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# From Extraterritorial Jurisdiction to Sovereignty and Annexation of Palestine

Alice M. Panepinto

## INTRODUCTION

Brandishing the Torah before the UN Security Council in December 2016, Israeli ambassador Danny Danon vehemently rejected the landmark Resolution 2334,<sup>1</sup> which reaffirmed the illegality of settlement activities in occupied Palestine.<sup>2</sup> Danon invoked Israel's historic, divine right to the biblical land of Israel, claiming "we will continue to be a Jewish state, proudly reclaiming the land of our forefathers." In the absence of clearly recognised borders between Palestine and Israel, compounded by a 50-year military occupation, and over half a million Israeli settlers living in the West Bank and East Jerusalem, Danon's statement quite simply describes the reality on the ground: Israel's territorial expansion into Palestinian land continues, despite (and because of) international law.

Adopting settler-colonialism as a theoretical framework, this chapter considers how the extraterritorial reach of Israeli jurisdiction over Palestinian land and people contributes to the annexation of Palestine. It investigates how Israel gains control over Palestinian private and public land through extraterritorial jurisdiction of the Supreme Court in cases involving Palestinian rights and land in the occupied Palestinian territories (OPT hereafter) without needing to openly engage in armed territorial conquest. In the absence of an impartial and independent international arbiter over Israeli-Palestinian disputes over land, there are pragmatic considerations to take into account whenever Palestinians and the international community acquiesce to Israeli extraterritorial jurisdiction over Palestinian matters. Yet resignation to the jurisdictional *status quo*, in light of the governing party's recent vote supporting formal annexation,<sup>3</sup> is transforming Israel's extraterritorial jurisdiction over Palestine into something more: occupied Palestinian land is becoming absorbed into the sovereign jurisdiction of Israel, and Palestine is being conquered quietly through expansionist jurisdiction. The first part of this paper will present the (international) legal framework under which Israel is gradually taking possession of the West Bank, while the second part will consider how extraterritorial jurisdiction, as a core expression of the Israeli state in the West Bank, may operate as a tool of territorial conquest.

## PART I: THE LEGAL FRAMEWORK ENABLING EXTRATERRITORIALITY

### a. Legal landscape of the West Bank

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<sup>1</sup> United Nations Security Council Resolution 2334 (23 December 2016) (S/RES/2334 (2016))

<sup>2</sup> Danon condemns UN Security Council resolution (Israel International News, 24<sup>th</sup> December 2016), video available at

<http://www.israelnationalnews.com/News/News.aspx/222203> (see 5'45) [accessed 16th January 2018]

<sup>3</sup> Netanyahu's Party Votes to Annex West Bank, Increase Settlements (Haaretz, 1<sup>st</sup> January 2018), available at <https://www.haaretz.com/israel-news/.premium-netanyahu-s-party-votes-to-annex-west-bank-increase-settlements-1.5630099> [accessed 16<sup>th</sup> January 2018]

The protracted occupation of Palestine has created a peculiar political geography of law.<sup>4</sup> This is particularly evident in the occupied West Bank as regulated by international law,<sup>5</sup> and under the extensive reach of the Israeli state's military and civilian jurisdiction. This "elastic geography" of the West Bank, to borrow from Eyal Weizman,<sup>6</sup> and the dynamic, constantly shifting borders backed by Israel's military power over Palestine are entangled in the legal framework. The ambiguities of this legal landscape pose both challenges and opportunities for Israel to assume control over Palestinian land, despite the fact that under international law, in theory, "there is not an atom of sovereignty in the authority of the occupying power."<sup>7</sup>

The law of occupation plays an important role in the analysis of Israel's control over Palestine.<sup>8</sup> However, prolonged occupations such as this one "violate the normative premises and predicates for the application of the law of occupation"; consequently, the legal framework itself fails to deal with predatory intentions and acts of the occupying power over occupied territories.<sup>9</sup> Indeed, there is a "risk of using the law of occupation in its current version to legitimize new variations of conquest and colonialism."<sup>10</sup> Aeyal Gross has investigated the extent to which the concept of occupation constitutes a normative shift from the now prohibited regimes of conquest, colonialism and apartheid.<sup>11</sup> The three basic principles inherent in the law of occupation include the principle of inalienability of sovereignty, which is based on the right to self-determination and "cannot be breached through the actual or threatened use of force", the trust vested in the occupying power for the management of public order and civil life of which the people living under occupation are beneficiaries, and the temporary nature of the occupation.<sup>12</sup> An occupation that does not meet these three criteria may slip into the dangerous territory of (now prohibited) conquest, dressed up "in the garb of legitimacy."<sup>13</sup> Building on Sharon Korman's seminal work,<sup>14</sup> Gross concludes that "military occupation cannot be a legal way of acquiring territory and (...) "conquest" is illegal" – based on the principle set out in article 2(4) of the UN Charter, prohibiting the acquisition of land by force, and the right to self-determination.<sup>15</sup>

However, the international legal regime grants the occupying power extensive authority over occupied territories and its inhabitants, as evidenced in the 1907 Hague Regulations (hereafter, HR) (Section III) and 1949 Fourth Geneva Convention (hereafter, IVGC) (Section III). In particular, Article 43 HR recognises the "authority of the legitimate power having in fact passed into the hands of the occupant," which in turn acknowledges a substantial role of the occupying power in the regulation of many aspects of life of the local population ('protected persons' under IVGC).

Indeed, the occupier lawfully exercises a type and degree of power that is more often associated with the sovereign state. These powers include: public order and safety (Art 43 HR), collection of

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<sup>4</sup> An expression adopted from Hajjar 2005, p. 23-25

<sup>5</sup> On this point in general, see inter alia Arai-Takahasi 2009, p. 145-166; Dinstejn 2009, p. 132; Benvenisti 2012

<sup>6</sup> Weizman 2012, p. 6-7

<sup>7</sup> Oppenheim 1917, cited in Gross 2017, p. 20

<sup>8</sup> See among others, Playfair (ed) 1992; Shehadeh 1997; Imseis 2004; Shany 2008; etc.

<sup>9</sup> Azarova 2018 (forthcoming), p. 2-3

<sup>10</sup> Gross 2017, abstract and p. 23 – expanding on arguments presented in Ben Naftali, Gross & Michaeli 2005

<sup>11</sup> Gross 2017, p. 17-18– again expanding on arguments presented in Ben Naftali, Gross & Michaeli 2005

<sup>12</sup> Gross 2017, p. 18

<sup>13</sup> Gross 2017, p. 23

<sup>14</sup> Korman 1986, in particular p. 218-220

<sup>15</sup> Gross 2017, p. 21-22

taxes and other contributions (Arts 48-49 HR), requisitions in kind and services (Art 52 HR), the rights of administrator and usufructuary of public buildings, real estate, forests, and agricultural estates (Art 55 HR), the provision of services for children (including schooling and registration) (Art 50 IVGC), public health (Art 56 IVGC), the removal of public officials from their posts (Art 54 IVGC), repeal and suspension of penal legislation (Art 64 IVGC), and establishment of military courts (Art 66 IVGC). In line with its overall aims, the Fourth Geneva Convention is primarily concerned with civilians living under occupation, who find themselves living under the authority of the occupant whose role includes a range of positive and negative duties towards the locals (to echo human rights language ordinarily used to describe the relationship between citizens and state). Yet military necessity of the occupying power provides a justification to limit the rights of protected persons, for instance with regard to population transfers (Art 49), destruction of private property (Art 53), temporary restrictions of food and medical supplies, or requisition of hospitals (Art 57).

It is reported that immediately after the 1967 war Israel's military advocate general advised the state "to rethink its position vis-à-vis international law" and "rejected the applicability of the 1949 Fourth Geneva Convention" to the OPT, since they were considered disputed territory.<sup>16</sup> Crucially, while the land as such was considered to be outside the remit of IVGC, its inhabitants were not. The laws in force prior to the occupation, in light of the 1907 Hague Convention, were recognised "provided they did not contradict any legislation of the military commander."<sup>17</sup> Neve Gordon has considered the extent to which "Israel's concerns far exceeded those of a temporary occupying power," and how, by espousing a "rule of law approach," it presented itself as an "enlightened rule(r)" establishing judicial institutions (military courts) to sanction "the legality, legitimacy, and morality of the occupation."<sup>18</sup> Indeed, "without establishing this comprehensive legal system, Israel could never had administered the occupied regions effectively. The law served as the foundation for almost all of the other controlling apparatuses and practices and in many ways shaped their operations."<sup>19</sup> In this context, law is reshaped and used for specific state purposes.

The Oslo Accords<sup>20</sup> marked another milestone in the normative framework of the West Bank. However, little change came about, given the Accords "did not actually transfer meaningful authority over the OPT from Israel to the PLO".<sup>21</sup> The political geography of law results of the Accords formalised the A-B-C distinction of the West Bank,<sup>22</sup> giving Israel different degrees of authority over the various sections of the OPT, and complete military and civilian control in Area C, constituting over 60% of the West Bank. Consequently, the international community effectively vested Israel with default authority over the West Bank, which was meant to be transferred to the PA over the coming years, but has not been yet.

Through the executive authority of the Military Commander, Israeli civil legislation is channelled to the settlements, and the Israeli executive also issues law applicable to Israelis residing in settle-

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<sup>16</sup> Gordon 2008, p. 26. Notably, Theodor Meron, then legal advisor to the Israeli Foreign Ministry, wrote a legal opinion in September 1967 holding that the fourth Geneva Convention did indeed apply to the occupied Palestinian territories – as reported (inter alia) in Tilley 2012 in Tilley (ed) 2012, p. 37. For a longer discussion, see also Gross 2017, p. 141-180

<sup>17</sup> Gordon 2008, p. 26

<sup>18</sup> Gordon 2008, p. 27-28 (also citing Raja Shehadeh)

<sup>19</sup> Gordon 2008, p. 28

<sup>20</sup> I have summarised these elsewhere – see Panepinto 2017. For an interesting critical analysis of the Oslo lines, see inter alia Burns & Perugini 2016, in Manna & Storihle (eds) 2016

<sup>21</sup> Tilley (ed) 2012, p. 41

<sup>22</sup> For a critical discussion of the West Bank division into areas A, B and C in Oslo Two, see Said 2000, p. 78-80

ments, but not to Palestinians.<sup>23</sup> These include provisions to extend the jurisdiction of Israeli criminal courts extraterritorially in the West Bank, to ensure Israeli settlers and tourists are only tried according to Israeli law and courts – and not by Palestinian judges.<sup>24</sup> The ultimate jurisdiction over Israeli citizens in the West Bank rests with the Israeli Supreme Court in High Court of Justice formation (ISC/HCJ), which reviews actions of the Israeli authorities in the OPT.<sup>25</sup> And on the legislative front, the Knesset has enacted laws that apply extraterritorially to Israelis living in the West Bank on matters including taxation, oversight of products and services, census, and human rights.<sup>26</sup> Overall, applying Israeli law to Israeli citizens in the West Bank and disregarding the local Palestinian legal system, fits the annexationist aims of settler colonialism, as I will show later in this essay.

However, the extraterritorial extension of Israeli law into the West Bank does not just concern Israeli citizens. The ISC/HCJ exercises judicial review over the actions of state agents, which from the early days of the occupation includes the activities of the Israeli military apparatus operating in Palestine.<sup>27</sup> Through its jurisprudence, the ISC/HCJ has given Palestinians the possibility to petition against actions carried out by the Israeli military (or under the aegis of the military),<sup>28</sup> at times finding in favour of individual Palestinians and against the Israeli state apparatus. Regardless of who wins a specific case, for decades scholars have argued that in exercising jurisdictional oversight in the West Bank the ISC/HCJ has legitimized Israeli control and actions in the OPT.<sup>29</sup> Over time, the legalism articulated by the ISC/HCJ has helped make the occupation more palatable to sections of the Israeli elite, contributing to maintaining and upholding the occupation.<sup>30</sup> This judicial function, manifesting extraterritorial jurisdiction traits, also fits the model of settler colonialism, much like the extension of legislative power of Israeli lawmakers over settlers living in the West Bank. As an expression of the Israeli state in the West Bank, the ISC/HCJ plays a pivotal role in affirming Israeli claims to the land.

One area of Israeli law applies only to Palestinians in the OPT: military law as enforced by military courts.<sup>31</sup> Hajjar has considered this area of Israeli law as “a constitutive factor in the conflict”, highlighting its “paradoxical capacity to serve and secure the authority of the state while also enabling means of resisting that authority”.<sup>32</sup> More recently, numerous human rights organisations, including the high-profile Israeli NGO B’Tselem, have divested from the Israeli military court system, describing it as a fig leaf for the occupation.<sup>33</sup> As the military legal system is part of the package of Israeli

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<sup>23</sup> Tilley 2012, p. 65-66

<sup>24</sup> Tilley 2012, p. 65-66, citing the Extension of Emergency Regulations Law 1977

<sup>25</sup> Kretzmer 2002, p. 10

<sup>26</sup> Tilley 2012, p. 67, citing the Supreme Court judgment in the *Gaza coast* case, 2005

<sup>27</sup> Kretzmer 2002, p. 1 and 19-21 – I have briefly discussed these issues before, in Panepinto 2017

<sup>28</sup> Dinstein 2009, p. 25-26; Shamir 1990, p. 785; Weill 2015, p. 2; and Weill 2014

<sup>29</sup> See notably Kretzmer 2002, p. 2-3; Shamir 1990; Shehadeh 1985; and Shehadeh 1992 in Playfair (ed) 1992; Sultany 2014; Weill 2015

<sup>30</sup> Kretzmer 2002, p. 198; Harpaz & Shany 2010, p. 515; Al-Haq (2010) *Legitimising the illegitimate? The Israeli high court of justice in the occupied Palestinian territory*. Available at: <http://www.alhaq.org/advocacy/topics/military-administration-and-legal-remedies/380-al-haqs-new-study-legitimising-the-illegitimate-and-others> [accessed 10<sup>th</sup> January 2018]

<sup>31</sup> See Hajjar 2005

<sup>32</sup> Hajjar 2005, p. 24

<sup>33</sup> B’Tselem, *The Occupation's Fig Leaf: Israel's Military Law Enforcement System as a Whitewash Mechanism* (May 2016) – available at [https://www.btselem.org/publications/summaries/201605\\_occupations\\_fig\\_leaf](https://www.btselem.org/publications/summaries/201605_occupations_fig_leaf) [accessed 10<sup>th</sup> January 2018]

laws applied extraterritorially, there seems to be a deeper “entrenchment of a permanent regime of legalized control” which tests the boundaries of the very notion of occupation in the West Bank.<sup>34</sup>

To a doctrinal international lawyer, the military court system is premised on the (exceptional) laws of armed conflict; but a closer look indicates that Israeli courts, both military and civilian, have developed routine jurisdiction over Palestinians living under occupation on all issues that affect the Israeli state – from armed resistance, to peaceful activism, political journalism, land confiscation and many more. Using the paradigm of security and law enforcement, the existence of a military occupation has been side-lined, with the Israeli state preferring terms like “administered”<sup>35</sup> to indicate and de-problematise its *de facto* sovereignty over land outside its formal (and internationally recognised) territorial jurisdiction. Yet the expansive Israeli military and civilian jurisdiction suggests that the occupier / *de facto* sovereign in the West Bank has not clearly demarcated its territory from lands it holds under military occupation. This is especially apparent in the civilian court system – and the posturing of the ISC/HCI extraterritorial jurisdiction over the occupied West Bank reveals how a seemingly innocuous institution can become a key player in the Israeli conquest of Palestine from the perspective of settler-colonialism.

#### **b. The slippery slope: From occupation to conquering sovereignty**

We have seen how in theory occupation and sovereignty are mutually exclusive, and yet how the law of occupation allows the occupier to exercise its power in a manner similar to a sovereign state. Can protracted occupations result in a form of conquest leading to sovereignty? Conquest has been defined as ‘the forcible seizure and subsequent control of territory by one political group from either another such group or a recognized central government’.<sup>36</sup> As such, it consists of two concurring elements: firstly, the taking of territory through force; secondly, that sovereignty is assumed by the conqueror (despite the law). The first element consists of the fact of taking of territory (presumed to be part of a state) and the use of force to do so, prohibited by Article 2(4) of the UN Charter,<sup>37</sup> which includes the threat of force. The second element consists of the new political entity’s control over the territory, to the exclusion of the former political entity that controlled it previously. The law has a crucial role to play in consolidating that process.

The international law principle that occupation and conquest are mutually exclusive does not hold true in cases of protracted occupations, in which the occupying power may have more ambitious designs for the foreign land and peoples it controls after the formal cessation of hostilities. An extended occupation carries features of both sovereignty and war,<sup>38</sup> and in some cases there is an “intermediate status between invasion and conquest”, termed “transformative occupation”.<sup>39</sup> In these contexts, an occupying power can in practice extend its exercise of temporary, factual (and militarily-backed) authority over occupied territory, regulated under international humanitarian law (IHL), to a condition that resembles sovereign power. As such, the over-legalisation of the occupation in Area C (and more broadly in the West Bank) raises the question if the distinction between occupation and conquest has collapsed.

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<sup>34</sup> Discussed in Panepinto 2017

<sup>35</sup> Reported in Hajjar 2005, p. 31

<sup>36</sup> Hurrell 2003 in Buchanan & Moore (eds) 2003, p. 290

<sup>37</sup> For a detailed discussion, see Korman 1986, p. 199-200

<sup>38</sup> Koskenniemi 2008, p. 32-35

<sup>39</sup> Bhuta 2005, p. 725-726; and Roberts 2006

The (secular) basis for Israeli territorial claims to Palestinian land in the West Bank is found in the 1967 war, which marks the start of the occupation. At that time, reports historian Ilan Pappé, “there could not be a de jure annexation of the territories” and expulsion of its inhabitants, but it was clear that Israel intended to control the area indefinitely.<sup>40</sup> The theoretical lens of settler colonialism helps us contextualise this scenario, and it is increasingly being adopted to analyse the role of law in Israel-Palestine.<sup>41</sup> Indeed, it has been argued that “Israel’s urgent desire to normalise the exceptional status of its regime of occupation in accord with law” and the shift towards hyperlegality, has successfully incorporated the OPT “within its undeclared borders as an included excluded” and divided Israeli settlers and the Palestinian population “over which it exercises de facto rule along apartheid lines”,<sup>42</sup> as outlined in the previous section.

Settler colonial projects are “predominantly about territory” and the “deterritorialisation of indigenous outsiders”.<sup>43</sup> As a juridical phenomenon, settler colonialism entails the displacement and non-recognition of indigenous law, which is replaced by settler laws.<sup>44</sup> The development of settler laws obscures the violent origins of settler colonialism and gives an allure of ‘civilising mission’, fairness and justice.<sup>45</sup> When it comes to expanding territorial control, extraterritorial applications of settler colonial law can become an effective tool to smoothen the process of conquest. The extraterritorial jurisdiction of the Israeli Supreme Court to assert civilizational superiority (based on law) over land struggles in the OPT is a fitting example of this process.

The notion of extraterritoriality helps understand the effects of the application of Israeli laws – both military and civilian – to the West Bank, and the expansion of the jurisdiction of the ISC/HCI over Palestinian territory. Extraterritorial uses of law are framed as ordinary state administration of justice, according to Israeli laws, when it comes to Israeli citizens and interests. The Knesset may issue laws that apply extraterritorially, the Supreme Court exercises its jurisdiction between the river Jordan and the Mediterranean sea, and the (Israeli) rule of law is maintained – despite the obvious problems vis-à-vis IHL (occupation does not transfer sovereignty) and human rights (Palestinians and Israelis are treated differently by Israeli laws and courts operating extraterritorially - raising serious questions of discrimination). By treating Palestinian land beyond the Green Line (the putative border) as Israeli, and Israeli citizens in the West Bank as if they were within the jurisdictional boundaries of Israel proper, extraterritorial legislation and jurisdiction contributes directly to the settler-colonial project. Indeed, the role of Israeli laws and jurisdiction extended extraterritorially to conquer Palestinian land in the West Bank echoes the legal history of East Jerusalem, over which Israel extended its laws and jurisdiction following the 1967 Six Day War,<sup>46</sup> before formal annexation in the 1980 basic law.<sup>47</sup>

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<sup>40</sup> Chomsky & Pappé 2015, p. 168, 173 and 177

<sup>41</sup> See most recently in relation to (Israeli) constitutional law: Masri 2017, p. 15-20; and more generally Salamanca, Qato, Rabie & Samour 2012

<sup>42</sup> Lloyd, 2012, p 75-77

<sup>43</sup> Veracini 2008, p. 367-368. On settler colonialism more generally see Veracini 2010, Veracini 2011, and the seminal Wolfe 2006, and others

<sup>44</sup> For a valuable discussion of the colonial power of western law in the context of settler colonialism, building on Agamben, see Morgensen 2011

<sup>45</sup> On settler-colonial jurisdictional claims, see inter alia Pasternak 2014; and Smandych 2013

<sup>46</sup> Law and Administration Ordinance (Amendment no. 11) Law, 5727–1967 – full text available at <http://www.mfa.gov.il/mfa/foreignpolicy/mfadocuments/yearbook1/pages/13%20law%20and%20administrat>

As discussed in the previous section, the legal landscape of the West Bank has enabled the entrenchment of Israeli control over occupied Palestinian land, highlighting the ambiguities of international law in protecting Palestine from Israeli territorial expansionism. The next part will consider the role of extraterritorial jurisdiction of the Israeli courts in the West Bank as a way in which land is being conquered through law and subtly annexed – in a manner which is not openly in violation of international law, but whose results radically contradict it.

## **PART II: EXTRATERRITORIAL JURISDICTION AS A TOOL OF CONQUEST**

Jurisdiction and its extraterritorial applications help shape material and social realities. As a juridical expression of the Israeli state, Israeli extraterritorial jurisdiction over the West Bank has contributed significantly to the erasure of Palestinian legal and judicial authority, with severe political consequences. In the context of settler colonialism and territorial expansionism, the way in which jurisdiction of an occupying power is exercised over occupied land is constructive of a new experience of jurisdiction – one that conquers land. Jurisdiction possesses “material/special attributes”, but it is “also a discourse, a way of speaking and understanding the social world”.<sup>48</sup> So the presumption of Israeli jurisdiction over Area C – as seen in the recent case on the demolition of Al Khan al Ahmar to make way for settlement expansion<sup>49</sup> – exemplifies the paradox of the ISC/HCJ attempting to offer a fair and impartial tribunal for grievances against the Israeli state by Palestinians in the West Bank. By presenting itself as the only court providing judicial oversight over land disputes in the West Bank, and in particular area C, and denying the jurisdiction of Palestinian (or international) courts, the ISC/HCJ creates both a material reality and a narrative about its role in the area that goes beyond its borders, effectively dissolving them.

From the perspective of international law (and in particular the laws of occupation), Israeli extraterritorial jurisdiction over the West Bank establishes a practicable way for the occupying power to ensure its courts, and not Palestinian judges, enjoy judicial oversight on Israeli settlers and all other issues that pertain to Israel’s interests in the region. In the context of settler colonialism, the use of Israeli jurisdiction to assert control over Palestinian land is a device for (extra)territorial expansion without resorting openly to armed force. The deliberate exclusion of Palestinian law and jurisdiction from Area C of the West Bank is one of the many tools used to evaporate Palestinian control over that territory. As an expression of the Israeli state, the ISC/HCJ is an effective tool for bringing the West Bank into the fold of Israel proper, without the economic and political costs of a larger-scale military operation.

### **a. A jurisprudence of extraterritorial jurisdiction as sovereign expansionism**

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[ion%20ordinance%20-amendment%20no.aspx](#) [accessed 10 March 2017]. Note that the term Eretz Israel indicates the biblical land of Israel, and not the modern state of Israel (1948)

<sup>47</sup> Tilley 2012, p. 37-38. This has not been recognised by the international community, as evidenced in UN General Assembly resolution 181 recommending that the city be administered as a separate entity, and UN Security Council resolution 242 that prohibits the acquisition of territory by force (breach of Art 2(4) UN Charter)

<sup>48</sup> Ford 1999, p. 855

<sup>49</sup> As discussed extensively in Panepinto 2017, and further in Panepinto, *A tiny West Bank village is due to be demolished: here’s how international law could be used to intervene* (The Conversation, 14 June 2018) available at <https://theconversation.com/a-tiny-west-bank-village-is-due-to-be-demolished-heres-how-international-law-could-be-used-to-intervene-97885> [accessed 14 June 2018]



The exercise of Israeli extraterritorial jurisdiction over the West Bank, and especially Area C, which since the Oslo Accords falls entirely under security and administrative control of the occupying power, echoes past experiences of how law and imperialism (and settler colonialism, in particular) connect. Historically, “extraterritoriality was quintessential legal imperialism”, extending “Western legal authority into non-Western territories and limited non-Western legal authority over western foreigners”.<sup>50</sup> This required, on the one hand, a legal framework able to replace the local laws, and on the other, the “material capability” to protect these courts from the indigenous populations.<sup>51</sup>

The situation in occupied Palestine – and in particular in Area C – is a fitting example of how extraterritorial application of the colonisers’ laws facilitates imperialist aims, which in the case at hand include territorial expansion (annexation) over Palestinian lands. The ongoing military occupation facilitates the “material capability” to defend this court system (i.e. military courts and ordinary Israeli civilian courts, including the ISC/HCI) operating extraterritorially. But the denial of Palestinian legal authority is not simply an Israeli practice: the international community had sanctioned this in the Oslo Accords, which gave Israel authority over the West Bank as a default position. This authority was meant to be temporary, but is yet to be relinquished.

As previously discussed, with the creation of Area C in *Oslo II*, Israeli control over more than 60% of the West Bank was endorsed by the international community – adding to the pre-existing *de facto* control over the area premised on the laws of occupation. Since *Oslo II* the PA has been virtually excluded from operating in Area C, and its jurisdiction over Palestinians in those parts is suspended. And while Area C is an integral part of Palestine according to the UN and international consensus, the removal of Palestinian jurisdiction has created a legal vacuum that Israeli courts have filled with their own jurisdiction exercised extraterritorially. So by cutting off Area C from Palestinian domestic jurisdiction, the effects of *Oslo II* have facilitated Israel’s hold of that part through extraterritorial jurisdiction.

This jurisdictional conundrum emerges in the context of the limited sovereignty afforded to Palestinians under Israeli settler colonialism. Thus, Israeli law envelopes indigenous Palestine and Palestinians, and in so doing creates the conditions for displacement of the native group (in Area C more visibly) and the extension of its own jurisdiction extraterritorially. In this context, Palestine, to borrow the ideas put forth by Kayaoğlu, is the “non-Western state” that becomes “the nonsovereign “other” (...) excluded from the realm of sovereignty”.<sup>52</sup> In the process of a “positivist construction of sovereignty,” Western law is idealised and displaces non-Western law, including “removal or replacement of the non-Western judicial elite in order to eliminate or significantly limit indigenous legal systems” (often from an orientalist stance).<sup>53</sup> There are numerous historic examples of legal imperialism that can and have been interpreted through the lens of settler colonialism, for instance, in Ireland or Australia.<sup>54</sup> What emerges is that extraterritorial uses of colonial law can displace and eliminate not only indigenous laws but also indigenous populations, their cultural and their social structures.

In Area C the limitation of Palestinian jurisdiction based on *Oslo II* and the default supremacy of the extraterritorial jurisdiction of the ISC/HCI over both Israeli settlers and Palestinians whose actions affect Israeli public or private interests is emptying those parts of Palestinian jurisdiction – and en-

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<sup>50</sup> Kayaoğlu 2010, p. 6

<sup>51</sup> Kayaoğlu 2010, p. 6

<sup>52</sup> Kayaoğlu 2010, p. 10

<sup>53</sup> Kayaoğlu 2010, p. 32

<sup>54</sup> Pawlisch 2002, p. 3-5; and Orford 2007

trenching Israeli settler colonialism. The jurisprudence relating to land disputes between Palestinians and Israeli settlers in the West Bank brings to the fore the ambiguities of Israeli jurisdiction over Palestinian rights and property as an individual as well as a collective issue.

An example is offered in the dispute involving Micheal Lessens, an Israeli settler, who took possession of an uncultivated plot of land owned by Ahmad Abed-el-Kader, a Palestinian farmer, who subsequently sought to re-enter his property.<sup>55</sup> Prima facie this is a private land dispute; but in the context of occupation this case is a manifestation of a political battle in which the occupying power “is creating the conditions” to exclude Palestinians from proper safeguard and enforcement of property rights.<sup>56</sup> In fact, Lessens’ possession was secured by military protection, whereas Abed-el-Kader could not rely on a system of organised military protection – in addition to having no recourse in the Palestinian justice system, nor easy access to Israeli courts.<sup>57</sup> Additionally, since the introduction of Military Order 1586 (2007), the Head of the Civil Administration (the branch of the Israeli army administering the West Bank) can directly interfere in private land disputes.<sup>58</sup> The Supreme Court eventually found that the Order required the occupying power to protect private property, and the land was returned to Abed-el-Kader in 2012.<sup>59</sup> But this decision was heavily criticised by settlers and other Israelis. Shortly after, an alternative view was put forward in the Levy Report (commissioned by Benjamin Netanyahu), which claimed that Israel did not occupy the West Bank, and called for a change in the law to ensure Israelis could “gain rights based solely on cultivation” regardless of any pre-existing Palestinian property rights.<sup>60</sup>

By removing the socio-political context of the occupation in favour of a private law approach, the occupying power’s obligations towards the protected persons (individually and collectively) under IHL are put aside.<sup>61</sup> Ronit Levine-Schnur suggests that the occupying power should provide an “opportunity for a hearing before an independent tribunal.”<sup>62</sup> This point is crucial: land law disputes between Palestinians and Israelis heard by the Israeli court system operate on an inherent disparity, and instead should be heard by impartial judges. International acquiescence to the jurisdictional status quo of the ISC/HCI in the OPT rests on the belief that Israeli judges are able and willing to provide fair and impartial oversight over land disputes in the West Bank – which is clearly impossible, because they are an expression of the Israeli state and operate within a specific national framework and settler colonial context. Additionally, as discussed previously, this expression of extraterritorial jurisdiction paves the way for Israeli sovereign expansionism and territorial conquest of the OPT.

#### **b. Extraterritorial jurisdiction as a tool of conquest**

As I have argued elsewhere,<sup>63</sup> regardless of the outcome of a given case, the process whereby Palestinian rights and Israeli interests in the West Bank are adjudicated extraterritorially by the Israeli Supreme Court is inherently problematic. The conflict of interest is too deep: the right for Palestinians to a fair trial before an independent and impartial judge is invariably tainted by the institutionalisa-

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<sup>55</sup> HCI 5439/09 *Abed-el-Kader v Military Board of Appeals* (2012) (unpublished), reported in Levine-Schnur, 2017 p 130-132

<sup>56</sup> Levine-Schnur 2017, p. 130-132

<sup>57</sup> Levine-Schnur 2017, p. 130-132

<sup>58</sup> Levine-Schnur 2017, p. 130-132

<sup>59</sup> Levine-Schnur 2017, p. 136-137

<sup>60</sup> Levine-Schnur 2017, p. 138-139, citing The Levy Commission Report on the Legal Status of Building in Judea and Samaria (Jerusalem, 21 June 2012)

<sup>61</sup> Levine-Schnur 2017, p. 140

<sup>62</sup> Levine-Schnur 2017, p. 141

<sup>63</sup> Panepinto 2017

tion of the Israeli Supreme Court as an organ of the Israeli state, able to defer to the Knesset and Government, and a constitutional expression of a state who systemically denies Palestinian rights (regardless of the fact that individual judges may be fair and impartial). What can be garnered from this point is that by exercising extraterritorial jurisdiction over the West Bank, the ISC/HCI as an expression of the Israeli state is asserting its 'peaceful' control over Palestinian matters – as if the context of occupation and structural disparity can be overcome by the extension of (Israeli) judicial oversight and rule of law. If unchallenged, this extraterritorial reach will consolidate the legal fiction of normality adopted (and created) by the Israeli Supreme Court's jurisdiction over the West Bank.

As the ISC/HCI's jurisdiction over the West Bank is situated in the context of settler colonialism, the effects of juridical expansionism highlights the intention to act as sovereign by extending Israeli legality over Palestine. This extraterritorial jurisdiction is an outward projection of sovereignty *ratione loci, personae et materiae* over land, people and matters that fall outside a state's formal jurisdictional limits, when the (political) purpose to control or conquer is disguised by law. By seeking to exercise judicial control over contiguous territories that Israel may physically hold with relative ease (supported by the military), and in the absence of clearly demarcated state borders, the line between extraterritorial jurisdiction and de facto annexation is blurred.

In this context, the function of extraterritorial jurisdiction as a means to control and secure control over foreign land, people and matters seems to converge with the purpose of military conquest campaigns. A key distinction remains: military conquest carries a manifest armed nature, as opposed to the non-armed nature of securing control over foreign land, people and matters through extraterritorial jurisdiction. However, when extraterritorial jurisdiction coupled with the intention to secure control over foreign land, people and matters saturates a prolonged and normalised military occupation, then its results are hard to distinguish from the aims of a military conquest. Moreover, when an occupying-colonising power aspires to the takeover of contiguous foreign land, the extraterritorial uses of the domestic law of the occupying power acquire a unique function in territorial appropriation, as that extraterritorial jurisdiction is an expression of the political aims of the state.

Palestinians, for the most part, do not have the option of divesting from Israeli courts when they find demolition orders affixed to their homes or their farming land confiscated to allow the expansion of Israeli settlements, nature reserves or closed military areas in the OPT. In the context of structural oppression, they can only buy time and engage with the process, despite what it might mean collectively for the Palestinian state project. However, bilateral and multilateral donors who provide aid and development assistance to Palestinian communities in the West Bank, and in particular Area C, should consider carefully the ramifications of engaging with the Israeli courts to stall or contest demolition orders. The international recognition of the jurisdiction of Israeli courts over Palestinian land implicitly recognises Israeli sovereignty in the West Bank – contradicting the maxim that occupation does not transfer sovereignty.

## **CONCLUSION**

This paper investigated how extraterritorial jurisdiction, as an expression of the occupying state, can be a vehicle for territorial conquest in the context of protracted occupation over contiguous land and settler-colonialist projects. Exploring the situation in Palestine, and specifically in the West Bank, it considers how Israeli extraterritorial jurisdiction operates to transform occupation into a more permanent reality closer to sovereignty. Considering the role of law in colonial expansionism, and the international law of occupation, this chapter discussed the significance of extraterritorial jurisdiction exercised by the Israeli Supreme Court in the West Bank, and in particular in Area C.

The exercise of extraterritorial jurisdiction by the Israeli Supreme Court in the West Bank over matters involving Palestinian rights and land is contributing to the construction of Israeli sovereignty in those parts. In the context of settler-colonialism, the unimpeded Israeli jurisdictional reach over Area C in particular is consolidating the exclusion of Palestinian law and judges from those areas and entrenching Israeli territorial control. While it is tempting to interpret this process as something that occurs beyond the pale of international law, a closer look reveals how the ambiguities of international law itself (and in particular some aspects of IHL) has facilitated this extraterritorial jurisdiction as a form of creeping annexation. The practice of extraterritorial jurisdiction in those parts is an expression of asserting sovereignty in a manner that eschews the confrontation of military action, but is backed by the military threat inherent in the 50-year occupation.

Thinking about the future of Israeli extraterritorial jurisdiction in the West Bank can benefit from the past experience of Jerusalem (and to an extent, the Golan Heights). The extension of the legal system of an occupying power over occupied land, and the incorporation of foreign land into the conquering state's sovereignty, has been successful before – despite the (relative) lack of international recognition as the Jerusalem example illustrates. Walking around Palestinian East Jerusalem today, the laws, courts, and law enforcement are Israeli. East Jerusalem has, in effect, been taken away from Palestinians and out of Palestine, and is within the fold of Israeli sovereignty. The quiet “annexation through extraterritorial jurisdiction” that is also happening in Area C of the West Bank is invisible to the naked eye, but its effects will compromise prospects of a just and durable peace irreparably.

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