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ARTICLE

# Between Rules and Implementation: The Difficulty in Relying on International Law in Military Courts in Criminal Law

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## Abstract

The West Bank, also referred to as Judea and Samaria, has been subject to belligerent occupation since 1967, and its legal framework is grounded primarily in international law. This legal foundation of belligerent occupation emanates from the international law of occupation, which regulates the legislative, judicial and executive powers of the occupying state in the occupied territory. However, the utilisation of international law in adjudicating criminal matters within military courts in this region is sporadic. The underlying reasons for this practice call for inquiry and prompt a reconsideration of the optimal configuration of the legal regime.

This article contends that despite a recent uptake in integrating international law into military court decisions, its effectiveness in addressing criminal issues within these courts is limited. Moreover, in most cases presented before military courts, international law lags behind domestic legal doctrines, including Israeli criminal law. Despite its overarching authority, international law falls short of providing a pragmatic solution to the challenges confronted by military courts. Consequently, these courts are compelled to turn to alternative legal sources. The article proposes an integrated model, advocating reliance on international law for fundamental, constitutional-level issues while deferring to the Israeli criminal justice system for specific practical criminal matters.

**Keywords:** military courts; international law; West Bank; Israeli criminal law

## 1. Introduction

As judicial bodies, the primary role of the military courts in the West Bank (referred to by many in Israel as Judea and Samaria) (hereinafter 'the region') is to uphold the rule of law. While not their direct mandate per se, the military courts aim to maintain order and security in the region.[1] Established following the occupation of the region, the Six-Day War between Israel and Jordan in 1967, the military courts operate within the framework of the military government. While the direct mandate of the military courts is to administer justice, their rulings and decisions indirectly contribute to the maintenance of order and security in the region.[2] The power of the military courts is anchored in the Fourth Geneva Convention on the Protection of Civilians in Time of War from 1949 (GC IV). Article 64 of GC IV states that the occupying power may impose instructions on the population of the occupied territory that help in maintaining good governance and preserve safety for its populace.[3] Article 66 allows for the establishment of non-political military courts.[4]

The military courts primarily handle security offences, which include such crimes as the murder of civilians or soldiers, shooting and stabbing attacks, as well as membership of and activity in terrorist organisations. The primary legislation governing the operation of military courts in the region is the Security Provisions Order. This order regulates various aspects of criminal law, including the establishment of courts, appointment of judges, and rules of procedure and evidence. In practice, military judges rely on sources of Israeli law to interpret the law or fulfil lacunas in criminal matters brought before them; this reliance finds expression in both interpretation and inspiration. At times, Israeli law is drawn upon explicitly; for example, the military order governing proceedings in military courts provides that these courts will apply Israeli law in matters of evidence.[5] This reliance is based on both the similarities between the legal provisions governing their operations and

[1] Israel Defense Forces, 'Military Courts Unit, Courts Administration', http://www.idf.il/en/minisites/military-courts/the-courts (in Hebrew).

[2] Eyal Benvenisti, *The International Law of Occupation* (2nd edn, Oxford University Press 2012) 68–69; Meir Shamgar, 'Legal Concepts and Problems of the Israeli Military Government – The Initial Stage', in Meir Shamgar (ed), *Military Government in the Territories Administered by Israel 1967–1980* (Hebrew University of Jerusalem, Faculty of Law and Harry Sacher Institute for Legislative Research and Comparative Law 1982) 31, 43–45; Yehuda Blum, 'The Missing Reversioner: Reflections on the Status of Judea and Samaria' (1968) 3 *Israel Law Review* 279, 280–81.

[3] Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (entered into force 21 October 1950) 75 UNTS 287 (GC IV), arts 64, 66; Meir Shamgar, 'The Observance of International Law in the Administered Territories' in Yoram Dinstein and Fania Domb (eds), *The Progression of International Law* (Brill 2011) 429, 433–35.

[4] GC IV (n 3) art 66.

[5] Order regarding Security Provisions (Judea and Samaria) (No 1651), 2009, s 86, https://www.idf.il/media/zh2jx5pd/%D7%A6%D7%95-1651-%D7%A6%D7%95-%D7%91%D7%93%D7%91%D7%A8-%D7%94%D7%95%D7%A8%D7%90%D7%95%D7%AA-%D7%91%D7%99%D7%98%D7%97%D7%95%D7%9F-%D7%A0%D7%95%D7%A1%D7%97-%D7%9E%D7%A9%D7%95%D7%9C%D7%91-1.pdf (in Hebrew) (Security Provisions Order).

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Israeli law, and the fact that Israeli law serves as the foundation for their legal expertise.[6]

Generally, there is excellent evidence of the use of Israeli law.[7] However, the primary concern arises from the prevalent use of Israeli criminal law, coupled with limited utilisation of international law in resolving criminal matters in the region. While existing scholarship has extensively documented the use of international law in rulings of the military courts, few studies have critically examined the reasons behind the limited application of international law to substantive criminal matters.[8] Much of the literature focuses on analysing specific cases and principles rather than evaluating the suitability of international law as a coherent legal basis for criminal proceedings. Even studies that acknowledge difficulties in applying international law view it as theoretically sufficient if it is adequately interpreted and used by the courts.[9] However, fundamental gaps remain regarding whether international law can adequately address the complex balancing of individual rights, security and justice required for a functioning criminal system.

Moreover, most previous analyses rely heavily on legal sources, with less attention to more recent developments in the jurisprudence of military courts. Incorporating modern research and cases could provide greater insight into the evolving role and limitations of international law, given the prolonged nature of the occupation. Examining these issues through a contemporary lens is critical for developing a legal framework responsive to current realities.

This study will investigate issues related to the application of international law in military court rulings. It aims to address questions such as when military courts incorporate international law in their decisions, why international law is limited in these judgments, the rationales behind relying on Israeli law, and how the military legal framework should be appropriately structured moving forward. The article will delineate and elucidate the legal domains within military court rulings where the application of international law is pertinent.

While international law provides the overarching legal framework for the region, a territory under prolonged occupation, it is essential to recognise the unique challenges posed by this exceptional situation. The laws of occupation were designed primarily to address short-term, post-conflict scenarios rather than the complex realities of an extended occupation lasting over five decades. Consequently, the direct application of international law in the day-to-day functioning of the military courts may prove insufficient in

[6] ibid. This order regulates most issues related to establishing military courts and their work. One clear example out of many is s 86 of this order: 'In the law of evidence, a military court shall act according to the mandatory rules in criminal matters in the courts of the State of Israel'.

[7] Smadar Ben-Natan, 'Amongst Their People: The Application of Israeli Law in the Military Courts of the Occupied Palestinian Territories' (2014) 43 *Theory and Criticism* 45, 58–62; Yaël Ronen, 'Blind in Their Own Cause: The Military Courts in the West Bank' (2014) 2 *Cambridge Journal of International and Comparative Law* 738, 746–50.

[8] Anthony D'Amato, 'Trashing Customary International Law' (1987) 81 *American Journal of International Law* 101, 101–05.

[9] Yoram Dinstein, *The International Law of Belligerent Occupation* (2nd edn, Cambridge University Press 2019) 145–54.

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ensuring the effective administration of justice and the protection of defendants' rights.

Given these circumstances, reliance on Israeli criminal law as the default legal system in the military courts can be justified by the need to uphold the principles of fair trial and due process. The Israeli criminal justice system – with its well-established legal principles, detailed procedural rules and extensive case law – offers a more comprehensive and refined framework for adjudicating criminal cases. By drawing upon Israeli criminal law, the military courts can ensure that defendants' rights are adequately safeguarded, in line with international human rights standards, while also considering the specific security challenges prevalent in the region. This approach aims to strike a balance between the practical necessities of maintaining order and security in a prolonged occupation and the fundamental commitment to protecting the rights of the accused in criminal proceedings.

The article will contend that, despite the heightened integration of international law in recent years, its utility in providing resolutions of routine legal queries presented in criminal cases before military courts is constrained. Furthermore, when confronted with a judicial system that aspires to uphold contemporary legal principles that prioritise equitable procedures and the protection of the accused's rights, international law lacks the specificity to offer tangible solutions for the court; notably in certain realms, such as the laws of war, international law trails behind domestic legal methodologies, including Israeli criminal law.

Moreover, the identified gaps in the judicial system, operating extensively under a protracted belligerent concept, are on an upward trajectory. The article will assert that, notwithstanding the acknowledged importance of incorporating international law, the military court system endeavours to address these gaps in the legal landscape. Even if the system evolves in alignment with established principles of advanced criminal procedures, relying solely on international law is deemed challenging. It will provide normative justifications explaining why international law cannot be relied upon to resolve day-to-day criminal problems, as well as why it is more fitting, with a focus on advancing the defendant's rights, to lean on a legal system crafted to safeguard human rights – a system that possesses a comprehensive codex (as exemplified by Israeli criminal law) – as a normative foundation for military court rulings. Ultimately, the article will address potential criticisms and offer plausible responses.

This study aims to build on prior work by critically evaluating the capacity of international law to regulate criminal proceedings directly under conditions of modern occupation and examining the reasons for the limited use of international law in rulings of the military courts. Finally, it will show how the legal regime should be designed going forward.

The article starts (Section 2) by providing a contextual backdrop to establishing military courts in the region, delineating their authority derived from international law and domestic legislation. It expounds upon their pivotal role in implementing the rule of law within the region.

In Section 3 the article delves into the military courts' restrained yet indispensable utilisation of international law. Initially prominent in the 1970s, these

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courts frequently referenced international conventions, primarily on the status of the accused. Conversely, a shift occurred in the early 2000s, marking a partial reintegration of international law into military court rulings after infrequent reliance.

The next part (Section 4) examines the limited responsiveness of international law to military court decisions in the criminal domain. It underscores the distinctions between international law and the regional criminal justice system, emphasising the challenges of leveraging international law to adjudicate criminal matters. Section 5 shows examples of difficulties in relying on international law in military court rulings in criminal law.

The article then proposes a model for incorporating international law into military court rulings (Section 6). This model suggests that recourse to international law, the region's highest normative authority, is imperative when addressing fundamental and overarching issues. Conversely, deference to the Israeli criminal justice system is preferred when the military court addresses specific criminal matters. Simultaneously, this section considers potential criticisms of this proposition and explores the conceivable rationales behind such critiques.

Section 7 consolidates the findings and conclusions of the article, summarising the nuanced relationship between military courts, international law and the regional criminal justice landscape.

## 2. The military courts in the region

Israel has held the region under military occupation since 1967.[10] Under the rules of international law and, more specifically, the rules on belligerent occupation, the Israel Defense Forces (IDF), as the occupying power in the region, has full legislative, judicial and executive powers, including those of enforcing the laws and orders and protecting public order and security.[11] The basic rule of belligerent occupation law is that it is temporary and does not confer full sovereignty. Another basic rule is that the occupying power must restore and ensure, as far as possible, public order and civil life while respecting, unless absolutely prevented, the laws in force in the country.[12]

Although Israel disputes the *de jure* applicability of the Fourth Geneva Convention (GC IV) in the area and is not party to Additional Protocol I

[10] These principles are also mentioned in the Additional Protocol to the Geneva Convention and in the Rome Statute of the International Criminal Court. See Protocol Additional to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of International Armed Conflicts (entered into force 7 December 1978) 1125 UNTS 3 (AP I), art 75(4); Rome Statute of the International Criminal Court (entered into force 1 July 2002) 2187 UNTS 90 (Rome Statute), arts 22–33.

[11] HCJ 769/02 *The Public Committee Against Torture in Israel v Government of Israel* (14 December 2006) para 22; Moshe Drori, 'The Legal System in Judea and Samaria: A Review of the Previous Decade with a Glance at the Future' (1978) 8 *Israel Yearbook on Human Rights* 144, 147.

[12] Hague Convention (IV) respecting the Laws and Customs of War on Land and Its Annex: Regulations concerning the Laws and Customs of War on Land (entered into force 26 January 1910) 187 CTS 227, art 43.

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(AP I), it acknowledges that some provisions of AP I reflect customary international law. However, Israel does not consider all of AP I to be of a customary nature, rejecting particularly Articles 43 and 44 (relating to combatant status) and Article 1(4) (concerning wars of national liberation). Israel has undertaken to implement the humanitarian provisions contained in GC IV.[13] As a result, the legal regime in the Occupied Territory is determined mainly by the rules of international law,[14] particularly GC IV and the regulations respecting the laws and customs of war on land (Hague Regulations of 1907).[15]

Under the framework of belligerent occupation, Israel, as the occupying power, has assumed certain governmental powers in the region, including the establishment of military courts to handle security and certain criminal offences.[16] These courts, operating within the military government structure, administer justice according to applicable laws, contributing to order and security.[17] This authority is derived from the Hague Regulations and GC IV.[18] Article 64 of GC IV allows the occupying power to apply necessary regulations, while Article 66 authorises the establishment of military courts.[19] GC IV also outlines principles for fair trials, including prohibition of retroactive legislation, proportionality of punishment, deduction of pre-trial detention, orderly trials, the right to understand charges, and the right to defence counsel.[20] These principles reflect international fair trial standards.[21]

### 2.1. The inadequacy of Jordanian law in the military courts of the region

The application of Jordanian law in the region's military courts raises several concerns regarding its suitability and legitimacy. First, recognition of Jordanian sovereignty over the region following the 1948 Arab–Israeli War was limited, with only two countries acknowledging Jordan's control over the area.[22] This calls into question the extent to which Jordanian law can be applied legitimately in the region under the current authority.

In addition, the Jordanian law in force in the region is outdated and has not been updated for many years. Israel is not obligated to adopt the changes made to Jordanian law since the occupation of the region began.[23] Moreover, the existing Jordanian law does not reflect modern social and legal developments, making its application problematic.

[13] Dinstein (n 9) 32–24.

[14] David Kretzmer and Yaël Ronen, *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories* (2nd edn, Oxford University Press 2021) 43–81.

[15] Benvenisti (n 2) 203–204.

[16] Drori (n 11) 147; Blum (n 2) 280; Benvenisti (n 2) 7–8.

[17] Shamgar (n 2) 31–55.

[18] Hague Convention (IV) (n 12) art 43; GC IV (n 3).

[19] GC IV (n 3) arts 64, 66.

[20] ibid arts 67, 69, 71, 72.

[21] For a discussion of these principles in the context of international law see Kretzmer and Ronen (n 14); Benvenisti (n 2) 203–04.

[22] Blum (n 2).

[23] Shamgar (n 3) 433–39.

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In some cases Jordanian law violates basic human rights and fails to meet contemporary standards. For example, it discriminates against women in certain respects, such as providing an exemption for a husband who kills his wife on the grounds of 'preserving family honour'.[24] This stands in stark contrast to the law and jurisprudence of the military courts, which have consistently condemned such acts. Additionally, Jordanian law imposes severe mandatory penalties for certain offences, such as theft, which may be considered disproportionate by modern standards.

In comparison to Israeli law, Jordanian law tends to be more stringent and less liberal. Its application to the residents of the region could create significant disparities between their rights and those of Israeli citizens. This is particularly problematic when co-defendants, one a resident of the region and the other an Israeli citizen, face different legal systems (military and civilian courts, respectively) for the same offence. In such cases it is desirable to establish similar, if not identical, laws for both defendants.[25]

Furthermore, Jordanian law is not tailored specifically to address the complex security situation in the region and its unique legal status. Its application could lead to numerous practical and legal challenges. There are ongoing concerns about the adequacy of legal protection for women's rights in various legal systems in the region, including Jordanian law. Updating and improving these forms of protection is crucial for ensuring justice and equality.[26] This contrasts with military court jurisprudence, which has acknowledged the crime of marital rape and the need to protect all individuals from sexual violence.

It is worth noting that even if the current Jordanian law has been updated to address some of these issues, such as criminalising marital rape, the version of Jordanian law applicable in the region remains outdated as a result of Israel's lack of obligation to adopt these changes.

In conclusion, despite the challenges in applying international law in the region, the use of Jordanian law does not appear to be a suitable alternative. As mentioned, Jordanian law is outdated, it disproportionately infringes the rights of the accused, fails to meet the specific needs of the region, and lacks apparent legitimacy. It is preferable to develop dedicated legal arrangements that balance the security situation, the rights of residents and international law to the greatest extent possible.

### 2.2. *The legal framework of the military courts in the region*

At the end of the Six-Day War in 1967, by international law the pre-existing legal framework in the region remained in force. Consequently, the applicable criminal law was the Jordanian Penal Code of 1966. Military courts continue to this day to adjudicate criminal offences under this Jordanian criminal law.

[24] Penal Code, Law No 16, 1960 (Jordan), art 340.

[25] Benvenisti (n 2) 146–48.

[26] Human Rights Watch, 'World Report 2021: Jordan', https://www.hrw.org/world-report/2021/country-chapters/jordan.

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However, considering evolving circumstances, the military commander has implemented various modifications and adaptations. The act of marital rape, for instance, which was not criminalised under Jordanian law, has been proscribed. Furthermore, the punishment of stoning, which was present in the original law, has been abolished. The court has also used mandatory defence regulations, which were also in force in the region before 1967.[27]

In addition, the proclamation regarding enforcement of the Security Provisions Order was enacted.[28] The Security Provisions Order is the primary penal code regulating criminal jurisdiction and procedure, including establishing courts; the appointment of judges, prosecutors and defence attorneys; rules of procedure; evidence; offences and punishment.[29] According to the Order, military courts are authorised to adjudicate all crimes committed within the region and those committed outside the region if they were intended to damage or have damaged the region's security.[30] The rules of procedure are similar to those of the Israeli criminal system (except for arrest periods). The substantive law has also been assimilated into Israeli law, applying the 39th Amendment to the Penal Code (1977) in the region.[31]

Since their establishment in 1967, military courts have been occupied mainly with security offence cases.[32] However, the courts also handle various criminal offences to some extent (such as gender crimes, domestic violence and property offences). The military court system also operates a series of judicial committees that act as an appeal tribunal for decisions of the military commander. The military courts have implemented principles from Israeli law with the required changes. The Security Provisions Order has enforced significant parts of the Israeli criminal law in the region, and military courts have enforced various principles from Israeli criminal law through case law, thus improving the position of suspects and defendants in the region.[33]

In addition to the legal frameworks referred to above, principles of administrative law apply to the regional executive authorities, headed by the commander of the IDF forces and the civil administration. Former President of

[27] Defense (Emergency) Regulations, 1945.

[28] Shamgar (n 3).

[29] Order regarding Security Provisions (Judea and Samaria) (No 3). The order in effect today is the Security Provisions Order (n 5).

[30] Additional orders are in force and the legislation that was in force when the IDF assumed the administration, namely Jordanian legislation, including the Defense (Emergency) Regulations (n 27); Dinstein (n 9) 153–57.

[31] Military Proclamation concerning the Application of the Interim Agreement (Judea and Samaria) (No 7), 1995 (Israel).

[32] Order regarding Security Provisions (Amendment No 45) (No 1067), 1983; for a critical stance on this issue see Ben-Natan (n 7).

[33] The military courts have made several changes in criminal law to benefit suspects and defendants: the right to compensation upon acquittal, the enhancement of minors' rights, and the enhancement of evidence confidentiality, among others. See generally Shai Farber and Nethanel Benichou, 'Between Victims of Crime and Victims of Terrorism: Victims' Rights in the Military Courts in the West Bank' (2021) 24 *New Criminal Law Review* 568, 575; Nethanel Benichou, 'On the Criminal Justice in the Regions of Judea, Samaria, and the Gaza Strip' (2005) 18 *Law and Army* 293, 322–28.

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the Supreme Court of Israel, Judge Barak, succinctly expressed the ubiquity of Israeli administrative law, stating that '[e]very Israeli soldier carries with him in his "backpack" the basic rules of Israeli administrative law'. It is essential to clarify that the application of these fundamental principles to the actions of the military commander does not signify the imposition of Israeli law in the region. Instead, it implements additional provisions beyond international law, drawing inspiration from Israeli administrative law, to impose enhanced oversight (or heightened restrictions) on the governing authorities in the territory.

A consensus exists regarding the occupying power's authority to modify existing legislation when necessary. Both international literature and rulings of the Supreme Court of Israel suggest a diminishing weight over time concerning prohibitions on legislative changes. Conversely, the authority vested in military commanders to adapt legislation to contemporary needs has been on the rise. Section 3(a) of the proclamation regarding governmental and legal procedures authorises the military commander to amend local legislation. Consequently, decrees issued by the regional commander periodically serve as primary legislation. This dual role of the IDF commander involves wearing two legal hats. In the first capacity, the commander functions as a sovereign, serving as both a legislative and executive authority, thus subject to international law. In the second capacity, the commander acts as an extension of the State of Israel, subject to the administrative law rules prevailing in Israel.[34]

The military court system in the region has undergone many changes since its inception. The first structural change was made in the early 1990s when the Court of Appeal was established, following a recommendation by the Supreme Court in the *Arjub* case.[35] Another change in the military judicial system occurred in 2004 when the military courts separated from the military advocate general, the chief officer of the military legal corps. Another significant structural change was made when a juvenile military court was established; this has significantly improved the treatment of young criminals and adopted a more advanced procedure for treating minors, similar to that practised in the juvenile system in Israel.[36]

As discussed above, the military government and the regional IDF commander wield broad administrative and judicial powers. This aims to ensure order and security in an area subjected to prolonged belligerent occupation. The concentration of legislative and executive authorities in the hands of the military commander necessitates heightened judicial oversight. Additionally,

[34] HCJ 393/82 *Jamiyat Isqan v Commander of the IDF Forces in Judea and Samaria* (28 December 1983) para 11; HCJ 2164/09 *Yesh Din Volunteers for Human Rights v Commander of the IDF Forces in the West Bank* (26 December 2011); HCJ 351/80 *Jerusalem District Electricity Company Ltd v Minister of Energy and Infrastructure* (16 February 1981).

[35] HCJ 87/85 *Arjub v Commander of the IDF Forces in the Judea and Samaria Region* (7 February 1988).

[36] Shai Farber and Sharon R Achai, 'Considering Rehabilitation of Minors Sentenced in Juvenile Military Courts: Initial Proposals and Thoughts for the Future' (2021) 27 *Buffalo Human Rights Law Review* 90, 98; Shai Farber and Edna Erez, 'Procedural Justice, Therapeutic Jurisprudence, and Reoffending: Adjudicating Palestinian Minors in the West Bank's Military Court' (2023) 67 *International Journal of Offender Therapy and Comparative Criminology* 1581, 1591.

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the military courts operate independently and with full autonomy, as stated in Article 10 of the Order regarding Security Provisions.[37]

### 2.3. Challenges to legal accessibility

Some claim that the laws and legal procedures of the military courts are neither familiar nor accessible to the Palestinians being tried in them. However, all military orders and legislation are translated into Arabic and published regularly in the Official Gazette for the region, the *Qamtsam* (an acronym for the *Compendium of Edicts, Orders and Appointments*). The translation is available on the website of the Coordinator of Government Activities in the Territories, which includes a search mechanism.[38] Translating and publishing military laws and orders in Arabic significantly helps to overcome potential language and accessibility barriers. This availability allows Palestinian residents, lawyers and legal professionals direct access to relevant legal sources. It aids in understanding the military legal system, facilitates preparation for legal proceedings, and bridges the gap between the Israeli and Palestinian legal systems. Moreover, access to these documents enables Palestinian lawyers to specialise in representing clients in military courts, thereby improving the quality of legal representation.

Until 1967, Jordanian law – which, like Israeli law, originated from English common law – was applied in the region. Today, however, Palestinian law has evolved in a different direction and is closer to continental law. While divergent legal systems (continental or common law) may present theoretical challenges, the enduring reality of protracted military occupation has engendered practical solutions. Specifically, in recent decades, there is evidence of Palestinian attorneys, educated at Jordanian or Palestinian Authority (PA) law schools, successfully undertaking pupillages to represent defendants in Israeli military courts. A new generation of Palestinian attorneys from the Territories has emerged alongside veteran lawyers, gaining the requisite knowledge to practise within this exceptional judicial framework.

At the same time, reasonable differences between Israel's common law and the civil law traditions of the PA should not be overstated. Fundamentally, both uphold similar foundational principles. Each has its own legal hierarchy with considerable overlap in offences and protocols. Variations exist, particularly regarding statutory interpretation. However, in our assessment, misunderstandings are traced largely to accessibility gaps and linguistic barriers rather than irreconcilable ideological conflicts. With transparency and engagement, knowledge sharing can narrow these divides through cooperation.

Yet, current accessibility issues should not detract us from recognising the vital role of the military courts in subduing terror elements and enforcing the law in the Territories. As we shall see, despite certain limitations, the

[37] Security Provisions Order (n 5) s 10.

[38] 'Coordinator of Government Activities in the Territories', *Qamtsem Publications* (in Hebrew), https://www.gov.il/ar/departments/legalInfo?OfficeId=f79320cc-188a-43ed-84f2-6b60fe464ad4&limit=10&legalInfoType=874b8fb3-548f-4f25-ac19-e7c792642142&UnitId=8d21253c-e156-440d-b84e-3c2d1af48471.

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prevailing judicial system manages to maintain a reasonable balance between security considerations and defendants' rights.

## 3. The use of international law in military court rulings

### *3.1. 'The early period' (1970s)*

Following their establishment in 1967, the military courts examined the supremacy of international law and the applicability of the Fourth Geneva Convention in the region. For example, in the case of *Hamza*, which involved charges for possession of prohibited funds, the defence relied on international law in its claim that the decree prohibiting the possession of funds was not published and, therefore, its legislation was made in violation of the international convention regarding the preservation of civil rights in times of war. The court rejected this claim, stating:[39]

> We are the judges and, in this matter, the citizens of the 'administrative territory' – we have nothing but what the military commander orders us. The military commander's instructions are the only laws determining the matter. He can speak to the military if someone finds them contrary to the Convention. The power rests with that commander; he is required to bring a petition to the international institutions, but he is not free to ignore and cancel the law.

If this approach had been accepted, the ability to use international law as a legal tool to promote criminal justice in the region would not have been possible. However, other opinions were expressed in a later military courts ruling, stating that international law is the determining and supreme norm in an area under military occupation. This is how the military court determined the following:

> The military courts comply with the provisions of the Geneva Convention regarding the protection of civilians. Where there is a contradiction between the order above and the Convention – the requirements of the Convention take precedence.

It is important to note that Israel's official position at that time was that GC IV did not apply except for its humanitarian provisions.[40]

Despite uncertainties surrounding the applicability of GC IV to the region because of its constitutive nature and the country's voluntary commitment to adhere to the humanitarian provisions of the Convention, military courts have affirmed that the IDF constitutes the source of authority and sovereignty

[39] Hebron Military Court, Case No 185/67 *Military Prosecutor v Hamza*, 1 *Selected Judgments of the Military Courts* (1968) 497; Bethlehem Military Court, Case No 87/68 *Military Prosecutor v Zohair*, 1 *Selected Judgments of the Military Courts* (1968).

[40] Ramallah Military Court, Case No 144/68 *Military Prosecutor v Bakhis and Others*, 1 *Selected Judgments of the Military Courts* (1968) 371 (authors' translation).

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in the region under belligerent occupation. These courts have unequivocally determined that the IDF, with specific emphasis on the laws of armed conflict, apply the paramount norm governing areas subject to military occupation. It is noteworthy that, despite the avenue for petitioning the Supreme Court – particularly when it convenes as the High Court in relevant cases including those involving proclamations of the military commander – adherence to these norms must align with the principles of international law.[41]

In the last two decades of the twentieth century (1980s and 1990s) there is no reference to international law in the rulings of military courts.[42] Three examples can explain this: (i) the military courts were still in a formative stage during this period and focused more on establishing internal procedures and legal norms for operations rather than engaging deeply with international legal doctrines; (ii) the outbreak of the First Intifada in 1987 shifted attention towards addressing widespread protests and violence (applying principles of international law is likely to have been overshadowed by constant efforts to restore order); and (iii) global communications and media coverage then paled in comparison to modern times. This relatively limited external visibility resulted in less pressure on the courts to model conduct and rulings based on international legal standards.

However, the central reasons for the lack of reference to international law in rulings during this period more likely relate to the judges' limited knowledge of international legal principles and the failure of defence attorneys to raise challenges based on international law.

Since the 2000s, there has been a trend of renewed flourishing in international law of military court rulings. This may be related to the trend in the Israeli courts, especially the Supreme Court, to gradually increase its application of international law.[43]

### 3.2. 'The contemporary period' (2000s)

The *Schwartz* case in 2006 is a prominent example of this trend. The military commander ordered that Schwartz, a resident of the region, should have limits placed on his movement in the region. The Military Court of Appeals was required to answer whether it is authorised to examine the 'constitutionality' of the military commander's orders, which constitute primary legislation. The military court determined, relying on international law, that it is authorised to review the 'constitutionality' of such orders based on the norms of international law. Another vital rule established in the decision is that international law is superior to the internal law of the region; as much as there is a contradiction between the legal systems, international law prevails.[44]

[41] ibid.

[42] According to a search in the internal databases of the military court system.

[43] HCJ 7957/04 *Mara'abe v Prime Minister of Israel* (15 September 2005), separate opinion of Justice M Cheshin, paras 1–4, https://supremedecisions.court.gov.il/Home/Download?path=EnglishVerdicts/04/570/079/A14&fileName=04079570_A14.txt&type=4.

[44] Military Court of Appeals (Judea and Samaria), Appeals Commission, Case 5/06 *Schwartz v IDF Commander* (31 October 2006). We use the term 'constitutionality' even though there is no

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In the past, despite the acknowledged binding nature of norms of international law, judgments of the military courts underscored the primacy of internal law, specifically the order concerning security instructions, as binding upon the military court. This stance permitted challenges on a constitutional basis, with recourse to the Israeli Supreme Court in its capacity as High Court of Justice. In contrast, the *Schwartz* case firmly established the authority to conduct judicial review of the legislation enacted by the military commander in the region through the lens of international law.

In the *Mashahara* case in 2014, the Military Court of Appeals discussed supplementary issues in the *Schwartz* case,[45] The appellant's attorney attacked the adaptation of legislative amendments made to the order regarding the authority of military courts to revoke a prisoner's parole. The Court of Appeals reiterated its determinations in the *Schwartz* matter that military courts are authorised to examine the constitutionality of the military commander's legislation according to the norms of international law. It detailed how the said authority of review was exercised while using the constitutional tests adopted in Israeli law.[46]

### 3.3. Examples of fundamental applications

It should be emphasised that the importance of the *Schwartz* case is not only in establishing the norms of international law as super norms in the law of the region but mainly in the authority that the military courts considered themselves able to annul the primary legislation of the sovereign in the region where it does not comply with the instructions of international law.[47] Thus, despite the possibility of petitioning the Supreme Court, it seems that the Court of Appeals ruling renders this unnecessary as it does not allow the implementation of a law contrary to the instructions of international law.[48] As can be seen from the judgments above, it is possible to see a considerable jurisprudential development, and not only exceptional cases, of preferring the norms of international law in the face of conflicts between them and the legislation in the region.[49]

constitution in the region as, considering the conclusions of the *Schwartz* ruling, the military commander's legislation is required to comply with the principles of the supreme norm from which it derives, similar to the obligation that a country's legislation complies with the constitutional regulations of that country.

[45] Military Court of Appeals (Judea and Samaria), Single Judge Appeal, 1824/14 (Judea and Samaria) *Mashahra v Military Prosecution* (11 February 2015).

[46] The Court of Appeals determined that the provisions of the challenged order are consistent with the provisions of GC IV in relation to the existence of a fair procedure and the guarantee of judicial discretion.

[47] This is in stark contrast to the claims made by Nery Ramati, 'The Rulings of the Israeli Military Courts and International Law' (2020) 25 *Journal of Conflict and Security Law* 149; Ben-Natan (n 7) 56–60.

[48] This contradicts Ramati's claim regarding the limitation of the Supreme Court's authority: Ramati (n 47) 153–59.

[49] Ronen (n 7) 746.

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### 3.4. The principle of public discussion

In the case of *Dar-Khalil*, who was engaged in membership of the terrorist organisation Hamas, the military prosecution asked to hear the testimony of members of the General Security Service behind closed doors.[50] As there was no explicit reference to the issue in the region's law, the military court turned to sources of international law. The Court of Appeals recognised that in international law, particularly in the rules of military occupation, there is a broad expression of the principle of public hearing.[51]

In this case the Court relied on GC IV, which states that it is more for the representatives of the 'protecting power' to be present at the trial of any protected person, except for cases in which it was decided to investigate the trial behind closed doors for the benefit of the security of the occupying power.[52] The Court determined – by Regulation 43 of the Hague Regulations and by Article 64 of GC IV – that alongside the interests protected under the rule relating to publicity, the discussion (such as fairness of the procedure and public trust) has exceptions. These exceptions include the interests of maintaining security and preventing the witness from being deterred from testifying freely.

### 3.5. Publication of the law

In the *Hodley* case, international law assisted the High Court in resolving an issue arising from publication of the law.[53] Hodley was accused of membership of an association that had been declared illegal and claimed that she was unaware of this declaration. The military court ruled that, following Article 65 of GC IV, there is an obligation to publish the law in the language of the protected residents, although no details concerning appropriate ways of issuing these rulings were provided. The Court examined an interpretation of this provision found in the International Committee of the Red Cross (ICRC) Commentary edited by Jean Pictet, which suggested several methods of publication, including advertising in the local media and displaying notices in public places.[54] The military court, therefore, determined that the orders of the military commander are also published in Arabic through the file of proclamations of the orders, and are therefore compatible with international law.[55]

[50] Military Court of Appeals (Judea and Samaria), Appeal No 3335/07 *Dar-Khalil v Military Prosecution* (29 May 2008).

[51] International Covenant on Civil and Political Rights (entered into force 23 March 1976) 999 UNTS 171 (ICCPR), art 14(a); American Convention on Human Rights (entered into force 18 July 1978) 1144 UNTS 123 (ACHR), art 8(5); European Convention for the Protection of Human Rights and Fundamental Freedoms (entered into force 3 September 1953) 213 UNTS 222 (ECHR), art 6(a).

[52] Geneva Convention (III) relative to the Treatment of Prisoners of War (entered into force 21 October 1950) 75 UNTS 135, arts 62, 74, 105.

[53] Military Court of Appeals (Judea and Samaria), Single Judge Appeal, 4869/07 *The Military Prosecution v Hodley* (2 November 2008).

[54] Jean S Pictet (ed), *Commentary on the Geneva Conventions of 12 August 1949, Vol IV* (ICRC 1958) 369–70.

[55] *Hodley* (n 53).

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### 3.6. A detainee's right to be present at hearings of his case

Another aspect of principle addressed by international law pertained to a detainee's participation in hearings conducted in his case in the High Court. In the case of *Aziz*, in 2007, the Court of Appeals deliberated on the correct interpretation of a temporary order applicable in the region. This order permitted the holding of hearings on requests to extend the detention of a suspect involved in security offences without requiring the suspect's presence.[56] The Court conducted a two-stage examination of the case. Initially, it considered justifications for conducting a custody hearing in the suspect's absence. It was determined that the security rationale supporting the decision to order a person's arrest without their presence is grounded in Regulation 43 of the Hague Regulations and Article 64 of GC IV. Nevertheless, the Court observed that holding a detention hearing in the absence of the suspect is an uncommon practice in international law.

The Court drew upon AP I (relating to the protection of victims of international armed conflicts), which stipulates that 'any person accused of a crime shall have the right to be tried in his presence'. This mirrors a similar provision articulated in Article 6(2)(e) of the Second Protocol to GC IV (relating to the protection of victims of non-international armed conflicts).[57]

In addition to the above sources the Court invoked human rights law, referencing explicitly Article 14(3)(d) of the International Covenant on Civil and Political Rights (ICCPR), which asserts that 'everyone shall be entitled to … be tried in his presence'.[58] Furthermore, the Court considered the statutes of the International Criminal Court (ICC), the International Criminal Tribunal for the former Yugoslavia (ICTY), and the International Criminal Tribunal for Rwanda (ICTR).[59] Drawing on these international legal frameworks and considering prior rulings from both the Supreme Court and military courts concerning the fundamental rights of detainees, the High Court concluded that provisions allowing the extension of a suspect's detention without their presence resulting from severe violations of basic legal principles in the region should be interpreted with circumspection and applied carefully and strictly.

In sum, starting in the 2000s, the military court recognised the special status of international law as the region's supreme legal norm; it was used to decide several fundamental legal issues that had been put before it. However, despite the expansion of international law in recent years, it seems that the possibility of relying on this branch of law to find solutions to everyday legal questions in criminal law is limited.

[56] Military Court of Appeals (Judea and Samaria), Detention Appeal (Judea and Samaria) 4757/07 *Aziz v The Military Prosecution* (29 April 2010), 6–14.

[57] AP I (n 10) art 75(4)(e); Protocol Additional to the Geneva Conventions of 1949 relating to the Protection of Victims of Non-international Armed Conflicts (entered into force 7 December 1978) 1125 UNTS 609.

[58] ICCPR (n 51).

[59] Rome Statute (n 10); UNSC Res 827 (25 May 1993), UN Doc S/RES/827, art 21(4)(d); UNSC Res 955 (8 November 1994), UN Doc S/RES/955.

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## 4. The reasons for limitations in the use of international law in military court rulings

### *4.1. Limitations stemming from the nature of international law*

Despite the inclination of military courts to utilise international law as a reference for resolving specific legal disputes, the feasibility of such application is constrained because of its nature as a system grounded in general principles with less precise rules. As international norms reflect global consensus, they may sometimes be ill-suited to address distinctive conditions and threats within the region's security environment and social fabric. Their direct implementation has posed challenges. Furthermore, within the unique reality of the region, military courts often adjudicate cases concurrently with Israeli courts. When a terrorist cell involves individuals who operate in Israel, and are therefore subject to trial within the Israeli legal system, alongside residents from the region facing proceedings in military courts, considerations of fairness and justice necessitate the application of similar if not identical legal systems. Consequently, the preference for adherence to Israeli law interpretation is more prudent than adopting ad hoc norms of international law.

However, some argue that, at least in principle, international law could have been directly applied in criminal proceedings. In theory, the general principles of international humanitarian and human rights law provide a sufficient basis for underpinning the criminal process, encompassing extensive forms of protection for defendants' rights. However, analysis of jurisprudence and literature shows that these principles are not practical enough for most applied issues in criminal matters. Hence, there is a need for a more comprehensive and coherent system.

Furthermore, we contend that to safeguard and advance the rights of individuals involved in criminal cases, it is appropriate for military courts to rely on a well-developed legal system, which embodies an organised and cohesive normative framework for rulings, such as Israeli criminal law. A comprehensive criminal justice system is deemed more advantageous than the selective incorporation of ambiguous norms from international law to address the courts' myriad of criminal issues.

Moreover, a substantial portion of international law pertinent to the region, particularly the laws of war, is not aligned with the day-to-day reality in which military courts operate. It should be recognised that IHL distinguishes between norms governing armed conflict and belligerent occupation, with the latter also encompassing law enforcement paradigms.[60] Still, the fundamental premise of many laws of war relies on active combat conditions. Conversely, in the region, authorities like military courts typically function under a law enforcement framework in situations persisting since 1967. Consequently, this context emphasises individual rights and the rights of suspects and the accused through criminal law principles. Military courts' adherence to criminal law and jurisprudence in Israel is thus fitting for the reality of protracted occupation, while international human rights law can still provide interpretive

[60] Nils Melzer, *Targeted Killing in International Law* (Oxford University Press 2008) 55–60.

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guidance on protection. This approach proves beneficial for the region's residents.[61]

These factors were expressed precisely during the challenging period of fighting against the waves of Palestinian terrorism that began in 2000. During this period the military judges acted to fortify and expand the rights of the accused and the suspects brought before them.[62] In a consistent and prolonged ruling of the military courts, the defences of the applicable penal laws were adopted in Israel (some of which do not exist in international law), outdated doctrines were abolished, and additional rights for those involved in crimes were established. In a series of precedent rulings, the legal situation changed and a legal climate was created that gave more weight to the rights of those involved in crimes.[63] This approach aligns with the requirements of international law for judging territories held under martial law.

### 4.2. Advantages of the Israeli legal system

Additionally, two practical factors contribute to the limited utilisation of military court rulings. Firstly, there is a requirement for judges to possess a sufficient understanding of international law, a field in which the majority of their training is acquired within law faculties in Israel. Unlike the comprehensive knowledge that judges accumulate in criminal law matters, their academic and practical training often lacks extensive exposure to international law.

Second, defence attorneys must seek consultation for arguments grounded in international law. Consequently, the court finds itself in a situation where if there is a desire to invoke international law, it necessitates going beyond the parameters initially delineated by the defence. Such a situation is incompatible with the adversarial legal system, in which the court typically decides between the arguments presented by the parties and does not proactively propose alternative ideas or directions for the decision.[64]

In summary, a criminal court seldom necessitates recourse to international law, whether in the region or a state jurisdiction. Most of its functions involve applying criminal law, handling detention extensions, issuing judgments and imposing sentences that typically do not pose questions, in which international law offers additional insights beyond customary criminal law. As demonstrated by the examples above, the incorporation of international law in military court rulings occurs selectively in distinctive cases marked by principled or complex legal issues.

[61] Tzvi Lekah, 'Protecting Human Rights in Military Courts during Times of Counterterrorism' in Ariel Bandor, Khaled Ganaim and Ilan Saban (eds), *Mordechai (Mota) Kemnitzer Book* (Nevo 2017) 641, 641–42.

[62] ibid.

[63] eg, Benichou (n 33) 309–20 (discussing the evolution of jurisprudence in military courts towards greater protection of defendants' rights); cf Sharon Weill, 'The Judicial Arm of the Occupation: The Israeli Military Courts in the Occupied Territories' (2007) 89(866) *International Review of the Red Cross* 395, 402–05 (analysing changes in military court practices over time).

[64] Carrie Menkel-Meadow, 'The Trouble with the Adversary System in a Postmodern, Multicultural World' (1996) 38 *William and Mary Law Review* 5, 21–31.

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## 5. Examples of difficulties in relying on international law in military court rulings in criminal law

Having portrayed the fundamental difficulties in applying international law in the previous section, we aim to highlight three cumulative factors that produce a particular challenge in the context of criminal law. While earlier discussions focused on conceptual hurdles around the principles-based orientation of international law, here we isolate practical impediments that are uniquely problematic for criminal proceedings, such as arrest laws, limits of criminal liability and rights of minors.

In previous sections we described the powers of the military courts and the limited reliance in recent years on international law in respect of fundamental legal issues. However, it cannot be denied that these exceptions do not inform about the rule. The limited use of international law has even provoked criticism by the military courts. One claimed that the courts take the 'apologist' approach even when using international law. According to this, they are taking advantage of the instructions of international law to justify decisions made by the military commander.[65] Our view, however, is that the military courts' limited use of international law stems primarily from the difficulty in relying on this branch of law to find practical solutions to regular legal issues in criminal law. In most of the areas that come before the military courts this is when, in practice, there are no practical and concrete instructions in international law that can help in answering the legal questions that arise.

The difficulty of basing international law on criminal law in the region stems from three interrelated cumulative factors. First, international law includes amorphous and sometimes non-binding norms. Second, the origins of international criminal law (ICL) in instruments like the Rome Statute establishing the ICC reflect a compromise between diverse global legal systems and do not comprise a uniform code compatible with the criminal law applied by military courts in the region.[66] Third, ICL, by its nature, concentrates on principles and does not provide a benevolent response to those in the criminal process.

We will demonstrate our arguments using some critical issues in criminal law frequently discussed in the military courts in the region.

### *5.1. Arrest laws*

First, we consider the law relating to arrest. As is customary in other legal systems, in the region the court regulates the possibility of arresting a person for investigation and even extending his detention during his trial. The law of the region includes judicial supervision of arrest and release procedures, and it also regulates issues of authority, policy, periods, conditions of release, and more.[67] Arrest laws in the region have undergone many transformations

[65] Ramati (n 47) 155–56.

[66] Rome Statute (n 10).

[67] Security Provisions Order (n 5) s 31(c), 31(c2). It is possible to extend by 96 additional hours: s 32(a)–(b).

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that bring their provisions closer to those of Israeli law. This rapprochement occurred mainly as a result of military court rulings, which relied heavily on their verdict on Israeli law, with the view that, even if it is difficult, it will improve the rights of those involved in crimes.

In all its decisions related to interpreting laws relating to detention, the Supreme Court drew inspiration from the principles and rules of the Israeli Arrest Law and the Basic Law: Human Dignity and Freedom (which, in Israel, is part of the human rights chapter of the informal constitution). The Basic Law: Human Dignity and Freedom does not apply to the region. The exception is arrest.[68] Similarly, the balance point has changed in the conflict between the public interest and the interest in release of the suspect or the accused. In the past, it was determined that the public interest in prolonging detention would prevail. Today, however, the court will require a more careful balance, within which significant weight will be given to ensuring that there is limited harm to the freedom of the individual. This profound change has also spread over many issues in the region's detention laws.[69]

The rights of argument and representation were recognised as central rights that influenced arrest procedures to the point of release, where these rights were violated.[70] Indeed, international human rights law is also based on broad standards of rights protection, which could have been applied in rulings. However, it appears that the courts sought more precise and actionable guidance than that offered by the general principles of international law. It may be possible to direct judges towards international humanitarian law. Still, here is an example of the current reality in which judges use what is familiar to them: the Israeli Detention Law and the Basic Law on Human Dignity and Liberty.

Military courts developed the laws of detention relying on Israeli law and not basing it on international law. This is because even if international law includes many principled references to ensure the rights of an arrestee or prevent false arrests,[71] it does not contain detailed regulations regarding concrete issues in the area of arrest. By way of illustration, when a problem arises over when to bring a suspect before a judge, international law contains general guidelines on bringing a suspect before a judge without delay. As a rule, these sources use uniform language such as 'shall be brought promptly before a judge',[72]

[68] Military Court of Appeals (Judea and Samaria), Detention Appeal (Judea and Samaria) 1271/06 *Military Prosecutor v Nachla* (2 February 2006).

[69] Military Court of Appeals (Judea and Samaria), Detention Appeal (Judea and Samaria) 3664/09 *Military Prosecution v Abu Eid* (30 December 2009).

[70] Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law, Vol II: Practice* (International Committee of the Red Cross and Cambridge University Press 2005, revised 2009) 2328–55.

[71] ICCPR (n 51) art 9(3); Rome Statute (n 10) art 59(2); UNGA Res 47/133, Declaration on the Protection of All Persons from Enforced Disappearance (18 December 1992), UN Doc A/RES/47/133, art 10.

[72] UN Commission on Human Rights, Draft International Convention on the Protection of All Persons from Enforced Disappearance (26 August 1998), UN Doc E/CN 4/Sub 2/RES/1998/25.

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'without delay' or 'as short as possible'.[73] – but what exactly is meant by 'without delay': 24 hours? 48 hours? 7 days? Maybe more?

To these vague principles there are diverse positions in the jurisprudence of international tribunals on the question of timing for bringing a suspect before a judge. In the *Martinez Portorreal* case, for example, the UN Human Rights Commission determined that 50 hours of detention does not violate Article 9(3) of the ICCPR.[74] In the *Balgeth and Brink* case[75] the European Court of Human Rights (ECtHR) determined that over six days of arrest before bringing the detainee before a judge does not comply with Article 5(4) of the European Convention on Human Rights (ECHR). In a later ruling of the ECtHR, it was determined in the *Brogan* case that, according to Article 5(3) of the ECHR, a person's detention should not exceed three days before being brought before a judge.[76] In another case, the ECtHR approved seven days of arrest pending judicial review.[77]

In other words, there is no clear and detailed code in international law (in human rights law or the rule of belligerent capture) that includes practical instructions to guide issues in the regulation of arrest that can be a guiding source or a straightforward interpretive tool for the military court judiciary. Considering this, it is natural that, in the spirit of these questions, the judges will turn to the twin brothers of the arrest laws in the region: the Israeli Arrest Law and its interpretation in the ruling of the Israeli Supreme Court.

By way of background, technically Jordanian law still applies in criminal matters but, being formulated in 1967, it thus fails to address contemporary contexts, notably security issues.[78] Theoretically, we could rely on Jordanian legislation; however, it clearly requires updating to align with current standards on defendants' rights. Similarly, while some propose consulting Palestinian law,[79] realities suggest that this would profoundly violate rights of detainees, given the documented systemic issues in their legal system.[80] Updating outdated Jordanian law based solely on abstract international legal principles also poses difficulties. Hence, while perhaps counter-intuitive, embracing facets of the robust Israeli criminal justice system, despite its

[73] Human Rights Committee, CCPR General Comment No 8: Art 9 (Right to Liberty and Security of Persons) (30 July 1982), UN Doc HRI/GEN/1/Rev 1.

[74] Human Rights Committee, *Martínez Portorreal v Dominican Republic* (Views of 5 November 1987), Communication No 188/1984, UN Doc CCPR/C/31/D/188/1984; ICCPR (n 51).

[75] ECtHR, *De Jong, Baljet and Van Den Brink v The Netherlands*, App nos 8805/79, 8806/79 and 9242/81, 22 May 1984.

[76] ECtHR, *Brogan and Others v United Kingdom*, App nos 11209/84, 11234/84, 11266/84 and 11386/85, 29 November 1988.

[77] ECtHR, *Brannigan and McBride v United Kingdom*, App nos 14553/89 and 14554/89, 26 May 1993.

[78] Benvenisti (n 2) 108–10.

[79] Tobias Kelly, *Law, Violence and Sovereignty among West Bank Palestinians* (Cambridge University Press 2006) 50–55.

[80] Human Rights Watch, 'Palestine: Authorities Crush Dissent,' 23 October 2018, https://www.hrw.org/news/2018/10/23/palestine-authorities-crush-dissent; Amnesty International, 'Palestine: "Strangling Necks": Abductions, Torture and Summary Killings of Palestinians by Hamas Forces during the 2014 Gaza/Israel Conflict', 26 May 2015, https://www.amnesty.org/en/documents/mde21/1643/2015/en.

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flaws, may pragmatically afford the strongest protection for Palestinian defendants in terms of detailed due process and evidentiary procedures absent in alternative frameworks.

Similarly, and perhaps more acutely, it is possible to demonstrate the priority of using Israeli law over international law in promoting the protection of detainees' rights in relation to the grounds for arrest. The law in the region is silent on the grounds for arrest required to hold a person in custody during his trial. Military courts have also adopted this trend of implementing the grounds for Israeli detention in the area; such adoption can be seen in the case of *Abdul Saleem*, which shows that although the Israeli detention laws do not apply directly in the region, the court must act according to its instructions as a rule.[81]

Accordingly, if, in the past, it was enough to submit an indictment that included a security offence to establish sufficient grounds for arrest,[82] the military courts began to require that there be grounds for arrest in the same way as under Israeli law to justify detention. This is how it was determined in the *Haj-Hssein* case.[83]

Since the *Saleem* case, in every case where a request is submitted for detention until the end of the proceedings, it has been customary for the courts in the region to examine not only if, based on first impression, there is prima facie evidence to prove the allegations attributed to the accused, but also the existence of a reason for detention; the question is also examined if there is an alternative to detention that falls short of it in severity.

In the *Nachla* case, the law in the area of grounds for arrest was concluded as follows:[84]

> If, in the past, it was determined that as a general rule the public interest in extending the detention would prevail, today the court will require a more careful balance, within which significant weight will be given to the strictness of a limited violation of the individual's freedom.

Also, similar to the question of the period of arrest, if military courts avoided drawing the grounds for arrest from Israeli law, it is doubtful whether they would have been able to use international law to create the foundations for arrest in the region. The military courts in the region are required to strike a complex balance between individual freedom and the public interest in reaching decisions in the tens of thousands of hearings a year that take

[81] Military Court of Appeals (Judea and Samaria), Detention Appeal (Gaza Region) 157/00 *Military Prosecutor v Abu Saleem*, 11 *Selected Judgments of the Military Courts* (2000) 217.

[82] According to the traditional approach, a security offence constitutes a reason for arrest without needing to check for dangerousness or alternatives. Thus, for example, it was determined in Military Court of Appeals (Judea and Samaria and Gaza Region), Detention Appeal 22/95 *Casey and Others v Military Prosecutor* (13 March 1995): 'All of these are "security" offences, the offender of which is usually expected to receive relatively long prison sentences, and due to their seriousness in the eyes of the legislator, he considered them in their own right as grounds for arrest'.

[83] Military Court of Appeals (Judea and Samaria and Gaza Region), Detention Appeal (Judea and Samaria) 115/02 *Military Prosecutor v Haj-Hssein* (3 October 2002).

[84] *Nachala* (n 68).

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place before them. Like the other questions related to the laws of arrest, an examination of international legal sources reveals a lack of detailed reference to the issues of the grounds for the arrest of suspects or defendants. For example, there is no specific provision regarding the grounds for detention in criminal proceedings in GC IV or the Hague Convention of 1907 and attached regulations. Requirements to this effect are not even found in human rights law, such as in the ICCPR, the American Convention on Human Rights,[85] the African Charter on Human and Peoples' Rights,[86] or the ECHR.[87]

Over the years, therefore, military courts have developed the grounds for arrest as a danger to the security of the region and the public and fear of disrupting the investigation or trial procedures (if the suspect has not been arrested), while relying on an advanced source of law, which has developed on this issue – in other words, Israeli law. To summarise this point, a quick look at the arrest laws of the region is enough to demonstrate the inadequacy and inability of international law (both the rules of military seizure and the laws of human rights) to address these questions. The changes made to the provisions of the laws of arrest in the region were, therefore, inspired by Israeli law.

### 5.2. Limits of criminal liability

A further example of the advantage of relying on criminal law to guarantee the rights of the accused is found in judicial rulings in connection with the responsibility of commanders of terrorist organisations. In one such case, the fundamental issue arose of the responsibility of the heads of terrorist organisations regarding offences committed on their behalf by operatives, without having directly participated in those offences or being aware of their commission.[88] With regard to the limits of criminal responsibility, the court found that international law is the strictest compared with American or Israeli law. It states that it is possible to convict a commander, as mentioned, whose status is similar to that of the head of a criminal organisation or head of a terrorist organisation, not only when they took part in the act of the crime or motivated others to act, directly or indirectly, but also when they were in charge of the perpetrators of the crime and did not prevent its commission or when they did not act to locate the commission of the crime.

These arrangements are found, for example, in Article 7(1) of the ICTY Constitution and Article 6(1) of the ICTR Constitution. The ICTY ruling in the case of the war criminal *Tadić* even expanded the conditions for the personal responsibility of a defendant according to this section when it stated

[85] ICCPR (n 51), ACHR (n 51).

[86] African Charter on Human and Peoples' Rights (entered into force 21 October 1986) 1520 UNTS 217.

[87] ECHR (n 51); although the ECHR provides (Art 5(C)) the justification of arresting a person when there is a fear of committing another offence or escaping following commission a crime, it does not generally cover additional reasons for arrest, such as dangerousness.

[88] Military Court of Appeals (Judea and Samaria), Appeal (Judea and Samaria) No 1643/05 *Abu Al Hija v Military Prosecutor* (7 September 2011).

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that '[a]ll those who have engaged in serious violations of international humanitarian law, whatever and however they may have perpetrated, or participated in the perpetration of those violations, must be brought to justice'.[89]

The Military Court of Appeals examined the suitability of international law in this respect and, based on Israeli law, it concluded that the doctrine in international law, which significantly expands criminal responsibility, is too strict for the circumstances in the region and causes difficulties. At the level of principal, it was found that in cases where the head of the organisation was not involved in a crime, this is contrary to the principle of imposing criminal responsibility without a behavioural component. At the practical level, in the region there is no necessity for a clear commander-in-command relationship between the chain of activists, and on more than one occasion a person has acted under the responsibility of more than one party or, alternatively, while ignoring the words of his superior.

The field of criminal responsibility shows that even when there does exist a criminal norm in international law, it may not provide a legal answer to a concrete issue. It is often unsuitable for application in the reality of the region and may even become worse for the accused. Adherence to a more developed and detailed criminal justice system, such as the Israeli system, allows the court to establish norms that are more compatible with the principles of criminal law and align more closely with the legal system practised in the region.

### 5.3. Rights of minors

It is possible to demonstrate, once again, the inadequacy of international law to assist the military courts in resolving legal questions from the field of criminal law concerning the rights of minors in criminal procedure for youth.[90] International law pays much attention to criminal cases involving minors. For example, we can point to the establishment of the International Convention on the Rights of the Child (CRC) in 1989.[91] which established the principle of 'the best interests of the child' as the overriding principle in all decisions of governmental authorities concerning minors. The United Nations Committee on the Rights of the Child, an expert and independent UN body responsible for implementing and interpreting the Convention, has published various guidelines on this issue. In its policies, the Committee emphasised that the member states of the Convention must implement and

[89] ICTY, *The Prosecutor v Duško Tadić*, IT-94-1-A, Appeals Chamber, Judgment, 15 July 1999, para 190. To mention that the ad hoc tribunals developed the joint criminal enterprise (JCE) theory, and the ICC developed the 'control over the crime' theory (see the case concerning the arrest warrant for Bashir: ICC, *Prosecutor v Al Bashir*, Arrest Warrant Decision, ICC-02/05-01/09-3, Pre-Trial Chamber I, 4 March 2009) to address such questions of responsibility of superiors as direct perpetrators.

[90] Shai Farber, 'Judicial Review of Military Courts in the West Bank (Judea and Samaria) in Administrative Affairs – Between International Law and Administrative Law' (2021) 51 *Israel Yearbook on Human Rights* 47.

[91] UN Committee on the Rights of the Child, General Comment No 12: The Right of the Child To Be Heard (20 July 2009), UN Doc CRC/C/GC/12.

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respect the principle of rehabilitation at all stages of criminal procedure. They also need to provide measures to ensure that minors who break the law receive appropriate support and assistance for their reintegration into the community after imprisonment.[92]

In addition, the Committee emphasised that member states must carry out an independent periodic examination and evaluation of the various programmes and tools they use concerning their effectiveness in promoting reintegration into the community.[93] Alongside the CRC, guiding legal standards on juvenile delinquents adopted by the UN also emphasise the rehabilitative rationale of criminal procedure. The Beijing Rules of 1985 established legal standards for managing unique legal systems for minors who break the law and include references to rehabilitating juveniles after imprisonment.[94] Furthermore, the UN Economic and Social Council has recommended rules regulating children in the criminal justice system.[95]

Although these general instructions can serve as a source of inspiration for military courts, they do not provide practical tools for implementing the instructions. Therefore, to the extent that the court sought to apply actual content to the general principles of international law and give them practical implementation, it made use of the juvenile-related laws of the Israeli system; these include a series of moral determinations adopted by Israeli rule in the field of minors: interrogation hours for children, the presence of parents during interrogation of minors in the region, receiving an arrest report in respect of the minor concerned,[96] guidance regarding lenient punishment for juveniles,[97] as well as several other aspects of criminal procedure adopted in regions in which Israeli law is used.

The examples given are just the beginning of the substantial gaps in international law regarding providing answers to applied questions of criminal law, such as is practised in the region. The difficulties listed above, compared with the clear advantages of sticking to a regular criminal justice system (such as the Israeli legal system) explain why there is a reduction in the use of international law by military judges compared with the extensive use made of Israeli law to supplement orders or resolve legal questions.[98]

As exhibited across the three self-reinforcing factors explored here, criminal law involves applied micro-issues that are often incongruous with the broader framework of international law. These exacerbated difficulties of criminal justice, building upon previously noted conceptual gaps, demanded a concentrated

[92] ibid para 99.

[93] UNGA Res 40/33 (29 November 1985), UN Doc A/RES/40/33 (Beijing Rules).

[94] ibid paras 11 and 18.

[95] UN Economic and Social Council, Guidelines for Action on Children in the Criminal Justice System (21 July 1997), UN Doc RES/1997/30.

[96] Jerusalem Magistrates Court, Detention Case 4704-10 *Jerusalem Police Prosecution Bureau (Criminal) v Abu Naya (Detainee)* (15 February 2011).

[97] Military Court of Appeals (Judea and Samaria), Appeal No 2891/06 *Military Prosecutor v Abu Hashem* (13 August 2006).

[98] Benichou (n 33) 323–27.

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analysis – hence the focus of this section outlining the additional limitations of international law in the criminal context, as well as the resultant needs.

## 6. A proposal for a model of relying on a systematic criminal justice system as a response to resolving criminal legal issues in the region and criticisms of this proposal

As presented in the preceding discussion, numerous factors curtail the use of international law in military courts, encompassing considerations of justice and the incongruity between the content and structure of international law and cases adjudicated in the region's military courts. Nonetheless, instances exist in which international law can offer an optimal resolution. Consequently, in this section we propose a model that distinguishes between cases in which it is appropriate for military courts to refer to international law, recognising it as the paramount normative source in the region's legal framework. This approach aligns with the role of ICL as enforcer and validator, ensuring protection of the residents of the region.

Conversely, in situations deemed suitable for reliance of military court judges, internal law should adhere to Israeli legal principles rooted in a coherent, developed and dynamic system. This equilibrium offers numerous advantages, particularly in a contentious environment such as the Territories. Opting for an internal legal framework provides the benefits of richness, detail and precision. Simultaneously, incorporating references to international law aims to guarantee the requisite adaptation of Israeli law to the specific context of the region.[99]

(1) It is important to note that the Israeli Supreme Court has ruled that local legislation takes precedence over international law.[100] This means that local laws typically would prevail if there is a conflict between international law and Israeli law or security legislation. However, given the unique context of the military courts operating in the region, it is arguable that international law should be given greater weight in this specific setting. The military courts could potentially stipulate that in the event of a conflict between international law and local legislation, the provisions of international law are to take precedence. This approach would help to ensure compliance with international legal obligations and address concerns about the challenges that military courts might face in nullifying a norm within Israeli law when a contradiction arises. Nevertheless, this proposal would need to be carefully considered in the light of the Supreme Court's established precedent on the matter.[101]
(2) The initial category of cases necessitating the application of binding international law by military courts comprises situations involving

[99] Ronen (n 7) 759.
[100] For example, *Mara'abe* (n 43) para 74.
[101] Ronen (n 7) 756.

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general norms, encompassing the laws of war, customary treaties and agreements on occupied territory. Such instances may arise through arguments presented by the parties or even on the court's initiative. Conversely, when confronted with a specific criminal issue, the court will defer to the Israeli criminal justice system.

(3) Another crucial determination involves deciding the source of supplementation to which judges should turn in the presence of gaps in international law. According to this proposition, military court judges must prioritise the Israeli justice system as the primary supplementary source. As demonstrated earlier, this alternative proves to be the most fitting among the available options, as reference to Israeli criminal law affords more vital protection of the rights of the accused compared with both international and Palestinian criminal law.

In addition to the considerations mentioned above, potential criticisms of the military courts' proposal to rely on Israeli law in criminal matters may arise. The first such criticism is that use of Israeli law by military courts is deemed inappropriate. For instance, Ben-Natan contends that reliance by the military courts on Israeli law is aimed primarily at securing legitimacy within the Israeli community, particularly among its legal fraternity, rather than among the Palestinian population. In her view, if military courts were to base their decisions on international law or Palestinian law, this could also foster legitimacy among Palestinians in the region. According to her, the reliance by military courts on Israeli law, even if it holds the potential to enhance the rights of a protected resident accused of a crime, results in a broader infringement of the rights of the accused population – the residents of the region. First, Israeli law needs to be translated into Arabic and be made known to the region's residents. Second, the legal training of Palestinian lawyers is based on something other than the standard legal system used in Israel. Third, the judgments are not translated, and the military prosecution has an inherent advantage on account of its knowledge of Israeli law.[102]

The second potential criticism revolves around the notion that relying on Israeli law might imply a gradual annexation of Israeli legal principles in the region.[103] According to this argument, this process strengthens Israel's association with certain territories while creating a disconnection from others. It involves the military commander's extensive 'translation' of Israeli law and its application in the military courts. Essentially, this is perceived as a form of 'creeping annexation' or 'de facto annexation'.[104] While there is no formal legal determination of the territory's annexation, this process signifies an assimilation of the region into the State of Israel and the convergence of

[102] Ben-Natan (n 7) 65–66. Ronen holds that military courts avoid applying international law in their rulings. In her estimation, this is neglect on the part of military courts in implementing and verifying the protection for the protected residents of the region: Ronen (n 7).

[103] Ben-Natan (n 7) 68–70.

[104] Benvenisti (n 2) 212–15.

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laws applicable in Israel and the military courts.[105] Those who think this claim that to guarantee the rights of the local population, international human rights law must apply directly as the sole legal source to which one must turn. At the core of their argument is the assumption that Israeli law does not comply with international human rights, so the application of Israeli law in the region will harm the rights of its residents.[106]

Indeed, there is some merit in these criticisms. However, Ben-Natan's proposal regarding the preference for local law (i.e., Palestinian law) ignores the essential differences between the legal systems and the fact that the territories of the Palestinian Authority constitute just 18 per cent of the region. First, military courts are dealing with terrorist organisations that operate in the region; Palestinian law, unlike Israeli law, does not answer to security offences and the need for a balance between the rights of the accused and the fight against terrorist organisations. Ben-Natan's main argument is that in an attempt to adopt a fair trial, one must turn to the law of the domestic region – which is familiar to the lawyers and residents of the region and reflects the political community to which they belong, but also bearing in mind the role of the military courts, which primarily concerns security offences, such as membership of prohibited organisations (Hamas, Jihad, and similar). Appealing to Palestinian law may eliminate crimes as most do not constitute an offence against the law. In addition, Palestinian law is rarely published, and its jurisprudence is not detailed and lacks coherence.[107] Moreover, the aspiration to acquire legitimacy among the protected residents through court rulings seems to be impossible as Palestinians will never recognise the legitimacy of military courts, even in rulings that consider Palestinian law.

The same rationale applies to the reliance on international law. While many rights are indeed guaranteed in international law, in practice it is a challenge to apply them in day-to-day issues in military courts without detailed methods of implementation as required by criminal law. The Israeli criminal justice system is highly developed and encompasses a comprehensive set of protections for the rights of individuals involved in crimes. Judges require a clear, detailed and up-to-date code of rules to make informed decisions, which is seldom found in the principles of international law. However, deriving an orderly and straightforward system from international law principles can be challenging. This approach does not imply legal annexation but rather honest assistance. As mentioned, it may simplify matters for those involved in crimes in some instances and complicate them in others. The objective is to rely on an organised and precise legal system that provides concrete solutions. Therefore, considering the above considerations, reliance on Israeli criminal law appears preferable.

[105] Eyal Benvenisti, *Legal Dualism: The Absorption of the Occupied Territories into Israel* (Routledge 1990) 29–31; Joshua Kleinfeld, 'Skeptical Internationalism: A Study of whether International Law is Law' (2010) 78 *Fordham Law Review* 2451, 2474–75.

[106] Ronen (n 7) 756.

[107] After extensive investigation, we found one website where the law is published, but it is not easy to navigate and find a ruling: Maqam, 'Judicial Decisions', https://maqam.najah.edu/judgments/?page=4.

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The debate among various theoretical approaches encompasses not only legal considerations but also political aspects. Deciding between these approaches regarding the unique law in the region exceeds the scope of this article. For our purposes, it suffices to start from the premise that in any discussion related to criminal law applied in the region, there is agreement from the perspective of both international law and Israeli law that it is of paramount importance for criminal law to be fair, transparent, just and aligned with all the principles of criminal law observed in reformed countries.

## 7. Summary

This study aimed to examine the reasons for the limited use of international law in the rulings of the military courts in the West Bank, and propose a design for the legal regime moving forward. The findings indicate that while international law is acknowledged as the supreme legal authority in the region, its broad principles often lack the detail and coherence required to address complex criminal law issues. Consequently, relying on the comprehensive Israeli criminal code offers greater protection for defendants' rights and allows the courts to balance security concerns. These conclusions highlight the necessity for an integrated legal framework incorporating international law for fundamental issues while drawing on a systematic criminal justice system for applied criminal matters. Further research could explore how this model could be implemented to best uphold justice and human rights within the constraints of prolonged occupation.

The international law applicable in the region lacks elements that are commonly recognised in any legal system, such as a sovereign, a legislator, a uniform law book, a binding judicial system, and a standardised system of enforcement. The nature of international law is to establish principles, and military courts may use these principles when substantial legal issues arise, typically in areas that require discussion of those principles, such as administrative or constitutional law.

However, most issues discussed in military courts relate to the criminal realm rather than various constitutional or administrative principles. Therefore, despite the desire and perhaps even the legal obligation to use international law to resolve criminal legal issues, generally international law cannot be applied effectively in de facto criminal proceedings. The general principles of international humanitarian law, mainly those found in the law of belligerent occupation, are of an abstract nature compared with those of the Israeli criminal justice system, which holds sway in the region.

In contrast to international law, the Israeli criminal justice system is highly developed and provides a complete corpus of protection for the rights of those involved in crimes. Judges require a clear, detailed and updated code of rules to make informed decisions. The relatively extensive use of Israeli criminal law has several distinct advantages. The issues covered by the laws of occupation are relatively limited, while Israel's long-term control, extending far beyond the intended period for the laws of occupation, has introduced a growing variety of legal issues for the military courts that find no response in international

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law. Therefore, adapting the applicable legal framework to the reality on the ground is essential, making reliance on Israeli criminal law appropriate. This reliance may offer legal protection for the region's citizens while maintaining security.

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