who are subject to the prescriptions: settlers in the territories, and residents of Israel who travel or carry out transactions in the territories. There are three general areas that are covered by the extra″territorial legislation: criminal law in general, fiscal law, and other public laws. The first two categories apply equally to settlers and to

residents of Israel. The third category applies only to the settlers.

3.1.1 Criminal Law

The Israeli Emergency Regulations (Judea, Samaria and Gaza – Adjudication of Offences and Legal Aid, 5727–1967), paragraph 2(a), as amended in 1988, provides that:

> "The courts in Israel have jurisdiction to adjudicate according to Israeli law a person who is present in Israel, with regard to that person's act or omission that has occurred in the area [i.e., the territories] and that would have constituted an offence had it occurred within the area under the jurisdiction of the Israeli courts.
>
> "For the purposes of this regulation, 'a person who is present in Israel' - includes the following:

(1) A person who is registered in the Population Register according to the Population Register Law, 5725–1965;
(2) A corporation registered in Israel;
(3) A corporation that is active in Israel or that is controlled by an entity that is registered in Israel in according to subsections (1) or (2)."[100]

Paragraph 2 (c) explicitly excludes from the rule residents of the territories who at the time of the act or omission were not registered in the Israeli Population Register, i.e., local residents.

This jurisdiction is concurrent with the jurisdiction of both the military courts and the local courts that operate in the territories. The practice, however, has been to use this option and to try Israeli citizens in Israel. This option has not always been the one preferred by the accused. Some of those who were charged with crimes of violence against Arabs thought they would be better off in the military court, where they expected a more lenient sentence. Nevertheless the policy of the Israeli attorney-general has been to try these cases in Israel, and thus impose on the Israeli citizens the same standards, including those with regard to the adjudicative

process and punishment, that would be imposed for acts committed within Israel.

In the process of applying internal criminal law to the foreign offences, a unique issue of choice of laws has arisen: When one of the elements of a crime consists of a circumstance which is defined in legal terms (such as lack of permit), as opposed to a factual circumstance (such as the existence of a weapon), according to which law is the existence of this circumstance to be decided? The Supreme Court finally ruled that such questions are governed by the laws of the territory, and not by the Israeli law.[101] This, the court reasoned, would serve better the purpose of the extra"territorial application of the Israeli criminal law, which was "that an act or omission, punishable on the Israeli side of the border, shall not be exempted from the Israeli criminal norms when it is accomplished on the other side of the border which is under Israeli effective control."[102]

3.1.2 Fiscal Laws

Both the settlers and other Israelis are subjected to the Israeli income tax law and VAT in order not to circumvent the latter by creating directly or through a corporation a source of income in the territories,[103] or by carrying out transactions there.[104] The Israeli land appreciation tax, which serves in Israel as a capital gains tax with regard to the sale of immovables, and also taxes the buyer of immovables, has been extended to immovable property in the territories.[105] (The taxation of the purchase of immovables was, however, reduced from 3.5% to 0.5%, the same rate that applies to such purchases in development areas within Israel.[106])

This legislative effort has left outside the net of the Income Tax Ordinance settlers who are not Israeli citizens-for instance, newly arrived Jewish immigrants. Even more important, it does not cover companies which are managed by settlers in the territories, and which conduct their main operations outside Israel. Although the Israeli shareholders are

considered by that law as having earned a sum of the company's profit proportional to their holding in the company's shares, these companies are not required to file any documents with the Israeli tax authorities.[107] An amendment of the Order Concerning Legal Aid[108] from 1984 provided that the tax authorities and the registrar of companies in the territories may reveal to the Israeli tax authorities all the information they have, including documents.[109] This attempt to reduce the importance of the "tax haven' ' obviously depends on how much the military tax authorities actually know about these firms' activities. It appears that they know very little, and that tax evasion is prevalent there.[110] Moreover, those companies and their Israeli shareholders remained outside the net of the new Israeli income tax law that was introduced to counter the effects of inflation, which had been used by companies to reduce their taxes.

The Israeli Supreme Court has seen this extraterritorial prescription as perfectly legitimate under international law. In its answer to some settlers' claim that the extraterritorial extension of the Income Tax Ordinance was incom" patible with the duties of the belligerent occupant, the court rejected the link between these issues, maintaining that the international law of belligerent occupation does not control the application of laws by the occupying sovereign to its citizens in the occupied territory.[111]

3.1.3 Other Public Laws Applied to the Settlers

In addition to the fiscal legislation there has been a continuous effort to apply other Israeli laws extra territorially to settlers in order to equate their status with that of other Israelis who reside in Israel. One can discern two phases in this area. At first the application has been achieved through amendments in specific laws. The amendment includes a definition of the target population (those who have Israeli citizenship and reside in the territories), and of the operative clause (equation of status with Israelis who reside within Israel). This procedure was used in 1969 to amend the

Elections to the Knesset Law, giving the settlers the right to vote in the Israeli parliamentary elections, by voting in polling stations situated in the territories.[112]

The second phase was introduced in 1984. In an amendment to the Emergency Regulations (Judea, Samaria and Gaza, Adjudication of Offences and Legal Aid), the Knesset established a comprehensive framework for the application of Israeli laws to Israelis in the territories. The framework consists of a list of laws which appear in a schedule to the Emergency Regulations, and a definition of the target population. The listed laws are extended extraterritorially to the group defined by the following provision, entitled ″Presumed Residency”:

> “For the purpose of the enactments listed in the schedule the expression ‘Israeli resident‘ or any other expression used herein regarding domicile, residence or living in Israel, shall be regarded as including also a person whose place of residence is the àrea [i.e., the West Bank and Gaza] and who is an Israeli citizen, or who is entitled to immigrate to Israel under the Law of Return, 5710-1950, and had his residence been in Israel that person would have been included under the same expression [i.e., a Jew who is not merely a tourist].”[113]

The appended schedule contained nine Israeli laws. Apart from those nine laws, this framework provides that in future the process of extending further Israeli legislation shall not bother the Knesset: the minister of justice is empowered, subject to the approval of a Knesset committee, to alter the schedule, thus applying by reference more statutes and other enactments to the settlers.

Some of the laws that have been extended through the second phase provide that the National Insurance Law applies to the settlers.[114] The duty to serve in the IDF is also imposed on the settlers, and they are all to be registered in the Israeli Population Register according to the Israeli Population Register Law.

With the extension to the settlers of the Population Register Law, the legislature has established a concise definition of the population it considers as its citizens or residents within Israel and the territories. From now on there is no need to resort to linguistic gymnastics in order to include and exclude people. Whenever it wants to prescribe law to that group it can simply

refer to the Population Register Law. And this is exactly what happened shortly after the legislation of this instrument. The text of the amendment to the Land Appreciation Tax Law defined ″Israeli citizens" simply as those who are registered or must be registered in the Population Register. The same reference is used in the Emergency Regulations that impose Israeli criminal laws on Israelis.[115]

3.2 Administrative Control of the Territories

It is not unusual for the Knesset to confer powers upon the executive to regulate entire areas by sub-legislation. The treatment of problems related to the territories was no exception. The ministers have used their powers to extend the personal and subject-matter jurisdiction of the Israeli courts in civil matters over people present and events that occurred in the territories;[116] to establish rules regarding the service of process and of documents issued in civil proceedings in the territories, and the recognition and enforcement of judgments and decisions rendered in these proceedings;[117] to extend Israeli orders regulating the qualities of goods and services sold within Israel to the territories;[118] to extend state insurance for property that was damaged in the territories because of its ″Israeli character," or for agricultural investments of Israelis in the territories that suffered damage because of drought;[119] and to give Israelis who quit their jobs in Israel in order to settle in the territories a right to severance payments from their former employers as if they had been dismissed from work.[120]

In addition to the legislative powers of the executive, they have also some administrative functions: The Israeli police force‘s powers are extended to offences committed by Israelis in the territories;[121] Israeli tax collectors are empowered to act in the territories with regard to taxes and duties due to the Israeli Treasury as if they were operating in Israel.[122]

To these one should add the powers exercised regularly by the Israeli Civil Administration under the auspices of the

military government in the territories.[123]

Another crucial move made by the administration was to declare the settlements as "development settlements" pursuant to Israeli law. This declaration created immensely attractive incentives for private investors and developers. The Israeli laws that encourage investment and residence in development settlements provide, *inter alia,* income tax and capital gains tax exemptions, other exemptions from taxes, and under certain circumstances even financial aid from the Israeli government.[124]

One should also take into account the administrative actions that "overcome"legal technicalities. Indeed, for some functionaries in the Israeli administration, legalistic difficulties apparently do not seem to be insuperable. The political agenda makes those technicalities obstacles that should be overcome. Thus, for example, no Population Register official has ever refused to register people from a settlement whose name did not appear in the official list of settlements (which includes only settlements within Israel)[125] This is extremely important as the register now plays a major role in the extension of Israeli law to settlers.[126] Also the military service and national security dues and benefits have been extra-legally extended until the amendment to the Emergency Regulations was introduced in 1984. The same atmosphere prevails also outside the government. The Israel Bar Association could disbar an Israeli lawyer who has settled outside Israel, yet no such case has arisen with regard to lawyers who have settled in the territories.[127]

3.3. Application of Israeli Laws by the Israeli Civil Courts

3.3.1 Extraterritorial Jurisdiction of the Civil Courts

The Israeli civil courts have jurisdiction over people and property in the territories and events that occur there. In effect, the courts exercise this jurisdiction in all cases except those in which all the parties to the litigation are non-Israeli residents of the territories. From the point of view of the Israelis this situation ensures that they will not have to sue in courts in the territories even when their counterpart is a local resident. From the point of view of the indigenous population the consequence is that they have the option of suing settlers in Israel, yet at the same time are subject to the jurisdiction of the Israeli civil courts whenever they are sued by Israelis, settlers and non-settlers alike.

This jurisdiction is formally concurrent with the jurisdiction of the local courts of the territories (with regard, of course, to issues that are under the jurisdiction of the latter courts). Yet it would be very irresponsible for a plaintiff to file a claim against an Israeli in the local courts, as the local court system suffers from poor conditions,[128] the summoning of Israeli witnesses (including members of the military administration) to testify is difficult to achieve, and the prospects of enforcing the judgment on the Israeli defendants are slim.[129] In fact, the local residents have tried many times to file claims against other local residents in an Israeli court, probably for reasons that concern the quality of the local courts.[130]

The decision to extend the jurisdiction of Israeli courts over the territories was not taken in the Knesset. It came about as the result of measures taken by both the Justice Ministry and the Supreme Court. The minister of justice, pursuant to his general power under The Courts Law to regulate the procedure in the civil courts, prescribed that service of "documents" from an Israeli court would be effected in the territories in the same manner as it was effected within Israel.[131] As "documents" include the service of process upon a defendant,[132] this technical provision was interpreted by the Supreme Court[133] as exempting the plaintiffs in the Israeli court from the otherwise applicable requirement of obtaining the court's permission to service the process abroad, and as a result wiped

out, for the purposes of personal jurisdiction, the pre-1967 borders.[134]

The extraterritorial jurisdiction of Israeli courts is fashioned according to the common law principle of the service of the summons on the defendant. By this very service the court‘s extraterritorial jurisdiction is established. The service of process is conceived as an act of sovereignty, in fact the only relevant act of sovereignty; thus no additional contact points of the defendant with the forum are required. Thus, when the defendant is in Israel, even as a tourist, there is no obstacle to serving the summons on him or her, thereby granting the court jurisdiction to adjudicate the claim. When the defendant is abroad, the crucial act of service is not controlled by the local sovereign, but rather is contingent upon the cooperation of the country where that person is found. As the focus is on the process of service, the Israeli Regulations of Civil Procedure prescribe the conditions on which the courts shall grant leave to serve documents abroad,[135] and these conditions delineate the extra"territorial jurisdiction of the Israeli courts.[136]

Now it will be understood how the seemingly technical provision concerning the service of documents in the territories, considered “merely a matter of procedure” by the Supreme Court,[137] has extended the jurisdiction of Israeli courts to all the residents of the territories, even in matters that have no contact points with Israel.

I should also point out that the regulation concerning the service of documents encompasses not only the service of process, but also the service of subpoenas, and of court interim and final decisions.[138] Thus a local resident in the territories who does not obey an Israeli court‘s subpoena is liable to the Israeli quasi-penal sanctions against non appearance.

Usually the service would be effected through the mail or personally by the plaintiff. One does not need to be aided by the local authorities in this matter, nor to receive the cooperation of the military authorities. The military commander in fact issued an order that respected the service method prescribed by the Israeli regulation,[139] but this had

only formal importance. Thus, Eli Natan, at the time a judge of the District Court of Jerusalem, despite having commented on the illegality of the said military order under international law,[140] could still give a judgment concerning the extension of the Israeli court‘s jurisdiction without even mentioning the order.[141]

The validity of the Israeli regulation that extended the courts‘ jurisdiction has not been attacked directly in the Israeli courts. Nevertheless the Supreme Court did refer to this issue. According to Israeli law, only norms of customary international law may be directly applicable in the courts. Statutes can derogate from customary international law. However, the court will interpret statutes as being in accordance with international norms, unless the legislative intention to derogate has been established.[142] Following the same approach, sub-legislation by the executive could also overcome international law, but only if the enabling statute is construed to have intended to confer such powers upon the executive. In the context of the said Regulation a question could have arisen as to the authority to enact it, especially since the power to sub-legislate was confined to procedural matters only.[143] The Israeli Supreme Court, in a series of decisions by Chief Justice Sussman, approved the validity of that regulation. The court examined it in view of the general international norm with regard to extraterritorial jurisdiction, and not with regard to the international laws of belligerent occupation, apparently since it viewed the latter laws as delimiting only the powers of the military government and not of the home countries. The generâl international norm, the court reasoned, did not apply in this case since here Israeli jurisdiction did not interfere with the sovereignty of any other state:

> "Israel is exercising [the sovereign‘s suspended powers in the territories] in fact, by virtue of the law of conquest under the rules of international law… [the Israeli court] acts only in theory in the territory of another sovereign. In fact, as long as the territory is held by the IDF, the authority is in the hands of Israel, and there is no fear of violation of any other authority…"[144]

In other words, in a situation of belligerent occupation, there are no limits imposed by customary international law on the

exercise of extraterritorial adjudicative jurisdiction by the occupant's country over the residents of the occupied areas, provided that this jurisdiction is prescribed by the laws of that country and not by military orders issued by the commander of the occupying force, which are subject to the international law of belligerent occupation.

This reasoning takes what is good from both worlds. On the one hand, it pierces the veil of the separate authority of the military government (an authority based on international, not Israeli law[145]), by saying that it is Israel which controls the territories and in fact exercises sovereign powers there. On the other hand, however, it does not impose on the Israeli authorities the same limits that international law imposes on the Israeli army as a belligerent occupant. By this reasoning the opinion purports to avoid all the limits recognized in international law on the exercise of adjudicative powers extraterritorially. The principle that emerges from the court's opinion is that a state has extra"territorial powers over a territory held by its army which are not delimited by the international law of belligerent occupation. The state can do what its army cannot do. This principle undermines the very structure of the international norms that regulate the powers held by the occupant, and therefore is unacceptable.

The principle of unlimited adjudicative powers was crucial to determine another, more specific, question, which concerned the jurisdiction of Israeli courts over immovables situated in the territories. In a suit brought in the Jerusalem District Court,[146] the Israeli plaintiff sought a declaration that he owned a piece of land which was situated in the West Bank and registered in the name of one of the defendants (a Palestinian). The Israeli law was not clear as to whether it had adopted the English rule that denied the courts' jurisdiction to adjudicate claims concerning foreign lands.[147] However, the district court refrained from clarifying this question, due to the unique situation of the territories. Judge Weiss reasoned that the English restraining principle was based on the ineffectiveness of the court's judgments abroad. In contrast, in the territories an order of the Israeli court would be enforced.[148] Its judgment concerning the rights in a land

situated there would be effective. Thus the judge disregarded the English rule as irrelevant to the case, and found no other reason to refrain from determining the rights in immovables situated in the territories.[149]

Local Jurisdiction:

According to the Israeli civil procedure rules, in addition to personal jurisdiction and subject-matter jurisdiction, there is also the question of local jurisdiction. All claims should be filed in the appropriate district, designated by the Regulations of Civil Procedure. In *Man-tzura V. Cohen*[150] the Supreme Court upheld the Jerusalem District Court's refusal to entertain a claim concerning a tort committed in the West Bank by an Israeli resident of Kiryat Arba against his Israeli neighbour. The reason was that the district court was lacking local jurisdiction. Justice Sussman, the president of the court, pointed out that the extension of the Israeli courts' extraterritorial jurisdiction (described above) could not be implemented without a designation of the local district that would hear the cases that had no contact points to Israel.[151] In other words, the grant of extraterritorial jurisdiction could in many cases be ineffective. Shortly after that, the minister of justice corrected the situation by adding to the Regulations of Civil Procedure the following provision:

> "An action that does not have an appropriate local forum under these regulations or under any other law, shall be filed in a court in Jerusalem which has subject-matter jurisdiction over it, but the court in Jerusalem may give any other direction, if it finds that according to the circumstances of the case, the litigation in another court would be more convenient to the parties."[152]

Thus, if a suit cannot show any circumstances, relevant under the regulations that allocate local jurisdiction, that tie it to Israel, the suit should be filed in Jerusalem. If, for instance, the parties reside in Gaza, and the claim also arose there, it is reasonable to assume that the court in Jerusalem would defer the case to the proper court in Beersheba.

The Exercise of Discretion With Regard to Entertaining Claims Against Residents of the Territories:

According to Israeli law, the civil courts may use their discretion to decline to exercise their jurisdiction. Faced with actions against non-Israeli residents of the territories, the Supreme Court has adopted a flexible criterion – the notion of the ″natural forum"[153] - for the use of the discretion to decline jurisdiction.[154] Despite the flexibility of the criterion, its application in a number of claims concerning residents of the territories has been fairly steady, to the extent that one can restate the rules as follows:

1. When all the parties to the litigation are non-Israeli residents of the territories, and the cause of action arose in the territories – the Israeli courts will not entertain the case.[155]
2. When either the plaintiff or the defendant is an Israeli citizen or resident, the court will adjudicate the claim.[156]

Some questions are still left open. For instance, what will the case be when the only contact to Israel is the place of the act or omission that gives rise to action? (A variation on rule 1.) Will it make any difference if all but one of the litigants in a multi-party litigation were non-Israelis? (A variation on rule 2.)

In the final analysis, the outcome of the grant of extraterritorial jurisdiction to the Israeli courts and the courts' use of their discretion, is that Israeli citizens or residents do not have to sue residents of the territories in the courts there. They may also be sued in Israeli courts. Indeed, the poor conditions of the local courts in the territories, and the lack of effective enforcement measures of the latter's judgments against Israelis, channel suits against Israelis to the Israeli courts.

3.3.2 Choice of Law

Which law should the Israeli courts apply to a transaction that took place in the territories? The Israeli courts have examined that question in a number of tort cases. In those claims, when the tortious act was committed in the territories, and both parties were Israelis, Israeli law has been applied.[157] This outcome was based not on the special circumstances of the territories, but on the common domicile of the litigants. It followed a reasoning which is accepted in many jurisdictions.[158]

A more difficult question arose in a case where the Israeli claimant was injured in a fire that had broken out in the (Palestinian) defendant's factory in the West Bank. The district court judge, Domer, decided to apply Israeli law, with the following reasoning:

> "Many Israelis live, work, travel in Judea and Samaria, and have commercial relations with the local residents. This state of affairs creates an anticipation that not only the legal proceedings concerning a tort in Judea and Samaria which involves both Israeli residents and local residents shall be held in a competent court in Israel, but also that the Israeli law shall be applied.
>
> "The Israelis, even if present in Judea and Samaria-do not conceive themselves as under Jordanian law, and do not anticipate that the norms practised in Jordan will be applied to their case. They are linked to Israel and to Israeli law.
>
> "These facts influence also the anticipation of the other side – in this case the tort-feasor who is a local resident."[159]

This reasoning, in its generality, can be applied to any tort action involving Israelis. Moreover, the principle does not seem to be confined only to tort cases. Applying it also to other fields, its first consequence is to totally immunize Israelis from the local law. The second, complementing, consequence, is to subject the entire local community to Israeli private laws with regard to both their rights and their duties whenever they are involved in transactions with Israelis.

The decision of Judge Domer was influenced by an opinion of the Supreme Court (per Justice D. Levin) which emphasized the *sui generis* status of the territories. It is based on the idea that the territories are not foreign countries, but in

fact form an integral part of Israel. Thus, the opinion goes, the court should give this situation the proper legal consequences:

> “The routines of daily life linking the State of Israel, and its residents, with the administered territories, and their residents, converge into an economic system that is unified in fact. The commercial and economic ties are branched out. The transportation lines are open; in the employment area there is convergence; and in fact in all these areas there are usually no barriers or restrictions.”[160]

The attitude of the courts, as mentioned above, seems to indicate a willingness to prefer Israeli to local law. However, the situation is different with regard to labour contracts. Labour contracts (and presumably, other contracts as well) between Israelis are governed by Israeli law. But labour contracts between Israelis and Palestinians would seem to be subject to the local law. The first proposition relies on a case which involved a dispute between Israeli residents of the West Bank and their employer, the Kiryat Arba Administrative Board.[161] Said Justice Shamgar: "To Israeli workers who are employed by the commander of the area… apply the Israeli labour law, including the right to litigate in Israel‘s labour courts.”[162] In this case the emphasis was on the identity of the employer as an entity acting under the auspices of the military government, but this holding seemed so natural to the court that no reasoning was offered. Indeed, this comment conforms with the expectations of the Israeli employers and employees in the territories.

From the last quote one might conclude that labour contracts between Israeli employers and local workers are governed by the local law rather than the Israeli one. This also seems to be the approach of the military authorities.[163] Moreover, it seems that the Israeli administrations, both the civil and the military ones, view even the labour contracts between Israeli employers and Palestinians which are to be carried out *within Israel,* to be governed by the Jordanian or the Gazan law.[164] This conclusion is deduced from the arrangement prescribed by the military authorities with regard to the social benefits of Palestinian workers in Israel. According to this arrangement, payments for the social benefits of those workers, which employers make under collective agreements, go to the Treasury instead of private

funds. The arrangement would be illegal under the Israeli Collective Agreements Law, but not under the laws of the territories.[165] This position only mirrors the generally unequal treatment of Israeli and Palestinian workers by Israeli employers.[166]*

To conclude: Transactions between Israelis are governed by Israeli law. Transactions between local Palestinians will probably be subject to the local law. There is a tendency to apply Israeli law to transactions involving people of the different groups, with one exception in the context of labour contracts – where the local law seems to prevail.

Choice of Law With Regard to Land Possessed by or o¤ Behalf of the Military Authorities:

This area is totally immune to the local law. Rights in the market of immovable property managed by the military authorities are defined by them through contracts. Thus it is a modern version of the feudal system, where all rights derive from the military government‘s title, and the concession replaces ownership as the basic reference unit. To solve the issues that cannot be solved in bilateral contracts, such as procedure for registration and its effects, a special order has been promulgated,[167] and further regulations enacted, to emulate the Israeli land registration system in all the aspects of title registration and its effects.

3.3.3 Recognition and Enforcement of Judgments

A network of provisions both in Israeli and in military enactments all but erase the pre-1967 borders with regard to recognition and enforcement in one area of court decisions rendered in the other area.

Israeli judgments can be executed by their submission to an execution bureau in the territory.[168] There is no need to submit the judgment to the prior scrutiny of a local court.

The area commander has established a special execution bureau which deals only with judgments against those who are registered in the Israeli Population Register or against corporations registered in Israel (in the latter case only if the judgment concerns its businesses or property within the territory).[169] In this bureau there is no need to append an Arabic translation of the document.[170]

Another, easier way to execute Israeli judgments is through the Israeli execution office. This office will be able to perform all its powers short of physical actions, such as carrying out arrests and confiscating property.[171] If a physical action is necessary, the office may order it, and the order shall be carried out by the execution bureaus in the territories. Registrations of court orders concerning immovables that are registered in the military-run Registry of Land (which registers the land held by the authorities[172]) can be effected directly by the military registrar if the court has so ordered.[173] The second method applies equally to interim orders of the courts.[174]

Judgments rendered in the territories can be enforced in Israel as if they were Israeli judgments, provided that the military commander of the relevant area confirms the document's authenticity, and the Israeli attorney-general does not oppose that execution as one that is "likely… to harm Israel's sovereignty, its security, or its public policy."[175]

Extrajudicial Enforcement of Fiscal Debts:

The internationally accepted rule, that one country cannot sue in foreign courts to recover fiscal debts, does not apply with regard to the relationship between Israel and the territories. Moreover, tax collectors do not need judicial permission to "cross the borders" of the "green line." Israeli law empowers the Israeli collectors of all fiscal debts owed to the Treasury to collect them in the territories, using the same extrajudicial powers that they have according to the Israeli law.[176] To remove all doubts, a corresponding provision in a military order repeats the same thing.[177] Another provision in

the Israeli law authorizes the justice minister to issue general or specific orders regarding the procedure for collection in Israel of delinquent taxes owed to the military administration.[178]

4. Assimilation of Israeli Laws by the Military Government

The first part of this paper dealt with the laws applicable to the settlements and their inhabitants; the second part with the Israeli laws applied to both Jews and Arabs. In this part I shall discuss the adaptations of Israeli laws by military orders which are applied only to the Arab population (the corresponding laws concerning the Jews having been detailed in the preceding two parts). The legislation that will be outlined below is classified under three general headings; (a) legislation that is aimed to facilitate a free trade policy; (b) welfare and human rights oriented legislation; and (c) legal instruments to control the local population.

4.1. Removing Economic Borders

There are two discernible policies with regard to the ties between the economies of Israel and the territories. The first one allows the free flow of persons, commodities and services across the pre-1967 borders. All the legal obstacles that would have maintained the “green line” are to be removed. Apart from certain restrictions on the movement of Palestinian workers from the territories into Israel, the policy of open borders has been maintained during the uprising. The second policy concerns Israeli investments in the territories and governmental aid to the Jewish settlements there. In the context of the highly governmentally protected Israeli

economy, the latter policy creates new economic boundaries that encompass Israel and the settlements, and exclude from the national umbrella the indigenous economies of the territories. Investments in the settlements receive preferential treatment.[179] No similar incentives are given to the Arab economies. The cumulative effect of these two policies is the growing interdependency of the Israeli economy (which includes the settlements) and the Palestinian one. This interdependency, however, does not amount to their being treated equally.

The legal reflections of the settlement policy were discussed in connection with the application of Israeli law to the settlements and to Israelis living there. Here we shall discuss the laws that reflect the first policy, namely economic integration. Its implementation has fiscal, monetary, and other related aspects. Before going into details it should be pointed out that the free trade policy was sanctioned by the Supreme Court in the well known VAT case,[180] in which the military authorities defended the imposition of a new Value Added Tax on the territories by claiming that it was necessary for keeping the borders with Israel open. That tax coincided with a similar one that was introduced in Israel. The authorities claimed that the new tax was prescribed in order to protect the local residents from a situation in which VAT was imposed only in Israel. In such a case, they reasoned, Israel would have had to resurrect the economic borders, and impose restrictions on the free flow of goods and services. That alternative would have worked to the detriment first and foremost of the local population. In other words, the main reason for the tax was not to increase revenues, but to retain the interdependency of the economies.[181]

The Supreme Court affirmed in principle the power of the occupant, under international law, to introduce new taxes. Applying the principle to the circumstances, it then examined the justification for using these powers in this case. Justice Shamgar upheld the new tax, affirming the authorities‘ concern:

> “The compilation of the facts that was presented indicates a strong reliance of the economy of the territories on that of Israel, and thus it is clear that severing

ties between the economies, as long as Israel controls the territories… might have brought immediately destructive consequences on the economy of the territories and on the welfare of their population. The discontinuance of the free movement would have created immediately even harsher ramifications regarding the labour force in the territories and the commercial and industrial sectors."[182]

For Justice Shamgar the unification of the economies was not only a consequence of the occupation to which the army commander now had to react. The very creation of the single market, said the court, was demanded by international law:

> "To sum up, in view of the economic reality, which flows from the aggregate political facts (the military government) and geographical facts (the territorial contiguity)… the economy of the territories is inseparable from that of Israel [lit., connected by its umbilical cord to the Israeli economy]. Therefore it was decided already in the initial steps of the formation of the military government, that no separation between the economies be maintained…. Such a separation would have hampered the possibility of returning life to its normal course, and would have prevented an effective fulfilment of the duty concerning the maintenance of the *vie publique."'**[183]

Who benefited from the free trade policy? Certainly the relationship between the economies has not been one of dependency, as that of a fetus in its mother's womb. As the recent uprising sharply demonstrates, the relationship is actually symbiotic. Both sides have benefited from it. Hypothetical evaluations of other possible relationships are pointless, as it was not feasible for Israel to keep the borders closed. Such a possibility would have also conflicted with other Israeli policy concerning the settlements.

The reasoning behind the VAT ruling not only sanctioned the free trade policy and the specific introduction of that new tax, but implicitly approved all other measures required to keep the borders open. This ruling cleared the way for the imposition of other new taxes.

The court's reasoning comprised the following syllogism: Premise one, that Israel has imposed the new tax within its borders. Premise two, that without a complementing tax, the borders would be closed, and the territories would suffer. From these two premises the conclusion follows, namely that the new tax is required for the wellbeing of the residents of the territories.

The problem with this argument is that it both accepts and muffles the fact that the local population has become a captive of Israeli policies – policies which only the Israeli voter, and not the Palestinians, can influence. Israeli interests are taken for granted. The acts of the military government are treated as responses to new situations created by the Israeli government. To follow Justice Shamgar's metaphor, the pregnant mother decides what is good for her health, and the fetus has no choice but to bear the consequences, for good and for bad. In reality, the decision to impose VAT in the territories was made by the Israeli authorities, since the success of the new tax was contingent on its implementation in the territories. The enactment of the same tax by the military commander cannot be regarded as a mere reaction to a *fait accompli,* a reaction arising from the exercise of unfettered discretion. This would not be consistent with the actual decision-making process. Nevertheless, the fiction of the separate entity, the military government, requires the court to do just that.

It should be noted that the coordination between the economies of Israel and the territories is achieved not only on the level of assimilating Israeli laws, but also on the administrative level. The officials of the military administration who perform the various functions under these orders are regular employees of the relevant Israeli ministries. Each ministry selects among its staff people to serve in the military administration, whether as "staff officers' ' or as other functionaries. The military commander retains the power to *refuse* such a nomination , and sometimes he exercises this power.[184] Obviously, the military commander lacks the expertise required to supervise his staffs activities, which are regulated by the Israeli ministries.

4.1.1 Fiscal Legislation in the Territories

Value Added Tax:

This issue was discussed in the preceding paragraph. Currently the tax rate is 15%, and applies to almost every transaction in goods and services.

Import Duties:

Order Concerning Duty Tariffs (Judea and Samaria) (No. 1093), 5744–1984, provides that imports from Israel to the West Bank shall be exempted from import duties, while imports from Jordan shall be subjected to the same duties and other taxes, related to the import, as would have applied had the goods been imported through Israeli ports.[185]

It should be noted that the Israeli tariffs are prohibitively high in certain areas, especially with regard to consumer goods. Import duties may double and even triple the price of certain goods. These measures are designed to protect Israeli industries by increasing the competitiveness of their products (on which duties are much lower, if they exist at all), as well as to increase revenues. Thus, in effect, the similar import duties extend the protected markets of the Israeli products to include the territories. The latter, of course, have no interest in the strength of Israeli industry.

From the point of view of the legislative technique, there is in the tariffs order a delegation of powers from the military government to the Israeli legislature and executive. It provides that any change in the Israeli law will apply automatically to imports from Jordan.

The export of goods from Israel to the territories is not restricted.[186] With regard to the movement in the other direction, a general permit has been issued, according to which exports from the West Bank and Gaza to Israel are not restricted except for certain goods. These include fresh fruit and vegetables, olives and olive oil, nuts, raisins, and the shoots of fruit-bearing trees. The export of these specific goods from the territories to Israel, to the other territory, or abroad is regulated by the military authorities.[187]‘

Levy on the Purchase of Foreign Currency:

Since 1983 a levy of 1% has been imposed on any purchase of foreign currency in the territories.[188] This order mirrors an identical Israeli law from the same period.[189] Paragraph 10 of the order pledges that "The revenues that will be collected from this levy to the treasury of the Civil Administration shall be allocated to the development of the economy of the area and to encourage export from the area." The order, however, fails to provide for a special fund to that effect, or other means to ensure compliance with this asserted goal.

Levies on the Purchase of Imported Services and Foreign Assets:

These levies, instituted in 1986, followed an identical Israeli version.‘[190] A 15% tax was imposed on the transfer of foreign currency from the territories abroad for goods and services purchased by the local resident for his/her own use while travelling abroad (not for import purposes). Within Israel these provisions were intended to increase the price of trips abroad, a move that would either increase revenues or reduce the flow of foreign currency from Israel to the outside world, and thus decrease the negative balance of payments. When it came to the territories the motivation was not the imbalance of payments between them and foreign countries. The transfer of the dinar abroad, by those who are permitted to possess it, is not restricted.[191] Neither is there concern about free trade between Israel and the territories. The effects of this levy on business opportunities abroad is marginal.[192] The only motivation could thus be an increase of revenues by taxing the local residents who travel abroad. Therefore, the decision in the VAT case with regard to the free trade argument cannot justify the imposition of this new tax under international law.

However, the authorities can rely on the similarity between this tax and the Israeli one. In the same VAT case the court asserted a presumption according to which adoption of

legislation which was identical to the Israeli arrangements was *prima facie* within the powers of the military government.[193] Such an adoption could show that the military administration is concerned with the wellbeing of the occupied population as much as it is concerned with the wellbeing of its own population, and therefore that its motives are sincere and legal. Indeed, this criterion facilitates the further assimilation of the laws of the occupied area to that of the occupant. Following its reasoning to the extreme, that principle could well justify the extension of most of the occupant‘s laws to the occupied territory.

Levy on Vehicles:

In 1985 a new tax was introduced in the territories, to coincide with the Israeli levy on vehicles, being one of the measures of the Israeli austerity plan.[194] The order imposed a levy on the owner of each vehicle according to year of manufacture and engine size. Despite its announced provisionally, this tax has continued to be collected ever since and has not been challenged in the Supreme Court. In this case, as in the case of the levy on purchases of goods and services abroad, the authorities could not use the argument of free trade to justify the levy. Besides the fact that this tax was retroactive for some owners,[195] no one could use the different status of the territories to claim exemption, as there was no possibility of registering vehicles in other areas without transferring their ownership. But the criterion of similarity between the Israeli and the military provisions, announced in *Abu-Ita,*[196] could be relevant here. Another way of arguing for the tax would be to demonstrate the benefits the local community derive from it. As the collection of income tax is problematic in the territories, the method of levies becomes attractive, since they are easier to collect; If the authorities could show that the revenues from the tax are being used for the benefit of the indigenous population, this would be a good argument for its legality.

Levy on Credit in Foreign Currency:

This order was introduced in late 1987, following the Israeli example.[197] It imposes a 3% tax on credit extended by local banks to local importers in foreign currency, mainly through letters of credit, and on standing letters of credit issued by the banks on behalf of the resident. Its objectives are to increase the price of imported goods and to decrease the imbalance of payments. There is yet another outcome-the Israeli products now become more attractive to the Israeli and the local residents than imported goods.[198]

4.2.2 Monetary Regulations

Legal Tender:

The Israeli currency, the shekel, is legal tender in the territories as well. In Gaza it is the only currency, while in the West Bank the Jordanian dinar is also legal, and the exchange rate between the two currencies is adjusted by the authorities according to fluctuations in the world markets.[199] For Israelis, however, including those who live or do business in the West Bank, the dinar is a foreign currency, and the severe restrictions on transactions in foreign currency apply to the dinar as well. The local residents have tended to prefer the dinar, as it has been much more stable than the shekel. There is, however, a criminal sanction against refusal to accept shekels at their face value.[200]

Foreign Currency Regulation:

The same restrictions on trade in foreign currency, foreign stocks, bonds and gold that are imposed in Israel apply also in the territories by military orders.[201] The only exception is that local residents of the West Bank are allowed to transfer dinars

out of the area. These restrictions have two important consequences. First, they do not frustrate Israeli policies with regard to foreign currencies, whose protection is necessary due to the free trade policy. Second, they place under the control of the authorities any transactions in immovables situated in the territories, and any other transactions that foreigners are part of, thereby enabling the authorities to monitor the identity of foreign investors, and to control their transactions.[202]

Banks:

The banks that operated before the 1967 war were ordered immediately afterwards to freeze all transactions. Almost none of these banks have reopened since, the only exceptions being the Palestine Bank in Gaza, which was the only local bank there (the others being branches of foreign banks), and the Cairo-Amman Bank in Nablus, both of which were opened recently. The major obstacle to the reopening of the other banks has been the disagreement between Israel and Jordan on the supervision of their activities. In the meantime the Israeli banks have opened branches in the territories. They have conducted business according to Israeli law, and are controlled by the Israeli supervisor of banks. When an agreement was reached on the opening of the Nablus-owned Cairo-Amman Bank, the local Banks Law was amended to reflect Israeli banking practices, and to provide full control of the bank‘s activities. The bank was placed under the supervision of the military authorities, with accounts in the Israeli central bank, the Bank of Israel.[203]

Order Concerning Dishonoured Cheques:

The Israeli law that prevents under certain conditions a person from opening bank accounts and drawing cheques after ten cheques of his have been dishonoured, was adopted by the military authorities shortly after it was introduced in Israel.[204] It should be noted that this protective law applies only to

cheques drawn on accounts in shekels. It does not protect the public from bounced cheques drawn in dinars, although such cheques are in common use in the West Bank.[205]

A person who cannot open an account or draw cheques pursuant to this order cannot circumvent it by opening an account in Israel or in the other territory. The limitations take effect both in the territories and in Israel simultaneously.[206]

Legislation Related to īnũation:

The inflation that affected the Israeli market has moved the Israeli legislature to create an indexing clause of all pecuniary judgments. In 1982 a similar clause was introduced in the territories.[207]

According to the austerity plan of 1985, all prices of goods and services were frozen in Israel. No one was allowed to raise prices without the prior approval of the finance minister and the minister of industry and trade. The same freeze was introduced in the territories.[208] Subsequent changes in the law imposing the freeze were also implemented in the territories. The original orders provided that price rises in the territories would be effected through military decrees. An amendment from 1988 created an automatic linkage between the raised prices decreed by the Israeli authorities (or the military authorities in the other territory) and the prices in the territories.[209]

4.1.3 Other Subjects Related to the Free Trade Policy

The following issues, *inter alia,* were regulated in the territories in order to facilitate trade relations with Israel:

(1) *Labels*: The Order Concerning Labelling of Goods (Judea and Samaria) (No. 530), 5734–1973, empowers the authorities to demand from exporters of goods to the

Israeli market that they attach to them Hebrew and Arabic labels.

(2) *Traffic*: The Order Concerning the Traffic Law (Judea and Samaria) (No. 56), 5727–1967, and other orders enacted thereafter, have replaced the local traffic code with the Israeli one.[210]

The Order Concerning Compensation to Victims of Road Accidents (Judea and Samaria) (No. 677), 5736–1976, has introduced in the territories the Israeli law that provides for no-fault tort liability for bodily injuries caused by the use of motor vehicles. The Order Concerning Insurance of Motor Vehicles (Judea and Samaria) (No.215), 5728-1968, prescribes mandatory insurance for motor vehicles that is similar to that effective in Israel. Insurance policies for motor vehicles cover accidents both in Israel and in the territories.

Thus, anyone driving from one region to the other[211] would not have to adjust to different rules.

(3) *Export Control*·. Export of agricultural produce from each territory is subject to permits issued by the military authorities.[212] This permit system enables the authorities to control the flow of these commodities to Israel, and to prevent saturating the Israeli market, or reducing the price of overpriced produce. This authority may be used to protect Israeli farmers in case supply exceeds demand, a frequent situation in the Israeli produce market. It has been used also to prevent competition with Israeli produce on world markets.[213]

4.2 Public Welfare Legislation

The military government has introduced in local systems legal changes motivated by what may be generally called welfare considerations. Some rules followed similar Israeli enactments. Others were original modifications of existing laws. The Supreme Court has affirmed the right of the

administration to take measures towards such a goal. In the first case to deal with legislative powers of the occupyingforces, the court rejected a strict interpretation of the Hague Regulation No. 43. Rather, it upheld the view that the occupant is entitled, and indeed, required, to amend the local laws so as to serve the wellbeing of the indigenous population.[214]

The following are the areas in which military orders were aimed at the wellbeing of the local residents:

Environmental Issues:

The military authorities introduced in the territories environmental laws based on similar Israeli laws. The Order Concerning Cleanliness (Judea and Samaria) (No. 1162), 5746-1986, proscribes littering, and provides some means to fight this phenomenon. The Order Concerning Protection of the Natural Habitat (Judea and Samaria) (No. 363), 5770–1969, regulates the use of certain areas designated by the authorities as "nature reserves," and provides penalties for damages to plants, animals and other objects which the general public has an interest in preserving. The Order Concerning Parks (Judea and Samaria) (No. 373), 5730–1970, regulates the use of certain areas adjacent to historical sites. Another environmental issue is regulated by the Order Concerning Regulation of Public Bathing Areas (Judea and Samaria) (No. 280), 5728–1968.

Labour Law:

(1) Workmen‘s compensation: The Jordanian Labour Law was amended to increase the amount of compensations for injuries.[215] Another order was added to require all employers to have adequate insurance policies to cover workers‘ claims.[216]

(2) Paid sick leave of up to 60 days each year was granted by another amendment to the Jordanian Labour Law.[217]

(3) The Jordanian Labour Law was amended on the issue of the appointment of arbitrators in labour disputes. The new rules facilitated mandatory proceedings to solve labour disputes.[218]

Health Law:

Public health services were instituted.[219] The services are available to local employees of the military administration, and to residents who work in Israel through the public Employment Agency. Others who wish to be included may do so. For a mandatory nominal monthly payment (in 1988 it was about $20 per month) the insured party and his/her spouse and children are entitled to receive health services, including hospitalization and medicines (the latter for a fee of about $1 per prescription).

Municipal Law : [220]

(1) The municipalities were empowered to declare a weekly day of rest, and to regulate the opening and closing of businesses during that day.[221]
(2) Suffrage in municipal elections was extended to women before the 1976 municipal elections.[222] The same right was extended also to poor people who had not been qualified to vote since they were not required to pay municipal taxes.[223]
(3) The rural councils were authorized to issue bylaws for the administration of their affairs.[224] Other military orders provided for elections to rural councils.[225]
(4) An order from 1976 provided that, at the request of a municipality, the authorities could establish a municipal court which would have jurisdiction over municipal affairs within the municipal boundaries. From all other perspectives, including the judges and the right to appeal, it would act like a local magistrates‘ court.[226] Since that

time only one municipal court was established, for matters arising in Bethlehem, Beit Jalla, and Beit Sahour.

Protection of the Holy Places:

An order providing free access to holy places, and prescribing penalties for violators, was promulgated, as was its Israeli equivalent, soon after the 1967 war.[227]

Criminal Law:

(1) Abolition of capital punishment: Capital punishment imposed by Jordanian law was abolished. Life imprisonment is now the maximum penalty in the local courts.[228]

(2) Detention without trial: The Emergency Regulations effective both in the territories and in Israel made it possible to detain people without trial and without judicial inspection. After the equivalent Israeli law was changed to allow such inspection, a similar arrangement was introduced in the territories.[229]

4.3. Legal Instruments to Control the Local Population

The discussion that follows, concerning the legal methods used to compel obedience, does not reflect similar practices within Israel. The tools that will be outlined below are the reflection in law of the conflict between the military authorities and the Palestinians of the territories.

The activities of the local population are regulated by criminal codes (three, to be precise) and by an extensive licensing system that puts almost all private activity under the control of the authorities. It is unusual to link licensing

requirements to criminal law, but in this context it does make sense. As will be pointed out below, the licensing system has been used to obtain compliance with the law, through the "carrot and stick" approach.

It should be emphasized that, in theory, these controlling systems do not discriminate between Israelis and others. Formally, Israelis in the territories are subjected to the same regulatory systems. Practically, as was explained above,[230] Israelis are usually prosecuted in Israeli courts. These controlling systems are not foreign to the internal Israeli law, in which the notorious Emergency Regulations, issued by the British in 1945, are still in effect.[231] The difference between the areas lies in the exercise of these powers. The methods that will be outlined below are used only against the disobedient sector, namely the Palestinians.

The three criminal systems are the Security Code enacted by the Israeli army;[232] the British Emergency Regulations of 1945, which remained in force in the territories until the IDF entered them;[233] and the local criminal code. The first two systems deal with subversive activities against the military occupation, or other failures to comply with requirements under security enactments,[234] while the latter handles of"fences against local interests. The Security Code establishes a military court to adjudicate cases under all three codes, while the local courts have jurisdiction over the local system only.

The Security Code resembles in many aspects the British Emergency Regulations. In fact it was modelled after the latter.[235] As a result there are many issues that are covered by both systems, and the Emergency Regulations are used only for issues not dealt with by the Security Code, most notably the administrative measures of destruction of homes, and of deportations.

Under the Security Code the military court sits in panels of three army officers, at least one of them a lawyer, all appointed by the area commander on the recommendation of the IDF's judge advocate-general.[236] An amendment to the Security

Code in 1988 added a provision to the effect that: "Those who exercise judicial functions are, injudicial proceedings, subordinate to nothing but the law [the local laws[237]] and the security enactments."[238] This provision was merely a *formal* announcement of the impartiality of the military judges. It has, however, a much more important outcome: It does not allow the military court to consider any claim by a defendant to invalidate an act of the military administration as being contrary to international law.[239]

Before being brought to trial, the accused may be detained by a police officer, without any judicial supervision, for a period of up to six months. A military court may extend this detention for another period of up to six months. Once an indictment has been filed, the court may order the accused to be detained until the end of the trial. There are no guidelines that delimit discretion with regard to these decisions.[240]

After the person has been detained, there is a duty to inform a close relative and his counsel, and to provide for a meeting with the latter. However, if the detainee is suspected of having violated the Security Code, these rights can be postponed for a period of up to 12 days (with regard to informing the family), and 90 days (with regard to meeting with counsel), for security or investigative reasons.[241]

In addition to the criminal sanctions of imprisonment and fines,[242] the court is empowered to grant compensation to those who suffered loss or injury as a result of the offence. Originally the aggrieved party under this provision could only be the authorities, whether Israeli or military, and their employees. In 1988 that limitation was dropped, and now compensation may be imposed to redress any person aggrieved by the acts of the convicted party.[243]

At the time of writing there is no procedure for appealing decisions of the military courts; however, a decision to establish a military appellate court was taken in 1989 by the judge advocate-general, following the High Court's recommendation.[244] Until such is established, the only way to contest a judgment is by a petition to the military commander

(if the judgment was rendered by a panel[245]) or the area commander (if a single judge gave the decision). These officials may pardon the petitioner, mitigate his or her sentence, order a new trial or, since 1988, also order a retrial (the discretion to order a retrial is not limited).

Non-Judicial Sanctions:

The Security Code provides the area commander with the authority to detain people without trial for a period of up to six months. This detention is called ″administrative detention" or "preventive detention." Its aim is not punishment; it is not based on the detainee's prior offences, but on the likelihood of his committing an offence in future. The detention order can be renewed for similar periods indefinitely. The detention order must, within 96 hours of the detention, receive the approval of a military judge who has legal training, and his decision may be appealed to the president of the military court.[246] In the wake of the Palestinian uprising, the procedures for detention were changed, so that no review by a military judge and no appeal procedures were possible.[247] After strong criticism within Israel, the military judges have resumed their former role, but no appeal on their decisions was provided for.[248]

The commander may also restrict people to their homes or towns for indefinite periods. The restriction orders may be appealed before a special appeals committee headed by a judge with legal training. The powers of this committee are limited to submitting recommendations to the commander.[249]

The Emergency Regulations provide for more drastic punitive measures, all of which may be effected without trial: demolition of houses and prohibition of their reconstruction, confiscation of the property of those suspected of violation of the regulations, and deportations.

Licensing:

The activities of the local population in the territories are extensively regulated by an elaborate licensing system. Licensing may be an efficient tool in regulating businesses, making sure that health, safety and other such demands are complied with. In the context of occupation, these permits provide the authorities with powerful opportunities for a ″carrot and stick" policy. Those who "behave" get permits, those who are ″bad" do not. Moreover, those whom the authorities want to be influential within the local community are given the standing of "permit brokers."[250]

This practice is clearly illegal under Israeli administrative law, to which the military administration is subject. One of the basic principles of that law requires that administrative bodies act pursuant to the purpose of the legislative grant of power, without considering irrelevant considerations. Under this principle, non-renewal of a driving licence, for example, because of failure to pay taxes, would seem to be unacceptable. Nevertheless, allegations of illegal exercise of powers are not easy to prove.

The licensing system includes the usual licences, such as those for driving and owning a car. It includes also the specific permits required for engaging in certain financial activities, like registering a company, running all sorts of businesses (these licences must be renewed every year), working as insurance agents, public accountants, physicians, lawyers, and land surveyors. But, in addition, the local residents are required to obtain other permits to travel abroad, to import or export certain goods, to transfer any rights regarding local immovables, to plant trees and to grow some kinds of fruit and vegetables (except for private consumption). Other orders require permits for erecting or maintaining any dam or well, and for building.

Against the denial of certain permits one may appeal to the Objections Committee. This institution had a modest beginning as a tribunal that handled appeals against decisions regarding abandoned property[251] and property of the local government.[252] As more and more issues have since been allocated to this tribunal, it has gradually become the

administrative court of the occupation authorities.[253] The committee has recently published its own rules of procedure.[254] It can issue subpoenas,[255] and lately has been given power to issue injunctions.[256] Now that this committee has become an institutionalized tribunal, the administration has begun to allocate some adjudicatory functions to special committees.[257]

Formally, the members of the committee are independent of the administration.[258] In fact, however, they are appointed by the area commander, and can be dismissed by him.[259] They sit in panels of three. At least one of them should have legal training. The outcome of the proceedings is not a judgment that is binding on the authorities, but a recommendation that the area commander can accept or reject.[260] The High Court of Justice has strictly enforced principles of due process with regard to the proceedings of these committees,[261] but it is unlikely that it would hear a petition against the decision of the committee, since the area commander has power to reject the committee's recommendations. The petitioner should therefore try first to persuade the commander.

The High Court exercises judicial review over other decisions to refuse permits, as for instance travel permits. This court is the ultimate forum to contest any action taken by the military administration. As will be explained below, the court examines the action under both customary international law and the Israeli administrative law.

5. The Israeli High Court of Justice and the Territories

The Israeli Supreme Court, mainly through its decisions as a High Court of Justice, has over the years formulated the unwritten Israeli bill of rights. As Israel lacks a constitution, the court has based its rulings upon general principles of democracy, the rule of law, and the separation of powers. Civil rights were in many cases defined negatively, as a reflection of the limitations imposed on the executive‘s powers. In the same manner, the limits defined by the High Court with regard to the military government‘s powers in the territories reflect the local population‘s rights as recognized by the court. This chapter will explore those limits.

The court assumed its role with regard to the territories after considerable discussion. The misgivings concerned both the jurisdiction of the court and the applicability of international law. From the jurisdictional point of view, the questions involved both the extraterritorial reach of the court – could it decide cases that arose outside Israel? - and the nature of the military orders in the territories (these orders were primary legislation in the territories, and could thus be considered immune to judicial review). From the perspective of the applicable law, the Fourth Geneva Convention could have been pronounced inapplicable by the court for two reasons: One was the government‘s formal position, that the Israeli occupation of the West Bank and Gaza had not ousted any legitimate sovereign, and therefore a condition precedent to the application of the Convention did not exist.[262] Alternatively, the Convention could have been declared

inapplicable by the court as one that does not reflect international customary law.[263]

All these questions were set aside as the government‘s policy has been to refrain from raising them when it responded to petitions. The government was ready to have its acts in the territories scrutinized by the High Court according to Israeli and international laws, including the Fourth Geneva Convention. What were the reasons for such a policy? One reason was concern for the human rights of the local population,[264] and arising from this was the need to prevent any abuse of power by the military authorities. Another motivation was political and psychological – the wish to intensify ties between the local residents and the Israeli system, and encouraging them to have faith in the Israeli legal system.[265] The Supreme Court, concerned with the possible humanitarian consequences of a decision to decline jurisdiction,[266] chose to follow the lead of the government.

Until the time of writing this arrangement has not been shattered. It was threatened twice, when settlers argued in court for the inapplicability of international law to the territories, but the court adhered to its practice. Justice Landau, sitting in both cases,[267] curtly rejected the argument as irrelevant to the cases. Justice Vitkon held that the status of the territories was not a justiciable issue, therefore the court had to rely on the position of the government.[268]

Two developments in the court‘s approach to these questions can be discerned. The first involves the view with regard to the applicability of the Fourth Geneva Convention. In the Beit El case,[269] and afterwards in Elon Moreh,[270] the Court decided not to follow its former practice of basing the application of the Convention on the government‘s consent. Both in the Beit El case and in Elon Moreh, the government invited the court to decide on the conformity of their acts with the humanitarian provisions of the Geneva Convention.[271] The court, however, refused to do so. The Fourth Geneva Convention, it held, was conventional and not customary law, and thus not a part of Israeli law. However, this decision notwithstanding, the court has continued to examine acts of

the authorities in light of that Convention in long *obiter dicta*.[272] This practice seems to reflect a policy that respects the Geneva rules, but without elevating them to rules binding on the government. If this is indeed the policy behind this practice, it could have been better served by treating the Convention as the government formally views it, i.e., internal self-imposed rules of conduct that are binding on the executive until revoked by it. At least one justice, Barak, seemed ready to consider such an argument.[273]

The second development in the court's approach concerns its jurisdiction over the military authorities abroad. For many years a theoretical question has lingered with regard to the consensual basis for the court's jurisdiction: Could the government be exempted entirely from the supervision of the court by revoking its consent? Today this question is no longer open. The court asserted clearly that it had jurisdiction over the activities of the military administration in the territories, without relying on governmental consent:

> "Now there is no doubt that… this court has the right to review [administrative acts in the territories]. It stems from the fact that the military commander and his subordinates are public servants, who perform public duties according to law…. Every Israeli soldier carries with him in his knapsack the rules of customary international law and the principles of Israeli administrative law."[274]

Based on this jurisdiction, the court will examine the military authorities' acts according to both the principles of Israeli administrative law and the customary international law. In theory, this situation should have encouraged many, especially the local residents of the territories. The "export" of Israeli administrative law to the territories could have meant, as it means within Israel, the establishment of a legal order that pursues the welfare of the local population and upholds the rights of individuals. Indeed, the court clearly stated that it would pursue humanitarian concerns, even giving them precedence over international norms that call for the conservation of the *status quo ante.*™ [275]But this ideal vision conflicted with the reality of fierce confrontations between the Palestinians and the army.

One of the court's clearest policies has been deference to the discretion of the military authorities whenever it invoked

security considerations. The same attitude has existed with regard to security considerations cited by authorities within Israel,[276] but with regard to the territories the security reasons were much more frequently invoked. Whenever these concerns are invoked, the court‘s scrutiny is confined to an examination whether the act was not *ultra vires* and whether the reasons cited were not simply a cloak that hid irrelevant or illegal factors, or motives that were relevant but not dominant.[277]

Only in two cases – Elon Moreh; and the Jerusalem Electricity Company (No. 2)[278] - did the court declare that security concerns were not the real motive behind the administrative acts (and therefore nullified them). In both cases the court learned from the authority itself what was the real underlying motive. Since the fact-finding procedure in the High Court is usually based only on affidavits, it would be very difficult to challenge the motives put forward by the authorities.

The supervision of the High Court can be further curtailed when the defence minister declares that the evidence which formed the basis of the administrative decision is privileged for security reasons. A justice of the Supreme Court can decide to reveal the evidence, despite the minister‘s declaration, in cases where the former finds that the interests of justice override the concern that led to the declaration.[279] It can be expected however, that the justice will use his or her discretion to reveal the evidence only where no security concerns exist and the minister has misused his power.[280]

In cases where security reasons were not invoked, the court applied the general criteria of Israeli administrative law, like the relevancy of considerations, impartiality, and reasonableness.[281] As early as 1972, the court included the Jewish settlers as part of the local community, whose interests, therefore, the military authorities also had to take into consideration in their decisions.[282] In later cases the court has not applied this reasoning, and when it referred to the local interests it meant those of the Palestinians.[283] But when it considered whether the administrative act in question

benefited the indigenous population, it was satisfied if that act had been intended to benefit *also* the local community.[284] The fact that the act served primarily Israeli interests was not seen as relevant.

With regard to procedural due process in military tribunals and commissions in the territories, the High Court has been strict, insisting that the procedural rights of the individual be respected, whether the tribunal is a military court,[285] the appeals committee,[286] or the advisory committee established under the Emergency Regulations (1945).[287]

Evaluation:

Although the High Court has applied the principles of Israeli administrative law to the conduct of the military government, the deep conflict between the latter and the local population prevented the court from exporting Israeli standards. The court would apply, for example, the principle of equality, yet it would be an equality between the local residents, not equality between them and the Israelis. Facing repetitive claims of security reasons, the court could only guard against abuse of these considerations and against breaches of due process requirements. It could not bring about normality.

The case of the newspaper *Al-Tali'ah* is an example in a nutshell of the different standards that were applied. In that case the authorities decided to stop the circulation in the territories of an Arab newspaper, despite the fact that it continued to be published and circulated in East Jerusalem (under Israeli rule). Justice Shamgar addressed the issue of equality: Since the newspaper did not contain more incitement than other newspapers whose circulation was permitted in the territories, the contents of the articles could not have been a legal reason for singling the petitioner out. In other words, there should be equal treatment of newspapers circulated in the territories.[288] However, the same criterion of equality was not

applied to the discrepancy between the standards imposed on newspapers in the territories and on those which appeared in East Jerusalem (and were censored by the Israeli authorities). There should be equal treatment in the territories, but not necessarily similar treatment to that exercised within Israel.

The petition submitted by *Al-Tali'ah* was dismissed, although the court accepted its right to be treated the same way as other newspapers in the area. The argument that worked against the paper was that it had been, according to the authorities' claim, a bulletin of the Communist Party, which has conducted terrorist activities. Before dismissing the petition, Justice Shamgar put forward the idea that the fact that the Communist Party had been banned under Jordanian law did not bind the military authorities: It is not necessarily reasonable and just to proscribe today everything that was proscribed by the ousted sovereign.[289] The idea of encouraging democratic political activity, which was banned by the ousted sovereign, is indeed a noble and enlightened one. But when it faces real life in the territories, it evaporates. There is no democratic political activity there. Elections do not take place, neither statewide nor on the municipal level, and political parties cannot pursue their goals through the democratic process.

Indeed, the court's lofty principles of equality, reasonableness and justice only rarely make sense in the context of the occupation. The problem is that the court's continued use of these terms creates the impression that they have effect there, and leads people to believe in the feasibility of "enlightened occupation."

The preceding remarks do not suggest that the court has had no meaningful role with respect to the control of the administration. On the contrary, it did serve as a conscientious ″watchdog" of military actions. Its mere jurisdiction obliged officials to coordinate their actions beforehand with their legal advisers; as petitions were heard by the court, decisions were often changed, because it was made clear that they had to be, and harsh measures were mitigated; in addition, there have also been judgments against the authorities. Their access to the

High Court has given Palestinians a way to fight through legal channels against abuses of power and arbitrary actions. This outlet could have been a channel for neutralizing feelings of anger against the occupation.

But even this function of the court has been limited. The military authorities could effectively curtail the court‘s supervision, and have done so with regard to crucial issues. After Elon Moreh the method of land acquisition was changed, and the court was effectively divested of supervisory powers in this respect.[290] Another example is a case of land confiscation for ″public purposes” (for paving a highway that would bypass Arab town centres). When it was discovered that notices had not been served according to the law, the authorities changed the law retroactively to legitimize the confiscation, and to prevent the court from declaring the confiscation illegal.[291]

6. Conclusion

As hostilities subside, the belligerent occupant creates a new *status quo,* one that tends to perpetuate itself unless a shift in the balance of power occurs. It was Professor Benjamin Akzin who, in 1943, with World War II still far from over, observed this propensity:

> "In a discussion of occupation, it is natural to emphasize the temporary character of this institution. With reference to the present war, occupation is generally described as a feature of the transitional period, necessary to safeguard military success and to ensure return to orderly conditions, but without in the least prejudicing future definite arrangements. The assumption is far from correct: while abjuring the establishment of a legal and permanent *status quo,* occupation creates, in fact, a *status quo* of its own which, in a great many cases, will tend to perpetuate itself." *Akzin, Introduction to a Study of Occupation Problems,* in *International Conciliation – Documents for the Year 1943,* 263.

As long as the occupation lasts, the occupant has both the right and the duty to maintain and promote *"ordre et la vie publique."* This role reflects the endeavour of the law of belligerent occupation to strike a balance between the interests of the occupant and the needs of the indigenous population. It provides for a legal balancing mechanism, one that should compensate for the unequal balance of power in a situation where conflicts of interest are abundant. Under this new status quo it is the occupant who is in charge of this balancing mechanism, of deciding whether it is competent to change the local law or not. Thus, this system is inherently biased in favour of the occupant. Politicians and soldiers are not saints, and one can only expect the occupants to be prejudiced in favour of their own interests at the expense of the indigenous community. In the modern world the occupant's interests

encompass not only the safety of its troops, but also a wide variety of economic concerns; not only temporary benefits, but also long-term advantages.

The Israeli occupation of the territories has not been an exception. From my survey it appears that Israeli interests were not hampered by the formal adherence to the law of belligerent occupation. The changing legal environment of the territories followed closely the changing policies of Israeli governments, facilitating their implementation.

Israel has taken care of some important aspects of public and social welfare in the territories, but this was all from a paternalistic attitude. As the VAT case demonstrates, the fiction of military government as a separate entity from the Israeli body politic puts the residents of the occupied territory at the mercy of the political forces of the occupying power. With this fiction of belligerent occupation Israel has succeeded in slowly absorbing the territories, without having to share political or economic power with the local population, or resorting to a symbolic act of annexation.

The continuation of the new status quo, of "benign occupation" has numbed the conscience of many Israelis concerned with the abnormal yet indefinite situation. Because the territories were not annexed, the myth of the rule of law was respected, and the High Court exercised judicial review over military activities there, political pressures within the Israeli body politic never reached unmanageable levels.

Notes

1 Article 43 of the Hague Regulations delimits the powers of the occupant with the following general expression: "The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure as far as possible public order and safety [l*l'ordre et la vie publics],* while respecting, unless absolutely prevented, the law enforced in the country."

2 The commonly referred to "annexation" of East Jerusalem and of the Golan Heights stems from a declaration of the Israeli ″law, adjudication and administration" as applicable in those areas (*see* Law and Administration Order [No. 1], 5727–1967, regarding East Jerusalem and The Golan Heights Law, 5742–1981, regarding the Golan Heights). Although it is clear that the intention of the Israeli legislature, the Knesset, was to annex these areas by using that formula, the Supreme Court, however, stopped short of using the term ″annexation." As the court reasoned, ″The mere application of an Israeli norm to an area situated outside Israel does not necessarily make that area a part of Israel" (*Kanj Abu Salakh v. The Minister of Interior,* 37(2) P.D. 718 (1983); *Ravidi v. The Military Court in the Hebron Distńct*, 24 (2) P.D. 419 (1969)).

The "missing" declaratory annexation with regard to East Jerusalem may be found in Basic Law: Jerusalem the Capital of Israel, from 1980, which states *inter alia* that "Unified Jerusalem is the capital of Israel."

The Israeli law (subject to security enactments) had replaced the entire Syrian legal system in the Golan Heights even before The Golan Heights Law *(see* Order Concerning Courts (No. 273) (Ramat Hagolan) - 1970). This application of Israeli law through military orders was not conceived of as annexation. It was motivated by the army's desire to ensure order in that area, where no Syrian lawyers, judges, or even law books had remained after the occupation *(see* Shamgar, *Legal Concepts and Problems of the Israeli Military Government – The Initial Stage,* 13, 55, and Appendix C, No. 3, in *Military Government in the Territories Administered by Israel 1967-1980* (M. Shamgar ed., 1982).

3 Gaza is still being treated by both the Israeli military government and the Israeli High Court of Justice as if it were under belligerent occupation, although a peace treaty has been signed between Israel and Egypt. *See* Justice Shamgar in H.C. 785,845/87,27/88 *Afou v. The Commander of the IDF in the West Bank* (1988; not published). (The military administration continued until further developments in the process of implementing the Camp David accords.) Dinstein, "Deportations from Administered Territories," 13 *Tel Aviv University Law Review* 403, 415 (1988), suggests an end to the military government but not the Civil Administration.

4 Shamgar, *Legal Concepts, supra* note 2, at 33.

5 (The West Bank) (No. 130), 5727–196?, para. 8. In the discussion that follows I shall refer to orders that deal primarily with the situation in the West Bank. The situation in the Gaza Strip is essentially similar, and important variances from the situation concerning the West Bank will be indicated.

6 *Idem,* at para. 1(8).

7 A change in the local laws can be effected implicitly, as by the promulgation of a conflicting norm by security enactments. *See Khassan v. The Commander of the IDF in Judea and Samarìa* 39 (3) P.D. 245 (1985).

8 Order Concerning the Establishment of the Civil Administration (Judea and Samaria) (No. 947), 5742–1981, para. 4.

9 Some of the rules translated into English were reproduced in Shamgar‘s article, *supra* note 2, at 27–31.

10 *See* rule No. 3 in Shamgar, *supra* note 2, at 30.

11 Para. 6 of that promulgation.

12 A special order controls the possibility of different versions in the two modes of publication: Order Concerning the Compilation of Promulgations (The West Bank) (No. Ill), 5727–1967.

13 A special order enables army commanders to require bookstores in the territories to sell these pamphlets: Order Concerning the Sale of Official Publications (Judea and Samaria) (No. 133), 5727–1967.

14 Benvenisti and Khayat; The West Bank and Gaza Atlas, WBDP Jerusalem 1988, p. 61, 113. See Map 2 in this volume: Areas defined as ″State Land’ ‘ and ″Requisitioned Area.”

15 The formula of applying the Israeli law, adjudication and administration has been used by Israel to denote annexation. *See supra,* note 2.

16 (Judea and Samaria) (No. 561), 5734–1974. Kiryat Arba is the first urban settlement on the outskirts of Hebron. Its name is one of the biblical names for Hebron.

17 Order Concerning the Administration of Ma‘ale Adumim (Judea and Samaria) (No. 788), 5739–1979. Ma‘ale Adumim is situated to the east of Jerusalem, on the way to Jericho.

18 Order Concerning Administration of Local Councils (Judea and Samaria) (No. 892), 5741–1981, from March 1, 1981 (hereinafter: Local Councils Order). That order repealed the orders concerning Kiryat Arba and Ma‘ale Adumim (para. 7).

19 Order Concerning Administration of Regional Councils (Judea and Samaria) (No. 783), 5739–1979, from March 20, 1979 (hereinafter: Regional Councils Order). A similar order exists for the settlements in the Gaza Strip.

20 The promulgation of the Order Concerning the Regional Councils took place only six days before the signing of the peace treaty between Israel and Egypt, and about half a year after the Camp David accords.

21 There are eight local councils in the West Bank: Elkana, Ariel, Ma‘ale Adumim, Ma‘ale Ephraim, Kiryat Arba, Emmanuel, Alfei Menashe and Givat Ze‘ev. There are six regional councils, each of which comprises of a number of settlements (and the order provides also for the internal legal order in each of these settlements). In the Gaza Strip, there is one regional council, Hof Azza.

22 In both orders the text is identical: para. 2(a) and (b) in the Local Councils Order; para. 2(a) and (c) in the Regional Councils Order (in the latter order, subsection (b) is omitted).

23 *Supra* text to notes 5–8.

24 The orders use the terms ″‘commander of the region… and "commander of the IDF in the Region" to mean the same authority. Until the establishment of the Civil Administration in the territories these two terms had been used interchangeably. Then, in the Order Concerning Interpretation (Further Provisions) (No. 6) (Judea and Samaria) (No. 946), 5741–1981, the title of the ″commander of the area" was changed to the "commander of the IDF in the region."

25 Local Councils Order para. 6; Regional Councils Order para. 3.

26 The Local Councils‘ Bylaws (Judea and Samaria), 5741–1981 (hereinafter: local bylaws) para. 149; the Regional Councils‘ Bylaws (Judea and Samaria), 5739–1979 (hereinafter: regional bylaws) para. 132. Those sections prescribe also another mode of publication, namely, their inclusion in a compilation of rules that each council may eventually arrange for. But the local bylaws para. 94 and para. 144 do not require that such a compilation be published other than by depositing it in the office of the council, where only persons who reside within the council‘s jurisdiction or who pay taxes to it may have access to it (para. 143). The regional bylaws para. 77 require the availability of the compilation to every ″interested" person in the council‘s office. In the Regional Councils‘ Bylaws (Provisional Order) (Judea and Samaria), 5744–1984, it was further provided that wherever there is a duty to publicly announce a municipal enactment, the announcement can be carried out by depositing the enactment in the council‘s office, and in addition posting a note on the bulletin board of the office stating that it has been deposited.

27 *See infra* text to notes 79–81.

28 Para. 22A-22M of the local bylaws, an amendment from January 10, 1985.

29 *See* chapter 7 ("Employees") of both bylaws. As this process includes examination and approval of nominees by Israeli authorities, the local authorities are also subjected to them: *see* para. 50A, 501.

30 Para. 83 of the local bylaws; para. 691 of the regional bylaws.

31 Para. 69G of regional bylaws; para. 86 of the local bylaws.

32 Para. 70 of the regional bylaws; para. 86A of the local bylaws.

33 Para. 73, 75B of the regional bylaws; para. 89, 92A of the local bylaws.

34 *See* chapter I-1 of both bylaws. This chapter was added in July 7, 1982.

35 Para. 70R of the regional bylaws; para. 87(28) of the local bylaws.

36 Para. 70(28) of the regional bylaws, para; 87 (28) of the local bylaws.

37 The Income Tax Ordinance (Collection).

38 Paras. 57(16) and 72(b) of the regional bylaws; paras. 68(17) and 88(b) of the local bylaws.

39 *Friday V. Tel Aviv Municipality* 10P.D. 734. 741 (1955); *see* also *Axel V. The Mayor and Municipal Council ofNetanya,* 8 P.D. 1524 (1954).

40 *Supra* text to note 22.

41 *See supra* text to note 5.

42 *Id., id.*

43 Para. 76 of the regional bylaws, para 93 of the local bylaws, which provide that: "For the purpose of para. 8 of the Order Concerning Interpretation… the regulations made in pursuance of these bylaws shall be deemed security enactments issued by the area commander."

44 The bylaws with regard to the court appear only in the local bylaws(chapter 16). In the regional bylaws there is an incorporation by reference of all those rules, including future changes in the bylaws (para. 121 A). Therefore the references that follow will be to the local bylaws only.

45 Announcement on Establishment of a Court for Domestic Affairs of First Instance and Determination of Venue and Territorial Jurisdiction (No. 2) from Aug. 3, 1984.

46 Kiryat Arba, Ma'ale Adumim, Efrat, Giv'at Ze'ev.

47 Har Hevron, Gush Etzion, Megilot.

48 Ariel, Elkana, Ma'ale Ephraim, Emmanuel, Alfei Menashe.

49 Shomron, Mateh Binyamin, Bik'at Hayarden.

50 Appointment of Judges and a President for the Appeals Court of the Domestic Affairs Courts, from September 1, 1987.

51 That person should be one who is qualified to be appointed a district court judge in Israel. Every Israeli lawyer who has been a member of the bar for at least six years is qualified for such a post.

52 *See* paras. 124, 127.

53 Para. 140: they are to obey only the "law," a term that is not defined in the bylaws, or in the Order Concerning Interpretation.

54 Para. 11 of the Basic Law: Adjudication.

55 Para. 11B of the Law and Administration Ordinance, 1948.

56 Jail orders of the domestic courts are to be executed by the Israeli authorities: *see* text to note 83 *infra.*

57 *See, e.g., Jama'iat Iscan v. The Commander of the IDF Forces in Judea and Samaria,* 37 (4) P.D. 785, 810 (1983).

58 *See Shmaüawi v. The Appeals Committee,* 39 (4) P.D. 598 (1985);*Harpaz v. The Head of the Civil Administration of Judea and Samaria,* 37 (4) P.D. 159 (1983); *Al-Gazawi v. The Panel of the Military Court in Gaza* 34 (4) P.D. 411 (1980).

59 The supervision of the High Court over decisions of judicial tribunals is more confined than the regular supervisory powers of an appellate court. The court will nullify a decision based on excess of powers, improper hearing, or a blatant mistake in the interpretation of the law.

60 In certain issues the representatives are those appointed by the Israeli attorney-general: para. 132.

61 An administrative institution in Israeli criminal procedure that effectively amounts to dismissing a criminal action after the claim has been submitted to the court.

62 Para. 133A. This section supersedes the otherwise applicable rule in the territories which gives the military authorities the power to grant stay.

63 Para. 134. Although the provision speaks about *dinim,* a concept which is defined under Israeli law and which does not stand for court precedents (except those based on the English common law or equity), the same concept in legal parlance does include court decisions. Since the Israeli laws of procedure and evidence rely heavily on court precedents, one can assume that the intention of this provision was to include also these precedents. One could also view the Israeli court decisions as declarations of the proper meaning of the law, and thus they would be followed by the domestic courts. Either way, the doctrine of *stare decisis,* with regard to the Israeli court decisions, applies to the domestic courts.

64 *See* para. 135 (c) that prescribes the procedure for appeal against a detention order issued by a domestic court.

65 Para. 134 (c).

66 In the latter case the jurisdiction is confined to the issues that relate to the person‘s business or employment: para. 124 (definition of “settler”).

67 *See* notes 72-75 *infra* and accompanying text.

68 Paras. 124 and 136.

69 Except one – the grant to exercise the powers of the Israeli small claims court. It leaves open the choice of law question.

70 As it is difficult to get a hold of subsequent changes in these enactments, this list is updated to the beginning of 1987.

71 See para. 4(e)(2); 4(g)(6)(b); a(k)(7).

72 The grants of jurisdiction in Schedule 3 seem to contradict para. 136 of the bylaws, which does not include under the court‘s jurisdiction the non-settlers who do not agree to the litigation. However, the schedule is the most recent of the two, and is also *lex specialis,* and therefore it would seem to prevail over para. 136.

73 Para, (g)(5) of Schedule 3.

74 Para. 4(a)(4) of Schedule 3.

75 Provided that the decedent was a settler or a Jew who left assets in the area, and that the Israeli courts do not have jurisdiction over the case: para. 4(k)(5) of Schedule 3.

76 *See supra,* text to note 22.

77 *See* para. 4 to Schedule 1* “Rights, duties, powers, immunities, and sanctions according to the Youth Law shall apply to settlers also with regard to one who is not a settler, provided that the latter is registered in the Israeli Population Register.”

78 Bylaw No. 138.

79 Among those were Prof. Rubinstein, who in his article, “The Changing Status of the ‘Territories‘ ”11 *Tel Aviv University Law Review* 439 (1986), written while he was serving as a minister in the Israeli government, did not discuss the significance of the municipal system, and the Association for Civil Rights in Israel, which in its publication, *Reflections on the Civil Rights in the Administered Territories: The Judicial and Administrative System* 19 (Hebrew, 1985), said that the domstic courts are similar in their organization and powers to their Israeli counterparts (at 19).

80 *See infra* notes 25–26, and accompanying text, on the modes for their publication.

81 R. Shehadeh, *Occupier's Law* 92 (Rev. Ed., 1988).

82 Para. 139(a) empowers the domestic court to impose on criminals the same sanctions that Israeli courts can impose.

83 Emergency Regulations (Judea, Samaria and Gaza – Adjudication of Offences and Legal Aid), 5738–1977, para. 1 (definition of "Military Court") and para. 6.

84 *See* para. 137, and the Announcement on Establishment of Execution Agencies of September 23, 1985.

85 Order Concerning Legal Aid (Judea and Samaria) (No. 348), 5730–1969, para. 5A.

86 Emergency Order (Judea, Samaria and Gaza – Legal Aid) (No. 2), 5736–1976, para. 3.

87 Para. 140a of the bylaws.

88 *See* his decision about division to districts of February 20, 1984.

89 *See* Order of the Employment Services (The Establishment of an Office for Employment and its Jurisdiction) of May 29, 1985.

90 Para. 3A of the Order Concerning Police Forces Acting In Coordination With the IDF (Judea and Samaria) (No. 52), 5727–1967 (as amended in Order No. 105 of 1968). Other examples of this kind of delegation of powers include the appointment of the Israeli Nature Reserves Authority and the Israeli Parks Authority to administer areas designated as nature reserves or as parks. For the other type of delegation, the use of Israeli government employees as functionaries of the military administration, *see infra,* text to note 184.

91 The Law and Administration Ordinance, *see* text to note 55 *supra.*

92 (Judea and Samaria) (No. 807), 5740–1980.

93 (Judea and Samaria) (No.981), 5742–1982.

94 The rabbinical court has jurisdiction also over couples of which one spouse resides in the region and the other in another region "occupied by the IDF or Israel" (para. 7(b). If "occupied by Israel" means simply "Israel," then these courts' jurisdiction is greater than that of their Israeli equivalents, since the latter are authorized to deal only with husbands and wives who *both* reside in Israel: *Chen v. Regional Rabbinical Court of Haifa* 31 (3) P.D. 679 (1978). Another vague grant is para. 7 (3): jurisdiction when "the necessity to adjudicate the matter arose in the region."

95 *Supra* note 93, at para. 6.

96 Order Concerning the Guarding of the Settlements (Judea and Samaria) (No. 432), 5731–1971; Order concerning the Protection of Educational Institutions (Judea and Samaria) (No. 817), 5740–1980.

97 Para. 3A of the Order Concerning the Guarding of the Settlements, *supra* note 96.

98 Order Concerning the Employment of Workers in Certain Places (Judea and Samaria) (No. 967), 5742–1982, para. 3 (as amended on November 19, 1987). *See* also discussion with regard to the Arabs who work in the settlements, *infra* text to note 163.

99 *See, e.g.,* General Permit to Carry Portable Cellular Phones, 1987, para. 2; Order Concerning the Law of Supervision of Insurance Businesses (amendment) (Judea and Samaria) (No. 1215), 5748–1987, para. 2.

100 The 1988 amendment added categories (2) and (3) to the rule. Before that only individuals were subject to the Israeli criminal law for activity in the territories.

101 *David v. The State of Israel* P.D. 37 (1) 622 (1983), overruling *Tzuba v.The State of Israel* P.D. 36 (2) 169 (1981).

102 *Id.* at 643.

103 *See* Income Tax Ordinance, para. 3A (enacted in 1978). (Income procured in the territories is deemed to have been procured inside Israel, and the tax is to be paid to the Israeli Treasury, with a deduction of the amount of income tax paid to the military authorities in the territories.)

104 The Value Added Tax: *see* para. 144A from 1979. (These transactions will be deemed to have occurred in Israel.)

105 Land Appreciation Tax Law (Amendment No. 15), 5744–1984.

106 Regulation 13 (a) of the Land Appreciation Tax (Purchase Tax), 5735–1974.

107 *See K.P.A. Co. v. The State of Israel* P.D. 38 (1) 813, 827 (1984).

108 *Supra* note 85.

109 Para. 6A. A corresponding authorization to disclose information from an Israeli to a military official was introduced in late 1987 in the Emergency Regulations, *supra* note 83, at para. 7A.

110 *See* M. Benvenisti, *The West Bank Handbook* 203; *Monitin* (an Israeli monthly), January 1989 20, 67.

111 *K.P.A., supra* note 107, at 819.

112 The Elections to the Knesset Law provides that only Israelis registered in the Israeli Population Register as residents of Israel can vote, and then only by voting in the ballot of the registered Israeli residence. The settlers are the only non-residents who are given the right to vote, and the opportunity to vote abroad is given to them and to sailors only (the last issue is not prescribed by law: it is the interior minister who is empowered to decide about the location of the polling stations for these voters).

113 Para. 6B of the Emergency Regulations, *supra* note 83.

114 This law provides a variety of benefits, such as allowances for elderly and dependent, unemployed, or disabled persons, for maternity leave, for children, and also workmen‘s compensation. All these benefits, excluding the last one, are given to Israeli residents. Workmen‘s compensation is paid to workers (or qualified volunteers) in Israel. In the National Insurance Regulations (Application on Special Categories of Insured), 5747–1987, and in the National Insurance Order (Categories of Volunteers Outside Israel) 5747-1987, the minister of labour and social affairs extended the National Insurance Law to cover Jews who work in the territories, and those who volunteer in the Jewish settlements, thus going even further than the above-mentioned extension.

115 *Supra* text to note 100.

116 This authority is only implicit, as the discussion *infra* text to notes 134–37 explains. Yet the exercise of this authority with regard to the territories has not been questioned in the Knesset.

117 Para. 7 of the Emergency Regulations, *supra* note 83.

118 The Supervision of Goods and Services Law (Amendment No. 12), 5742–1982.

119 Para. 38A of Property Tax and Compensation Fund Law, 5721–1961, and Property Tax and Compensation Fund (Payment of Compensation for Damages) (Israeli External Property) Regulations, 5742–1982.

120 Regulation 12 (d) of the Dismissal Compensation Regulations (Computation of Compensation and Resignation that is seen as Dismissal), 5742–1964.

121 Para. 3 of the Emergency Regulations, *supra* note 83.

122 *Id.,* at para. 3A.

123 On this phenomenon *see also* text to note 184 *infra,* and M. Benvenisti, *The West Bank Handbook, supra* note 110, at 149–53.

124 *See* Encouraging Capital Investments Law, 5710–1950.

125 According to Drori, "The Israeli Settlements in Judea and Samaria:Legal Aspects," 44, 69, in *Judea, Samańa, and Gaza: Views on the Present and Future* (D. Elazar, ed., 1982), this obstacle did not prevent registration despite its illegality. As this author mentions, it is hardly conceivable that someone would be found to have standing to challenge this practice in court.

126 *See* text to note 115 *supra.*

127 This problem was solved under para. 6B of the Emergency Regulations *supra* note 83, according to which such lawyers are deemed to be living in Israel; and *see* Drori, *supra* note 125, *id.*

128 *See* M. Benvenisti, *supra* note 110, at 35–36. The poor conditions motivated local residents to sue other local residents in the Israeli courts. Thus, the plaintiff in *Gabour v. Hanitan,* [1983] (A) P.S.M. 499, a Palestinian, requested that the court not decline its jurisdiction due to the poor quality of the local judicial system.

129 *See* The Association for Civil Rights in Israel, *The Adjudicative and Administrative System, supra* note 79, at 17: "We‘ve heard complaints that civil suits against Jews [in the local courts] face obstacles since they resist the local police forces and the clerks of the local court and execution offices… Thus it seems that the local court system continues to apply mainly to disputes [between] the local residents."

130 *See* the cases mentioned in note 155 *infra.*

131 Regulation of Procedure (Service of Documents in the Administered Territories), 5729–1969. A similar regulation was enacted by the minister with regard to documents of the labour courts.

132 It includes also subpoenas and court decisions, as well as documents issued by the execution offices.

133 In *Alkirv. Van dev Hurst Roterdam,* 25(2) P.D. 13 (1971) (per Justice Sussman).

134 Another interpretation of the regulation was possible, and indeed, more appropriate: Bracha, *Service of Documents to the Administered Territories* 4 Mishpatim 119 (1972-73). Bracha suggested that the regulation be interpreted as regulating the means by which, *after* the court has granted a service of process to the territories, such a service may be effected. This interpretation would also have been compatible with international law: *see* critique on the court‘s interpretation, *infra* text to note 145.

135 Service to be effected by means prescribed by the country where the defendant is present.

136 There are three cumulative tests for the grant of leave: (1) The subject matter falls within the exhaustive list of factual links with Israel as prescribed in the regulations. (2) The claim is a substantial one. (3) The court exercised its discretion to approve the service: *see* Regulations 500–501.

137 *Alkir, supra* note 133, at 15.

138 *See Bank Leumi Lelsrael Ltd. v. Hirschberg* P.D. 32 (1) 617 ("Document" includes any legal act that can be effected through a document issued by a court, including an attachment of property).

139 Para. 2 of the Order Concerning Legal Aid, *supra,* note 85: "A document issued by [an Israeli civil court or execution office] shall be served in the region in the manner prescribed in the Israeli civil procedure regulations."

140 In this article, "Israel Civil Jurisdiction in the Administered Territories/' *13 Israel Yearbook on Human Rights* 90, 115 (1983), he concludes: "The powers of the military government (or of the Israeli government) over the administered territories under the laws of belligerent occupation would not appear to include the power to extend the civil jurisdiction of the Israeli courts over the residents of the administered territories in such a manner…"

141 *Gabour v. Hanitan, supra* note 128.

142 *Eichman v. Attorney General* 16 P.D. 2033, 2040; *Al-Cutub v. Shahin* 25 (2) P.D. 77 (1970); *Abu-ita v. The Commander of the Judea and Samaria Region*, 37 (2) P.D. 197, 233 (1981). This doctrine was inherited from the English common law: *Cheung v. The King* [1939] A.C. 160, 168.

143 *See supra* text to note 131.

144 *Shurpav. Wechsler, 28(l)?.O.5l2, bl7 (1973).SeealsoBankLeumiv. Hirschberg, supra* note 138, at 620: [E]ven though the administered territory does not form a part of the [Israeli] territory, and from the procedural point of view it is *prima facie* outside the jurisdiction of an Israeli court, an act of an Israeli court performed in the adminis" tered territory does not infringe in fact upon the sovereignty of any other power."

145 *See*, *e.g., Jama'iat Iscan, supra* note 57, at 793.

146 *Levi V. Barouch* [1984] (3) PSM, 45.

147 The rule was pronounced in *Bńtish South Afńca Co. v. Companhia de Mozambique* [1893] A.C. 602, and affirmed recently in *Hesperides Hotels v. Muftizade* [1978] 2 All.E.R. 1168 (H.L.).

148 On the enforcement procedures *see infra* para. 3.3.3.

149 *Levi v. Barouch, supra* note 146, at 55.

150 32 (3) P.D. 405 (1977).

151 Regularly the allocation of local jurisdiction is determined by territorial contact points such as the residence or the place of business of the defendant, place of contracting or of performance, place of the commission of tort. (Para. 3 of the Civil Procedure Regulations.)

152 Para. 6 of the Civil Procedure Regulations (formerly para. 4B of the regulations from 1963).

153 *Abu-Atiya v. Arabtisi* 39 (1) P.D. 365, 385 (1985) (examination of the reasonable expectations of the parties to the litigation).

154 The former rule, which would have narrowed significantly the prospect of rejecting such claims, permitted the court to decline jurisdiction only on condition that the defendant shows that (1) the continuation of the trial will be unfair to him, and (2) that the dismissal of the case will not jeopardize the plaintiffs claim. This was the test laid down in the English case of *St. Pierre v. South American Stores Ltd.,* [1936] 1 K.B. 382, and adopted in Israel in *Hachamov v. Schmidt* 12 P.D. 59 (1957). *See* S. Goldstein, "International Jurisdiction Based on Service on the Defendant," 10 *Mishpatim, Hebrew University Review* 409 (Hebrew, 1980).

155 *Abu-Atiya v. Arabtisi, supra* note 153 at 372,385; *Elraias v. The Arab Insurance Co. Ltd.* 38 (3) P.D. 495, 496 (1984). And *see also* the Jerusalem District Court decisions: *Gabour v. Hanitan, supra* note 128; *The Arab Insurance Co. Ltd. v. Khader* 1984 (2) P.S.M. 172.

156 C.A. 425/81 *Abu-Ita v. Ya'nkobi* (unpublished decision); *Abu-Atiya v. Arabtisi supra* note 153 at 386.

157 *Kaplan v. Gabai* 1982 (2) P.S.M. 290; *Katz v. Segal* 1986 (2) P.S.M. 119.

158 In the U.S. the first case was *Babock v. Jackson,* 12 N.Y. 2d. 473 (1963); in England it was *Chaplin v. Boys,* [1969] 2 All E.R. 1085. The same rule is accepted in many European countries: H. Batiffol and P. Lagarde, 2 *Droit international privé* para. 558, pp. 239–42 (7th ed., 1983).

159 C.F. 910/82 *National Insurance Institution v. Abu-Ita* 1987 (unpublished, p. 21 of the typed opinion). This case has not gone up to the Supreme Court.

160 C.A. 425/81 *supra* note 156, at pp. 6–7 of the opinion.

161 *The Kiryat Arba Administrative Board v. The National Labour Court,* 34 P.D. (2) 398 (1979).

162 *Id.,* at 403.

163 *See* Order Concerning Employment of Workers in Certain Places (Judea and Samaria) (No. 967), 5742–1982. The "certain places" are the Israeli settlements, and the assumption of the order is that it is the local law which applies to labour contracts in those places. Otherwise the order would have been unnecessary.

164 Probably since the workers are hired through the local Labour Exchange bureaus.

165 *See* Ben-Israel, "On Social Rights for Workers of the Administered Areas," 12 *Israel Yearbook on Human Rights* 141, 150 (1982) (concerning the pension payments): "[T]his special arrangement is unlawful, being not only in contradiction to international standards related to migrant workers, but at the same time also breaching the relevant provisions of the collective agreements [under the Israeli Collective Agreements Law, 57171957]."

166 On the different status of Israeli versus Palestinian workers *see* M.Shalev, "Jewish Organized Labour and the Palestinians: A study of State/Society Relations in Israel" in *The Israeli State and Society: Boundaries and Frontiers* 93, 115–119 (B. Kimmerling ed., 1989).

167 Order Concerning Registration of Transactions in Certain Immovables (Judea and Samaria) (No. 569), 5735–1974.

168 Para. 4 of Order Concerning Legal Aid, *supra* note 85.

169 Para. 4A of the Order Concerning Legal Aid, *id.*

170 *Id.,* at para. 4A (9).

171 *Bank Leumi v. Hirshberg, supra* note 138.

172 *See* text to note 167, *supra.*

173 Para. 16 of the Regulations Concerning Registration of Transactions in Certain Immovables (Management and Registration) (Judea and Samaria), 5735–1975.

174 *Bank Leumi v. Hirshberg*, *supra* note 138.

175 Para. 5 of the Order Concerning Legal Aid, *supra* note 85, and the Israeli Emergency Order, *supra* note 83, paras. 3 and 4 (against the attomey-general's decision one could submit a petition to the High Court of Justice).

176 Emergency Regulations, *supra* note 83, at para. 3A.

177 Para. 6A of the Order Concerning Legal Aid, *supra* note 83.

178 Para. 7A of the Emergency Regulations, *supra* note 83.

179 *See* text to notes 118–120, 124 *supra.*

180 *Abu-Itav. the Commander of the Judea and Samaria Region, supra* note 142.

181 *See Abu-Ita, supra,* note 143, at 211.

182 *Id.,* at 320.

183 *Id.,* at 320–21.

184 *See Daniel v. The Commander of Judea and Samaria* 30 (1) P.D. 813 (1976).

185 The Israeli Purchase Tax Law exempts goods imported from the territories from tax.

186 Order Concerning Transport of Goods (Judea and Samaria) (No. 1252), 5748–1988. This order replaced the order in force since 1967.

187 On this see *infra,* text to notes 211–12.

188 Order Concerning Purchase of Foreign Currency (Judea and Samaria) (No. 1055), 5743–1983. On the legal tender in the territories *see* text to note 199, *infra.*

189 Levy on Purchase of Foreign Currency (Judea and Samaria) (No.1055), 5743–1983. On the legal tender in the territories *see* text to note 199, *infra.*

190 Order Concerning Levy on the Purchase of Imported Services and Foreign Assets (Provisional Order) (Judea and Samaria) (No. 1183A), 5746–1986. The Israeli version is: Levy on the Purchase of Imported Services and Foreign Assests (Provisional Order) Law, 5745–1984.

191 The dinar is not considered a foreign currency for the purposes of that order. *See also* Order Concerning Control (Judea and Samaria) (No. 952), 5742–1981 (the dinar is not considered a foreign currency).

192 The purchase of goods for their import to the territories is exempted from the levy: *see* the definition of "foreign asset" in that order. The levy paid for purchase of goods and services abroad by an exporter in the course of business is refundable: Regulations Concerning the Levy on the Purchase of Imported Services and Foreign Assets (Refund for Export) (Judea and Samaria), 5746–1986.

193 *Abu-Ita, supra* note 142, at 314–15; following Dinstein, "Legislative Power in Occupied Territory," 2 *Tel Aviv University Law Review,* 505, 511 (1972).

194 Order Concerning Levy on Vehicles (Provisional Order) (Judea and Samaria) (No. 1150), 5746–1985. In Israel the law is Levy on Property Law (Provisional

Order), 5745–1985, part C. The Israeli version included also levies on other properties.

195 It was introduced in December 15, 1985, and imposed the tax on car owners who were registered as such since June 1, 1985.

196 *See supra* note 193.

197 Order Concerning Levy on Loans in Foreign Currency (Judea and Samaria) (No. 1228), 5748–1987.

198 This does not work the other way around since there is no industry in the territories that could replace foreign products for Israeli consumption.

199 Order Concerning The Establishment of the Israeli Currency as a Legal Tender (Judea and Samaria) (No. 76), 5727–1967.

200 Order Concerning the Israeli Currency as a Legal Tender (Further Provisions) (Judea and Samaria) (No. 83), 5727–1967, para. 3.

201 *See* Order Concerning Currency Control, *supra* note 191, and the General Permit issued under the order.

202 There are other means of controlling the flow of currency into the Territories: Order Concerning the Transfer of Money into the Area (Judea and Samaria) (No. 973), 5742–1982.

203 Order Concerning the Amendment of the Banks Law (Judea and Samaria) (No. 1180), 5746–1986, and the directions that were issued pursuant to this order.

204 Order Concerning Dishonoured checks (Judea and Samaria) (No.1024), 5742–1982. The Israeli law is Dishonoured Cheque Law, 5741–1981.

205 The "deposit" on which the relevant checks are drawn is "A deposit in Israeli currency": para. 1 of the order.

206 *See* paras. 13, 20 of the order.

207 Order Concerning Awarding Interest and Indexing (Judea and Samaria) (No. 980), 5742–1982.

208 Order Concerning Stability of Prices of Goods and Services (Temporary Provisions) (Judea and Samaria) (No. 1125), 5745–1984.

209 Para. 2(e) of that order, as amended on March 23, 1988.

210 The Israeli requirements with regard to safety belts are also imposed in the territories: Order Concerning Safety Belts in Vehicles (Judea and Samaria) (No. 600), 5735–1975.

211 A driver's licence from one region is respected in the other regions: *see* para. 9A of the Order Concerning Traffic Law.

212 Order Concerning the Transfer of Agricultural Produce (Judea and Samaria) (No. 47), 5727–1967.

213 In 1988 Israel undertook to allow the Palestinians direct access to the EEC markets, thus submitting to the request of the latter.

214 *The Christian Association for the Holy Places v. The Minister of Defence* 26 (1) P.D. 574, 582 (1971) (per Justice Sussman). *See also* Justice Barak in *Jama'iat Iscan, supra* note 57, at 799: The powers under Regulation 43 encompass all the aspects of our modern life.

215 Order Concerning the Labour Law (Injuries in the Workplace) (Judea and Samaria) (No. 663), 5736–1976, para. 5.

216 Order Concerning Insurance Against Injuries in the Workplace (Judea and Samaria) (No. 662), 5736–1976.

217 Order Concerning Amendment of the Labour Law, Law No. 21 for the year 1960 (Judea and Samaria) (No. 439), 5731–1971 (Amendment from 1987).

218 *Id.,* para. 5. This amendment survived an attack in the Israeli High Court: *The Christian Association, supra* note 214.

219 Order Concerning Health Services (Judea and Samaria) (No. 746), 5738–1978.

220 On this subject *see* Drori, "Local Government in Judea and Samaria," in *Military Government in the Territories Administered by Israel 1967–1980,* 237 (M. Shamgar ed,, 1982).

221 Order Concerning the Municipalities Law No. 29 for the year 1955 (Judea and Samaria) (No. 194) 5727-1967.

222 *Id.,* at para. 2-1.

223 On these changes *see* Drori, *supra* note 220, at 278. *See also* Drori,"Second Municipal Elections: Legislative Changes" 12 *Israel Law Review,* 526 (1977) 223.

224 Order Concerning the Administration of Villages Law No. 5 of the year 1954 (Judea and Samaria) (No. 191), 5728–1967, para. 2C.

225 For details on these elections *see* Drori, *supra* note 223, at 272–75.

226 Order Concerning the Erection of Municipal Courts (Judea and Samaria) (No. 631), 5736–1976.

227 Order Concerning the Protection of the Holy Places (Judea and Samaria) (No. 66), 5727–1967 (later replaced by Order No. 327).

228 Order Concerning Local Courts (Capital Punishment) (Judea and Samaria) (No. 268), 5728–1968.

229 The arrangement is outlined in the text to note 246.

230 *Supra,* text to notes 100–101.

231 Except for deportation. Israeli law does not permit the deportation of Israeli citizens.

232 Order Concerning Security Code (Judea and Samaria) (No. *378),* 5730–1970. This order is an amended version of the code that was promulgated on the first day of the occupation.

233 The Israeli High Court of Justice could not reach a clear answer on whether the Jordanian Constitution had repealed the power to deport Jordanian citizens under the Emergency Regulations of 1945. In *Kawassme v. The Minister of Defence,* 35 (1) P.D. 617 (1980) the court seemed to favour the opinion that this power had indeed been repealed. Be that as it may, the Order Concerning Interpretation (Further Provisions) (No. 5) (Judea and Samaria) (No. 224), 5728–1968 upheld the deportation power by insulating it from any effects that the Jordanian Constitution could have had: *see Nazal v. The Commander of the IDF in Judea and Samaria*, 39 (3) P.D. 645 (1985).

234 *E.g.* breaching conditions of a licence, or tax avoidance: paras. 60, 61 of the Security Code.

235 *See* M. Drori, *The Legislation in the Area of Judea and Samaria,* 94 (1975). The Security Code was intended to comply with the Fourth Geneva Convention. Indeed, one of its provisions (para. 35) declared explicitly that whenever there

was a conflict between the code and the Convention – the Convention prevailed. But by the end of 1967 this provision was quietly replaced with another, totally unrelated, provision, thus denying the formal applicability of the Convention in the internal legal system. On the status of the Fourth Geneva Convention in the military courts *see infra* note 239 and accompanying text; on its status in the civil courts *see infra* text to notes 268–73.

236 There may also be adjudications by a single judge (an officer with legal training). The latter has the same jurisdiction that the panel has, but the punishment is limited: maximum imprisonment – five years (para. 50).

237 The "law" is defined in the Order Concerning Interpretation as "an enactment of a legislative body which was effective in the area on the eve of [June 7, 1967], including every rule issued pursuant to such an enactment, and excluding security enactments."

238 Para. 7A, from February 3, 1988.

239 In the past some panels of the military courts did hear arguments against military acts as being contrary to international law. On the other hand, other panels were of the opinion that they did not have jurisdiction to entertain such claims. *See* Sommer, ″Eppur si applica – the Geneva Convention (IV) and the Israeli Law," 11 *Tel Aviv University Law Review* 263, 269–70 (Hebrew, 1986); Drori, *Legislation, supra* note 235, at 66–72. Since there was no military court of appeal, the question remained open.

240 *See* para. 78 of the code.

241 Para. 78A-78D of the code. The whole arrangement with regard to these rights of the detainee were introduced on February 3, 1988.The Israeli Criminal Procedure Law [Consolidated Version], 5742–1982, paras. 29, 30, provides (in certain security offences) for up to 15 days' delay in both informing relatives about the arrest and seeing a counsel.

242 The court is authorized to impose capital punishment for murder(and according to the Emergency Regulations, for other crimes also), but this sanction has never been exercised.

243 *See* Order Concerning Security Code (Amendment No. 55) (Judea and Samaria) (No. 1233), 5748–1988, of May 5, 1988.

244 *Jamal v. The Military Commander for the Gaza District,* 37 (2) P.D. 798, 802 (1983).

245 Judgments of a panel must be approved by the military commander.

246 Chapter El of the Security Code.

247 Order No. 1229 from March 17, 1988.

248 Order No. 1236, from June 13, 1988.

249 Paras. 85, 86.

250 This method was used when the authorities tried in the early eighties to create the "Village Leagues," a "genuine" local leadership that was to be responsive to the Israeli autonomy plan.

251 Order Concerning Abandoned Property (Private Property) (Judea and Samaria) (No. 58), 5727–1967.

252 Order Concerning Objections Committees (The West Bank Region)(No. 172), 5728–1967.

253 Order Concerning Objections Committees (The West Bank Region)(No. 172), 5728–1967.

254 Rules Concerning Procedure in Objections Committees (Judea and Samaria), 5746–1986. The former rules, from 1984, were apparently not published (the other does not require the publication of the rules of procedure: para. 8 (b).

255 Order Concerning Objections Committees, *supra* note 253, at para.8(c).

256 *Id.,* at para. 9A, of November 1987.

257 *See* Order Concerning Supervision over Building (Provisional Rules)(Judea and Samaria) (No. 1153), 5746–1985. Another special appeals committee is established by para. 8 of the Order Concerning the Transportation on Roads (the West Bank) (No. 56), 5727–1967, to hear claims against the cancellation, suspension, or non-renewal of driver or vehicle licences.

258 Order Concerning Objections Committees, *supra* note 253, at para. 7.

259 *Id.,* at para. 2.

260 *Id.,* at para. 6.

261 *Shmalawi v. The Objections Committee, supra* note 58; *Al Nazer v. The Commander of Judea and Samaria,* 36 (1) P.D. 701, 707 (1982).

262 On the Israeli position *see, e.g.,* Blum, "The Missing Reversioner:Reflections on the Status of Judea and Samaria" 3 *Israel Law Review* 279 (1968); Shamgar, *Legal Concepts, supra* note 2, at 13, 31–43. This formal position has been understood by the court to include all the laws regarding belligerent occupation – even those incorporated in the Hague Regulations. However, due to the consent of the govern-ment in court, there has been no need to clarify the legal situation.

263 The High Court consistently held that the Fourth Geneva Convention had not been incorporated by the Knesset and therefore was not binding as law in Israeli courts. *See infra* text to notes 269–73. For other views which maintain the applicability of the Convention, *see*: Rubinstein, *supra* note 79, at 446; Sommer, *supra* note 239, at 279; Rubin, "Adoption of International Treaties into Municipal Law by the Courts," 13 *Mishpatim, Hebrew University Law Review,* 210 (1983).

264 This reason was put forward by Shamgar, *supra,* note 2, at 42.

265 *See* M. Negbi, *Justice Under Occupation,* 16–17 (Hebrew, 1981). The author has interviewed Justice Shamgar and others for the purpose of his book.

266 *See* Negbi, *id.,* at 21. The author details the recollections of (by then retired) Justice Vitkon.

267 The first case was the famous "Elon-Moreh case" *Dwaikat v. The Government of Israel* 34 P.D. (1) 1, when two settlers joined as respondents to the petition. The second case was *Ha'etzni v. The State of Israel* 34 (3) P.D. 595 (1980).

268 Elon Moreh, *supra* note 267, at 13, 29–30 (1979). Translation of the case appears in *Military Government, supra* note 2, at 404.

269 *Ayyub v. The Minister of Defense* 33 P.D. (2) 113 (1979). English translation appears in *Military Government, supra* note 2, at 371.

270 *Supra* note 267.

271 Beit El, *supra* note 269, at 128; Elon Moreh, *supra* note 267, at 29.

272 *See, e.g., Kawassme v. The Minister of Defence* 35 P.D. (1) 617, 626–7 (1980); *Afou v. The Commander of the IDF Forces in the West Bank, supra* note 3.

273 *Jamďiat Iscan, supra* note 57, at 794.

274 Justice Barak in *Ĵama'iat Iscan, supra* note 57, at 809–10. The court asserted its jurisdiction also with regard to activities in Lebanon during the war there: *Al-Nawar v. The Minister of Defence,* 39 (3) P.D. 449, 461 (1985).

275 *See El-Tali'nh v. The Minister of Defence* 33 (3) 505, 512–13 (1979);*Jamat'iat Iscan, supra* note 57, at 799–800.

276 *See*, *e.g., Abu-Gosh v. The Military Commander of the Corridor to Jerusalem, 1* P.D. 941, 943 (1953).

277 The Beit-El case, *supra* note 269, at 126.

278 *Electricity Co. For the District of Jerusalem v. The Minister of Energy,* 35 (2) P.D. 673 (1981).

279 The Evidence Ordinance [New Version], para. 44A.

280 This would be an approach similar to that used in examining security considerations: *see supra,* text to notes 276–79.

281 *Jama'iat Iscan supra* note 57, at 810.

282 *Electricity Co. For the District of Jerusalem v. The Minister of Defence* 27 P.D. (1) 124, 138 (1972).

283 *Jama'iat Iscan*, *supra* note 57.

284 *Id., id.; Abu-Ita, supra* note 142.

285 *Al-Gazawy v. The Panel of the Military Court of Gaza, supra* note 58.

286 *Shmalawy v. The Appeals Committee, supra* note 58.

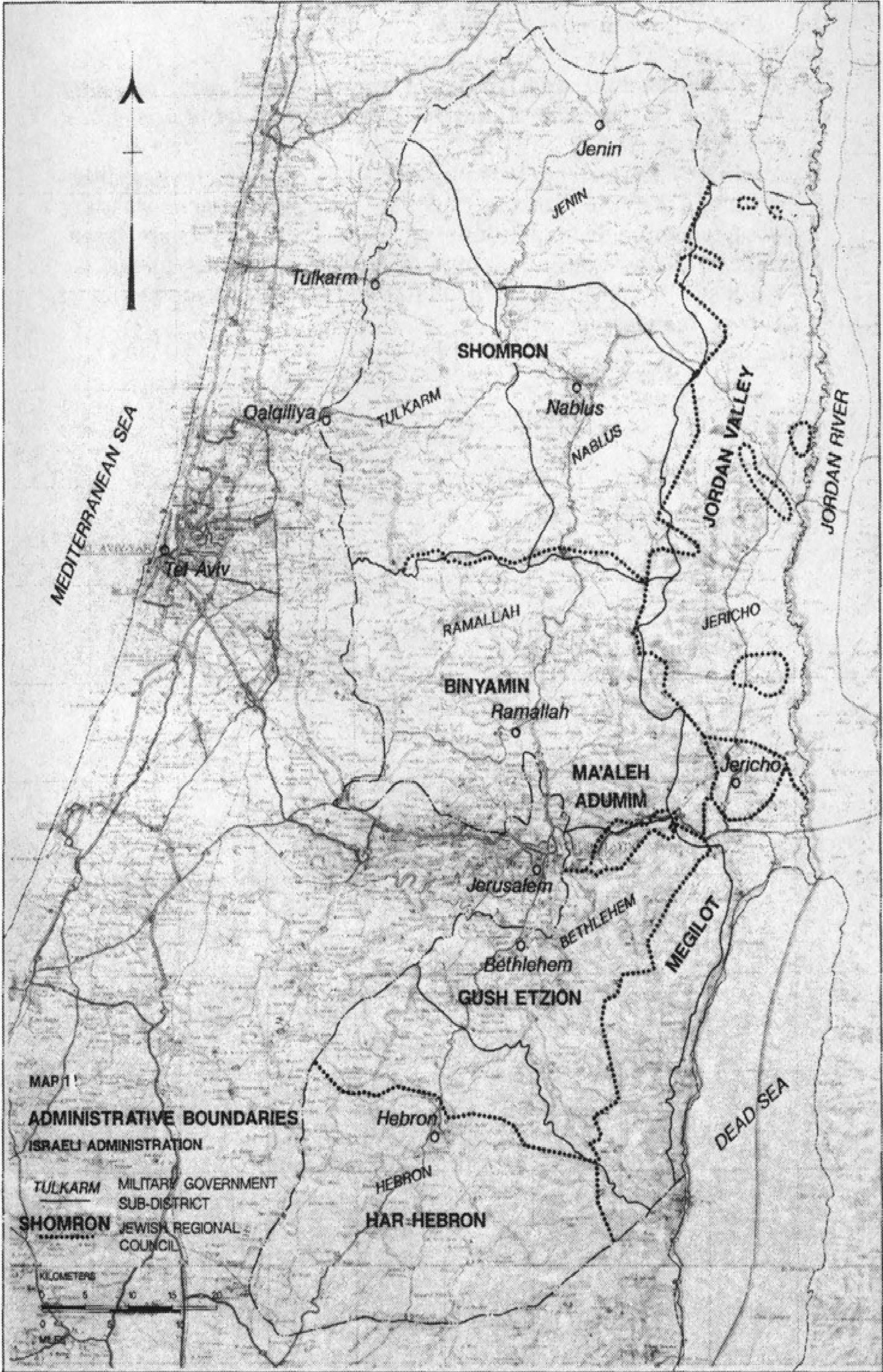
287 *Kawassme v. The Minister of Defence* 35 (3) P.D. 113 (1980).

288 *Al-Tali'nh, supra* note 275, at 512.

289 *Id.,* at 513.

290 The new technique, a declaration of lands as "state lands," was later approved by the court: *Al·Nazer v. The Commander of Judea and Samaria* 36 (1) P.D. 701 (1982).

291 *Tabib v. The Minister of Defence,* 36 (2) P.D. 622 (1981). Justice Shiloh criticized the order, commenting that hat retroactive enactment is not accepted willingly, in particular where basic civil rights are dependent on the enactment." (At 633.) Nevertheless the court upheld the method of notification, saying that it had been a reasonable way to convey the message.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Tel Aviv
RAMALLAH
JERICHO
BINYAMIN
Ramallah
MA'ALEH
ADUMIM
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MEGILOT
GUSH ETZION
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MAP 1
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ISRAELI ADMINISTRATION
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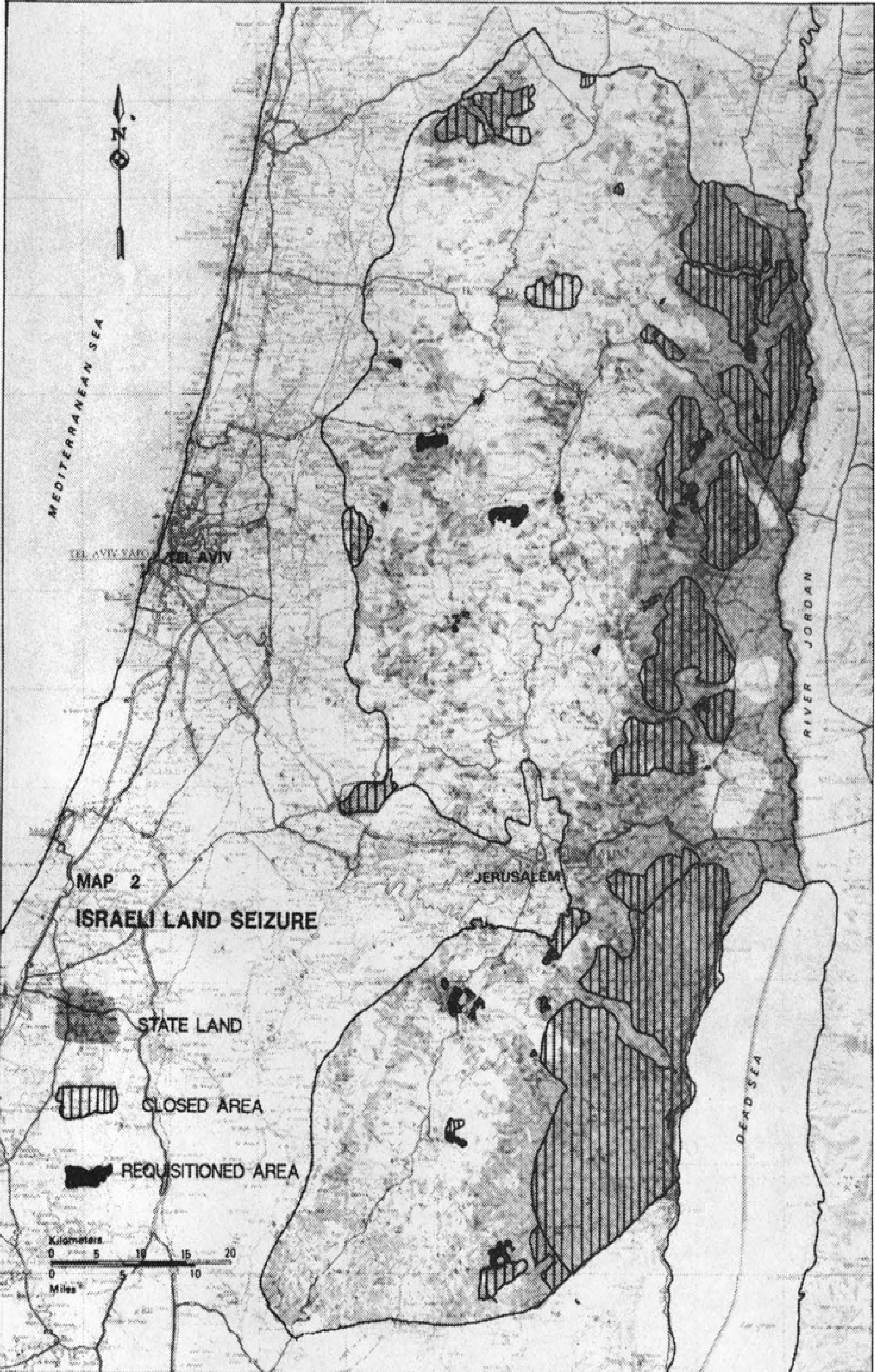
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DEAD SEA
MAP 2
ISRAELI LAND SEIZURE
STATE LAND
CLOSED AREA
REQUISITIONED AREA
Kilometers
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Cover