H.C.J 27/48

SHMUEL LAHISSE

v.

THE MINISTER OF DEFENCE AND OTHERS.

In the Supreme Court sitting as the High Court of Justice.
[February 1, 1959]
Before: Olshan J., Cheshin J., and Silberg J.

Military Court - Jurisdiction - Personal or territorial - Criminal offence committed by army officer beyond the borders of Israel - Petition to High Court - Power of High Court to interpret Army Code.

An officer in the Israel Army was charged before a military court in Israel with murder, an offence under S. 214(b) of the Criminal Code Ordinance 1936 and section 97 of the Army Code 1948[1)]. The officer submitted that the military court had no jurisdiction inasmuch as the acts with which he was charged were alleged to have been committed in Hula, a village in Lebanon, and outside the borders of either Israel, or Palestine as constituted under the Mandate. This submission was rejected, but the case was stood over to allow him to petition the High Court on the question of jurisdiction.

Upon the hearing of the petition it was argued, in addition to a submission of no jurisdiction in the military court, that only that Court had jurisdiction to interpret the Army Code.

Held, rejecting the petition, that where a criminal offence is committed by an army officer beyond the borders of Israel, he may be tried by a military court under the Army Code:

a person charged before a military court who alleges that that court is without jurisdiction, may petition the High Court without awaiting the decision of the military court:

the High Court may interpret the Army Code, the military court having no exclusive jurisdiction to interpret that Code :

1) See infra p. 145. The Code appears as a schedule to the Emergency (Army Code 1948) Regulations, 1948.

the military court has jurisdiction to try a case such as the present in accordance with Article 38 (as amended) of the Palestine Order in Council[2], read together with Section 3(b) of the Criminal Code Ordinance 1936[3] and section 3 of the Army Code[4].

Palestine Cases referred to:

(1) *H.C.* 78/39 - *Gedaliah Havkin v. Inspector-General of Police and Prisons and others*: (1940), 7 *P.L.R.* 35.

(2) *H.C.* 104/41 - *Selim Barakat as administrator of the property of "Awad Wakf", Jaffa v. Maronite Ecclesiastical Court, Jaffa and others :* (1941), 8 *P.L.R.* 593.

(3) *Cr.A.* 63/39 - *The Attorney-General v. Vladimir Nikolaiovitch and others :* (1940), 7 *P.L.R.* 1.

English Cases referred to :

(4) *Mncleod v. Attorney-General for New South Wales :* (1891) *A.C.* 455.

(5) *Jefferys v. Booseg :* (1854), 4 *H.L. Cas.* 815.

Geiger for the Petitioner.

H. H. Cohn, State Attorney, for the Respondents.

CHESHIN J. giving the judgment of the court. On December 6, 1948, an order nisi was issued by this court calling upon the respondents to appear and show cause why they should not be restrained from placing the petitioner on trial before the Special Tribunal of the Defence Army of Israel on a charge of murder under section 214(b) of the Criminal Code Ordinance. 1936, and section 97 of the Army Code, 1948, and why they should not release the petitioner from custody.

2. The facts, as detailed in the affidavit of the petitioner, are not in dispute, and may be summarised shortly as follows:

2) See infra p. 147.
3) See infra p. 150.
4) See infra p. 146.

The petitioner, Shmuel Lahisse, an officer of the rank of first lieutenant, served in the Defence Army of Israel as a Company Commander. On November 12, 1948, he was arrested by order of the prosecutor of "A" Command, and was charged with the murder of a number of persons in the village of Hula, Lebanon, on October 31, 1948, and November 1, 1948.

On December 2, 1948, the petitioner was brought to trial before the Special Tribunal of the Defence Army of Israel sitting in Haifa. After the charge had been read to him, but before he had pleaded to the charge, his counsel submitted that the tribunal had no jurisdiction to consider the offences charged, as it was clear from the information itself that the acts constituting the offence had been carried out beyond the borders of Palestine and, therefore, outside the jurisdiction of the tribunal. The tribunal, by majority decision, dismissed this contention, and counsel for the petitioner requested an adjournment in order to enable them to apply to this court for a ruling on the question of jurisdiction. The tribunal held unanimously, "that there is no justification for acceding to the request of the Defence", but it adjourned the hearing to another date - in its own words - "as an exception and having regard to the unusual matter arising in this case and the serious penalty to which the accused" (the petitioner) "will be liable in the event of his conviction". At the same time the tribunal hinted, in the course of its decision, that "the Defence is entitled to make use of this delay for the taking of such steps as it sees fit". The accused then petitioned this court and, as above stated, an order nisi was issued.

3. Before considering in detail the principal submissions of counsel for the parties we would like to refer, although the matter may not be strictly relevant, to the following point, because it is one that gives rise to much discussion in cases of this nature. The point is this : In section 10 of his petition the petitioner submits that "the decision of the Supreme Court, sitting as the High Court of Justice... binds all the courts in the country, including military tribunals". Mr. Cohn, the State Attorney, who appears on behalf of the respondents, does not deny the soundness of this contention, and the affidavit of the President of the Special Tribunal before whom the charge against the petitioner was heard, the third respondent before us, makes no reference to this submission. In the absence of any reference to the point in the affidavit it is unnecessary to deal with it at any length. It appears, however, from the detailed record of the proceedings before the Special Tribunal -

which was annexed to the petition - that this question was the subject of lengthy discussion and argument, and the President of the Tribunal made some remarks which seem to throw doubt on the competence of this court to interfere in proceedings before the military courts. In one of its decisions it was held by the Special Tribunal that:-

> "There is no authority in the law of the State for the submission:
>
> (a) that the High Court of Justice may intervene in the course of proceedings before a military tribunal:
>
> (b) that a military tribunal is bound in any way by the decisions of any civil court...".

It was this very decision which induced counsel for the petitioner to make the submission contained in paragraph 10 of the affidavit which he filed, and since the question of the "superiority" of the civil as against military courts is raised in this court all too frequently, it is imperative that something be said here on this subject which will constitute an "authority", or, at least, something in the "nature of an authority".

4. The Army Code, 1948, from the provisions of which the military tribunals derive their jurisdiction, is modelled upon the English Army Act. This Act does not lay down specifically the relationship between the civil courts and military tribunals. Learned jurists in England, however, regard the military tribunals as part of the general system of courts for certain purposes, and in the course of time a number of principles which indicate the de facto relationship between these courts have been laid down by the courts and legal writers. A number of these principles are cited in the Manual of Military Law, in Chapter 8 of which the following is laid down:[1)]

> "The members of courts martial... are, like the inferior civil courts and magistrates, amenable to the superior civil courts for injury caused to any person by acts done either without jurisdiction, or in excess of jurisdiction... Such injuries will equally be inquired into whether they

1) The learned judge gives a citation from an early edition.

affect the person, property, or character of the individual injured; and whether the individual injured is a civilian or is subject to military law".

"'The jurisdiction of a tribunal may be limited by conditions as to its constitution, or as to the persons whom, or the offences which, it is competent to try, or by other conditions which the law makes essential to the validity of its proceedings and judgments. If the tribunal fails to observe these essential conditions, it acts without jurisdiction... The result of acting without jurisdiction is that the act is void, and each member of the court-martial... is liable to an action for damages".

"The proceedings by which the courts of law supervise the acts of courts-martial... may be criminal or civil... Civil proceedings may either be preventive, i.e., to restrain the commission or continuance of an injury; or remedial, i.e., to afford a remedy for injury actually suffered. Broadly speaking, the civil jurisdiction of the courts of law is exercised as against the tribunal of a court-martial by writs of prohibition or certiorari.

"The writ of prohibition issues out of the High Court of Justice to any inferior court, when such inferior court concerns itself with any matter not within its jurisdiction, or when it transgresses the bounds prescribed to it by law. The writ forbids the inferior court to proceed further in the matter, or to exceed the bounds of its jurisdiction; and if want of jurisdiction in the inferior court be once shown, any person aggrieved by the usurpation of jurisdiction is entitled to the writ as a matter of right".

"Disobedience of a prohibition is a contempt of court, and as such punishable by fine and imprisonment at the discretion of the court which granted the writ “.

5. These principles are laid down in respect of the courts of England, but as it is not disputed that the military tribunals in this country are also part of the system of the courts generally, it may be assumed that they also apply to the relationship between the civil and the military courts in Israel. Since this is so, this court is competent to direct military tribunals, through orders issued by it, to refrain from considering a particular matter, and it is the duty of the military tribunal to which the order is addressed to comply with its terms. Section 58 of the Army Code, 1948[1)], is entirely irrelevant. This section, which for some reason has been given the title "The supremacy of Military Tribunals" - is merely designed to provide that a soldier who has committed an offence and is arraigned in criminal proceedings before a civil court is not released thereby from also being tried for the same offence before a military tribunal. It can on no account be deduced from the language of the section, however, that military tribunals are never subject to the authority of this court, even when they purport to arrogate to themselves jurisdiction which in law they do not possess.

6. Mr. Cohn, in the course of his argument before as, submitted that in fact only a small number of applications for a Writ of Prohibition had been made to the civil courts in England, and even those which had been made, were dismissed. If this be the fact, it merely shows that those responsible for prosecutions in the military tribunals in England are very careful in their work and are anxious not to bring matters before the tribunals which are beyond their jurisdiction, or that the few applications which were in fact brought were not sufficiently well based to succeed. This does not show that a civil court will never intervene in the work of a military tribunal. The Manual of Military Law, which I have quoted, deals also with this point, and it is said there, at page 123:

> "Although the writ of prohibition has never actually been issued to a court-martial, there seems no doubt that it might issue in a proper case".

7. We make these comments in the belief that the question of the "superiority" of military tribunals over civil courts will no longer trouble the judges who sit on such tribunals nor those who plead before them.

1) See supra p. 132.

8. Turning now to Mr. Cohn's reply on behalf of the respondents, we find it is divided into two parts. The first includes those arguments which deal, in the main, with the submission that the petitioner's application to this court is premature. The second contains Mr. Cohn's arguments on the merits of the petition. We shall deal with these submissions separately.

9. In the first place, it is submitted by Mr. Cohn that this Court should not accede to the prayer of the petitioner, since the regular work of the military tribunals would be seriously hampered if it be held that any person charged before them is entitled, at any time, to apply to this court for a writ of mandamus or a writ of prohibition. It is emphasised by Mr. Cohn that he makes this submission on the specific instructions of the third respondent, the President of the Special Tribunal, which dealt with the case of the petitioner. In our opinion this argument discloses no ground for dismissing the petition, and there is no need to deal with it at any length. Where a person accused before a military tribunal requests a postponement of the proceedings in order to petition this court, the military tribunal may dismiss the application and proceed with the case, if this appears to it to be the correct course. Where, however, a person accused petitions this court and demands justice, it is right that he should be heard, and the doors of the court should not be closed against him merely to suit the convenience of the military tribunal. On no account are the basic rights of a citizen to be withheld on grounds such as these. If, indeed, a military tribunal acts in a particular case without jurisdiction, a serious infringement of the rights of the citizen has taken place, and this court will not hesitate to hear his petition, nor will it pay any regard to the degree of inconvenience which may be caused to the military tribunal in its work.

10. The second submission of the State Attorney is that this court will not usually intervene when another remedy is available to the petitioner. According to this argument the petitioner in this case must first be tried before the military tribunal. If he is convicted, he will be able to appeal against the judgment as is provided in the Army Code, 1948. If the judgment on the appeal does not satisfy him, he may apply to the responsible authority for a pardon. If at that stage too he feels aggrieved - only then may he petition this court. As a general rule the principle stated above is a sound one, and this court has in first acted upon it in innumerable cases. The jurisdiction of this court is derived from the second paragraph of Article 43 of the Palestine Order in Council, 1922, and section 7 of the Courts

Ordinance, 1940. The second paragraph of Article 43 of the Order in Council provides that: -

> "The Supreme Court, sitting as a High Court of Justice, shall have jurisdiction to hear and determine such matters as are not causes or trials, but petitions or applications not within the jurisdiction of any other Court and necessary to be decided for the administration of justice".

Section 7 of the Courts Ordinance provides, inter alia, that: - "The High Court of Justice shall have exclusive jurisdiction in the following matters: -

> (a) .....
>
> (b) orders directed to public officers or public bodies in regard to the performance of their public duties and requiring them to do or refrain from doing certain acts".

In the light of these two provisions this court (in the time of the Mandate) gave a number of directives to indicate in which cases it will intervene and in which cases it will refrain from intervening; see, for example, *Havkin v. Inspector-General of Police and Prisons* (1) which sets forth the principles which had been laid down in a number of earlier decisions. Today, however, it is beyond doubt that this court will certainly intervene by the issue of a Writ of Prohibition, where an inferior court in a particular case proposes to assume jurisdiction it does not possess. The present case is not similar to one in which it may be said to the petitioner, as was said to him in the case of *Barakat v. Maronite Ecclesiastical Court* (2), "You have the right not to appear before the body which wishes to try your case if in fact it does not constitute a proper court; wait until actual steps are taken against you, for at this stage of the proceedings you have suffered no injury".

In the case before us the petitioner does not deny that the body which proposes to try him is in general a legal and competent tribunal to deal with the cases of soldiers. His contention, however, is that in this particular case it is wholly incompetent to demand of

him that he account for his actions. He is, moreover, not entitled to refuse to obey the summons of the tribunal - he is compelled to appear before it. It would be unjust, therefore, to compel the petitioner first of all to stand trial, and later to be subject to the several stages of the proceedings, with a serious charge carrying a heavy penalty hanging over him, and only after the trial has run its full course to appear here and show that all the proceedings were invalid. At this stage there is no place other than this court to which the petitioner can turn for relief. It seems to us, therefore, that this is one of the eases in which this court is entitled to come to a decision in accordance with both the second paragraph of Article 43 of the Order in Council, and section 7 of the Courts Ordinance.

11. The third submission of the State Attorney is that this court should not intervene during the proceedings of the Special Military Tribunal, since section 40 of the Army Code, 1948, deprives it of the right to interpret that Code. That section, which is headed "Interpretation of the Code", provides that "The Presidency of the Supreme Tribunal and any 'sitting' of the Supreme Tribunal shall be competent to interpret this Code should they deem it necessary so to do, and such interpretation shall be binding unless set aside by the Minister of Defence." As I have said, nothing is further from the intention of Mr. Cohn to deny the jurisdiction of this court. On the contrary, he has emphasisd time and again that this court is competent to make orders against military tribunals, and the presidents and judges of such tribunals. In his opinion, however, one power alone has been denied this court by the section cited, and that is the power to interpret the Code and the principles to which it gives expression. It can only be concluded, therefore, that section 40 impliedly deprives this court altogether of the power to consider any matter connected with the soundness of this submission.

12. We would point out that section 40, as is the case with many other sections in the Code, is drafted negligently and carelessly, and is defective both in what is lacking and in what is superfluous. It provides, for example, that "a sitting of the Supreme Tribunal" shall be competent to interpret the Code, but we do not know the nature of such a "sitting". Is it intended to refer to every panel of judges "of not less than twenty-one in number" spoken

of in section 34[1)], or only to the three or five judges of whom a tribunal is constituted for a particular purpose, as stated in section 36[1)]. If the intention is to refer to all the judges sitting together, why are they described by the name "sitting" and not "panel of judges", the name which appears in the marginal note to regulation 34? And if it is intended to refer to a tribunal as ordinarily constituted, sitting for the purposes of a particular case, the question arises whether it is only the Supreme Tribunal which is competent to interpret the Code? Have the inferior military tribunals been deprived of this power ? If so, how is it possible to imagine that an ordinary military tribunal will consider a case in accordance with the Code without being competent to interpret it? And how did the Special Tribunal, which dealt with the case before us, reach its decision if not by interpreting the Code? Moreover, section 40 provides that "such interpretation shall be binding". On whom shall it be binding? Shall it bind every inferior military tribunal in every case brought before it, or only a single particular military tribunal dealing with a particular matter brought before it? And what about the Superior Military Tribunal itself? Will an interpretation given by one "sitting" bind another "sitting" of the same tribunal, or not? And was it the intention that such interpretation should also bind other courts - such as this court - or not? It is elementary principle that an ordinary civil court is not to be deprived of jurisdiction otherwise than by an express provision or an implied intimation in the body of the law itself. (See, for example, section 8(3) of the Registrars Ordinance 1936: section 45 of the Constituent Assembly Elections Ordinance, 1948; regulation 5 of the Emergency (Requisition of Property) Regulations 1948). It would seem, therefore, that the only remarkable feature of this regulation is that the presidency of the Supreme Military Tribunal - although this presidency is not a tribunal in the accepted sense of the term and is also not included in the judicial administration as detailed in regulation 7 - is also

1) Army Code, S. 34:

Panel of Judges. 34. The Minister of Defence shall appoint, and ensure that there will always be appointed by him, Judges of the Supreme Tribunal of no less than twenty-one in number and that among the Judges there will be at least two from each commanding rank in the Army except the Chief of Staff.

1) Army Code, S. 36:

Three or five judges to sit in every case 36. In every case there will sit three or five judges, as may be decided by the President of the Tribunal in each instance, and they shall be appointed thereto from among the Judges of the Supreme Tribunal by the Presidency of the Tribunal, and one of them shall be appointed by it to act as president of the tribunal.

competent to interpret the Code, and its interpretation, as also the interpretation of "every sitting of the Supreme Military Tribunal" shall be binding "unless rejected by the Minister of Defence" Their interpretation "will be binding", excludes a case in which their interpretation has not yet been given. In the case before us no interpretation has yet been given by the bodies mentioned in regulation 40, and for this reason this court is competent to interpret the Code for the purpose of this case.

13. We now come to deal with the principal submissions of counsel for the parties. As I have said, the petitioner was brought to trial before the Special Military Tribunal under section 214(b) of the Criminal Code Ordinance, 1936, and section 97 of the Army Code. All the arguments of counsel for the parties were concentrated on the exact interpretation which is to be given to section 97, and indeed the fate of the application depends upon which version is accepted by the court.

14. Section 97 of the Army Code, 1948, provides:

> "(97) Every soldier who, within the framework of the army or by reason of his belonging to the army commits an offence punishable under the general criminal law which is in force or will from time to time be in force in the State and for which belonging to the army does not expressly release the offender from liability, may be tried for such offence before a military tribunal and shall be liable to the same punishment as that to which he would be liable in the ordinary courts".

It is difficult to say that this provision is short and clear, and it is no wonder that the parties before us differ as to its meaning.

Mr. Geiger, counsel for the petitioner, interprets this regulation so as to deprive a military tribunal of the power to try a soldier who has committed an offence under section 214(b) of the Criminal Code Ordinance, 1936, beyond the borders of Palestine. His submission may be framed as follows : when a soldier is tried before a military tribunal for an act which constitutes an offence under the existing criminal law, it must first be ascertained whether, according to that law, the accused would be liable to be punished were

he to be tried before the ordinary courts. Counsel stresses the words "commits an offence which is *punishable* under the existing criminal law", and concludes from this that any act, even if it constitutes an offence, which for any reason would not be punishable by the ordinary courts, is also not punishable by military tribunals. One of the limitations on the powers of the ordinary courts, so counsel continues, is contained in section 6 of the Criminal Code Ordinance, 1936. This section provides : "The jurisdiction of the Courts of Palestine for the purposes of this Code extends to every place within Palestine or within three nautical miles of the coast thereof measured from low water mark".

From this it follows, counsel submits, that the general criminal law recognises only the territorial jurisdiction of the ordinary courts, and not jurisdiction as to persons who commit offences outside the territory. The only exception is that contained in section 5 of the Ottoman Law of Criminal Procedure 1879[1)] which is still in force. Every section of the Criminal Code Ordinance which creates an offence, therefore, must be read together with section 6 of that Ordinance, in order to test whether or not the courts have jurisdiction.

15. Applying this test, counsel submits, it is clear that had the petitioner in the case before us been brought to trial for the offence charged before an ordinary civil court, that court would have had no jurisdiction to try the case since the offence charged was committed in Lebanon. That being so, the special Military Tribunal also has no jurisdiction to try the petitioner, since the act in respect of which he is charged before that tribunal does not constitute "an offence punishable under the existing criminal law".

16. Mr. Geiger finds support for his submission in the concluding portion of section 97. This section, in speaking of the punishment which may be imposed by a military tribunal for an offence described in the opening portion thereof, provides that the accused "shall be liable to the same penalty as could have been imposed upon him in the ordinary courts". Had a person in the position of the accused been tried before the ordinary courts, so the

1) Ottoman Law of Criminal Procedure, S. 5:

> Every Ottoman who has committed outside the territory of the Empire a crime against the safety of the Empire or the crime of forgery of State seals, of legal currency, of any kind of Government titles, of bonds, of treasury bills and of bank notes authorised by the law may be prosecuted and convicted of such offence in accordance with the Ottoman Law if he has not already been convicted therefore in a foreign country.
> *(Note:* The Law was repealed - as regards Israel - in 1955).

argument proceeds, he would not have been liable to any penalty at all since, as the offence was committed beyond the borders of Palestine, such court would have had no jurisdiction to try the case. This being so the petitioner, in terms of the concluding portion of the section quoted, is also not liable to any penalty before the Special Tribunal, and if there is no penalty there is no jurisdiction, and there can be no trial.

17. Mr. Geiger has not overlooked section 3 of the Army Code which provides that "the Army Code, 1948, shall be binding upon the army and all its institutions and units, and upon soldiers of all ranks whether within the State or beyond its borders". In the first place, however, he submits that this section applies the Code only in respect of the offences set forth in the Army Code itself, that is to say, military offences, and not in respect of other offences which are civil in character and to which the Criminal Code Ordinance - including the limitation in section 6 thereof - applies. According to this argument, therefore, the Army Code, 1948, binds the army, its institutions, units, and soldiers, wherever they are, but only in respect of the offences set forth in that Code, and not in respect of an offence which is stated in the general criminal law. Mr. Geiger further submits in the alternative that the words "beyond its borders" in section 3 mean beyond the borders of the State of Israel, and beyond the borders of the area which was once covered by the Mandate, and was called "Palestine". From this it follows that the Army Code, 1948, binds the army, its institutions, units, and soldiers both in the State of Israel and in Palestine, but does not apply to acts performed by a soldier in Hula in Lebanon - a place beyond the borders of Palestine.

18. In explanation of this latter interesting conclusion Mr. Geiger relies upon a number of ordinances, regulations and proclamations. His contention may be put in this way: On May 14, 1948, there was the declaration of the establishment of a Jewish State, namely, the "State of Israel". The Declaration of the establishment of the State, which is published in Official Gazette No. 1, page 1, draws a distinction between the "State of Israel" and "Eretz-Yisrael".[1)] The "State of Israel" extends only over a portion of "Eretz Yisrael". In terms of section 1 of a proclamation published the same day a legislative authority, the Provisional Council of State, was constituted, and by virtue of the powers conferred upon it, it enacted the Law and Administration Ordinance, 1948. In terms of section 11 of that Ordinance

1) Meaning literally the 'land of Israel'. This is the Hebrew for Palestine.

there shall remain in force in the State of Israel "the law which existed in Palestine on 14th May, 1948". It follows that the limitations on the powers of the legislative authority which applied previously under the law "which existed in Palestine" were not repealed and are still in force. Article 38 of the Palestine Order in Council, 1922, as amended by the Order in Council (Amendment) 1935, provides that "Subject to the provisions of any part of this Order or any Ordinance or Rules, the Civil Courts hereinafter described, and any other Courts or Tribunals constituted by or under any of the provisions of any Ordinance, shall exercise jurisdiction in all matters and over all persons in Palestine".

From this it follows that the territorial jurisdiction of the courts of the State of Israel is in fact more limited than that of the courts which existed in the time of the Mandate, for the area of jurisdiction of the courts of the State of Israel only extends over the area of the State, while the area of jurisdiction of the courts in the time of the Mandate extended over the whole area of "Eretz-Yisrael".

19. The Provisional Council of State, in enacting section 1 of the Area of Jurisdiction and Powers Ordinance, 1948, opened the door for extending the areas in which the law of Israel will apply. That section provides : "Any law applying to the whole of the State of Israel shall be deemed to apply to the whole of the area including both the area of the State of Israel and any part of Palestine which the Minister of Defence has defined by proclamation as being held by the Defence Army of Israel." In this extension, however, there are limitations. Firstly, it is necessary that the extended area be defined by a proclamation of the Minister of Defence as being held by the Defence Army of Israel. Secondly, it is necessary that such extended area be situated within the borders of Palestine - even if it be beyond the borders of the State of Israel. In no circumstances, however, may it extend beyond the borders of Palestine.

20. The result, so counsel submits, is that if we read section 3 of the Army Code in the light of all the statutes and proclamations to which I have referred, the meaning of that section is as follows : The Army Code binds the army both within the State and beyond its borders that is to say, beyond the borders of the State of Israel, but not beyond the borders of Palestine. This being so, and the village of Hula in Lebanon being beyond the borders not only of the State of Israel but also of Palestine, and seeing it has not been defined by the

Minister of Defence as an area which is held by the Defence Army of Israel, the Army - Code does not apply to it, and the military tribunals have no jurisdiction to try a person for an offence committed by him in that village.

21. In view of the authorities which apply to this case these arguments, though forceful, do not appeal to us. Section 97 of the Army Code is of course of decisive importance. The correct intention of that section may be discovered by considering the sections which precede it. Section 97 is found in that chapter of the Army Code which deals with the various types of offences. All the preceding sections, starting with section 77, specify the offences for which a soldier is liable to be tried, and lay down penalties attaching to them. Almost all of these offences are of a military character and are not mentioned in the general criminal law. On the other hand, the general criminal law details numerous offences of a civil character of which there is no mention in sections 77-96 inclusive of the Army Code. Were it not for section 97 a military tribunal would not be competent to try a soldier for one of the offences included in this last group of sections referred to. This section introduced two innovations:

(a) the offences specified in the general criminal law are also offences under the Army Code and may therefore be dealt with by military tribunals.

(b) the penalties which may be imposed upon a soldier by military tribunals in respect of such offences are those laid down in the general criminal law.

This section, therefore, serves as a channel through which all the offences specified in the general criminal law flow into the Army Code, thereby adding to the list of offences already specified in the preceding sections. The opening words of the section "commits an offence punishable under the general criminal law" refer to a soldier who has committed an act regarded by the general criminal law as a punishable offence - that is to say, an act for which a penalty has been prescribed. This is the substantive portion of the law regarding military tribunals and it bears no relationship whatsoever to the question of the jurisdiction of the ordinary courts. Let us suppose that a person is charged before the District Court of Haifa with an offence committed by him within the area of jurisdiction of the District Court of Jerusalem. It is clear that the District Court of Haifa has no jurisdiction to try and punish

the accused. This in itself, however, in no way affects the fact that the act committed by the accused is in the nature of a punishable offence. The District Court of Haifa has no jurisdiction but the offence is still an offence which is punishable under the Criminal Code.

22. This is what is intended by the opening words of section 97. Where a soldier is charged before a military tribunal under a section of the Criminal Code, the opening words of section 97 require that that Code be consulted in order to determine whether the act of the accused constitutes an offence for which a penalty is prescribed. At this stage no reference should be made to section 6 of the Criminal Code, for that section deals not with offences and punishments but with the jurisdiction of the general courts, while we are concerned with the military courts.

23. In the same way in which the offences described in the general criminal law are introduced into the Army Code by the opening words of section 97, so the penalties attaching to such offences are introduced by the concluding words of the same section. There may be some force in the submission of Mr. Geiger that the words "shall be liable to the same punishment as that to which he would be liable in the general courts" in the concluding portion of the section, force as to ask whether the person in question would be liable to be punished had he been charged before an ordinary court, and I attach importance to the words "to which he would be liable". The person charged in this case would not be liable to be punished in a general court - not because there is no offence, but because in terms of section 6 of the Criminal Code such court would have no jurisdiction to impose the punishment. This submission, however, goes not to the jurisdiction of the military tribunal but to the merits of the case. It must be made, therefore, before that tribunal when all the other submissions of the defence on the merits of the case are presented to that tribunal.

24. It must be borne in mind, moreover, that the opening words of section 97, in speaking of the offence, are directed not to a particular person charged nor to a particular offence, but to offences generally ("an offence punishable"). As against this, the concluding words of the section speak of the punishment to which a particular accused may become liable. It follows, therefore, that the jurisdiction of the military tribunal is to be determined by the following two factors:

(a) whether the accused committed an act which constitutes an offence under the Criminal Code;

(b) whether a punishment for such offence is prescribed by the Criminal Code.

The question whether or not a particular person charged is liable to be punished for a particular act does not require consideration of the jurisdiction of the military tribunal but of the charge itself, that is to say, whether or not upon that charge the accused is liable to be punished. That is a matter for the military tribunal - and not for this court.

25. We find support for this opinion in section 3(b) of the Criminal Code Ordinance, 1936. That section provides that "The provisions of this Code shall be without prejudice to . . . .

(b) the liability of any person to be tried and punished for an offence under the provisions of any law relating to the jurisdiction of the Palestine Courts in respect of acts done beyond the ordinary jurisdiction of such Courts;"

In other words, the legislature has left the door open for itself to enact laws in the future (and to provide therein also for what has happened in the past) whereby courts will be competent to try and punish persons for acts committed by them which fall beyond the ordinary jurisdiction of such courts, without their being limited by the provisions of the Criminal Code Ordinance (referring, apparently, to section 6 of that Ordinance). The Army Code must be regarded as one of those laws.

26. To sum up our consideration of this problem, therefore, section 97 was not intended to introduce into the Army Code the whole of the existing Criminal Code, but only specific sections thereof, namely, those which deal with particular offences and the punishment for such offences, and no more.

The Criminal Code Ordinance, for example, devotes a whole chapter (chapter 4) to "General Principles relating to Criminal Responsibility". For the purposes of the Army Code, however, sections in the Ordinance creating an offence must not be read together

with the sections of that chapter, since a whole chapter of the Army Code, namely, part 3, chapter I, is also devoted to these and similar matters. Moreover, the expression "offence" itself is defined differently in the two statutes. It follows from this that it is not the whole of the Criminal Code that has been introduced into the Army Code by section 97, and that section 6 of the Criminal Code Ordinance falls outside the Army Code which contains a parallel provision in section 3 thereof.

27. Even if this is not so, and section 6 of the Criminal Code Ordinance is included in the Army Code by virtue of section 97, that Code also includes section 3(b) which, as I have said, renders section 6 inapplicable.

28. We shall now examine the nature of Mr. Geiger's second submission. As we have already said, it is his contention that the Special Military Tribunal lacks jurisdiction because even if the Army Code, by virtue of section 3, binds the army and its soldiers also beyond the borders of the State of Israel, it does not apply to them beyond the borders of Palestine, and the act in respect of which the petitioner is charged took place beyond the borders of Palestine. There is no doubt that a number of legislative provisions published after the declaration of our political independence distinguish between the area which is included in the State of Israel and the area which is outside the State of Israel, but within the borders of Palestine, and lay down a number of provisions relating to those areas of Palestine which have been defined by the Minister of Defence as occupied areas. This distinction, however, between the "State of Israel" and "Palestine" does not appear in section 3 of the Army Code. That section applies the Army Code to the army wherever it is, whether within the State or beyond its borders - the words "beyond its borders" are without limitation.

29. Two further submissions have been advanced by Mr. Geiger:

(a) just as no extra-territorial jurisdiction has been conferred upon the civil courts, the military tribunals have no such jurisdiction;

(b) if, indeed, it was the intention of the Minister of Defence to confer extra-territorial jurisdiction upon the military tribunals by section 3 of the Army Code, that section would be ultra vires.

30. In support of these submissions Mr. Geiger relies upon the case of *Attorney-General v. Nikolaiovitch* (3) and upon obiter dicta in the judgment. In that case a number of persons were charged under the Immigration Ordinance with assisting Jewish refugees to immigrate to this country. It was proved that the act committed by the accused had been performed beyond the territorial waters of Palestine. It was accordingly held by the court that since it exercised no authority over the place where the offence was committed it had no jurisdiction to deal with the matter. The Supreme Court (in the time of the Mandate), sitting as a Court of Appeal, upheld the judgment, relying upon the English case of *Macleod v. Attorney-General for New South Wales* (4).

The facts in *Macleod's* case were as follows: The appellant, a resident of New South Wales, married a woman in America during the life of his former wife. Upon his return to New South Wales he was charged with the crime of bigamy and upon the basis of a statute which made the marriage of a second wife in any place whatsoever, during the lifetime of the former wife a criminal offence, was duly sentenced. The Court of Appeal in New South Wales upheld this judgment. The decision, however, was reversed by the Privy Council which held that the statute in question must be very strictly interpreted, and that the words "in any place whatsoever" meant any place within the area of New South Wales and not outside it.

The Privy Council went on to point out that were the position otherwise it would mean that the colony of New South Wales assumed jurisdiction over every place in the world. The assumption of powers such as these, which exceeded those conferred upon the colony, was inconceivable. The Privy Council cited with approval the remarks of Baron Parke in *Jefferys v. Boosey* (5) that,

> "It is clear that the Legislature has no power over any person except its own subjects, that is, persons natural-born subjects, or resident, or whilst they are within the limits of the Kingdom. The Legislature can

> impose no duties except on them; and when legislating for the benefit of persons must, prima facie, be considered to mean the benefit of those who owe obedience to our laws, and whose interests the Legislature is under a correlative obligation to protect."

The Court in the case of *Nikolaiovitch* (3), when dealing with the principle laid down in *Macleod's Case* (4), pointed out obiter that had it been the intention of the legislature in enacting the Immigration Ordinance to empower the courts of this country to deal with offences committed beyond its territorial waters, it could not have done so because of the limitations upon its own powers. For these reasons Mr. Geiger asks us to conclude that even under section 3 of the Army Code the area of jurisdiction of the Special Tribunal in this case does not extend beyond the borders of Palestine since that section is to be strictly interpreted.

31. These arguments too, which were advanced by Mr. Geiger with much ingenuity, do not appeal to us. It is an important principle of the common law that the area of jurisdiction of the courts extends over the area of the State alone, and that they have no jurisdiction in regard to offences beyond the borders of the State - that is to say, that the criminal jurisdiction of the courts is territorial and not personal (see Archbold's Pleading, Evidence and Practice in Criminal Cases, thirty first Edition, page 25). The Privy Council in *Macleod's* Case (4) reached its decision upon the principles of the common law which have been introduced into the framework of our criminal law by section 6 of the Criminal Code Ordinance. In England too, however, that principle is subject to limitation and change, and it does not apply when the jurisdiction of the courts has been expressly extended by the legislature. Thus it is said by Archbold, (ibid),

> "The jurisdiction of the Courts of British colonies is limited to offences committed within their territories unless express legislation otherwise provides".

and at page 26 he says,

> "in the case of British subjects who have committed offences abroad there are many exceptions to the common law rule by virtue of specific statutes".

We have already seen that the Ottoman Law also recognised personal jurisdiction in the special case dealt with in section 5 in the Ottoman Code of Criminal Procedure, and it is not impossible that this is also the intention of section 3(b) of the Criminal Code Ordinance. Section 3 of the Army Code is then only another example of this. This section confers jurisdiction upon military tribunals to try a military offender who has committed an offence beyond the borders of the State. In other words the jurisdiction of military tribunals is personal and is unlimited by geographical boundaries. Moreover, as we have already seen, the words "beyond its boundaries" are intended to refer to any area beyond the borders of the State, without limitation.

32. We now come to deal with the second argument of Mr. Geiger that if that was indeed the intention of section 3 of the Army Code, then that section is ultra vires. Mr. Geiger bases this submission upon Article 38 of the Order in Council, the Declaration of the State of Israel and the first Proclamation made on May 14, 1948, section 11 of the Law and Administration Ordinance, and section 1 of the Areas of Jurisdiction and Powers Ordinance.

There would have been substance in this submission of Mr. Geiger had the Army Code, 1948, been enacted by virtue of the Palestine Order in Council. That, however, is not the case. The Code was enacted in the exercise of powers conferred upon the legislature after the establishment of the State. It is stated at the commencement of the Emergency Regulations Army Code, 1948, that they were made by virtue of the powers conferred upon the Minister of Defence by Section 9 (a) of the Law and Administration Ordinance, 1948. Section 9(b) of the Ordinance provides that,

> "An emergency regulation may alter any law, suspend its effect or modify it..... "

It is true that in terms of section 11 of the Ordinance

> "The Law which existed in Palestine on the 14th May, 1948, shall remain in force"

but there are added immediately the additional words,

> "in so far as there is nothing therein repugnant to this Ordinance or to other laws which may be enacted by or on behalf of the Provisional Council of State . . . . ."

Section 2(a) of the Law and Administration (Further Provisions) Ordinance, 1948, moreover, explains section 11 of the Law and Administration Ordinance, 1948, in providing that

> "Where any Law enacted by or on behalf of the Provisional Council of State is repugnant to any law which was in force in Palestine on the 14th May, 1948, the earlier Law shall be deemed to be repealed or amended even if the new Law contains no express repeal or amendment of the earlier Law".

It follows therefore that whatever may be the effect of Article 38 of the Order in Council and section 6 of the Criminal Code Ordinance, 1936, there can be no doubt whatsoever that section 3 of the Army Code, 1948, repealed or amended or replaced all earlier provisions in the Law as was the case, as we have seen above, with the specific statutes in England which modified the principle applied by the common law. It follows therefore that by virtue of this section a military tribunal is competent to try a soldier who has committed an offence under the Army Code (this including an offence under the general criminal law which has been introduced into the Army Code under section 97) beyond the State of Israel, or beyond the area of Palestine to which the Mandate applied. Since this is so, the Special Tribunal constituted for the purpose of dealing with the offence committed by the petitioner in the village Hula in the Lebanon was also competent to try the case.

33. We desire in conclusion to mention one other argument of the State Attorney. He submitted at the outset of his argument that since the Minister of Defence had dealt neither directly nor indirectly with the matter of the petition there was no necessity to join him as a respondent. In any event, he continued, the name of the Minister should be deleted from the petition so as not to hinder him in the exercise of the powers conferred upon him by section 40 of the Army Code.

It might be proper to examine this submission but in view of the conclusion which we have reached, as set forth above: we do not deem it essential to deal with it here since, in any event, the court has refused the petitioner the relief which he seeks.

In view of what we have said it has been decided to discharge the order nisi granted upon the application of the petitioner.

Order Nisi Discharged.

Judgment given on February 1, 1959.