DAVID AND GOLIATH:

The Position of the Palestinian Minor when Prosecuted by Military Courts for Throwing Stones in the West Bank

ABSTRACT

This study examines whether the Israeli military court system used to punish Palestinian minors in the West Bank for throwing stones at Israeli citizens, soldiers and their vehicles can be considered doing so on a collective basis.

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I. Introduction

The Israeli-Palestinian conflict is one of the longest conflicts in recent history. The long duration of Israeli control over Palestinian territories provide ample material for study with respect to the international law of armed conflict. This study examines one aspect of this situation: the prosecution of Palestinian minors living in the West Bank in Israeli military courts for throwing stones at Israeli citizens, soldiers and their vehicles. The aim of the study is to determine whether the way in which this is conducted could be considered as constituting collective punishment which is a war crime under international law. However, before such an analysis can take place it must first be established which laws apply to the population of West Bank and correspondingly, which laws govern the conduct of the Israeli Defence Forces (*hereafter:* the IDF) when exercising jurisdiction over them.

1. Structure

The structure of this study is divided into four chapters. The first chapter is the present Introduction. It will begin with setting out the structure of the following chapters. Consequently, it will provide the reader with background information such as the temporal scope of the study, the methodology employed in its conduct as well as addressing the sources used.

The Second chapter concerns some of the international laws applicable to the West Bank. It is divided into three sections: The first will consider whether Israeli control over the West Bank can be considered as belligerent occupation under international law. Belligerent occupation essentially falls under the purview of international humanitarian law in two international conventions. These are the 1907 Hague Convention respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (*hereafter:* The Hague Regulations) and the Geneva Convention Relative to the Protection of Civilian Persons in Time of War (*hereafter:* The Fourth Geneva Convention).[1]

[1] *Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land*. The Hague, 18 October 1907; International Committee of the Red Cross.

Consequently, the first section of the second chapter will mainly be concerned with determining whether these conventions are applicable in the West Bank. Additionally, the section will consider whether Israel is bound to apply human rights treaties to which it is party to the population of the West Bank. The second Section of chapter two will elaborate on the prohibition of collective punishment under international law. The legal development of the prohibition will be described and international jurisprudence will be examined to give further clarification to the present content of the prohibition. Consequently, section three of the second chapter will offer some conclusions to the aforementioned considerations.

The third chapter of this study will examine the domestic legal framework governing the punishment of Palestinian minors accused of stone throwing. The penal provision prohibiting the behaviour will be described and the court system employed to punish it will receive extensive analysis. The chapter will describe the entire process faced by Palestinian minors beginning with their initial arrest and concluding with observations on the trials conducted to convict them for the offence of stone throwing.

Finally, the fourth chapter will analyse whether the legal framework described in the previous two chapters and how it is applied in practice allows for the conclusion that Palestinian minors might be subjected to collective punishment for stone throwing in the West Bank. To this end, the constitutive elements of the war crime of collective punishment as defined by the Special Court of Sierra Leone will serve as a frame of reference to determine whether indications of this practice exist within the military court system. The fourth chapter also contains the conclusion to this study and will offer some recommendations potentially capable of ameliorating the conditions of Palestinian minors within the juvenile military justice system.

2. The Scope of the Present Study

Palestinian minors are considered criminally responsible at the age of 12.[2] Consequently, any reference had to minors or children in the course of this study therefore refers to persons who are at least twelve years of age and are not older than 18, the statutory age of majority in the

Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 12 August 1949, 75 UNTS 287.

[2] Israel Defense Forces Order Regarding Security Directives [Consolidated Version] (Judea and Samaria) (No. 1651), 2009 (*Hereafter*: Military Order 1651), Article 181 (b).

West Bank.[3] The territorial scope is limited to the West Bank but Israeli minors living in the West Bank are also excluded from the scope of this study because they are not tried before the military courts as a matter of policy.[4] As to the temporal scope of this study, conduct described herein largely relates to practices occurring from the year 2009 to the present. Some cited studies will have been conducted prior to this date but care will be taken that any reference thereto contains practices and procedures still used today.

3. Methodology and Sources

The research for this study was conducted by desk research based on extensive review of a wide array of legal sources. Analysis of primary instruments such as The Hague Regulations, the fourth Geneva Convention or human rights treaties will be supported by reference to authoritative sources such as the international bodies tasked with supervising the adherence to said conventions and with the commentary of respected legal academics. When examining the domestic legal framework the primary source of reference will be translations of Israeli military legislation. With respect to the application of this legislation to minors arrested for stone throwing reference will be had to reports of international as well as domestic organisations as well as to information provided by the Israeli government.

It should be noted at this point that while the stated purpose of this study is to analyse the conduct of the IDF towards Palestinian minors accused of stone throwing in light of the prohibition of collective punishment, it is not the intent of this study to imitate a court of law in so doing. Consequently, while the elements of the crime of collective punishment will be used as a frame of reference these are not meant to imply criminal responsibility of any individual involved in the process.

II. The Applicable International Legal Framework

The international norm of focus of this study is the prohibition of collective punishment under *jus in bello.* Said prohibition is regulated in various international and national legal instruments

[3] *Ibid*.
[4] Lior Yavne, ed. Michael Sfard, "Backyard Proceedings: The Implementation of Due Process Rights in the Military Courts in the Occupied Territories", Yesh Din – Volunteers for Human Rights, Tel Aviv, December 200, (*hereafter:* Backyard Proceedings) p. 56.

and arguably under customary international law as well.[5] However, before the content of said prohibition can be examined under and determined under section two of this chapter, section one will first establish whether the laws of armed conflict apply to the West Bank and if so, to what extent. Specifically, section one will consider whether or not the laws of occupation, in particular those enumerated in the 1907 Hague Regulations and the fourth Geneva Convention are applicable.[6] Moreover, as the present study considers the procedural rights and legal standing of Palestinian children in the context of collective punishment, section one will also study the applicability of human rights law to the West Bank. In particular, it will be determined whether the State of Israel is obliged to comply with the provisions of the Convention on the Rights of the Child (*hereafter:* CRC) as well as the International Covenant on Civil and Political Rights (*hereafter:* ICCPR) in their administration of juvenile military justice in the West Bank.[7] These conventions contain several guarantees of due process forming a useful frame of reference with which to evaluate the quality of rules and procedures governing the arrest, detention and trial of Palestinian minors. Thereafter, section two will address the precise content of the prohibition of collective punishment. Consequently, the historical development of the prohibition will be traced, considering its roots as a common tool of warfare to its emergence as a war crime under international humanitarian law. The elements of the crime will receive special attention and will be reviewed through the lens of international jurisprudence. Section three will then offer some conclusions.

1. The Status of the Territories

Israeli control over the Palestinian territories has spurred a profusion of debate amongst legal professionals both national and international. In particular, the legal status of the territories and which international legal framework and norms apply remains obscure and hotly debated.[8]

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[5] See further discussion in sections 1.1. to 1.6.

[6] See *supra note* 1.

[7] UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3; UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171

[8] *See amongst others: Legal Consequences of the Construction of a Wa11 in the Occupied Palestinian Territory*, Advisory Opinion, I. C. J. Reports 2004, p. 136; Report of the Secretary-General prepared pursuant to General Assembly resolution ES-10/13 (To the International Court of Justice for its advisory opinion on the Wall), A/ES-1 01248 of 24 November 2003, Annex I: Summary legal position of the Government of Israel (*hereafter:* Summary legal position of the Government of Israel), paras. 3 and 4; Yoram Dinstein, ''The international legal status of the West Bank and the Gaza Strip – 1998'', *Israel Yearbook on Human Rights*, Vol. 28 (1998), p. 45;

Generally speaking, it is recognized by Israel and the international community alike that Israel is administering the West Bank under belligerent occupation and that international norms of humanitarian law apply.[9] However, whilst Israel has accepted the applicability of the 1907 Hague Regulations to the West Bank it has disputed that the Fourth Geneva Convention relating to the protection of Civilians in armed conflict applies.[10] This is problematic because said Convention contains extensive and up to date regulation on an occupying power´s rights and obligations towards the occupant civilian population and is meant to supplement the very basic provisions of the Hague Regulations in this respect.[11]

In terms of human rights, Israel has argued the inapplicability of human rights treaties to which it is party, such as the International Covenant on Civil and Political Rights as well as the Convention on the Rights of the Child, to the West Bank.[12] While the international community generally rejects the inapplicability of the aforementioned conventions, for compelling reasons, it is incumbent to examine the position of the Israeli government more thoroughly in this respect and to provide therewith some historical context before turning to the respective counter arguments.

1.1. The 1907 Hague Regulations

The Hague Regulations originated in a declaration made in 1874 on the laws and customs of war. They were annexed to Conventions adapted in two international peace conferences held in

Sharon Weill, "The Judicial Arm of the Occupation: the Israeli military courts in the Occupied Territories", *International Review of the Red Cross*, Vol. 89, no. 866, June 2007, p. 402 (*hereafter:* The Judicial Arm of the Occupation); Scobbie, Iain. "EJIL: Talk! – Justice Levy's Legal Tinsel: The Recent Israeli Report on the Status of the West Bank and Legality of the Settlements." EJIL: Talk! - Blog of the European Journal of International Law. Web: http://www.ejiltalk.org/justice-levys-legal-tinsel-the-recent-israeli-report-on-the-status-of-the-west-bank-and-legality-of-the-settlements/ *(hereafter:* Justice Levy´s Legal Tinsel).

[9] With respect to the Israeli position *see: Beit Sourik Village Council v. The Government of Israel*, HCJ 2056/04 (2004) were the Israeli High Court of Justice states this unequivocally at para. 24: Concerning the views of the International community see: *Legal Consequences of the Construction of a Wa11 in the Occupied Palestinian Territory*, para. 89.

[10] Summary legal position of the Government of Israel, paras. 3 and 4.

[11] Oscar Uhler, Henri Coursier, *Commentary on the Geneva Conventions of 12 August 1949. Volume IV*, International Committee of the Red Cross, December 31, 1958, Art. 2, Part I: General provisions, web; http://www.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?viewComments=LookUpCOMART&articleUNID=C5031F972DD7E216C12563CD0051B998, (*hereafter:* Commentary on the Geneva Conventions) para. 1.

[12] Summary legal position of the Government of Israel, para. 4; "State of Israel, Implementation of the Convention on the Rights of the Child in Israel, Response of the State of Israel to the document titled List of issues to be taken up in connection with the Consideration of the initial report of Israel, U.N. Doe. CRC/C/8/Add.44 (20 February 2001), (*hereafter:* Response of the State of Israel) p. 18.

the Hague in 1899 and 1907 respectively.[13] Both Conventions and the Regulations annexed to them deal with the laws of land warfare as their subject matter in near identical language. Since then, their provisions have evolved from being an international treaty in force between their sovereign State Parties to embodying customary international laws of war binding on all states engaged in international armed conflict.[14] Their customary status has been affirmed by international judicial bodies such as the Nüremberg International Military Tribunal and the International Court of Justice.[15] Section III of the Regulations addresses territories under the control of a hostile army with its starting Article defining occupation:

> *Article 42*
>
> *Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.*

This Article has widely been accepted as the authoritative definition of an occupation under international law.[16] The applicability of the Hague Regulations to the West Bank is largely uncontested and has been affirmed by the International Court of Justice as well as the Israeli government and their Supreme Court of Justice.[17]

1.2. The Fourth Geneva Convention

The fourth Geneva Convention was adopted in 1949 and is aimed at the protection of civilians in times of war and occupation.[18] The Convention contains extensive guarantees aimed at protecting civilians in armed conflict and its provisions are considered binding upon States Parties.[19]

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[13] "Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907" ICRC website, sourced: D. Schindler and J. Toman, The Laws of Armed Conflicts, Martinus Nihjoff Publisher, 1988, pp.69-93. http://www.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=4D47F92DF3966A7EC12563CD

[14] *Ibid.*

[15] Judgment of the International Military Tribunal of Nuremberg,30 September and 1 October 1946, p. 65; *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion,* para. 75.

[16] *Legal Consequences of the Construction of a Wa11 in the Occupied Palestinian Territory,* para. 78.

[17] *Ibid,* para. 89: As to the posisition of the State of Israel, see *supra note 9.*

[18] *Commentary on the Geneva Conventions,* Art. 2, Part I: General Provsions.

[19] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* para. 89 *et. seq.*

Drawing from harsh lessons of the Second World War where various pretexts were used to argue the inapplicability of humanitarian conventions, the drafters of the fourth Geneva Convention sought to ensure that the Convention would find application in all instances of armed conflict between two or more signatory States. Consequently, Common Article 2 of said Convention contains broad wording pertaining the situations in which it finds application.[20]

The first two paragraphs of common Article 2 read:

> *In addition to the provisions which shall be implemented in peace-time, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.*
>
> *The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.*[21]

The language of the Article is representative of the growing tendency to consider these humanitarian provisions as laws of humanity deserving of compliance on their own merit rather than a contract between Sovereigns entered into solely for realist reasons of statesmanship.[22]

Indeed, the motivation behind this broad wording of Common Article 2 was inspired by the experience of Sovereigns avoiding their obligations by refusing to recognize the legitimacy of their enemy governments and therewith the existence of a state of war. Similarly, the wandering legal status of territories due to capitulation or annexation have been used to justify inobservance of certain conventions relating to conduct in warfare.[23] Nevertheless, the Israeli government has sought to argue that the language of Common Article 2 excludes the applicability of the Convention to the West Bank. The following section will seek to explain the reasoning behind this stance.

1.3. The Missing Reversioner Theory

[20] *Ibid.*
[21] *Fourth Geneva Convention.*
[22] *Commentary on the Geneva Conventions,* Art. 2, Part I: General provsions.
[23] *Ibid.*

The Israeli government has repeatedly rejected the *de jure* applicability of the fourth Geneva Convention to the West Bank.[24] The rationale behind this stand is quite complex and some historical context is required to do its explanation justice. Its central premise lies in the uncertain legal status of the territories before their occupation by Israeli forces in 1967 and a formalistic approach to the applicability of the convention to "High Contracting Parties" as per the Convention´s common Article 2.[25]

To start, as it were, from a beginning: During the First World War, in an exceptional feat of *perfidious albion,* Britain had promised Palestine (then under Ottoman rule) to three political entities, one of which was the Jewish population through the now (in)famous Balfour Declaration.[26] After the war the League of Nations endowed the United Kingdom with a Mandate over historical Palestine which included the authority to secure there a homeland for the Jewish people.[27] Perhaps quite naturally, the indigenous population of the area was not at all satisfied with this arrangement and widespread violence and unrest characterised the thirty years of the Mandate´s duration.[28]

In 1947, Britain declared its intention to hand its Mandate over the territory over to the UN and therewith withdraw all its forces, and followed through on this in May 1948.[29] Britain did not, as it were, leave all its affairs in order; the empire left the territory without designating its

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[24] See for example: *Legal Consequences of the Construction of a Wa11 in the Occupied Palestinian Territory,* para. 90; Summary Legal Position of the Israeli Government, Annex 1; Committee on the Rights of the Child, "Consideration of reports submitted by States parties under article 8 of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict - Concluding Observations: Israel", CRC/C/OPAC/ISR/CO/1, January 29, 2010. .

[25]Adam Roberts, "Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967", *The American Journal of International Law*, Vol. 84, No. 1 (Jan., 1990), pp. 44-103, p. 61.

[26] Avi Schlaim, "The Balfour Declaration and its Consequences", in Wm. Roger Louis, ed., *Yet More Adventures with Britannia: Personalities, Politics and Culture in Britain*, London, I. B. Tauris, 2005, pp. 251-270, web: http://users.ox.ac.uk/~ssfc0005/The%20Balfour%20Declaration%20and%20its%20consequences.html , para. 2. *Note:* The Balfour Declaration was a brief letter in support of the Zionists written by British Foreign Secretary James Arthur Balfour to Lord Rothschild in 1917. *Inter alia* it stated:

> "His Majesty's Government view with favour the establishment in Palestine of a national home for the Jewish people, and will use their best endeavours to facilitate the achievement of this object, it being clearly understood that nothing shall be done which may prejudice the civil and religious rights of existing non-Jewish communities in Palestine, or the rights and political status enjoyed by Jews in any other country."

Full text available at:
http://news.bbc.co.uk/2/hi/in_depth/middle_east/israel_and_the_palestinians/key_documents/1682961.stm.

[27] *Legal Consequences of the Construction of a Wa11 in the Occupied Palestinian Territory, Advisory Opinion,* para. 70; The Council of the League of Nations, "The Palestine Mandate", London, June 24, 1922, web: http://avalon.law.yale.edu/20th_century/palmanda.asp , Article 2.

[28] "The Balfour Declaration and its Consequences", para. 2.

[29] *Legal Consequences of the Construction of a Wa11 in the Occupied Palestinian Territory,* para. 71.

successor government.[30] Meanwhile, the UN had issued General Assembly Resolution 181 (II) which recommended the partition of the territory into two states: one Arab and one Jewish.[31] Whilst Jewish authorities accepted the Plan of Partition the Arabs did not and when Israel claimed its independence and creation in 1948 it resulted in a war between the newly founded State and its surrounding sovereigns: Egypt, Syria, and Jordan. Subsequently, the UN demanded a cessation of hostilities and that an armistice be entered into which culminated in several such agreements between Israel and its neighbours. Thus, the envisioned Plan of Partition never came to be.[32]

One of the armistice agreements, made in Rhodes in the spring of 1949, determined the demarcation line between Israel and the Arab forces which since then has come to be known as "the Green Line".[33] The agreement made clear that these lines would in no way prejudice a final political settlement between the parties or future territorial arrangements.[34] Thus it came to be that Jordan occupied the West Bank whereas Egypt held the Gaza strip and the remainder of historic Palestine became what today is for the most part recognised as Israel.[35] In June 1967 war broke out again between Israel, Egypt, Jordan and Syria. Israel gained control of the West Bank and Gaza when it emerged victorious after what has since then been commonly known as the Six-day War.[36]

Since the status of the West Bank was unclear before the outbreak of hostilities and little has changed in the direction of clarification to that end since, the Israeli government has refrained from accepting the *de jure* applicability of the Geneva Convention and even to a varying degree, its status as an occupied territory at all.[37] On the contrary, the territory is considered to have been under Egyptian and Jordanian occupation and Israel has maintained that by conceding the

[30] "The Balfour Declaration and its Consequences", para. 48.
[31] General Assembly of the United Nations, Resolution 181 (II): "Future government of Palestine", A/RES/181(II), 29 November 1947.
[32] *Legal Consequences of the Construction of a Wa11 in the Occupied Palestinian Territory,* para. 71.
[33] *Note:* The name draws its origin from the colour used to draw the line on the map: *Legal Consequences cf the Construction of a Wa11 in the Occupied Palestinian Territory,* para. 72.
[34] *Ibid.*
[35] *Ibid.*
[36] This is somewhat a simplification: The author leaves out the fate of Jerusalem and the Golem Heights, both of which Israel has annexed internally and yet the annexation remains unrecognized by the international community.
[37] See for example a memorandum written by the Legal Adviser of the Israeli Ministry of Foreign Affairs, Mr. Theodor Meron to the Foreign Minister in the immediate aftermath of the six day war (1967), titled *Settlement in the administered territories,* available at: http://www.soas.ac.uk/lawpeacemideast/resources/file48485.pdf , Section B.

application of the Convention it would allow for the conclusion that these States were ousted sovereigns with reversionary rights.[38]

Hence the ostensible inapplicability of the fourth Geneva Convention to the OT stems from Israel´s desire not to recognize any sovereign reversionary rights to either Jordan or Egypt. It is therefrom that the legal theory draws its name: "The Missing Reversioner Theory".[39] As Israeli authorities maintain there was no true Sovereign over the territories and neither Egypt nor Jordan had any claim to them, Palestine can-not be considered to be or to have been "a High Contracting Party", in the sense of the second paragraph of Common Article 2 of the fourth Geneva Convention.[40] However, Israel has often indicated that whilst it rejects the *de jure* application of the Convention it does apply its humanitarian provisions *de facto* in its administration of the territories, albeit without ever clarifying which specific provisions fall under this category.[41]

1.4. Counter Arguments

Perhaps the most persuasive counter-arguments against the Missing Reversioner Theory can be found in the Advisory Opinion on the construction of a wall in the Occupied Palestinian Territory, made by the International Court of Justice (ICJ). The ICJ conducted an authoritative study on the meaning of Common Article 2 and found that it did indeed include in its scope the Occupied Palestinian Territory, irrespective of their precise status prior to the occupation.[42] The Court relied on the methods of interpretation recognised in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT) and cited various authorities such as the *travaux preparatoirs* of the Convention as well as *opinio iuris* and State practice to support this conclusion.[43]

It bears mention of course that both Israel and the Kingdom of Jordan became party to the fourth Geneva Convention prior to the former taking control over the West Bank by force from the latter in 1967.[44] Utilising the primary method of treaty interpretation, Article 31 of the VCLT,

[38] "Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967", p. 64.
[39] *Ibid.*
[40] *Legal Consequences of the Construction of a Wa11 in the Occupied Palestinian Territory,* para. 90.
[41] "Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967", p. 55.
[42] *Legal Consequences cf the Construction of a Wa11 in the Occupied Palestinian Territory,* para. 101.
[43] *Ibid,* paras. 90-101.
[44] *Ibid,* para. 91.

namely that "a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose", the ICJ surmised that under the first paragraph of Common Article 2, the fourth Geneva Convention finds application when two conditions are met: Firstly, an armed conflict must exist (irrespective of any declaration of a state of war). Secondly, this conflict must occur between two Contracting Parties. Thus, the Convention applies if these conditions are met, specifically also to any territory occupied in the course of the conflict.[45]

Contrary to the view of the Israeli government, the Court held that the wording of the second paragraph of Common Article 2 was not meant to restrict the scope of application presented in its first paragraph and therewith exclude territories not under sovereign control of either party.[46] Rather, the wording of the second paragraph elucidates that even if said occupation meets with no armed resistance the Convention still applies to that situation.[47] To support this conclusion the Court turned to subsidiary means of interpretation as foreseen in Article 32 of the VCLT, citing the *travaux preparatoires* of the Convention to determine both the teleological and historical meaning of the second paragraph: The drafters intended to include in its scope of application protection of all civilians who find themselves under hostile occupation of a Contracting Party, irrespective of the previous status of those territories.[48]

Further evidence for this stance is found in article 47 of the Convention which states:

> *Protected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory, into the institutions or government of the said territory, nor by any agreement concluded between the authorities of the occupied territories and the Occupying Power, nor by any annexation by the latter of the whole or part of the occupied territory.*

The intention of the drafters was thus not to restrict the scope of application announced in the first paragraph of Common Article 2 through the language of the second paragraph, but rather to widen it. This has twice been confirmed by the States parties to the Convention in statements made which specifically hold that it applies to the Occupied Palestinian Territory.[49] In addition,

[45] *Legal Consequences cf the Construction of a Wa11 in the Occupied Palestinian Territory,* paras. 94 and 95.
[46] *Ibid,* para. 95.
[47] *Ibid*.
[48] *Ibid,* paras. 95 and 101.
[49] *Ibid,* para. 96.

the International Commission of the Red Cross has affirmed the applicability of the convention to the West Bank and so has the United Nations General Assembly (UNGA) and the Security Council on multiple occasions since the beginning of the occupation.[50]

Moreover, Israel´s own Supreme Court of Justice has accepted the applicability of the Convention to the West Bank although it has failed to take a firm stance on its *de jure* status.[51] Furthermore, Military Proclamation no. 3 which establishes the military courts in the West Bank explicitly references the applicability and in fact supremacy of the Convention to the rules and procedures of the courts.[52] However, the Proclamation´s successor Military Orders no longer mention the Convention.[53]

It is regrettable that the Israeli government refuses to acknowledge the applicability of the fourth Geneva Convention to the OT but its stance cannot be accepted. Not only does the Israeli government´s policy stand at odds with the views of the highest international authorities, it conflicts with its own behaviour and practice. For it is contradictory to set up military courts, the authority for which is based in said Convention, to then deny that it actually applies to the people the courts have jurisdiction over.[54] It is unacceptable to state that the humanitarian provisions of the Convention find *de facto* application without ever clarifying these provisions and how they should in fact be applied. The inherent notion of this stance is that the Israeli government can decide *ex gratia* which provisions of the Convention apply and which not according to their preference.[55] Doing so is attempting to evade legal certainty and determinism and cannot be considered valid legal argumentation.

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[50] GA Resolution 56/60: "Applicability of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949, to the Occupied Palestinian Territory, including Jerusalem, and the other occupied Arab territories", A/RES/56/60, February 14, 2002.
GA Resolution 58/97: "Applicability of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949, to the Occupied Palestinian Territory, including Jerusalem, and the other occupied Arab territories", A/RES/58/97, December 17, 2003; S/RES/237 (1967), 14 June 1967; S/RES/271 (1969) 15 September 1969; S/RES/446 (1979) of 22 March 1979;S/RES/681 (1990) of 20 December 1990; S/RES/799 (1992) of 18 December 1992; S/RES/904 (1994) of 18 March 1994.
[51] "Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967", p. 66.
[52] Order Concerning Establishment of Military Courts (No. 3), 7 June 1967, published in Collection of Proclamations, Orders and Appointments of the Military Commander in the West Bank Region, Israeli Defense Forces, Article 35.
[53] Those would be Military Orders 378 and 1651, discussed further in the Chapter on the national legal framework.
[54] Granted, the Military Courts were first established during the war rendering the application of the fourth Geneva Convention unavoidable. Since the cessation of hostilities the Israeli government has since then sought to establish the jurisdiction of the courts solely on the basis of the Hague Regulations although not referencing these explicitly in subsequent Military Orders. Se „Prolonged Military Occupation: The Israeli-Occupied Territories since 1967", p. 65.
[55] "Prolonged Military Occupation", p. 66.

The Israeli government cannot rely on a restrictive interpretation of Common Article 2 of the Convention as a defence, as this has repeatedly been refuted by authoritative sources such as the ICJ. The Palestinian people are civilians which find themselves under the effective control of a hostile army which is bound by the provisions of the fourth Geneva Convention. The conclusion that must be reached is that the fourth Geneva Convention and all its provisions are in fact applicable to the situation in the OT regardless of whichever status these territories might have had before they came under Israeli occupation.

1.5. Other Objections

The Missing Reversioner Theory is by far the most prevalent theory used in an attempt to refute the applicability of humanitarian law to the Occupied Territories but it does not stand alone. Other arguments have been offered to support the conclusion that not all laws of occupation apply due to the considerable length of the occupation.[56] Another view holds that the West Bank is not occupied at all.[57]

Recently, the Israeli government appointed a commission led by former Israeli Supreme Court Justice Levy which concluded that the territories were not occupied by Israel in the sense of international law but rather Israeli sovereign territory all along which, for practical reasons of peaceful relations had simply not been utilized as such so far.[58] The commission bases its findings on similar reasoning to that of the missing reversioners, but take the argument one step further: The Balfour Declaration and the Palestine Mandate are interpreted to have granted the Jewish people sovereign rights over Palestine whilst only recognising cultural and religious rights of the Arab majority.[59] The armistice lines drawn in 1949 were only temporary measures

[56] "Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967", p. 44.
[57] See for example a memorandum written by the Legal Adviser of the Israeli Ministry of Foreign Affairs, Mr. Theodor Meron to the Foreign Minister in the immediate aftermath of the six day war (1967), titled Settlement in the administered territories, available at: http://www.soas.ac.uk/lawpeacemideast/resources/file48485.pdf , Section B.
[58] *Note:* The full report is only available in Hebrew: http://www.pmo.gov.il/Documents/doch090712.pdf, however a translation of its main conclusions can be found here: Baker, Alan . "Conclusions and recommendations of the Commission to Examine the Status of Building in Judea and Samaria - "Levy report" on settlements /Non-UN document (13 July 2012)." UNISPAL-United Nations Information System on the Question of Palestine. http://unispal.un.org/UNISPAL.NSF/0/D9D07; an unofficial translation of its argumentation can be located here; "Elder of Ziyon: English translation of the legal arguments in the Levy Report (updated)." Elder of Ziyon. http://elderofziyon.blogspot.cz/2012/07/english-translation-of-legal-arguments.html and detailed discussion of the Commissions finding can be found here: Justice Levy's Legal Tinsel *supra note 8*.
[59] *Ibid.*

under the UN Charter and subsequent wars invalidated their boundaries and returned the territories to their rightful owner and sovereign: the Israeli State.[60]

Although the stated purpose of founding the Commission was to seek means by which to legalize Israeli settlements within the West Bank, so far, the government of Israel has not officially endorsed its findings.[61] Perhaps this is so because it contradicts both the extensive case law of the Israeli Supreme Court on the matter as well as the State practice of Israel itself since 1967.[62] All authority exercised by IDF military commanders in the West Bank has been used on the basis of the laws of occupation. Should the territory never have been occupied in the first place all action taken there would have been illegitimate and cause for compensation to those deprived of their property in the process.[63] Also, supporting the thesis that Palestinians only received cultural and religious rights through the British Mandate, leaving the minority Jewish population with sovereign and political control over the indigenous population, invites imperialist notions of racial superiority and apartheid.[64] The Israeli government is sure to wish to avoid publicly supporting conclusions based on the denial of basic human rights to an entire population solely to legitimize its settlement policies.

Hitherto, there seems little doubt in Israeli legal circles that the West Bank is under belligerent occupation.[65] Nevertheless, Israel has often refrained from referring to the West Bank as "occupied" preferring the less opprobrious terminology of the "administrated territory" and has in various ways sought to distinguish it from "normal occupied territory", *inter alia* by citing the considerable duration of the situation.[66] Justice Levy´s report echoes this opinion, claiming that international laws of occupation were only meant to apply for short periods of time and not to the situation in Israel, spanning decades and therefore being a "unique and *sui generis*" situation.[67]

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[60] *Ibid.*
[61] *Ibid.*
[62] *Beit Sourik Village Council v. The Government of Israel*, HCJ 2056/04 (2004); Gross, Aeyal . "If there are no Palestinians, there's no Israeli occupation - Israel News | Haaretz ." Israel News - Haaretz Israeli News source. http://www.haaretz.com/news/diplomacy-defense/if-there-are-no-palestinians-there-s-no-israeli-occupation-1.449988.
[63] Zarchin, Tomer . "Legal expert: If Israel isn't occupying West Bank, it must give up land held by IDF - Israel News | Haaretz ." Israel News - Haaretz Israeli News source. http://www.haaretz.com/news/diplomacy-defense/legal-expert-if-israel-isn-t-occupying-west-bank-it-must-give-up-land-held-by-idf-1.449909
[64] "If there are no Palestinians, there's no Israeli occupation - Israel News | Haaretz ."
[65] "Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967", p. 63.
[66] *Ibid*, p. 44.
[67] Justice Levy's Legal Tinsel.

While the duration of occupation raises valid concerns with respect to the sustainability of some rules of occupation aimed at preserving the *status quo ante* in the context of say, the economic development of the occupied population, convincing arguments have been raised to counter the claim that these would somehow nullify the applicability of occupation law.[68] In fact, some scholars suggest that the longer an Occupation lasts, the more stringently should its laws be applied towards the Occupying power in favour of the occupied population.[69] In any event, there is no time limit on the laws of occupation, they apply while a territory remains occupied in the sense of Article 42 of the Hague Regulations.[70]

1.6. Human Rights Treaties and their application to the West Bank

With respect to human rights treaties, Israel has denied its obligation to apply those treaties to which it is party to the West Bank.[71] Its position is based on two central arguments. Firstly, that international humanitarian law is the applicable framework in the West Bank which excludes the application of human rights treaties. Secondly, it is said that human rights treaties are only meant to govern the relations of a government with its own citizens in peace time.[72] Consequently, Israel has denied that it is bound to uphold the provisions of the International Covenant on Civil and Political Rights as well as the Convention on the Rights of the Child when dealing with the population of the West Bank.[73]

However, the ICJ has affirmed that human rights do not lose their applicability in times of war but that their content must be interpreted in the light of humanitarian law which becomes *lex specialis* in these circumstances.[74] Some Human Rights provisions therefore give way to more specific humanitarian legal provisions (for instance, the right to life will be interpreted by different criteria under humanitarian law and human rights law) but do not lose their validity in other respects (*i.e.* the right to life still applies nevertheless).[75]

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[68] "Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967", p. 58.
[69] *Ibid,* p. 56.
[70] *Ibid,* p. 54.
[71] *See supra note 12.*
[72] *Ibid.*
[73] *Legal Consequences of the Construction of a Wa11 in the Occupied Palestinian Territory,* para.102. For a general discussion on this issue *see: Catherene Cook, Adam Hanieh and Adah Key, "Discrimination and Denial, Israel and Palestinian Child Political Prisoners: A Case Study of Israel´s Manipulation of the U.N Human Rights System, 13 Pal. Y.B. Int'l L. 91 2004-2005.*
[74] *Legal Consequences of the Construction of a Wa11 in the Occupied Palestinian Territory, para.* 105.
[75] *Ibid.*

Other bodies such as the UN Human Rights Committee, tasked with interpreting the ICCPR and considered its most authoritative source has unequivocally stated that the application of the laws of war does not void obligations under the Covenant.[76] In the same vein, the UN Committee on the Rights of the Child, has stated that the Convention on the Rights of the Child applies during times of conflict and specifically referred to the application of the Convention to the West Bank in this respect.[77]

The other line of reasoning, that is, that Human Rights Conventions are only applicable between a State and its citizens in peace time, has been rejected for two main reasons. In the first place, the scope of obligation of these instruments are considered to extend to all areas where a state exercises its jurisdiction. Moreover, a state of unrest or lack of peace is generally not considered to void the application of these instruments.

Turning to the scope of application, the ICJ and the UN Committees mentioned above, have all held that States are obliged to uphold the provisions of the CRC and the ICCPR in any of its activities involving the exercise of its jurisdiction, also outside of its territorial borders. [78] This reasoning stems from the wording of Article 2 of the respective conventions, both concerning their scope of application and both extending said application to any area subject to the jurisdictional powers of a State Party. The state of Israel quite evidently exercises jurisdiction in the West Bank, for instance through the military courts used to try Palestinians. Consequently, Israel cannot limit the application of these instruments to its own citizens. [79]

On the other hand, the argument that these conventions only find application in peace time merits further analysis, because a declared state of emergency can allow for derogation of certain rights contained in human rights instruments. To that end, a State must declare a state of emergency and submit a reservation to the relevant treaty regarding the rights it wishes to

[76] Human Rights Committee, CCPR/C0/78/1SR, para. 11 where it stated:
> *"in the current circumstances, the provisions of the Covenant apply to the benefit of the population of the Occupied Territories, for al1 conduct by the lState party's authorities or agents in those territories that affect the enjoyment of rights enshrined in the Covenant and fa11 within the ambit of State responsibility of Israel under the principles of public international law"*

[77] Committee on the Rights of the Child, "Consideration of reports submitted by States parties under article 8 of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict - Concluding Observations: Israel", CRC/C/OPAC/ISR/CO/1, January 29, 2010.

[78] *Legal Consequences cf the Construction of a Wa11 in the Occupied Palestinian Territory,* paras. 107-111.

[79] *Ibid.*

derogate from as a result of this. In the case of Israel, a state of emergency was declared in 1967 and has not been revoked to this date.

Since its ratification of the CRC, Israel has not submitted any reservations thereto and its provisions should therefore be considered fully applicable. As to the ICCPR, Israel invoked Article 4 of the Convention upon its signing, which allows for derogation of certain rights contained therein on the basis of a state of emergency. In accordance with this provision, Israel issued a reservation to its full application of Article 9 of the Covenant which regulates deprivation of liberty.[80]

Aside from the reservation concerning Article 9 of the ICCPR, Israel has not issued any further reservations to the application of these instruments. Consequently, all other provisions found in these instruments should be considered as fully applicable. Indeed, if the notion were to hold true that human rights treaties are only meant to apply in peace time, it fails to explain why Israel upholds their provisions towards Israeli citizens, evidenced by their transposition into Israeli national law.[81]

Consequently, it can be stated that as a State Party to the ICCPR, Israel is obliged to adhere to its provisions when it exercises jurisdiction over the West Bank. More specifically, the Israeli military courts are obliged to adhere to the provisions regulating individual rights of due process in their administration of justice within the West Bank.

2. Collective Punishment

Now that the applicability of the fourth Geneva Convention as well as the 1907 Hague Regulations to the OT has been established it is pertinent to examine the content of the norm which forms the frame of reference of this study: Namely, the prohibition of collective punishment. Throughout the war torn history of *Homo sapiens*, armies and militias have exacted harsh punitive measures against groups of persons for acts which were not individually attributable to these persons.[82] The aim of this behaviour is usually said to be to deter communities from any attempt of resistance against the punishing forces.[83] Collective

[80] *Ibid*, para. 127.
[81] *Ibid.*
[82] Shane Darcy, "Prosecuting the War Crime of Collective Punishment - Is It Time to Amend the Rome Statute?", *Journal of International Criminal Justice*, 8 (2010), p. 29.
[83] *Ibid*, p. 30.

punishment has been used to spread terror amongst populations which armies seek to subjugate to their command, often under the disguise of law enforcement.[84] Gradually, international law has sought to prohibit this behaviour in warfare as it stands against one of the central premises of the rule of law: that of individual criminal responsibility.[85]

The following sections will explain the content of this prohibition as laid out in international humanitarian law. To this end the language of the prohibition laid out in The Hague Regulations as well as the fourth Geneva Convention will be scrutinized. Moreover, whether or not the prohibition has obtained the status of customary international law will be ascertained. Finally, international case law on the subject will be reviewed in order to gain an understanding of the precise definition of collective punishment as a war crime and therewith its elements of *actus reus* and *mens rea.*

2.1. Collective Punishment under the Hague Regulations

The 1907 Hague Regulations as well as their 1899 predecessor were the first to regulate collective punishment.[86] Article 50 of the 1907 Hague Regulations provides:

> *No general penalty, pecuniary or otherwise, shall be inflicted upon the population on account of the acts of individuals for which they cannot be regarded as jointly and severally responsible.*

Here, a population could be punished when acts of individuals within it could be ascribed to the population as a whole under joint or several responsibility. Should such responsibility be ascribed to the population however, collective punishment could be used as a response thereto.

A further elaboration on the meaning of the responsibility described was given in the *travaux preperatoires* on Article 50. There it was stated that should it be determined that a certain community as a whole committed acts or at least permitted the commission of these acts it was permitted for an army to punish the population as a whole. Although it did not make it to the final wording of the Article, the drafters of the Article considered the acts for which a population

[84] "Prosecuting the War Crime of Collective Punishment-Is It Time to Amend the Rome Statute?", p.29.
[85] *United States of America v. Wilhelm List et al*., Judgment, 19 February 1948, , in Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, Volume XI/2, p. 1247 (*Hereafter:* The Hostages Case).
[86] "Prosecuting the War Crime of Collective Punishment-Is It Time to Amend the Rome Statute?, p. 32.

could be punished should be restricted to "reprehensible or hostile acts". [87] Consequently, collective punishment could still be employed against a population considered at least passively responsible for the commission of offending acts against an occupying army.[88]

A case in point is *The Hostages Case* before the International Nürenberg military tribunal wherein it was considered how collective punishment could lawfully be used against the population of an occupied territory. While the charges brought against the defendants did not explicitly mention collective punishment, their first indictment charged the defendants with the wanton murders of hundreds of innocent civilian hostages without the benefit of a fair trial determining their individual responsibility in response to acts committed by enemy forces or unknown persons. The case adjudicated over several high ranking German military officers who administered Greece and Yugoslavia whilst occupied by German forces. Faced with strong guerrilla resistance movements in these countries, the German Wehrmacht had enforced an official policy of murdering one hundred civilians in retaliation to every death of a German soldier caused by these movements.[89]

The Tribunal examined international law on the subject and found that it was lawful for an occupying army to take hostages to ensure the peaceful conduct of populations of occupied territory and to shoot them should the population disobey.

These measures were subject to the exhaustion of other remedies to ensure tranquillity, such as enacting curfews, prohibiting assembly and destroying property in the vicinity of the place of the crime. Failing these however, the Nürenberg Tribunal found that international law (*i.e.* the Hague Regulations) permitted this form of collective punishment. The widespread use of collective punishment during the Second World War was a strong impetus to prohibit the practice completely under international law, which was accomplished in the fourth Geneva Convention in 1949.[90]

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[87] *The Proceedings of the Hague Peace Conferences, Translation of the Official Texts: The Conference of 1899*, Prepared in the Division of International Law of the Carnegie Endowment for International Peace under the supervision of James Brown Scott (NewYork: Oxford University Press, 1920); *Report to the Conference*, by Edouard Rolin, Annex 1 to the Minutes of the Fifth Meeting, 5 July 1899, p. 65(*cited in "*Prosecuting theWar Crime of Collective Punishment-Is It Time to Amend the Rome Statute?", p.32).

[88] *Ibid.*

[89] *"Hostages Case"*, p. 1264.

[90] *Commentary on the Geneva Conventions of 12 August 1949. Volume IV*, Introduction.

2.2. Collective Punishment under the fourth Geneva Convention

Article 33 (1) of the fourth Geneva Convention offered a much more comprehensive prohibition on collective punishment than the Hague Regulations stating:

> *No protected person may be punished for an offence he or she has not personally committed.*
>
> *Collective penalties and likewise all measures of intimidation or of terrorism are prohibited.*[91]

The wording of the article also comes closer to the *raison d'être* of the prohibition of collective punishment; the ideal of individual criminal responsibility.[92] The prohibition extends to the persons protected by the convention: prisoners of war and persons living under occupation and has since then evolved into a rule of customary international law.[93]

2.3. The Prohibition of Collective Punishment as Customary International Law

Since the promulgation of the fourth Geneva Convention, the prohibition has evolved into a customary norm of international law. Not only has the norm been reaffirmed through various international legislative instruments, it has also found its way into national legislation and military manuals across the globe.[94] The following section will review these instruments and offer comments on the crystallisation of the rule into international customary law.

2.3.1. Subsequent International Legislation

[91] 1949 Geneva Convention IV.
[92] Paul Rabbat and Sigrid Mehring, "Collective Punishment", Max Planck Institute for Comparative Public Law and International Law, Heidelberg and Oxford University Press, 2013, para. 2.
[93] "Collective Punishment", para. 10; Henckaerts, Louise Doswald-Beck, *Customary International Humanitarian Law,(Online version)* Cambridge University Press, Book DOI: http://dx.doi.org/10.1017/CBO9780511804700, p. 374.
[94] *Customary International Humanitarian Law*, p. 375; International Committee for the Red Cross, "Practice Relating to Rule 103. Collective Punishments", Chapters III: Military Manuals and IV: National Legislation, web: http://www.icrc.org/customary-ihl/eng/docs/v2_rul_rule103#top, the countries listed are to many to enumerate here but include multiple representatives from all inhabited continents and the permanent members of the Security Council.

Collective punishment has been prohibited in various international instruments, amongst them the Convention Relative to the Treatment of Prisoners of War (1929), the third Geneva Convention as well as in Additional Protocol I and II to the Geneva Conventions.[95] The Statute for the International Criminal Tribunal for Rwanda (ICTR) was the first to extend the jurisdiction of an international tribunal explicitly to the war crime of collective punishment. Special Court for Sierra Leone (SCSL) followed suit and included the crime of collective punishment in its statute.[96] While the prohibition of collective punishment was included with the war crimes listed in the draft Statutes of the International Criminal Court it did not find acceptance in the final version thereof.[97]

Nevertheless, various international institutions have issued the opinion that collective punishment is a war crime which should incur individual criminal responsibility. Already in the wake of the First World War, the Commission on Responsibility of the Authors of War and on Enforcement of Penalties included collective punishment in its list of violations of the laws and customs of war which should be subject to criminal prosecution.[98]

Since then, many other declarations and instruments have followed suit. A case in point is the 1991 ILC Draft Code of Crimes against the Peace and Security of Mankind and its 1996 successor document; both list collective punishment as a war crime.[99] Parties to the Balkan

[95] Convention relative to the Treatment of Prisoners of War (signed 27 July 1929, entered into force 19 June 1931) 118 LNTS 343(Art. 46 (4)); Geneva Convention relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135 (Geneva Convention III) (Arts. 26 (6) and 87 (3)); Geneva Convention relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 (Geneva Convention IV) (Art. 33 (1)); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3 (Art. 75 (2)d); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS (Art. 4(2)b).
609.

[96] "Prosecuting the War Crime of Collective Punishment-Is It Time to Amend the Rome Statute?", p. 34; Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda, UN Doc. S/Res/955 (1994) (Art. 4(b)); Statute of the Special Court for Sierra Leone, having been established by an Agreement between the United Nations and the Government of Sierra Leone pursuant to Security Council Resolution 1315 (2000) of 14 August 2000 (Art. 3(b)).

[97] "Observance by the United Nations Forces of International Humanitarian Law", Secretary General´s Bulletin, UN Secretariat, UN Doc. ST/SGB/1999/13, August 6, 1999, Section 7.2; ICRC, Working Paper on war crimes submitted to the Preparatory Committee for the Establishment of an International Criminal Court, New York, February 14, 1997, Arts. 1 (ii)-(iii) and 3 (1). *See further cit. 100* below.

[98] Violations of the Laws and Customs ofWar: Reports of the Majority and Dissenting Reports of American and Japanese Members of the Commission of Responsibilities, Conference of Paris, 1919, at 16^19, 44 (*cited in*"Prosecuting theWar Crime of Collective Punishment-Is It Time to Amend the Rome Statute?", p. 38).

[99] *See* Art. 22, - 2(a) of the Draft Code of Crimes against the Peace and Security of Mankind, Report of the Commission to the General Assembly on the work of its forty-third session (1991), Vol.

conflict issued Memoranda of Understanding that collective punishment would not be exacted against civilians caught in the conflict.[100] In addition, the UN has issued various declarations and resolutions which stress the importance of member states respecting this norm, most of which, incidentally, have been addressed to the State of Israel.[101]

2.3.2. National legislation concerning collective punishment

The military manuals of armies across the globe expressly prohibit the use of collective punishment in the conduct of hostilities such as occupation of territory. The list of countries is diverse and although the detail with which the prohibition is described varies, the concept itself seems universally accepted by armies small and large. Countries such as Canada, The United States of America, Argentina, France, The United Kingdom, Spain, Sweeden, Russia, Nicaragua, Peru and, most relevantly, Israel, all prohibit the use of collective punishment in occupation situations.[102] In the same way, the national criminal legislation of a large number of States prescribes the act of subjecting protected persons to collective punishment as a war crime subject to individual criminal responsibility of the accused. There is therefore little doubt that collective punishment is near universally proscribed by national legislation, further strengthening its prohibition as a norm of customary international law.[103]

II, Part 2, *Yearbook of the International Law Commission*, UN Doc. A/CN.4/SER.A/1991/Add.1 (Part 2), pp. 104-105; Report of the Commission on the work of its forty-eighth session (1996), Vol. II, Part 2, *Yearbook of the International Law Commission*, UN Doc. A/CN.4/SER.A/1996/Add.1 (Part 2), pp. 53-54, Art. 20, - (f)(ii).

[100] Memorandum of Understanding on the Application of IHL between Croatia and the Socialist Federal Republic of Yugoslavia, Geneva, November 27, 1991, para. 4; Agreement between Representatives of Mr. Alija Izetbegovic (President of the Republic of Bosnia and Herzegovina and President of the Party of Democratic Action), Representatives of Mr. Radovan Karadzic (President of the Serbian Democratic Party), and Representative of Mr. Miljenko Brkic (President of the Croation Democratic Community), Geneva, May 22, 1992, para. 2.3.

[101] *See for example:* UNGA 'Report of the Secretary General Prepared Pursuant to General Assembly Resolution ES-10/13' (24 November 2003) UN Doc A/ES-10/248; UNGA Res 64/91 'Work of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories' (19 January 2010) GAOR 64th Session Supp 49vol 1, 312; UNGA Res 64/94 'Israeli Practices Affecting the Human Rights of the Palestinian People in the Occupied Palestinian Territory, including East Jerusalem' (19 January 2010) GAOR 64th Session Supp 49 vol 1, 335; UN HR Council 'Human Rights in Palestine and Other Occupied Arab Territories: Report of the United Nations Fact-Finding Mission on the Gaza Conflict' (25 September 2009) UN Doc A/HRC/12/48 (Goldstone Report).

[102] *See supra note 94.*

[103] *Customary International Humanitarian Law*, p. 375.

2.4. Case Law on the Prohibition of Collective Punishment

Whereas the customary status of the prohibition of collective punishment has been established, the precise content of the prohibition remains to be determined. It is imperative to ascertain how the rule translates into a war crime liable to individual criminal responsibility. To that end, the case law of the Special Court for Sierra Leone offers particularly pertinent guidance as it is the only international tribunal to have convicted persons for the act of collective punishment.[104] Other courts, such as the military tribunal in the case *United States v First Lieutenant William L Calley Jr*, the Military Tribunal of Rome in its judgment of *In Re Priebke* of 22 July 1997 and the International Tribunal for the former Yugoslavia (ICTY) (more generally) in the *Delalić Case*, addressed the prohibition but none were convicted for the offence.[105] Although no one was convicted for committing collective punishment in the Nüremberg trials, Article 50 was expressly mentioned as a punishable war crime in Court transcripts.[106]

Basing its jurisdiction on Article 3 (b) of the SCSL Statute, the SCSL issued indictments for collective punishment in near all of its cases.[107] Its three most prominent cases, namely *Prosecutor v Fofana and Kondewa* (*Civil Defence Forces (CDF)* cases), *Prosecutor v Sesay, Kallonand Gbao (Revolutionary United Front (RUF)* cases*)*, and *Prosecutor v Brima, Kamara and Kanu* (Armed Forces Revolutionary Council (AFRC) cases), the large majority of defendants were also found guilty of the crime (but revoked in appellate proceedings)[108]. The following section will examine the definition of the elements of collective punishment in the jurisprudence of the SCSL.

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[104] *Ibid*, para. 9.
[105] *United States v First Lieutenant William L Calley Jr* (1973) 46 CMR 1131; *In Re Priebke (Judgment)* Tribunale Militare di Roma (Military Tribunal of Rome) (22 July 1997) (1998) 38 Cassazione penale 689; *Prosecutor v Delalić (Judgment)* IT-96-21 (16 November 1998), para. 578; "Collective Punishment", para. 9.
[106] International Military Tribunal (Nuremberg), Judgment and Sentences, 1 October 1946, reprinted in 41 AJIL (1947) 172, p. 248; United States of America v.Wilhelm List et al., Judgment, 19 February 1948, Case No. 7, XI Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No.10 (1950) 757, p. 1239 (*cited in* "Prosecuting theWar Crime of Collective Punishment-Is It Time to Amend the Rome Statute, p. 38).
[107] "Collective Punishment", para. 9.
[108] Judgment, *Fofana and Kondewa* (SCSL-04-14-T), Trial Chamber I, 2 August 2007, (hereinafter, CDF Trial Judgment);*Prosecutor v Fofana and Kondewa* (Appeals Chamber Judgment) SCSL-04-14-A (28 May 2008);*Prosecutor v Sesay, Kal lon and Gbao* (Trial Chamber Judgment) SCSL-04-15-T (2 March 2009) (hereinafter, RUF Trial Judgment); Judgment, Brima, Kamara and Kanu (SCSL-2004-16-A), Appeals Chamber, 22 February 2008; Fofana and Kondewa (SCSL-04-14-A), Appeals Chamber, 28 May 2008 (hereinafter CDF Appeal Judgment).

2.4.1. The Elements of Collective Punishment as a War Crime

As the Statute of the SCSL does not define the elements of the crime, the Court had to devise its own interpretation of the scope and meaning thereof.[109] Criticism has been raised that the language used to this end in the indictments and judgments issued is imprecise and ambiguous which is not without its merit.[110] Nevertheless, the SCSL has developed extensive jurisprudence on the subject and the appellate judgments offer an authoritative definition of this crime which has eluded international justice thus far.[111]

In the indictments issued, defendants who were members of several militant groups (the AFRC, RUF and CDF) were charged with committing various crimes in order to punish the civilian population for supporting or failing to support one or more of the other militant groups involved in the civil war.[112] AFRC members as well as members of the RUF punished civilians ostensibly supporting President Ahmend Tejan Kabba´s government and associated fractions, or for their failure to support the AFRC/RUF.[113] Similarly, indictments against the members of the CDF maintained that these had through various criminal acts sought to punish civilians for their allegiance to the AFRC/RUF forces or support thereof.[114]

2.4.2. General Requirements

The acts must occur in the course of an armed conflict, either international or internal, against persons who take no active part in the hostilities.[115] As the SCSL dealt exclusively with an armed conflict, it did not include the other possible requirement to invoke the prohibition of

[109] "Prosecuting theWar Crime of Collective Punishment-Is It Time to Amend the Rome Statute?" p. 40.
[110] *Ibid;* Sandesh Sivakumaran, "War Crimes before the Special Court for Sierra Leone: Child Soldiers, Hostages, Peacekeepers and Collective Punishments", *Journal of International Criminal Justice* vol. 8 (2010), 1009-1034, pp. 1022-1023.
[111] , "War Crimes before the Special Court for Sierra Leone: Child Soldiers, Hostages, Peacekeepers and Collective Punishments", p. 1023.
[112] "Prosecuting theWar Crime of Collective Punishment-Is It Time to Amend the Rome Statute?", p. 41.
[113] *Further Amended Consolidated Indictment, Brima, Kamara and Kanu* (SCSL-2004-16-PT), 18 February 2005, para. 41; Amended Consolidated Indictment, Sesay, Kallon and Gbao (SCSL-2004-PT), 13 May 2004, para. 42.
[114] *Indictment, Norman, Fofana and Kondewa* (SCSL-03-14-I), 4 February 2004, para. 28, Count 7.
[115] Decision on Motion for Judgment of Acquittal pursuant to Article 98, Norman, Fofana and Kondewa (SCSL-04-14-T), Trial Chamber 1, 21 October 2005, x 116 (hereinafter, CDF Rule 98 Decision) paras. 68-70.

collective punishment. That is to say, the use of collective punishment is also prohibited when it is committed in the course of occupation against the occupant civilian population.[116]

2.4.3. The Different Variations Offered as Elements of the Crime

The Trial Chamber in the *CDF Case* offered two constituent elements for the crime of collective punishment:

> *(i) A punishment imposed on protected persons for acts that they have not committed*
>
> *(ii) The intent, on the part of the offender, to punish the protected persons or group of protected persons for acts which form the subject of the punishment.*[117]

After a rather more detailed discussion on the origins and elements of the crime of collective punishment, the Trial Chamber in the *AFRC Case* offered a different definition:

> *(i) A punishment imposed indiscriminately and collectively upon persons for acts that they have not committed and*
>
> *(ii) The intent on the part of the perpetrator to indiscriminately and collectively punish the persons for acts which form the subject of the punishment.*[118]

The Trial Chamber went on to state that the prohibition of collective punishment is "based on one of the most basic tenets of criminal law, the principle of individual responsibility".[119] The first element was thus considered to address punishments which are inflicted upon persons not due to their individual responsibility for certain acts but rather, "by wrongfully ascribing collective guilt to them".[120] The punishments issued would be imposed "indiscriminately without establishing individual responsibility through some semblance of due process and without any real attempt to identify the perpetrators if any".[121]

However, this legal reasoning was not entirely to the liking of the Appeals Chamber which held that the Trial Chamber had erred in law in its definition of the offence.[122] In particular, the

[116] "Collective Punishment", para. 1.
[117] *CDF Rule 98 Decision*, para. 118.
[118] *AFRC Trial Judgment*, para. 676.
[119] *Ibid*, paras. 678-680.
[120] *Ibid.*
[121] *Ibid.*
[122] Judgment, *Fofana and Kondewa* (SCSL-04-14-A), Appeals Chamber, 28 May 2008, para. 222 (hereinafter,

Appellate Court felt that the first instance Court had not fully distinguished the crime of collective punishment from that of targeting civilians.[123] Both acts were war crimes but collective punishment differed from targeting civilians in so far that its mens rea element necessitates that the perpetrators act against civilians in response to acts or omissions either real or perceived. In contrast, targeting of protected persons occurs due to the identity or perceived identity of the victims, such as belonging to a certain tribe or village.[124]

Consequently, the Appellate Court in the CDF Case offered yet another definition of the elements of the crime of collective punishment, one which found support in subsequent appellate proceedings and can therefore be considered its final authoritative interpretation thereof.[125]

It holds that collective punishment is:

> *(i) The indiscriminate punishment imposed collectively on persons for omissions or acts for which some or none of them may or may not have been responsible and*
>
> *(ii) The specific intent of the perpetrator to punish collectively.*[126]

While all versions are of considerable merit they are also worthy of the aforementioned criticism which has arisen since their publication. Most notably the Appellate Chamber is chastised for failing to require an offending act of some kind must have occurred which then is subject to punishment. This is considered to run afoul of the central tenet of the prohibition: That persons or groups of persons are being punished for the acts of another.[127]

Moreover, the facts of the prosecuted cases are alleged not to fully fit the description of collective punishment. Killing or punishing whole villages or groups of persons for acts or omissions described mainly as their political affiliations or support definitely constitutes a war

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CDF Appeal Judgment).
[123] *Ibid*, para. 223.
[124] *Ibid.*
[125] , "War Crimes before the Special Court for Sierra Leone: Child Soldiers, Hostages, Peacekeepers and Collective Punishments", p. 1021.
[126] *CDF Trial Judgment*, para. 224; In the same case Justice Winter, departed from this, preferring to define the elements
as:
(1) An indiscriminate sanction directed against protected persons for their perceived conduct; and,
(2) The specific intent to punish persons or groups of persons collectively for their perceived Conduct.
Partially Dissenting Opinion of Honorable Justice Renate Winter, para. 46.
[127] "Prosecuting theWar Crime of Collective Punishment-Is It Time to Amend the Rome Statute?" pp. 44-45.

crime but not necessarily one of collective punishment.[128] No specific acts or offences attributable to individuals for which the community was punished were listed in the SCSL jurisprudence.[129] Conversely, the community as a whole is penalised for its support or lack thereof to specific actors of the civil war.[130] A group- or mass-punishment incurred as a result of inaction or omission does indeed appear to render the concept of collective punishment a misnomer.[131]

The critics are right to point this out, illustrating also the difficulties of translating humanitarian law into the much more precise definition of a war crime with its requirements of legal certainty.[132] Regrettably, collective punishment was not included in Article 8 of the Rome Statute which would have endowed the prohibition with considerably more clarity and authority under international criminal law.[133] Nevertheless, its prohibition under customary international law is unequivocal and the rulings of the SCSL have only served to enrich the ground upon which said prohibition is based.[134]

3. Conclusion

The foregoing chapter has addressed various international legal issues relative to the subject matter of this study. First, the applicability of international humanitarian law to the West Bank, in particular the 1907 Hague Regulation and the 1949 fourth Geneva Convention and their rules on belligerent occupation were established. The objection of the Israeli government to the *de jure* applicability of the fourth Geneva Convention was refuted in light of insurmountable evidence to the contrary and in so doing, the history and nature of the precise legal status of the West Bank prior to and after its occupation by the IDF was examined. After expelling the myth of the Missing Reversioner, this study turned its focus on the applicability of the ICCPR and the CRC to Israel when exercising its jurisdiction in the West Bank.

[128] *Ibid.*
[129] *Ibid.*
[130] *Ibid.*
[131] *Ibid:* "War Crimes before the Special Court for Sierra Leone: Child Soldiers, Hostages, Peacekeepers and Collective Punishments", p. 1021
[132] "Collective Punishment", para. 9.
[133] *Ibid.*
[134] , "War Crimes before the Special Court for Sierra Leone: Child Soldiers, Hostages, Peacekeepers and Collective Punishments", p. 1023.

Once it had been established that these instruments are in fact applicable, this chapter focused on the development of one specific rule of international humanitarian law: the prohibition of collective punishment. The examination began with its debut appearance of conditional censure in the Hague Regulations, moving on to its absolute prohibition in the Geneva Conventions and eventually towards its crystallisation as a customary norm of international law. Its transformation into a war crime subject to individual criminal responsibility was also recounted, mainly through the lens of the jurisprudence of the SCSL.

III. The Domestic Legal Framework

When Palestinian minors are suspected of throwing stones at Israeli citizens, soldiers or their property they are processed by military courts established by the Israeli armed forces.[135] This chapter will examine the mechanism governing the punishment of Palestinian minors accused of the crime of throwing stones in the West Bank. To that end, the penal provision proscribing this behaviour will be examined along with the laws and procedures governing the treatment of minors suspected of this behaviour and how these find application in practice.

Military Order no. 1651 Regarding Security Directives in Judea and Samaria (hereafter Military Order 1651), is the legal instrument governing the processing of minors accused of stone throwing. The order serves as the primary penal code of the West Bank and regulates the jurisdiction of the military courts as well as their structure and composition. [136] It contains a list of offences as well as the procedural rules governing the arrest, detention, interrogation, trial and sentencing of persons accused of said offences. The novelty of Military Order 1651 lies in its introduction of juvenile military courts and some specific procedures in relation to minors.[137]

The first point of departure will be to introduce the crime of stone throwing proscribed under Article 212 of Military Order 1651. Consequently the military court system will be examined:

[135] Naama Baumgarten-Sharon, "No Minor Matter – Violation of the Rights of Palestinian Minors Arrested by Israel on Suspicion of Stone Throwing", Report prepared by B´Tselem, The Israeli Information Center for Human Rights in the Occupied Territories, July 2011, p. 6.
[136] Israel Defense Forces Order Regarding Security Directives [Consolidated Version] (Judea and Samaria) (No. 1651), 2009 (*hereafter*: Military Order 1651).
[137] Military Order 1651, Section G, as to criticism to this novelty *see*: UN Committee against Torture, Concluding Observations (20), CAT/C/ISR/CO/4, para. 28. "Bound, Blindfolded and Convicted-Children in Military Detention", p. 17.

The extent of their jurisdictional authority will be addressed before turning to their composition and structure. Thereafter, the procedural rules governing the arrest, detention and trial of minors will be scrutinized and examples of their practical enforcement will be given to determine whether they contain sufficient safeguards to protect the rights of minors throughout the proceedings ensuring that conviction only occur as a result of the individual criminal responsibility of the accused. To this end, when examining the legal processing minor suspects beginning with their initial arrest to their conviction, provisions of the ICCPR and the CRC will serve as a frame of reference to determine the level of commitment to the due process rights of the accused.. Finally, some conclusions on how well this system is equipped to ensure that the due process rights of minors are respected at all stages of the proceedings.

1. Article 212: A Person who throws an Object, Including a Stone…

Under Article 212 of Military Order 1651, "a person who throws an object, including a stone" is liable to serve up to twenty years in prison depending on their manner of execution. Should they do so in a manner that "harms or may harm traffic in a transportation lane", strict liability applies and the perpetrator could face up to ten years imprisonment.[138] A person who throws a stone or an object at a person or property with the intention of harming either is liable to ten years imprisonment. If the stone or object is directed at a moving vehicle and the person throwing it intends to harm the vehicle or the person traveling in it, the punishment is twenty years imprisonment.[139]

While they are not the only group residing in the West Bank who throw stones at people or property, Palestinian minors, especially teenage boys are the most frequent perpetrators. Correspondingly, stone throwing is also the conduct for which minors most often stand trial in the military courts.[140] In the years 2005 to 2010 alone, over 800 minors where prosecuted for this offence.[141] The throwing of objects, especially stones as defined by Article 212 is very

[138] Military Order 1651, Article 212.
[139] *Ibid.*
[140] *Children in Israeli Military Detention-Observations and Recommendations*, UNICEF, February 2013. p. 8; "Children in Military Custody, A report written by a delegation of British lawyers on the treatment of Palestinian children under Israeli military law, Foreign & Commonwealth Office, June 2012 Para. 23; "Bound. Blindfolded and Convicted", p. 17.
[141] "No Minor Matter", p. 5.

common in the West Bank with over two thousand incidents reported to the IDF each year.[142] Stone throwing can be dangerous to the lives of the persons subjected to it and is also the cause of considerable material damage.[143]

Containing the problem is somewhat challenging as apprehending the actual perpetrators for a specific occurrence of stone throwing can prove exceedingly difficult.[144] This is mainly due to the spontaneous nature of the offence and the circumstances under which they often take place.[145] Usually, incidents occur at locations where Palestinians come into contact with settlers and soldiers: at traffic arteries frequented by soldiers and settlers, in demonstrations controlled by security forces and in the proximity of the Separation Barrier.[146]

It is understandable that the IDF would wish to apprehend and punish stone throwers to deter future occurrences and to protect the security of its citizens and soldiers. However, security considerations combined with the difficulty of apprehending offenders can-not be used by the authorities as justification for arbitrarily punishing a member of the group most often responsible for such behaviour, in this case a Palestinian minors. Ensuring effective procedural safeguards to accused persons becomes particularly relevant in the circumstances in the present case: a situation of prolonged military occupation, often characterised by mutual mistrust and hostile interaction of two peoples in conflict. A trial conducted by an independent and impartial tribunal governed by the rule of law providing for basic procedural safeguards of the accused during all stages of the process is the most effective way of ensuring that only those individually criminally responsible for stone throwing be punished therefore.

2. The Military Court System

The military court system was officially established by Military Proclamation No. 3 in 1967 and was further developed through Military Order 378, which most recently has been replaced by Military Order 1651.[147] The Order regulates the widespread jurisdiction of the courts over a

[142] "No Minor Matter", p. 5.
[143] "No Minor Matter"- Official response of the Military Courts to the Report of B´Tselem: p. 69.
[144] *Ibid*, - Official responce of the Military Prosecutor´s Office, p. 72, para. 1.
[145] *Ibid.*
[146] "No Minor Matter", p. 5.
[147] Order Concerning Establishment of Military Courts (No. 3), 7 June 1967, published in Collection of Proclamations, Orders and Appointments of the Military Commander in the West Bank Region, Israeli Defense Forces No. 1, p. 25; "An Order Concerning Security Provisions" (Yehuda and Shomron) No. 378, 5730 – 1970; Israel Defense Forces Order Regarding Security Directives [Consolidated Version] (Judea and Samaria) (No.

large number of offences.[148] Since their inception, the military courts have tried hundreds of thousands of Palestinians on the basis of these military orders and amongst them, tens of thousands of children.[149] The following sections will examine the jurisdictional authority of these courts as well as their structure and composition.

2.1. The Jurisdiction of the Military Courts

Article ten of Military Order 1651 (titled in the English translation as Authority) governs the jurisdiction of the military courts. Subsection A thereof gives the courts authority to "adjudicate any offence defined in security legislation and law". [150] Subsection B states:

> *(B) If the defendant is found guilty of an offence according to the law, the military court is authorized to sentence him to punishment, not to exceed the punishment that a lawfully convened court is authorized to impose upon him in the same case, and this is where there is no other provision in the security legislation.*

The language of subsection B is somewhat ambiguous, perhaps simply due to an issue of translation. However its meaning becomes clearer when read in conjunction with paragraph C which holds:

> *(C) In regard to Subsection (B), the same applies:*
>
> *(1) if the offense was committed prior to the entry of IDF forces into the region or after it:*
>
> *(2) if authority for adjudication was assigned to a special court or tribunal.*

1651), 2009; "The Israeli Military Court System in the West Bank and Gaza", p. 206; Sharon Weill, "The Judicial Arm of the Occupation: the Israeli military courts in the Occupied Territories", *International Review of the Red Cross,* Vol. 89, no. 866, June 2007, p. 396.

[148] "The Judicial Arm of the Occupation: the Israeli military courts in the Occupied Territories", p. 409. Further discussion follows in section 2.1.

[149] Human Rights Situation in Palestine and Other Occupied Arab Territories: Report of the Special Rapporteur fon the Situation of Human Rights in the Palestinian territories occupied since 1967, John Dugard, A/HRC/7/17, 21 January 2008, para. 45; Lisa Hajjar, Courting Conflict: The Military Court System in the West Bank and Gaza, University of California Press, Berkeley, 2005, p. 3; "Bound, Blindfolded and Convicted-Children in Military Detention", p. 23. In 2007, the total number of trials was estimated at over 200.000 cases, *see*: "The judicial arm of the occupation: the Israeli military courts in the occupied territories", p. 395.

[150] Military Order 1651, Article 10 (A).

Read in conjunction, the subsections afford the military courts extensive jurisdiction over offenses in the area allowing it to overtake the functions and jurisdiction of "lawfully convened" courts or specially assigned courts or tribunals regardless of whether the offending behaviour took place before or after the entry of IDF forces into the region. The following subsection D grants the military courts the right assume the role of local courts for all offences subject to their jurisdiction.

Regarding areas outside of the direct control of the IDF, subsections E to G of Article 10 concern the extraterritorial jurisdiction of the military courts in relation to *Area A* (territory within the West Bank officially considered to lie outside the jurisdiction of Israeli forces) and the world at large. These provisions authorize the adjudication of offenses mentioned in Subsection A over any person suspected of committing a criminal act "which harmed or was intended to harm the security of the region".[151] These provisions combined with the widespread application of other methods of assuming both territorial and extraterritorial jurisdiction (for example, the protective principle and by requiring only that an offence be only partially committed in the region to assume territorial jurisdiction) would appear to invest almost unlimited jurisdictional authority to the military courts.[152]

Reading Article 10 as a whole, the military courts thus have authority to adjudicate all persons suspected of behaviour contrary to any law or security legislation applicable in the area prior to and after the entry of IDF forces into the West Bank if these acts harmed or were held to be intended to harm the security of the region. The Order contains no clarification as to which criminal acts can be considered to be intended to harm the security of the region. As stone throwing is considered a security offence, the jurisdiction of the military courts consequently also covers incidents of stone throwing within *Area A.*[153]

Deliberating the full implications of this almost all-encompassing jurisdiction of the military courts lies outside the scope of this study. However, certain issues certainly deserve mention at this point: the jurisdictional provisions of Military Order 1651 of the courts appear not to be restrained by the prohibition of retroactive legislation nor for that matter the prohibition of analogy.[154] This is obvious in the language of subsections A to C of its Article 10. Moreover,

[151] Subsection E pertains to acts committed outside the region which would be considered an offence if commited in the region and harmed or was intended to harm the security of the region or public order, whilst Subsection F subjects inhabitants of *Area A* to identical conditions for the institution of the jurisdiction of the Courts but suspends with the public order intent requirement.
[152] For furhter consideration on this subject *see* "The Judicial Arm of the Occupation" *supra note 8.*
[153] This is defined in the Annex to Military Order 1651, cited in "No Minor Matter", p. 6.
[154] As prohibited for instance in Articles 14 and 15 of the ICCPR.

the extraterritorial jurisdiction exercised toward the inhabitants of *Area A* contravenes a binding legal agreement between the State of Israel and the Palestinian Authority which gave full jurisdictional authority to the latter.[155]

The military courts have jurisdiction both territorial and extraterritorial over offences contained in security legislation enacted by the IDF. Moreover, their jurisdiction has been expanded to try other delicts of a purely criminal nature as well as minor offences such as traffic violations.[156] In fact, roughly half of the caseload of the military courts consist of minor offences unrelated to the security of the Israeli forces.[157] This arrangement stands at odds with Articles 64 and 66 of the fourth Geneva Convention requiring that unless prevented by security imperatives or major deficiencies in the national judicial institutions, persons living under occupation should continue to be judged by their own nationals for offences committed.[158]

While jurisdictional rules might be considered technical issues they retain fundamental importance in ensuring a fair trial.[159] An adjudication otherwise strictly adhering to international rules of a fair trial can nevertheless violate the rights of the accused when judges decide to apply a law exceeding its authority.[160] Failing respect for jurisdictional limits, a legal system may lose its viability as one tasked with regulating justice and emerge as a tool for legitimating domination and punishment disguised as the rule of law.[161]

These issues would seem to cast in question the very legal system used to try Palestinian minors suspected of throwing stones. A court system with apparently unrestricted jurisdictional authority cannot be seen as fully legitimate.[162] Certainly not when measured against the provisions of international humanitarian law which severely restricts the jurisdictional authority of these courts.[163] Nevertheless, as these courts are responsible for administering justice over Palestinian minors it is pertinent to examine the content of the rules by which they are governed.

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[155] "The Judicial Arm of the Occupation", p. 403: The Agreement in question is the Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, Washington DC, September 28, 1995, Article XIII, Section 1 thereof gives full jurisdictional authority to the Palestinian Authority.
[156] "Backyard Proceedings" pp. 45-47.
[157] *Ibid.*
[158] The Fourth Geneva Convention: for further discussion *see: Commentary to the fourth Geneva Convention,* Articles 64 and 66 and "Backyard Proceedings" pp. 41-45.
[159] "The Judicial Arm of the Occupation: the Israeli Military Courts in the Occupied Territories", p. 397.
[160] "The Judicial Arm of the Occupation", p. 403
[161] *Ibid.*
[162] "Backyard Proceedings", pp. 31 *et seq.*
[163] *Ibid.*

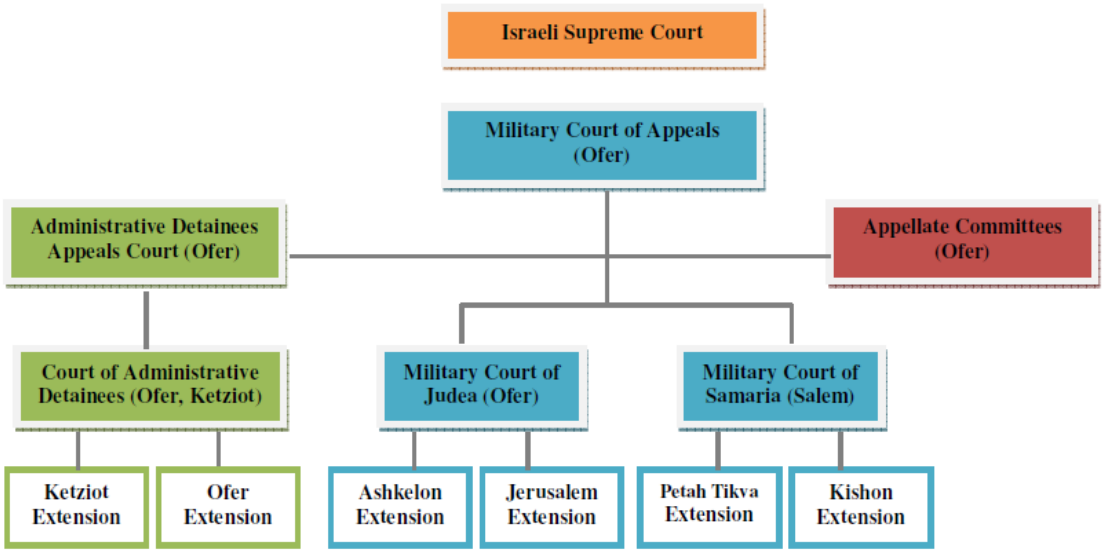
2.2. The Distribution of the Military Courts

The number and location of the military courts in the West Bank has varied throughout the years of the occupation in line with political and security related developments.[164] Currently, two courts of first instance and one appellate court are operational to try Palestinians, including children from the West Bank, for those offences under their jurisdiction.[165] The Israeli Supreme Court can be petitioned as a last instance court on a limited number of legal issues, then serving as the High Court of Justice.[166]

Defendants residing in the northern part of the West Bank are tried by the Military Court of Samaria, located in a military base in the vicinity of Salem village.[167] Defendants residing in the southern part of the West Bank are tried by the Military Court of Judea situated in the Ofer Military base close to Ramallah.[168] The Military Court of Appeals and the Administrative Detention Court also operate within the Ofer Military Base.[169] Moreover, branches of the military court system are operated inside Israel. These courts are located in the vicinity of interrogation facilities run by Israeli General Security Services (GSS) and mainly deal with detention hearings.[170]

[164] "The Judicial Arm of the Occupation: the Israeli Military Courts in the Occupied Territories", p. 396.
[165] *Ibid;* "Bound, Blindfolded and Convicted-Children in Military Detention", p. 15.
[166] "Backyard Proceedings", p. 26.
[167] *Ibid*, p. 40.
[168] *Ibid.*
[169] *Ibid.*
[170] "Backyard Proceedings" p. 41; It should be noted that operating courts within Israel violates Article 66 of the fourth Geneva Convention which demands that military courts be located within the occupied territory.

Distribution of the Military Courts (2009)[171]



The location of the "Extensions" or branches of the military courts which operate within Israel (blue outline) are subject to some controversy.[172] Firstly, it is noted that Israel is bound by Article 66 of the fourth Geneva Convention which requires that military courts only be operated within occupied territory.[173] Moreover, travel restrictions faced by Palestinians residing in the West Bank render it practically impossible for them to travel to Israeli territory.[174] Consequently, the families of defendants in these proceedings are prevented from appearing in their trials.[175] Additionally, Palestinian defence attorneys are hindered in their ability to defend their clients in these proceedings (most detention centres are located within Israel as well).[176]

Consequently, this situation runs afoul of Article 14 (3) (b) of the ICCPR which requires prompt access to legal assistance providing adequate time and facilities for the preparation of the

[171] "Presumed Guilty: Failures of the Israeli Military Court System -An International Law Perspective", Addameer Prisoner Support and Human Rights Association, November 2009." (*hereafter:*Presumed guilty), Appendix I; This structure is substantiated in: "Backyard Proceedings" p.40.
[172] *Ibid*, p. 41.
[173] Fourth Geneva Convention, Article 66.
[174] "Backyard Proceedings", p. 41.
[175] *Ibid.*
[176] *Ibid:* Nancy Glass and Reem Salahi, "Defending Palestinian Prisoners: A report on the Status of Defense Lawyers in Israeli Courts", Addamer, January 2007, pp. 10-14.

defendant´s defence as well as the corresponding Article 40 (2) (b) (ii) of the CRC while the exclusion of parents from the legal process is proscribed by its Article 40 (2) (b) (iii).[177]

2.3. The Structure and Composition of the Courts

Military judges and prosecutors must be members of the IDF in either active or reserve military service and they are appointed by the IDF commander of the West Bank. Prosecutors are normally selected from IDF legal staff, they often have an Israeli law degree and hold the rank of lieutenant.[178] Military judges are selected by a committee of seven members chaired by the President of the Courts-Martial Appeals court.[179] The committee selects judges from the IDF´s legal staff which must at least have the rank of major, except for the Court´s presidents which must have attained the rank of lieutenant colonel.[180] Each judge must have at least five years of military legal experience.[181]

Since 1967, military judges and prosecutors were both subordinated to the IDF´s highest ranking legal officer, the Military Advocate General (MAG).[182] However, as this was considered detrimental to the equality between prosecution and defence the system was changed in April 2004.[183] Consequently, whilst the MAG retained authority over the military prosecution service, the authority over administering the military courts was transferred to the Israeli Courts-Martial Unit.[184] Thereunder, a Military Courts Unit was established, headed by the Presiding Judge of the Military Court of Appeals, an IDF officer with the rank of colonel.[185]

Whilst headed by the MAG, the prosecution service is administered with the assistance of a Legal Advisor and a Head Prosecutor for the West Bank. They are responsible for supervising the Head Prosecutors of the Military Courts who in turn supervise all other prosecutors within the system.[186] The MAG meets regularly with chief prosecutors where policy decisions, such

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[177] For a detailed discussion on the content of these provisions *see: Committee on the Rights of the Child, "General Comment No. 10 – Children´s rights in juvenile justice", CRC/C/GC/10, April 25, 2007,* paras. 49 *et seq.*
[178] Military Order 1651, Art. 75; "The Israel Military Court System in the West Bank and Gaza, p. 208.
[179] Military Order 1651, 13 (A) 1.
[180] Military Order 1651, Art. 11.
[181] *Ibid.*
[182] "The Israeli Military Court System in the West Bank and Gaza", p. 207; "Backyard Proceedings", p. 39.
[183] *"Backyard Proceedings", p. 39.*
[184] *Ibid.*
[185] "Backyard Proceedings, p. 30; "Presumed Guilty", p. 7.
[186] "The Israel Military Court System in the West Bank and Gaza, p. 208.

as instructions as to how to handle specific types of cases, are made. [187] Moreover, the MAG is advised by the operational side of the IDF through regular meetings with field officers.[188]

The administrative composition of the Courts depends on the seriousness of the offences tried.[189] In the first instance, cases where penalties do not exceed ten years imprisonment are presided over by one judge.[190] A panel of three judges preside over more serious offences where penalties range from ten years to life imprisonment and capital punishment.[191] While the Appellate Court is usually comprised of three judges their number can be raised to a five person panel. In appellate detention hearings and some other cases the court can consist of one judge.[192]

2.4. "Legal Experience"

It must be considered imperative that the persons tasked with the administration of justice with a jurisdiction of the nature possessed by the military courts, have a solid education in the administration of criminal justice. Indeed, the level of judicial experience possessed by the members of the military courts has been heavily criticised, even by its own.[193] Atty. Daniel Friedmann, who served as a reserve judge in the military courts observed in a meeting with the Israeli Bar Association that:

> *"The main problem is that judges in the Military Courts are not professionals- they have not taken any judicial courses. Generally speaking, they are attorneys, most of whom are reservists. It makes a difference whether your chosen profession is that of a judge or attorney. The fact that non-professional judges are serving has an impact.* [194]

It was once the case that panels of military judges would consist of lay judges, presided over by those with legal background.[195] The use of lay judges who would be regular officers in the army was discontinued after some of them publicly described how they did not really have any

[187] "The Israel Military Court System in the West Bank and Gaza, p. 208.
[188] *Ibid.*
[189] Military Order 1651, Arts. 16 and 17. According to data afforded by the IDF Spokesperson to Yesh Din, the courts of first instance and the appelate courts were staffed with 14 permanent judges and 140 reservist judges at the end of 2006.
[190] *Ibid*, Art. 17 (C).
[191] Military Order 1651, Art. 16.
[192] Military Order 1651, Art. 19.A.
[193] "Defending Palestinian Prisoners", p. 22.
[194] "Backyard Proceedings" p. 49, citing a Statement by Daniel Friedman at a meeting of the Military and Security Committee of the Israel Bar Association: minutes dated July 2, 2003.
[195] "The Israel Military Court System in the West Bank and Gaza, p. 208.

part in the actual decision making of the courts.[196] Since then, military judges only consist of officers with a legal background.[197]

However, critics consider this to fall short of ensuring that only fully qualified individuals be tasked with judging offenders in the military courts. This is because the problem addressed by Friedman has not been ameliorated.[198] Lack of professionalism in court staff devalues their credibility as administrators of justice. Furthermore, judges lacking solid basis in criminal law and court procedure suffer a loss of the independence and impartiality gained by the full knowledge of the law.[199]

2.5. Independence and impartiality

Article 8 of Military Order 1651 addresses judicial independence, stating that only the authority of the law and security legislation holds authority over military adjudication.[200] An additional safeguard to their independence is provided in Article 14 of the same order which regulates when the tenure of judges can be terminated.[201] According to this Article, a judge´s tenure can only be terminated without his consent for a finite list of reasons: Upon a doctor´s confirmation that the judge is too ill to effectively administer his duties: if a reserve judge completes his reserve service: if his tenure is terminated by the selection commission responsible for appointing judges.[202]

Moreover, separating the command structure of the military judiciary from the prosecution was an important step in ensuring the independence of the military court system.[203] However, despite the recent transfer of authority, judges and prosecutors are still appointed by the same person: the IDF commander of the West Bank (upon whose authority Military Orders are also enacted). Finally, as both judges and prosecutors are members of the Israeli armed forces and thus subject to its chain of command.[204]

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[196] Amos Harel, "The Military Courts in the Occupied Territories: Judges with No Legal Education Pass Sentences of Imprisonment, Haaretz, December 16, 2001.
[197] "Backyard Proceedings" p. 50.
[198] *Ibid*, p. 51.
[199] "Defending Palestinian Prisoners". P. 21.
[200] Military Order 1651.
[201] *Ibid.*
[202] *Ibid.*
[203] "Backyard Proceedings" p. 47.
[204] "The Israeli Court system in the West Bank and Gaza", p. 208; "Backyard Proceedings", pp. 47-55.

Indeed, it is questionable whether military courts presided over by members of an occupying army could ever really be described as impartial towards the inhabitants of the occupied territory.[205] If they are to do so credibly, their proceedings must be subject to some form of review and open to public scrutiny. After all, justice must not only be done, it must also be seen to be done.[206]

However, the public is largely prevented from scrutinizing the courts conduct because most military judgments are not made public. The military courts only publish selected judgments of the military court of appeals which are not readily available to the public.[207] In fact, defence attorneys encounter difficulties in staying updated on the case law of the courts. They often hear of new developments through other colleagues and must go to great length to obtain recent jurisprudence. The unavailability of judgments contributes to legal uncertainty and hinders the ability of defence attorneys to provide their clients with effective representation. [208]

The need for some form of independent review on the proceedings of the military courts is even more important considering the often limited judicial experience possessed by the persons administering them. Nevertheless, Military Orders do not envision any form of independent review of the conduct of the courts.[209] To that end, the military court of appeals is considered a sufficient safeguard. Moreover, the High Court of Justice is mentioned in this connection as a last resort. [210] It should be noted however that the High Court of Justice limits its jurisdiction to administrative causes, *i.e.* issues of reasonableness and jurisdictional considerations. The Court is therefore not equipped in providing effective supervision to the military courts.[211]

2.6. The Military Court System: Some Conclusions

In conclusion, it can be said that the Israeli military courts need some improvement for them to become a trustworthy justice system, especially for the Palestinians. The far reaching and vaguely regulated nature of their jurisdiction allows the courts to conduct trials over any offence committed in the West Bank and in some cases even outside the region. Vaguely defined limits

[205] *See general to this effect:* General Comment No. 13 on Article 14 ICCPR, UN Human Rights Committee, April 12, 1984, UN Doc. HRI/GEN 1/ Rev. 1.

[206] This apt quote was first coined in the English Kings Bench by Lord Chief Justice Hewart in the *case R v Sussex Justices, Ex parte McCarthy* ([1924] 1 KB 256, [1923] All ER Rep 233)
[207] "Backyard Proceedings", pp. 118-121; "Defending Palestinian Prisoners" pp. 21-22.
[208] *Ibid.*
[209] "Backyard Proceedings", p. 26.
[210] *Ibid.*
[211] "Backyard Proceedings", p. 26.

to jurisdiction devalue the legitimacy of the courts purporting to administer justice in this area as it contributes to legal uncertainty when failing to limit their authority.

An additional hurdle to legal certainty lies in the lack of oversight to the case load of the military courts. An effective oversight mechanism would contribute in furthering the somewhat limited professional skills of court staff, but no such mechanism exists. Clarity is further inhibited by the limited access to the jurisprudence of the courts rendering it exceedingly difficult to monitor judicial impartiality and to keep track of jurisprudential developments.

3. The administration of juvenile military justice

The creation of juvenile military courts is unprecedented in international law.[212] Military Order 1651 therefore pioneered this process in 2009 by creating one through temporary order and later continuing their existence through permanent amendment.[213] According to the Order, the trials of first instance of suspected minor offenders aged 12 to 18 are to take place in juvenile military courts.[214] Aside from the first instance however, minors are tried through ordinary procedure. That is to say, arrest and detention hearings as well as appellate proceedings are still presided over by the ordinary Military Courts.[215]

Under Military Order 1651, judges who preside over minors should have received appropriate training in dealing with juvenile offenders.[216] Moreover, procedures regarding notification of arrest of a juvenile suspect exist in military legislation and provisions providing for their separate detention from adults are in force.[217] Aside from these considerations however, in practice, the military juvenile courts utilize the same court staff and facilities as the adult military courts and for the most part, minors are subject to the same rules and procedures as adults.[218]

[212] "No Minor Matter", -Official Response of the Military Courts to the B´Tselem Report, p. 68.
[213]This Order will be called: "Order regarding Security [Combined Version] (Amendment number 10) (number 1676) 5771-2011 (*hereafter*: Amendbment 1676).
[214] Military Order 1651, Article 137.
[215] Military Order 1651, Article 38 (B).
[216] Military Order 1651, Article 137.
[217] Amendment 1676, Amendment 5.
[218] "Bound, Blindfolded and Convicted-Children in Military Detention" DCI Palestine, Report, April 2012. p. 17.

3.1. Arrest

Arrest orders can be issued by a judge, a police officer or, in combat situations, by an IDF officer with the rank of captain.[219] Soldiers are authorised to carry out arrest orders as well as having authority to arrest persons without an arrest order if they have cause to suspect that a person has committed an offence under Military Order 1651.[220] There is no requirement of reasonable suspicion nor are soldiers required to conduct investigations into offences.

Moreover, the Order stays largely silent as to how arrests should be conducted and detainees should be treated. The IDF does have guidelines to this effect but they are not publicly available. Consequently, when describing the conduct of arrest, reference will be made to interviews with former IDF soldiers as well as to reports conducted by NGO´s and IO´s where appropriate, in order to illustrate accepted practices.

While Military Orders do not regulate the time of arrest nor dictate their conduct, extensive studies have shown that minors are most often arrested in their homes between midnight and six in the morning by several armed soldiers.[221] All the residents in their home are made to leave the house as/before the arrest takes place. Reasons for arrest are generally not given nor are arrest warrants presented.[222] When apprehensive of the fate of their children, parents are often placated with promises that the soldiers will bring them back soon, when in reality this might not happen for several months.[223]

Being woken up by a group of armed soldiers entering their home is an extremely traumatizing experience for minors and is widely considered as constituting torture or degrading treatment as it is designed to frighten or terrorise the minor.[224] The response of the army to this criticism has been that night time arrests are sometimes imperative to the security of the armed forces.[225]

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[219] Military Order 1651, Arts. 32, 33 and 34.
[220] *Ibid*, Arts. 30 and 31.
[221] UNICEF Report, p. 10; "Bound, Blindfolded and Convicted", pp. 25-29, "No Minor Matter", pp. 26-29.
[222] *Ibid.*
[223] "No Minor Matter", p. 27.
[224] Committee on the Rights of the Child, "Consideration of reports submitted by States parties under article 44 of the Convention – Concluding observations: Israel", CRC/C/15/Add.195, October 9, 2002 at para. 36: UNICEF Report, p. 10; "Bound, Blindfolded and Convicted", pp. 25-29, "No Minor Matter", pp. 26-29. As to the mental effects caused by this behaviour, *see:* Graciela Carmon, M.D., Psychiatric Expert Opinion, "Coerced False Confessions: The Case of Palestinian Children", Psychiatric Expert Opinion, May 2011.

[225] "No Minor Matter"- Official Response of the Military Prosecutors Office to B'Tselem´s report, p. 74, para. 15.

While arrest in homes during the night are the most common means of arresting minors they are not the only points of arrest. Other examples exist that also give cause for some concern. For example, in response to many reports of stone throwing in the proximity of a certain Palestinian village, every inhabitant under the age of 50 (and excluding the youngest children under 10) were arrested and brought to a local school.[226] Detainees were kept there for more than twelve hours, all of them handcuffed and many of them subjected to abuse during their detention. Soldiers guarded the villagers until officers of the Security Service arrived to collect suspects.[227] It is not uncommon that many people or many minors are rounded up in response to stone throwing incidents. Routinely, the military rounds up several, up to twenty minors in areas where stones are thrown and detains these children at gunpoint, interrogating them in order to determine which children are responsible for the incidents being reported.[228] Subsequently, some if not all of the minors are arrested on suspicion of stone throwing.[229]

Sometimes, minors are arrested because they are seen running away from military vehicles, considered by some soldiers to be evidence of their guilt for stone throwing.[230] In other instances, minors are arrested because they appear the closest match to the description given by an informant or a settler, but no official identification takes place and many soldiers express doubt as to whether those detained were actually the ones throwing stones.[231] In some cases, Palestinian minors are arrested simply for annoying a soldier, smiling at him or being in their way.[232] Considering the very low procedural threshold for arrest combined with the lack of effective oversight over the conduct of these arrests within the system, conditions are ripe for abuse and the likelihood of arrest being arbitrary in nature is considerable.[233]

An additional cause for concern is the use of restraints when conducting arrests. In nearly all cases the hands of minors are tied with one plastic strap behind their back and they are blindfolded.[234] Minors usually remain blindfolded and shackled for the whole duration of their

[226] Breaking the Silence, "Children and Youth – Soldiers Testimonies 2005-2011", www.breakingthesilence.org.il., (*hereafter:* Breaking the Silence), pp. 18-19, the soldier estimated that approximately 150 villagers had been detained that night.
[227] *Ibid.*
[228] *Ibid*, p. 70.
[229] *Ibid.*
[230] *Ibid*, p. 13.
[231] *Ibid.* p. 71.Other reports of doubt can be found at pp. 13 and 9.
[232] *Ibid*, p. 37.
[233] This is collaborated by the reports of the former soldiers in Breaking the Silence, out of 47 interviews conducted regarding the treatment of minors, hardly any did not involve accounts of violence of some form being exacted upon minors by the hands of soldiers.
[234] "Bound, Blindfolded and Convicted", p.7, "Children in Military Custody" p. 36: UNICEF Report, p. 7; "In their own Words: A report on the situation facing Palestinian children detained in the Israeli military court

transportation to interrogation.[235] Transportation can take up to two days, with stops in settlements, where minors often report they were beaten, threatened, exposed to the elements and denied food, water and trips to the bathroom.[236] Others report being kept on the floor of the army vehicle transporting them and many soil themselves out of fear or because they have not been permitted to use the bathroom.[237] Soldiers involved with this procedure report that detainees were sometimes a source of entertainment to the soldiers, some having their picture taken with the blindfolded prisoner.[238]

While generally speaking it should not be considered acceptable to allow soldiers to conduct the arrest of minor suspects, it is worth mentioning that some progress has been made in the treatment of juvenile detainees.[239] In response to a report made by an NGO criticising the conduct of arrest of minors, the Israeli government held that a suspect's minority is in fact taken into account. To arrest a minor, permission from a head prosecutor is required although no references were given to the provision demanding this and no information was furnished on the criteria used by the prosecutor to decide on giving permission either.[240]

Another improvement was made in response to complaints made by the Public Committee Against Torture in Israel when the army issued guidelines aimed at minimising the pain incurred by the use of plastic straps as restraints on minors. The procedure requires that hands be tied with three plastic straps instead of one and that hands be kept in the front rather than behind a detainees back.[241] Nevertheless, supervision is limited and there is little evidence to show that this procedure is complied with in practice.[242]

Military Order 1676 saw another improvement enacted, which required that a minor´s parent or guardian be notified of his or her arrest "as soon as possible" upon their arrival at a police

system", DCI Palestine, Reporting period: 1 January to 30 June 2011, submitted, July 19, 2011, p. 4. These accounts are also widely corraborated in Breaking the Silence testimonies at: pp. 9, 12, 14, 15.
See extensive coverage of this practice in:Atty. Samah Elkhatib-Ayoub, "Shackling as a Form of Torture and Abuse", The Public Committee against Torture in Israel, Periodic Report: June 2009.

[235] Concluding Observations of the Committee on the Rights of the Child, Israel, 2002, para. 33 where the Committee notes with some concern that plans are in motion to incorporate juvenile justice standards within military courts.

[236] "Bound, Blindfolded and Convicted", pp. 30-32: UNICEF Report, p. 10.

[237] *Ibid.*

[238] Breaking the Silence, pp. 21, 56, 66.

[239] "No Minor Matter", -Official Response of the Military Courts, in response to the Report of B'Tselem p. 68.

[240] "No Minor Matter", - Official Response of the Military Prosecution Service to the Report of B´Tselem, p. 73, para. 9 where it states that military prosecutors conduct supervision over arrests of a minor "over and above the required supervision by law. As such, the arrest of a minor required the authorization of a senior judicial official who is not part of the investigative body."

[241] UNICEF Report, p. 7.

[242] *Ibid.*

station.[243] Considering that it can sometimes take days to transport the minor detainee to a Police Station or interrogation centre, parents are often unaware of the whereabouts of their children for a long time, sometimes not knowing they have been arrested and unaware of their fate until notified by the police.[244]

An additional response to criticism was made when a provision was added requiring that if a minor can name an attorney, said attorney will be notified of the details of the investigation. However, this improvement comes with the *caveat* that notification will not delay the investigation.[245] Another drawback of this provision is that it assumes the unlikely eventuality that the minor can name a lawyer.[246]

While it is laudable that the IDF has responded to criticism on this front by amending some procedures as they relate to minors these still fall short of ensuring just treatment of Palestinian minors. In practice, no significant differential treatment exists between conducting the arrest of a juvenile suspect to that of an adult. The often terrifying conduct of arrest, with soldiers invading their home in the middle of the night, followed by harsh and often abusive treatment by soldiers during transportation, is violent and terrifying to the minor.

Indeed, the Committee on the Rights of the Child have characterized this treatment as torture and commented that the experience is likely to cause significant psychological damage to the minor. Moreover, psychiatrists have noted that the violent nature of these arrests can contribute to a minor surrendering into giving a false confession while under interrogation. [247] The psychological effects on minors of the methods of arrest therefore serve as *segue* to the next step in the process, one which is likely to have an even more profound effect on their mental state, namely, detention.

3.2. Detention

Prison conditions and family separation weigh more heavily on a minor than an adult and it is internationally recognized that incarceration should only be used as a measure of last resort

[243] Military Amendment 1676, Art. 136 (A).
[244] "Bound, Blindfolded and Convicted", pp. 19 *et seq.*
[245] Military Amendment 1676, Art. 136 (C).
[246] "No Minor Matter" p. 34:"Bound, Blindfolded and Convicted", p. 19.
[247] *See Supra note* 228 and Committee on the Rights of the Child, "General Comment No. 10 – Children´s rights in juvenile justice", CRC/C/GC/10, April 25, 2007, para. 57.

when dealing with juvenile offenders.[248] The Convention on the Rights of the Child contains several provisions regarding the treatment of juvenile offenders in detention which are aimed at minimizing the traumatizing effects of detention.[249] A central tenet thereof is to separate minors from adult detainees. Additionally, minors should be represented by counsel during interrogation and be thoroughly informed of their rights and duties in the criminal process.[250]

Whereas Military Order 1651 and its Amendment No. 1676 contain some provisions concerning the treatment of minors in detention, these are subject to severe restrictions and exceptions and fall short of ensuring the rights of minor offenders as they are foreseen in the Convention on the Rights of the Child. Consequently, the following sections will elaborate on how those procedural rights relating to detention that are granted in Military Order 1651 are largely negated by their ambiguous wording and the wide discretion given to IDF officers to disregard them when they consider it to be in the interest of "the security of the region or the interest of the investigation".

3.2.1. Rights Relating to Detention under Military Order 1651

Under Military Order 1651, minors have a right to consult with an attorney and should be notified of their "obligations as a suspect" in a manner deemed appropriate by the Police Commander.[251] Minors have the right to challenge the legality of their detention and should charges be brought against them, a judge is authorised to order that they should be released on bail pending their hearing.[252]

While Military Order 1676 expressly states that a minor has the right to consult with an attorney in private, it holds no mention as to when said consultation is to take place.[253] Indeed, practice has shown that minors rarely meet with a lawyer before they appear in court as Military Order 1651 grants Police Officers as well as military judges the authorisation to defer a detainee´s meeting with a lawyer for up to 90 days.[254]

[248] Article 37 CRC: General Comment No. 10, paras. 28 and 29.
[249] *Ibid.*
[250] *Ibid*, para. 58.
[251] Military Amendment 1676, Amendments 5 and 6.
[252] Military Order 1651, Articles 29-47.
[253] *Ibid.*
[254] "Children in Military Detention", para. 65.

Specifically, Police Officers can prohibit a meeting with an attorney for thirty days in total, if he or she is of the opinion that allowing such a meeting would endanger the security of the region or inconvenience the interrogation of the suspect.[255] A judge can then order deferral of additional thirty days for the same reasons.[256] Ninety days of incommunicado detention is however only allowed if the president or vice president of the Court of First Instance receive written confirmation from the IDF Commander of the region that "special reasons of security of the region necessitate this".[257] Consequently, the military has wide discretion to determine whether a detainee be allowed access to an attorney. Such unchecked authority is open to abuse as there are no independent criteria to determine the reasonableness of such decisions.

Even if such an order is not in place against the minor suspect, the circumstances prevailing in the area often prohibit an attorney from meeting with their client. Considering that minors have more difficulties in understanding the criminal legal process than adults this arrangement is detrimental to the welfare of the minor subjected to it.[258] Without legal counsel, the minor is unaware of his rights and is left in uncertainty regarding his future. This leaves the minor vulnerable to abuse and likely to render false confessions once interrogated. [259]According to the Committee on the rights of the Child, it is absolutely imperative that a child be assisted by legal counsel at the commencement of interrogations at the latest.

3.2.2. Interrogation

Usually, arrested minors are taken to one of eighteen interrogation and detention centres, many of which are located within Israel.[260] As has been noted, minors have a theoretical right to consult with a lawyer but there is no provision mandating that this happen before their interrogation or that lawyers be present during the investigation. Indeed, various NGO reports note that as a rule, a lawyer is not present during the interrogation of minors.[261]

[255] Military Order 1651, Art. 58 (C) and (D).
[256] *Ibid*, Art. 59 (B).
[257] *Ibid*, Art. 59 (C).
[258] General Comment no. 10, para. 58.
[259] *Ibid*. Para. 52.
[260] "Presumed Guilty: Failures of the Israeli Military Court System -An International Law Perspective", Addameer Prisoner Support and Human Rights Association, November 2009. p. 6.
[261] "Children in Military Detention", para. 68.

There is further no provision for the presence of a parent or guardian during interrogation, nor is audio visual recording required.[262] Palestinian minors have the right to silence but there is little evidence that they are generally sufficiently informed of the meaning of said right.[263] Finally, it should be noted that although there is a provision requiring that a suspect sign their confession or the report of their interview, there is no corresponding provision that the document must be in a language which they understand and there are consistent reports of minors being required to sign documents in Hebrew.[264]

In general, it can be stated that Palestinian minors are afforded with insufficient procedural safeguards in relation to their interrogation.[265] This is particularly worrisome as the vast majority of convictions are based on a minor´s confession obtained through interrogations which have widely been described as essentially coercive in nature. Supporting evidence is most often statements made by other minors under the same conditions, along with the testimonies of soldiers.[266]

3.2.3. The Right to Challenge the Legality of Detention

A person arrested without an arrest order can be held in detention for 96 hours before such an order must be issued.[267] Should such an order be issued by a police officer, a person can be detained for eight days.[268] Such an order can be contested before a judge by the detainee. Should a military judge issue the arrest order however, he or she can order the remand of a detainee without charge for a combined total of up to six months.[269] A detainee can appeal such an order to the Military Court of Appeals which has complete discretion to determine the proceedings of the appeal as well as the presence of the litigants.[270] Recently, the IDF enacted an amendment to this rule relating to minors in detention, requiring them to appear before a judge within four days after arrest.

[262] *Ibid*, p. 7.
[263] *Ibid*, paras. 36 and 86.
[264] Military Order 1651, Art. 70 (C). "No Minor Matter", p. 30.
[265] "Children in Military Detention", para. 58.
[266] *Ibid*.
[267] Military Order 1651, Art. 31 (C).
[268] *Ibid*, Art. 32.
[269] *Ibid*, Arts. 36 and 37.
[270] *Ibid*, Art. 45.

3.2.4. Release on Bail – Detention until Trial is completed

Once charges have been brought against a minor suspect, a judge is authorised to release him or her on conditions of bail or to continue detaining them until the completion of their trial.[271] Whilst release on bail is envisioned in Military Order 1651, practice shows that the provision allowing for the detention of a detainee until the completion of their trial is the one favoured by military judges.[272] A minor can be held in detention without a conclusion to their trial for up to 2 years, after which the Military Court of Appeals must reconsider the requirement to sustain the detention.[273] Should the appellate court decide to do so, there is no maximum limit as to when a verdict must in fact be reached.[274]

3.3. Trial

Considering that judgments of the military courts are generally not made public the conduct of trials can-not be fully examined in this section. However, there are some provisions regarding the conduct of trials that are interesting to look at. Amongst these are the Court´s rules of evidence; the burden of proof; the language used at trials; the right to appeal and the conduct of plea bargaining. This last aspect will receive particular attention as the overwhelming majority of cases end by conviction through plea bargains.[275]

3.3.1 Rules of Evidence

The Military Courts are to use the same rules of evidence as Israeli Criminal trials.[276] However, judges are authorised to use any other trial procedure they believe would be in the interest of a

[271] *Ibid*, Arts. 42 and 43.
[272] "Children in Military Detention" para. 76 where it is stated that approximately 90% of cases result in such a verdict.
[273] Military Order 1651, Art. 44.
[274] *Ibid.*
[275] "Children in Military Detention", para. 80.
[276] Military Order 1651, Art. 86.

fair trial.[277] Moreover, judges can order the non-disclosure of certain evidence if certified by a Military Officer that disclosure would endanger security of the region or of the witness, as the case may be.[278] Consequently, according to Military Order 1651, the military courts have full discretion to determine the procedural rules applied in their courtroom and can further decide to exclude any evidence from the purview of the defence in the interest of vaguely defined security considerations.

3.3.2. The Burden of Proof

The burden of proof is reversed in military trials. That is to say, the defendant must prove that "his matter is exempt, permitted or justified, or that he possessed a license, permit, approval or authorization" for any behaviour believed to be in contravention to the law.[279] This arrangement runs contrary to the presumption of innocence guaranteed in both the CRC and the ICCPR which demands that the prosecution must prove that a defendant violated the law rather than the opposite: that the defendant must prove his or her innocence.[280]

3.3.3. Translation

Trials are normally conducted in Hebrew but defendants have the right to a translator.[281] These are usually hired from the Druze community. Druze translators are soldiers serving compulsory military duty and are bilingual: Arabic is their native language and they have learned Hebrew in their compulsory education.[282] They are not trained interpreters and are tasked with a wide array of other duties during the conduct of trials, such as organising the court schedules and leading defendants in and out of courtrooms.[283]

Because of their lack of education as interpreters and the heavy burden of other duties imposed on the translators the quality of their work suffers. Most are not versed in Hebrew legal language

[277] *Ibid*, Art. 88.
[278] *Ibid*, Art. 87.
[279] *Ibid*, Art. 208.
[280] Articles 40 and 14, respectively. *See also:*General Comment no. 10, para. 42.
[281] Military Order 1651, Article 19.
[282] "Backyard Proceedings", pp. 144-156.
[283] *Ibid.*

and defence attorneys often complain of unqualified translations.[284] Consequently, defendants which mostly do not speak the Hebrew language are prevented from fully understanding the proceedings against them. This violates their right to be tried in a language they understand or else be assisted by an interpreter to do so.[285]

3.3.4. Plea Bargaining

The overwhelming majority of cases ends in conviction through plea bargaining or approximately 90-97% of all cases.[286] Trials in which a full hearing was held, including the examination of witnesses and evidence are consequently very rare, with a report showing that this happened in only 1,2 % of cases processed in 2007.[287] Defence attorneys report that they advise their clients to accept a plea as this will invariably lead to less prison time.[288]

Plea bargains are attractive to all participants in this process. The courts approve of this practice because it helps unload the very high number of cases encountered by them and the same applies to prosecutors.[289] Defence attorneys often report that they feel they have no other option than to enter into a plea bargain, especially when defending a minor detainee.[290] This is largely due to the prevailing practice of detaining a minor until the end of the proceedings which due to the high case load of the courts can take considerably longer than the prison sentences minors can expect if they enter a plea.[291]

The resulting drawback of this practice is that minors who have not already confessed during interrogation are pressured into doing so at the trial stage from all directions. Considering that all the participants of the process see this option as the quickest route out of detention for the minor the likelihood is very high that a minor would confess at this stage even if he has maintained his innocence so far.

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[284] *Ibid.* for a more comprehensive study, *see:* Lisa Hajjar (2000): "Speaking the conflict, or how the Druze became bilingual: a study of Druze translators in the Israeli military courts in the West Bank and Gaza", *Ethnic and Racial Studies*, 23:2, 299-328.
[285] Articles 14 and 40 of the ICCPR and the CRC respectively require this to be fulfilled.
[286] "Children in Military Detention" para. 80.
[287] "Presumed Guilty", pp. 17-19.
[288] "Children in Military Detention" para. 80.
[289] "No Minor Matter" Official Responce of the IDF Spokesperson to the Report of B´Tselem, p. 68, para. 6.
[290] „Defending Palestinian Prisoners" pp. 24-26:"Bound, Blindfolded and Convicted", p. 41.
[291] "No Minor Matter", Official Responce of the IDF Spokesperson to the Report of B´Tselem, p. 68.

3.4. Sentencing and Appeals

The right to appeal is conditional upon the approval of the Court of first instance in a one judge panel.[292] In a three judge panel, the right to appeal does exist but the authority to accept it remains with the appellate court. As most cases end with a plea bargained conviction, appeals of this kind are rarely resorted to. In some instances the Israeli High Court of Justice has jurisdiction to hear further appeals[293]

The conviction rate in the Military Court system is extremely high or 99%.[294] Although the Military Orders allow for a sentencing of up to 20 years imprisonment, studies show that minors are usually sentenced to a fine and imprisonment ranging from a week up to ten months.[295] It should be noted that while recently amended Military Orders restrict the length of permissible imprisonment of minors, they only do so in the case of children under the age of fourteen for the offence of throwing stones. Children under 14 can-not serve a longer sentence than six months imprisonment, whilst older children are subject to the same sentencing provision as adults. [296] Fines imposed usually average from the equivalent of 200-400 euros and failure to pay the fine can extend the prison sentence of the child in question.[297]

3.5. The Administration of Juvenile Military Justice: Some Conclusions

It is particularly worrisome that detention hearings largely take place inside Israel where family members of the detained as well as many defence attorneys are effectively prevented from attending the hearings. Out of the 18 detention facilities used to hold Palestinians, 17 are located within Israel. Trials to determine the legality of detention are conducted in courtrooms located in the vicinity of these centres which, because of travel restrictions, makes it practically impossible for the persons most concerned with the welfare and rights of the child to attend the trials and ensure some form of accountability in this respect.

[292] "The Israel Military Court System in the West Bank and Gaza" p. 208.
[293] *Ibid.*
[294] "Children in Military Detention", para. 80,
[295] "No Minor Matter", p. 18.
[296] *Ibid*, p. 15.
[297] *Ibid*, pp. 18-19.

In light of the low threshold required for the arrest of minors and without any specific criteria regulating when detention is justified the whole procedure becomes open to abuse.[298] The procedures governing the military courts only seem to compound the problems faced by juveniles accused of stone throwing. Confronted with a reversed burden of proof, loosely defined rules of procedure open to arbitrary decision making and often unable to understand the proceedings it is perhaps no wonder that most defence attorneys advise their clients to confess. The practice of detaining children until the end of proceedings not only violates their right to presumption of innocence, it adds to the pressure of confessing to an offence they may not have committed.

In this long standing conflict, both sides stand accused of acts of unspeakable violence. Tensions are high and so becomes the temptation to punish a person solely for belonging to the opposite party. Stone throwing has become the iconic form of resistance for Palestinians, especially young boys opposing the occupation. Regardless, the Israeli forces must ensure that when addressing this problem, they punish only those persons responsible for throwing the stone, not simply any one of the many belonging to the group most likely to do so.

In the recent past, the IDF has attempted to improve its conduct towards juvenile offenders within the military court system and does afford them with some procedural rights. Still, under the current legal framework, the danger exists that in a power relationship defined by one nation exercising authority as the occupying power of another, the former might exceed the limits of their power and abuse the rights of the population under occupation. The following section will consider whether the nature of this legal framework allows for and indeed leads to the imposition of collective punishment against Palestinian minors for throwing stones.

IV. Analysis

While the foregoing chapters described the legal framework governing the treatment of Palestinian minors accused of stone throwing this chapter will consider whether punishment for this offence as it is conducted in the West Bank could be construed as constituting collective punishment. This study does not purport to play the role of a court of law in this respect and the elements of the crime as they were established by the SCSL therefore only serve as the

[298] *I.e.* Art. 30 of Military Order 1651 only requires cause to suspect an offence to allow for arrest and the provisions regarding the hearings make no mention of any additional requirements.

frame of reference useful to determine whether these elements exist within the military court system.

Consequently, this chapter will begin by readdressing the constitutive elements of collective punishment before turning to their application to the subject under review: namely, the punishment of minors accused of stone throwing. To this end, the process encountered by the minors described in Chapter Three will be revisited under the considerations of the element of *actus reus* of collective punishment. Thereafter, Israeli State practice will be examined to determine whether indications exist as to the *mens rea* element of collective punishment. Once this has been accomplished, the chapter will provide some conclusions.

1. General Requirements

To invoke the scope of the prohibition of collective punishment, perpetrators must be actively participating in an armed conflict or the occupation of territory in the sense of the Geneva Conventions and their Additional Protocols.[299] That is to say, those engaging in the act must be members of the armed forces, agents of the State of Occupation or members of armed resistance groups, as the case may be.[300] Correspondingly, the victims of the act must be protected persons in the sense of the Conventions, *i.e.* the civilian population not taking active part in hostilities or the civilian inhabitants of a territory under belligerent occupation.[301]

2. Definition

The SCSL defined the elements of collective punishment as:

> *(i) The indiscriminate punishment imposed collectively on persons for omissions or acts for which some or none of them may or may not have been responsible and*

[299] Francoise Hampson in *Perspectives on the ICRC Study on Customary International Humanitarian Law (Online edition)*, ed. Elizabeth Wilmshurst and Susan Breau, Cambridge University Press, Book DOI: http://dx.doi.org/10.1017/CBO9780511495182, p. 299.
[300] "Collective Punishment", para. 1.
[301] *Ibid.*

(ii) The specific intent of the perpetrator to punish collectively.[302]

Considering that the origin of the prohibition stems from the universal respect for the requirement of individual criminal responsibility for the imposition of punishment, the *actus reus* of collective punishment must lie in inflicting punishment upon persons without establishing their guilt for any given offending behaviour.[303]

Such a construction resonates with the motives giving rise to the practice in the first place: The desire of hostile armies to suppress or deter acts of resistance within a civilian (occupied) population - the individual perpetrators of which being difficult if not impossible to identify - by punishing the community as a whole.[304] Considering its history it is evident that collective punishments were intended to subdue and terrorise a population to better control it, often under the guise of law enforcement.[305]

Although it would be desirable to include a requirement of fair trial guarantees in the definition of collective punishment, it would discredit the stated intent of the drafters of the rule to include in its prohibition all forms of punishment.[306] However, for individual criminal responsibility to be determined credibly, most cases would seem to call for adherence to the fundamental principles of fair trial. These would include guarantees such as the right to trial by a properly constituted independent and impartial tribunal with the assistance of legal counsel. Respect for

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[302] *CDF Trial Judgment*, para. 224; In the same case Justice Winter, departed from this, preferring to define the elements
as:
(1) An indiscriminate sanction directed against protected persons for their perceived conduct; and,
(2) The specific intent to punish persons or groups of persons collectively for their perceived Conduct.
Partially Dissenting Opinion of Honorable Justice Renate Winter, para. 46.
[303] "Prosecuting theWar Crime of Collective Punishment-Is It Time to Amend the Rome Statute?", pp. 29-30; "Collective Punishment", para. 10.
[304] "Prosecuting theWar Crime of Collective Punishment-Is It Time to Amend the Rome Statute?", pp. 29-30.
[305] "Prosecuting theWar Crime of Collective Punishment-Is It Time to Amend the Rome Statute?", pp. 29-30.
[306] ICRC Commentary to the Additional Protocols, p.1374: collective
punishments:

> "[Collective punishments] should be understood in its widest sense, and concerns not only penalties imposed in the normal judicial process, but also any other kind of sanction (such as confiscation of property) as the ICRC had originally intended. The prohibition of collective punishments was included in the article relating to fundamental guarantees by consensus. That decision was important because it is based on the intention to give the rule the widest possible scope, and to avoid any risk of a restrictive interpretation."

the principle of presumption of innocence is central in this respect and therewith the right to challenge the legality of detention.

Consequently, in contrast to the contention in the *AFRC Case* that "some semblance of due process" would ostensibly suffice to exonerate notions of collective punishment, the author is of the view that universally accepted principles of due process should serve as useful tools to evaluate indications of collective punishment in a given case.[307] These would appear most appropriate in ensuring the individual criminal responsibility of the accused and protect him from the intent of powerful armies to repress popular resistance "the easy way" that is, without finding the actual offenders, choosing rather to supress the entire population through arbitrary use of force. [308]

Turning then to the subjective element of the crime; the historic motives behind the commission of collective punishment offer authoritative guidance to its content, as has been noted.[309] The required intent should therefore be to punish indiscriminately persons or groups of persons for acts deemed likely to have been committed by unknown members of that group. Moreover, considerations such as aiming to deter members of that group from engaging in prohibited acts by indiscriminately or arbitrarily punishing members of the group for such behaviour could be considered powerful indicators to the existence of intent to employ collective punishment in the sense prohibited by international humanitarian law.

Considering then whether the way in which justice is administered over Palestinian juveniles allows for the imposition of collective punishment. From the outset, the general requirements for the crime are fulfilled. That is to say punishment is enacted by the occupying forces upon a population in the course of an occupation which is governed by the fourth Geneva Convention. It remains to be determined whether Palestinian minors are being punished collectively for the act of stone throwing.

3. Actus Reus

First there has to be an act for which persons are potentially punished collectively, in our case this act is the throwing stones, most commonly at Israeli soldiers or their vehicles. The

[307] *AFRC Trial Judgment*, paras. 678-680.
[308] *See inter alia to that effect:* UN Human Rights Committee, General Comment No. 29 (Article 4 of the International Covenant on Civil and Political Rights: "Prosecuting the War Crime of Collective Punishment-Is It Time to Amend the Rome Statute?", pp. 29-30.
[309] *See*: p. 56.

behaviour is common and culprits are exceedingly difficult to apprehend as the circumstances under which they commit the crime most often allow for an easy escape.[310] However, in order to establish whether punishment imposed through the military court system fulfils the *actus reus* requirement of the offence it must be considered whether the courts punish Palestinian minors indiscriminately and collectively for acts which some of them may or may not have been responsible.

In order to determine whether this is the case the conduct of processing minors accused of stone throwing as described in the previous section will serve as a frame of reference. Starting with the arrest of the minor and concluding with his trial this section will examine whether rules and procedures applied in this process allow for the imposition of collective punishment.

1. Arrest

Arrests are commonly carried out in the middle of the night by squads of heavily armed soldiers. All inhabitants of the suspect´s home are made to leave the house. Suspects are not notified of the reason for their arrest. Their families are often placated with phrases such as: "we´ll bring him back soon", or "we only need him for a minute". [311]

Once arrested suspects are subjected to a range of abuse. Nearly all are shackled with plastic straps irrespective of their behaviour, they are also blindfolded. The Convention on the Rights of the Child specifically states that children should be restrained only as a last resort. Here it seems the norm. Transport can take a long time, from several hours to a day. Often soldiers stop at a settlement, where many children report they were abused, exposed to the *elements* and threatened or beaten and denied food and water.[312]

Conducting arrests during night time with heavily armed soldiers, shackling and blindfolding the child and generally treating it disrespectfully during transit are all designed to lower their resistance during interrogation: sleep deprived, still in shock after their arrest and often afraid, they are likely to confess just to be left in peace.

As Minors have more difficulty in understanding the criminal process than adults their incommunicado detention is likely to weaken their resolve even further. For example, they often

[310] *See* chapter III, section 1.
[311] *See* chapter III, section 3.1..
[312] *Ibid.*

do not know that interrogators can lie to them and because of their minority they are taught to respect the authority of adults, especially the police and military.[313]

Moreover, interrogators do not adequately inform minors on their right to remain silent and what this right entails. This violates the requirements of the Convention on the Rights of the Child that children be free of compulsory self-incrimination. In that vein, it should be noted that according to the Committee on the Rights of the Child, the notion of compelling should be interpreted br*oadly:*

> *The term "compelled" should be interpreted in a broad manner and not be limited to physical force or other clear violations of human rights. The age of the child, the child´s development, the length of the interrogation, the child´s lack of understanding, the fear of unknown consequences or of a suggested possibility of imprisonment may lead him/her to a confession that is not true. That may become even more likely if rewards are promised such as "You can go home as soon as you have given us the true story", or lighter sanctions or release are promised.*

Nevertheless, interrogators often are accused of using coercive interrogation methods to obtain a confession from the child.[314] These methods include beatings and other physical violence, often in combination with psychological violence such as threatening the minor or his or her family to obtain a confession.[315] Interrogations can last a very long time, sometimes lasting weeks and solitary confinement can be employed to weaken a child´s resolve.[316] Until recently, the Israeli army had an administrative framework with a command structure for using torture in interrogations. The High Court of Justice found these practices to be illegal and formally banned them.[317] However, the practice appears to continue, less openly perhaps but complaints against maltreatment are most often ignored and impunity seems to surround abusive interrogators and soldiers.[318]

Isolating the children from persons who have their interest at heart and who can inform them of their rights and calm their fears is a means of weakening their will even further. Detaining

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[313] "Bound Blindfolded and Convicted" p. 34 *et seq.*
[314] *Ibid.*
[315] *See* Chapter 3 Section 3.2. Also *see Graciela Carmon, M.D., Psychiatric Expert Opinion, "Coerced False Confessions: The Case of Palestinian Children",* Psychiatric Expert Opinion, May 2011.
[316] "Bound Blindfolded and Convicted" p. 34 *et seq.*
[317] Public Committee Against Torture , in Israel and others v. The State of Israel (1999) 53 (4) PD 81 (The Torture Ruling).
[318] "Bound, Blindfolded and Convicted", p. 34, Breaking the Silence, pp. 63, 69: The Military Courts in the West Bank and Gaza, p. 206: Human Rights Watch, "Promoting impunity, The Israeli Military Failure to investigate Wrongdoing", June 2006, Vol. 17 No 7 (E), p. 7.

them inside Israel all but ensures that their family will have no access to them during the entirety of their detention.[319] Moreover, using coercive measures during interrogation can be used to manufacture confessions from children. These confessions, often obtained under duress, without the assistance of a lawyer are then often the sole evidence against them in the military courts.[320]

Palestinian children are hardly ever released on bail before their hearing. [321] There is no requirement to evaluate the necessity of keeping the child in detention in law at all. Should a child not have confessed during interrogation, it is likely to do so once it meets with its lawyer because in most cases, this will shorten their imprisonment considerably. Keeping children in pre-trial detention violates their right to presumption of innocence and is a grave violation to their rights under the CRC. [322]

Aid workers whose stated purpose is to help these children claim this is the only way to get them out of the system as soon as possible.[323] Should they not confess they will likely be held in pre-trial detention for a considerable period of time and later receive a harsher sentence than if they had confessed.[324] Consequently, hardly any cases end up in trial with over ninety percent being settled with plea bargains. The evidence most used is the child´s own confession, evidence obtained from other children´s confessions and the testimonies of soldiers.[325]

If irrespective of their guilt, children are advised to confess so that they may eventually be free it indicates that the aim of these trials is merely to punish somebody, anybody. Consequently, it would appear that the first element of the crime of collective punishment is present in this case. What remains to be determined is whether the specific intent to punish collectively is present.

4. Mens Rea

Before examining the *mens rea* element of collective punishment an important *caveat* should be entered here. It is not the purpose of the author to accuse a specific person of having committed the war crime of collective punishment. The author names no names and does not

[319] *See* Chapter III, section 2.2.
[320] *See* Chapter III, *section* 3.2.
[321] DCI Palestine approximates that minors are relaeased on bail only in 13% of all cases.
[322] CRC Article 37 (b): General Comment no 10, para. 80.
[323] Children in Military Custody, para. 37.
[324] "Defending Palestinian Prisoners" pp. 24-26: "Presumed Guilty", p. 17.
[325] *Ibid.*

intend to impeach IDF commanders or military judges as war criminals. The stated purpose of this study is to determine whether the conditions surrounding the punishment of minors for stone throwing in the West Bank allow for collective punishment to occur. As such, the elements of the crime only serve as a useful guidance to identify indications of whether this is in fact the case. Consequently, when determining whether the element of *mens rea* is fulfilled, it will be considered whether in general the intent to punish collectively is something characterizing the process under review.

From the outset, it should be noted that generally the State of Israel has not been shy to employ collective punishment against the Palestinian population for acts of resistance.[326] For example, they have been the subject of fierce international censure to this effect because of their practice of demolishing homes of persons suspected of committing suicide attacks inside Israel. The construction of a separation wall within the West Bank as well as the high number of road blocks and military check points severely limiting the freedom of movement of its Palestinian inhabitants have also been condemned as forms of collective punishment.[327] In these instances however, persons are punished either for belonging to the family of a suspected terrorist or for simply being a Palestinian living in the West Bank.

The intent to punish collectively is less evident in the subject of review. Punishment occurs after a legal process furnished by judges, prosecutors and defence attorneys. Rules of procedure are in place and the stated purpose of the military courts is to administer justice as a result of a fair process. Nevertheless, some indications exist that the IDF and its military courts are not all too concerned with the individual criminal responsibility of the minors convicted for stone throwing. These are gleaned from interviews made with former IDF soldiers as well as public statements made by the Israeli government.

Former IDF soldiers report that the Israeli army frequently resorts to scare tactics to deter stone throwing in locations where these are frequently reported. These tactics include the daily incursion of a large number of troops into such areas aimed at harassing the local population into tranquillity.[328] After a few days the streets of the affected village once bustling with traffic were left empty as the villagers dared not leave their homes in fear of the soldiers.[329] Other examples, such as detaining the large majority of villagers in their local school described above

[326] *See* for example: S. Darcy, "Punitive House Demolitions, the Prohibition of Collective Punishment and the Supreme Court of Israel", *21 Penn State International Law Review* (2003) 477.
[327] *See Supra note 101.*
[328] Breaking the Silence, p. 7.
[329] *Ibid.*

were conducted with the stated intent of deterring future stone throwing.[330] Soldiers also describe how they are made to round up several children and hold them at gun point until they identify stone throwers. Some commanders in the IDF reportedly teach their subordinates that Palestinians, regardless of their age deserve to be treated badly to teach them a lesson in "how not to throw stones". Others report that the view is prevalent within the army that Palestinians are all the same, they are all terrorists and criminals and should be treated as such. [331] Some commanders arrest minors guilty of looking at them the wrong way or even for smiling at them.

The officers responsible for the interrogation of minors have no qualms in using coercive interrogation methods to extract confessions and despite many complaints against them, little is done to address these issues. Whereas some judges within the military courts are reported to hold the same views as the soldiers that is to say that all the persons before them at trial are criminals or terrorists.[332]

Palestinian minors often throw stones at IDF personnel or their vehicles. Sometimes this can constitute a threat to their lives and it is quite understandable that they would wish to punish those responsible. However, considering the attitude prevailing within its ranks it would appear that they would have little reservations in punishing another Palestinian minor should they fail to find the actual culprit. No investigations into the crime are conducted and convictions almost exclusively rely on confessions and plea bargains. Once they have arrested a minor they frequently subject him to ill treatment and abuse, in some instances reaching the level of torture.[333] In light of how frequently Palestinian minors are arrested in the West Bank and considering further the impunity enjoyed by the soldiers engaged in such behaviour it can be stated that the IDF itself at least implicitly accepts their maltreatment.

It is perhaps not the stated official policy of the IDF to punish stone throwing collectively. Nevertheless, the prevailing mentality in the armed forces that all Palestinians are criminals or terrorists is cause for concern. Moreover because of their failure to promulgate effective procedural safeguards to prevent ill treatment of suspects and to ensure they are afforded with a fair trial serve as a strong indication that military officials are not all too concerned with apprehending the right suspect as long as someone is punished. To that end, Major Yoni from

[330] Breaking the Silence, p. 18.
[331] *Ibid*, pp. 53, 71, 9, 8, 67.
[332] "Backyard proceedings", p. 73: "these are all suicide terrorists, and we look after their rights and translate for them." When asked by a MachsomWatch member whether this applied to them "all," he replied: "Most of them. They are suicide bombers, terrorists who blow themselves up. They were caught en route to committing suicide attacks, and confessed it."
[333] Concluding Observations, Israel, 2002, para. 33.

the Kfir Brigade has stated that "the parents prevented their children from taking part in the weekly demonstration held immediately after the arrest for fear the children would be arrested and they would have to pay a high bond", considering this a positive deterrent.[334]

5. Collective Punishment? Some Conclusions

Of course barring examination of each individual case it cannot be stated unequivocally that innocent minors have frequently been convicted for stone throwing. It is possible that each convicted minor was in fact guilty of the offence for which he was punished. Nevertheless considering the legal framework governing this process it is equally possible if not likely that many of them were not. Once arrested by an Israeli soldier, a Palestinian minor can do little to defend himself against accusations of stone throwing and little is done to ensure that he is worthy of the accusation. Barring access to legal assistance and separated from his family the minor is especially vulnerable when interrogated by officers who are hardly restricted in employing coercive measures to compel the child to confess.

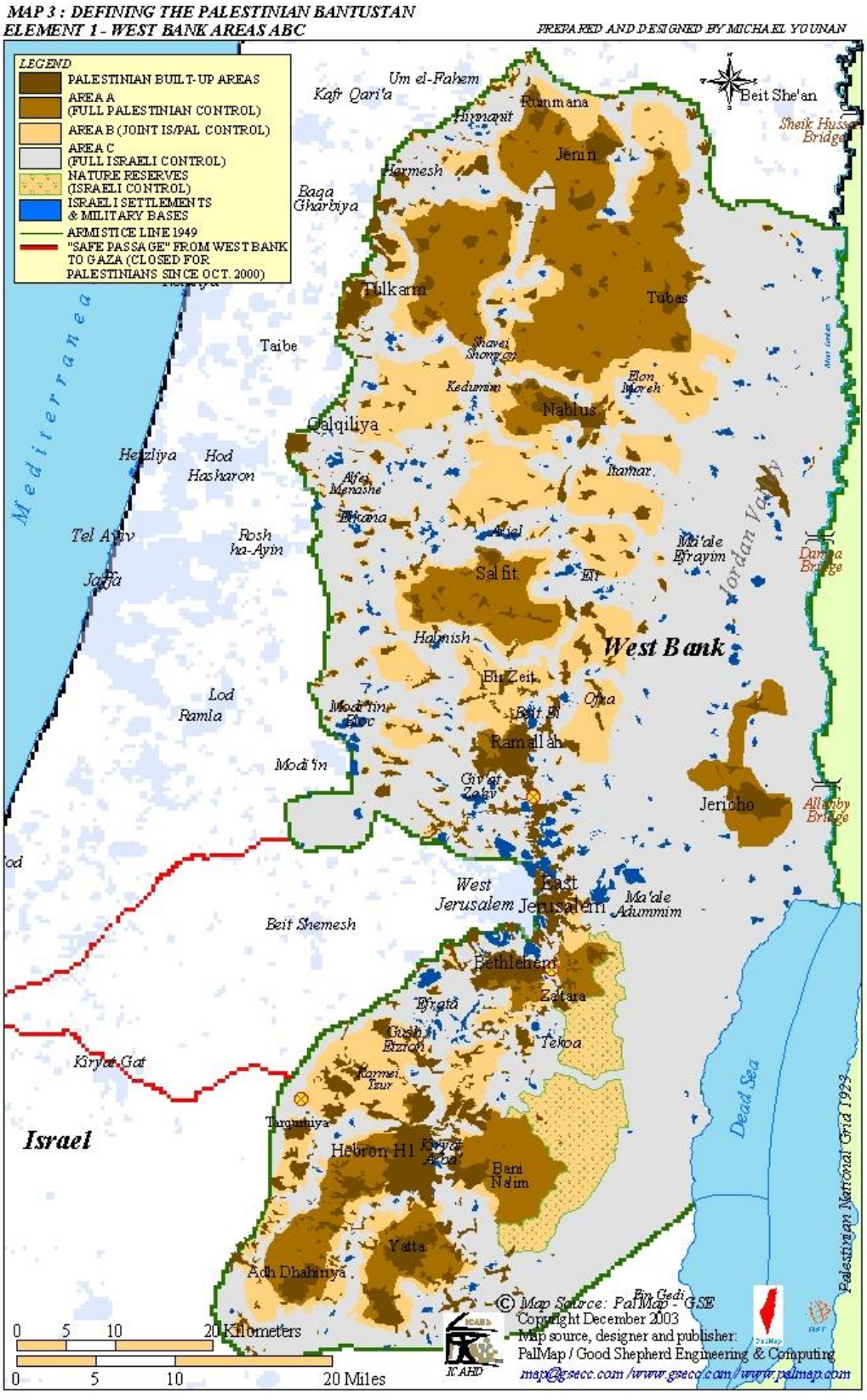
Once charged, minors are tried by military courts which hold unlimited jurisdiction over the inhabitants of the West Bank and are restrained only by vague notions of due process. Indeed, a former judge of the Palestinian Military Courts described them as kangaroo courts.[335] A description the author finds apt. They are courts are thus there solely to process these children through the system by some "semblance of due process". It gives this systematic treatment a veil of legitimacy but is in fact a farce.

It would seem that the whole system works against Palestinian youth. They have few if any procedural rights and are treated badly throughout the process. The consequences of this treatment are severe: children returning home after imprisonment find it hard to readjust, family life becomes difficult and they have missed out on their education.[336] When examining the legal framework governing the treatment of minors in the West Bank, it becomes obvious that the

[334] "No Minor Matter", p. 28.
[335] What Rules about What Laws? Paper produced and presented by Smita Shah , Barrister at Garden Court Chambers in response to The Law In These Parts, a film by Ra'anan Alexandrowicz, 15th June 2013, para. 16, referring to a statement made by Judge Jonathan Livny in response to the making of the film.
[336] *Graciela Carmon, M.D., Psychiatric Expert Opinion, "Coerced False Confessions: The Case of Palestinian Children",* Psychiatric Expert Opinion, May 2011.

guilt or innocence of a Palestinian youngster does not matter much, after all, the burden of proof is reversed! The notion arises that these children are not being punished for throwing stones, they are being punished for being boys around the same age as those throwing stones – and for being Palestinian.

Annex: A map of the West Bank and Areas of Israeli Control



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