

## **Abstract**

Palestinian children are being subjected to cruel, inhuman and degrading treatment (to be referred as torture from here onwards). The reason for this is due to Israeli authorities subjecting children, as defined by the CRC as under 18 years of age, to military detention. My thesis looks to address how and why there has been little international reaction or backlash to this situation. What is the real reason the Israeli authorities are treating Palestinian children in this way. My thesis is aimed at encouraging the actions of international players to ensure that Israel is investigated by the ICC for these crimes and to ensure that this practice is stopped immediately and the children concerned are released and compensated.

Israel has seemingly ratified conventions such as the CAT and the CRC and has also made amendments to its own laws regarding the trial and detention of minors. However these have remained on paper and not seen in practice. The Defence for Children International has documented numerous cases of Palestinian Minors being subject to cruel, inhuman and degrading treatment. Why has this been allowed to continue and what provisions will ensure real change is implemented. Israel has managed to continue detaining children due to 'state of emergency' declaration over Israel. Is this valid and justifiable? The state of emergency cannot continue unchecked for an unlimited amount of time.

The final part of my thesis will look to put forward suggestions and recommendations to end the torture of Palestinian children by Israel's military powers. This dissertation seeks to argue that those responsible, both directly, in the form of actually violating the rights of Palestinian Minors, and those under whose orders it has remained possible should face prosecution. This should be under the jurisdiction of the International Criminal Court or the 'universal jurisdiction' applied by the Fourth Geneva Convention.

## PART ONE

### INTRODUCTION

The thesis of this dissertation is to prove that because Israel is responsible for the Occupied Palestinian Territories (OPT) it should be held accountable for the human rights abuses' experienced by all Palestinian citizens. In particular, due to the vulnerable nature of children, the abuses of Palestinian minors should warrant special attention. This dissertation will be focussing in particular on the treatment of Palestinian minors while in Military detention by Israeli forces. There are many laws governing the treatment of prisoners and even more concerning minors in detention. These laws will provide a basis for the view that Israel can, and should be prosecuted for the crime of torture dealt to minors in Israeli custody.

There has been limited investigation into the area of Military detention of Palestinian Minors by Israel to date, either by Israel itself or other concerned States. Most research and material on this issue has been researched and published by the NGO Defence for Children International (DCI), which has a specific Palestine section; as well as B'Tselem and No Legal Frontiers. The human rights abuses of Palestinian minors is not a new issue, it has been ongoing since 1967 when the State of Israel was created (Cook et al; 2004). *"In the past 11 years alone, around 7,500 children, some as young as 12 years, are estimated to have been detained, interrogated, and imprisoned within this system. This averages out at between 500-700 children per year, or nearly two children, each and every day"* (DCI; 2012a; 7). Israel has been operating under Military Law / in a state of Emergency since this time (DCI; 2012a; 7). This dissertation aims to bring together evidence gathered by DCI-Pal as well as other research in this area and call for strong action by the international community to ensure that these human rights abuses end as quickly as possible, and to ensure that those responsible are prosecuted.

Essentially this dissertation seeks to address the issue of Military detention of Children, with a specific focus on Palestinian minors. This means the special circumstances of the Israel-Palestine conflict needs also to be addressed. In order to address the reasons behind why this practice occurs we need to understand the political status of the state of Israel and how that relates to the occupation of Palestine. However, in essence this thesis aims to highlight the human rights abuses of children and ensure international action to end the abuse. The nature and circumstances of this situation are secondary. Therefore first and foremost the argument will focus on the rights of children and the responsibility of States towards them. Now obviously the case of Israel is very sensitive and the law surrounding occupation equally complex, however there are very clear guidelines for certain situations and dealing with minors is one of them. This is why it is harder to understand why the situation has carried on for so long. Children are one of the most vulnerable groups in society; it is the responsibility of the international community to ensure that no child in any country has their rights violated. This is worse as Israel has signed and ratified many International Human Rights Treaties including the Convention on the Rights of the Child (CRC 1989); the Convention against Torture and Other Cruel, Inhuman or Degrading

Treatment or Punishment (CAT; 1984); and the International Covenant on Civil and Political Rights (ICCPR; 1966) which provide many rights and protections for children.

The overall objective of this dissertation is to ensure more voices call for action from the international community to put pressure on Israel to stop the continued human rights abuses of Palestinian Minors. Currently many states do not want to interfere with the internal security of Israel and its citizens. One argument put forward by Israel is that it is not in fact 'Occupying' Palestine but is only 'Administering' the region. If this were in fact the case then who is there to protect the rights and lives of Palestinians; why is Israel being allowed to continue the torture of many civilians, in particular children. This dissertation will unequivocally propose that the treatment of Palestinian children while in detention is 'torture', and should thus be tried as war crimes and crimes against humanity by the International Criminal Court (ICC) which was set up under the Rome Statute in 1998. Israeli officials continue to claim the Military detention of children is due to 'internal security', usually on the basis of coerced confessions from minors or secret evidence obtained by the Israeli Security Agency (ISA; otherwise known as Shabak) (DCI; 2012a; 44). "*Successive Israeli governments have skilfully constructed an ideological discourse within Israeli society to gain support for and justify a wide array of human rights abuses under the broad umbrella of 'security'*" (Cook; 2004; 149). This cannot be used as the basis for the military detention of children, and it does not justify the torture of those children while in the care of the Israeli authorities.

The treatment of children while detained by Israeli military has been described as torture by DCI (2012a; 7); the prohibition of torture is a customary international norm and a non-derogable right. Torture can never be justified or acceptable. Despite the severity of these crimes, Israel has never been tried or investigated for the crime of torture. According to Cook et al torture is a 'war crime' and crime against humanity':

The international prohibition on torture is absolute and is codified in international humanitarian law, regional and international human rights treaties, and UN guidelines. No circumstances whatsoever can justify its use. It is an indictable war crime and crime against humanity, pursuant to articles 7 and 8 of the Rome Statute of the International Criminal Court. The prohibition of torture forms part of customary international law and thus is binding on all countries (Cook et al; 2004; 45).

The key focus of this dissertation is to call attention to the actions of Israel with regards to the torture of Palestinian minors and call for international pressure, an investigation, and for those responsible for torture to be tried by the ICC for war crimes and crimes against humanity. If the Rome Statute cannot or does not extend jurisdiction of the ICC to incorporate the crimes of Israel, due to the fact Israel is no longer a signatory, then the Geneva Convention relative to the Protection of Civilian Persons in Time of War (the Fourth Geneva Convention) or CAT should be utilised to ensure Israel is prosecuted for the crime of torture. The role of ensuring responsibility lies with the international community who should ensure the most heinous of crimes does not remain unpunished.

This dissertation will begin with a brief analytical framework to provide the reader with a basic understanding of the literature available. This will only include two of the most recent reports on the topic of military detention of children, as the other literature available will be incorporated into the main text of the dissertation. Followed by this will be background information about the situation in Palestine and how it affects the treatment of Palestinian citizens, in particular children. The issue of occupation and what rule of law is applied to these territories will also be addressed. This will provide the basis for understanding what living conditions should be, for Palestinians under international law and how it currently differs. This will also set out how those who are detained either in military detention or for civilian crimes should be treated. This will bring into focus the negative conditions and treatment of Palestinian minors while in detention. From this, next we will look at what International Humanitarian Law (IHL) and International Human Rights Law (IHRL) apply to the minors living in the Occupied Palestinian Territories (OPT). This will help identify the key human rights abuses that are occurring to this vulnerable group. Following on from this will be a look at and analysis of the common experiences of nearly all Palestinian minors who are placed in Military detention by Israel. This will cover everything from the time of arrest through to their eventual release (if applicable). I will address the issues that have been reported time and again, including the interrogation techniques used to force confessions, the treatment of a child while in the custody of Israel and the challenges faced gaining legal representation and the presence of family while the child is detained. This section will also address the transfers of some detained children, out of Palestine and into Israel, which is prohibited by the Fourth Geneva Convention Article 76, of which Israel is a signatory.

Part two will analyse the consequences of Military rule in the OPT and how this leads Israel to break agreed IHL and IHRL continuously. We will look specifically at the Articles of the Geneva Conventions that apply (the law of war and occupation), and how Israel manoeuvres around these international norms so that they can claim to not exist for the Palestinian people living in the OPT. As well as violating IHL, Israel is violating human rights as set out by IHRL; we will look at the Convention against Torture (CAT); the Convention on the Rights of the Child (CRC); and the International Covenant on Civil and Political Rights (ICCPR) to discover what rights are being violated by Israel. This will lead onto analysing the opposing view, meaning how and what is argued by Israel to show it is not responsible for the Palestinian minors who are subjected to serious human rights abuses while in Military detention. There will be an analysis of how valid and legitimate these arguments are.

Part three will bring together all the arguments of why Israel is responsible for those in the OPT, followed by how Israel should proceed and be held accountable. Part two will have shown that the condition of Palestinian minors in military detention amounts to torture under the definition of CAT. This has been defined as a war crime and crime against humanity (Rome Statute; 1998; Articles 7 and 8). As it can never be justified it must be brought to an end and Israel must be prosecuted for these crimes. This section will look at relevant jurisdiction under which Israel can be prosecuted. The Rome Statute of the ICC will be the main focus of this section, as well as the GC and CAT. The Rome Statute has jurisdiction to prosecute the crime of torture as a war crime and crime against humanity. We

will discuss what issues need to be addressed/ present for the ICC to begin investigating Israel for war crimes and crimes against humanity.

The dissertation will conclude by proving categorically that Israel is responsible for the torture of Palestinian minors in Military detention and must be prosecuted by the ICC. It will also be made clear the wide range of other human rights violations of Palestinian Minors which occur by Israeli Military before, during, and after the period which minors are held in detention. Finally the dissertation will end with clear recommendations to the ICC and the international community to ensure that these war crimes and crimes against humanity are investigated and prosecuted. Recommendations will also be made to Israel, to ensure it complies with investigations by the ICC as the State of Israel is responsible for the Palestinian people as an Occupying Power, and as the State whose nationals are responsible for the violations of IHL and IHRL.

## **BACKGROUND**

The Convention on the Rights of the Child (CRC) has clearly defined a child as anyone under the age of 18 (1989; Article 1). Israel has ratified the CRC, yet refuses to recognise detained Palestinian minors aged 16 and 17 as children. Israel instead chooses to prosecute these children as adults. “*Males aged 16 and 17 go to prisons run by the Ministry of Defence. The distinction is pursuant to Israeli Order No. 132, which treats Palestinian children aged 16 and 17 as adults*” (Cook et al; 2004; 6). However, despite Israel claiming this distinction between children of 15 compared to 16 or 17 when it relates to court proceedings, Israel still uses double standards. According to Cook et al:

Court regulations allow only immediate family members to attend the trials. These family members must hold an ID card that is only issued to Palestinians aged 16 years and over. The Israeli military says this regulation exists because children under 16 are too young and may disrupt the court proceedings. In other words, a child of 14 has reached an age where he may be arrested by heavily armed Israeli soldiers in the middle of the night, face torture, be brought before a military court, and sentenced to many months in prison for the alleged offence of throwing stones, yet his 15-year-old brother isn't considered mature enough to attend his trial (2004; 28).

The Occupied Palestinian Territories (OPT) are generally defined as encompassing the West Bank including Jerusalem and the Gaza Strip (DCI; 2009; 9). According to DCI “*among the applicable legal regimes are the Third and Fourth Geneva Conventions of 1949, customary international humanitarian law and the international human rights treaties to which Israel is a State Party*” DCI; 2009; 9). This shows that both IHL and IHRL are applicable to the OPT.

The position in East Jerusalem is complex and is not within the scope of our report. We limit ourselves to noting a recent publication of the Association for Civil Rights in Israel which reports that, while the Israeli Youth Law of 1971 on adjudication, punishment and methods of treatment formally applies to all children in East Jerusalem, it is constantly departed from by the Israeli police when dealing with Palestinian children, in respects similar to those we record on the part of the military in the West Bank in this report (FCO; 2012; 5).

## **Key Concepts**

### **Military law**

According to Israel, Palestine is under military rule/ state of emergency, meaning certain laws and rights can be derogated from. This is the justification for certain actions taken against Palestinians i.e. the use of military courts when trying cases against children, using solitary confinement and the use of administrative detention. It is important to note that torture is a non-derogable right and can never be justified no matter the situation. When a State has declared a state of emergency, the laws of armed conflict takes effect i.e. the Geneva Conventions of 1949. IHRL should still apply; it just means that IHL sets out the minimum standards which should be met. Another point to note is that a state of emergency should only be a temporary measure, whereas in the case of the OPT and Israel it has been in place since 1948. This raises the question of its validity and the reason for its continued use. Israel's ‘Defense (Emergency) Regulations’ have been integrated into its national laws since

1948 and grants permission for the use of administrative detention and the use of military courts to try civilians without the right to appeal (B'Tselem; 2010).

Under Article 5 of the Fourth Geneva Convention, even an individual who is suspected of being a threat to the 'Occupying Power' should be treated with humanity and not deprived of the rights pertaining to a fair trial. Furthermore: "*They shall also be granted the full rights and privileges of a protected person under the present Convention at the earliest date consistent with the security of the State or Occupying Power, as the case may be*" (GC IV; 1949; Article 5). This means that the conditions faced by Palestinian minors are extremely opposite to what is set out in IHL. Israel is clearly violating international law which it has chosen to sign, and therefore should be adhered to. According to DCI-Pal, minors are not afforded rights pertinent to a fair trial; the conditions while detained also do not equal being dealt with humanity, and interrogation techniques amount to torture as defined by CAT (DCI; 2012a).

In the International Court of Justices' (ICJ) Wall opinion, the OPT is defined as under occupation, and Israel is the Occupying power (ICJ Wall Opinion; 2004). With occupation come rights and responsibilities on the part of the occupying power. According to the International Committee of the Red Cross (ICRC) the law of occupation applies even if the occupation is not lawful, or even when it is called something different such as 'administration' (ICRC; 2004). IHL which applies to occupation is based on The Hague Regulations (1907) and the Fourth Geneva Convention (1949). These state that the occupying power must never cause physical suffering or use torture on protected persons (GC IV; 1949; Article 32). A protected person includes those detained by the occupying power (GC IV; 1949; Article 2 and 13).

Currently the West Bank is operating under military law while East Jerusalem is under civilian law (DCI; 2009; 42). This corresponds with the numbers of minors being arrested and detained by Israel, generally there are more arrests made in the West Bank. These numbers are increasing and many children from East Jerusalem are also subject to the conditions faced by children from the West Bank during detention (DCI; 2011). "*Military law was imposed on Palestinians immediately on cessation of hostilities in June 1967, with the issuance of a military order empowering the Israeli area commander with full legislative, executive and judicial authority over the West Bank*" (DCI; 2012a; 6). To be very clear though, both IHL and IHRL do apply to the OPT despite various objections by Israel.

Speaking about the applicability of international law to questions of arrests and detentions, Said Benarbia, Legal Adviser, in charge of Middle East and North Africa Programme, International Commission of Jurists, Geneva, noted that there were some differences between international human rights law and international humanitarian law. But concurrently, both were applicable to the Gaza Strip, West Bank and East Jerusalem (UNGA; GA/PAL/1186; 2011).

## **Torture**

In a report in 2009, DCI used the findings of the Committee against Torture to outline the definition of torture. Individual circumstances should always be taken into account; however this definition is relevant as the types of actions which are defined as torture have been the common experience of Palestinian minors while in Israeli detention.

Restraining in very painful conditions; Hooding under special conditions; Playing loud music for prolonged periods of time; Threats, including death threats; Violent shaking; Kicking, punching and beating with implements; Using cold air to chill; Excessive use of force by law enforcement personnel and the military; Incommunicado detention (detention without access to a lawyer, doctor or the ability to communicate with family members); Solitary confinement; Sensorial deprivation and almost total prohibition of communication; Poor conditions of detention, including failure to provide food, water, heating in winter, proper washing facilities, overcrowding, lack of amenities, poor hygiene facilities, limited clothing and medical care. The above list is by no means exhaustive and in every case, the particular vulnerability of the victim, such as his or her young age or medical condition should be taken into consideration (DCI; 2009; 23).

In numerous reports by DCI, they repeatedly confirm the treatment of Palestinian Minors as including all of the above factors. This is clearly against IHL as well as IHRL, as we know that torture is never legally acceptable. The Fourth Geneva Convention states clearly that ‘protected persons’ which include those in detention should never be subject to: “*violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture*” (GC IV; 1949; Article 3.1). These human rights abuses are reported at every stage of the arrest and detention process.

The CRC has clearly outlined what the treatment of a child should be, even when they are being detained by the State: “*the arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time*” (CRC; 1989; Article 37b). We will see that Israel is not adhering to these laws when it is arresting and detaining Palestinian children. Article 27 of the Fourth Geneva Convention defines individuals who are detained as ‘protected persons’. Accordingly:

Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity (GC IV; 1949).

The UN Special Rapporteur (SR) on the Occupied Palestinian Territories, Richard Falk submitted a report to the Human Rights Council (HRC) in May 2012 which confirmed the conditions faced by Palestinian minors during detention. This information was provided by Issa Qaraqe, the Minister of Prisoners’ Affairs of the Palestinian Authority.

detention of children for long periods without family access and held far from the place of residence, with reports of torture and coerced confessions; and initial interrogations frequently held at Israeli settlements beyond the reach of the



International Committee of the Red Cross, family members and lawyers (Falk, R; UNHRC; 2012).

## **Military Detention**

### **Arrest**

The report published by DCI in 2012 clearly states that the treatment of Palestinian minors amounts to torture:

This report reveals a systematic pattern of ill treatment, and in some cases torture, of children held in Israeli military detention. The ill-treatment starts at the moment of arrest, when many children report experiencing terrifying night-time raids on the family home, before being tied, often painfully so, and blindfolded (DCI; 2012a; 69).

Furthermore the conditions reported by Palestinian children to DCI seem disproportionate to their alleged crimes, mostly that of stone throwing. These practices do not take into account the age and vulnerability of the children being arrested.

### **Transfer of detainees**

In certain cases, DCI has reported that some children say they were transferred from the OPT into a prison in Israel. This is a clear violation of the laws of war. Under the Fourth Geneva Convention, it is illegal to transfer a prisoner out of their national territory. *“All Palestinian children detained under Israeli military law should be held in facilities in the Occupied Palestinian Territories and not in Israel, which constitutes a breach of article 76 of the Fourth Geneva Convention”* (FCO; 2012; 34). Reports from different organisations such as DCI, B’Tselem and the Israeli Prison Service statistics confirm the illegal practice of transferring child prisoners from the West Bank into Israel (FCO; 2012; 27). The ICJ has stated that IHL is applicable to the OPT (ICJ Wall Opinion; 2004), thus Israel is directly violating International law every time it transfers a Palestinian child out of the OPT. Further, DCI points out that under Article 146 of the GC, all State Parties to the Convention have a responsibility *“to search out and prosecute those responsible for grave breaches”* (DCI; 2012a; 132).

Article 76 of the Fourth Geneva Convention provides that: “Protected persons accused of offences shall be detained in the occupied country, and if convicted shall serve their sentences therein.” The applicability of the Fourth Geneva Convention to the Occupied Palestinian Territory has been confirmed by the ICJ’s Wall opinion; various UN Security Council and General Assembly resolutions; and the International Committee of the Red Cross. Pursuant to Article 147 of the Fourth Geneva Convention, unlawfully transferring a protected person is a grave breach of the Convention and attracts personal criminal responsibility (DCI; 2012a; 132).

Israel should be investigated for illegally transferring detainees out of the OPT and into Israel, it is especially more heinous due to the fact it is enacted on children. Children should be granted access to meeting their parents while in detention; however this is basically impossible if they are held in Israeli territory. Article 146 of the Fourth Geneva Convention

should ensure that other State Parties take action and ensure those responsible of this crime are found and prosecuted.

### Interrogation

The use of interrogation techniques which amount to torture are prohibited, no matter what the circumstances are. However it seems that the Israeli military overlooks this issue when it is interrogating Palestinian minors suspected of ‘throwing stones. How can the crime of throwing a stone illicit the torturous techniques used by Israeli officials on children. DCI have documented testimony of hundreds of Palestinian minors relating to their experience of interrogation.

The testimonies reveal that the common experience of many children is that they are brought to an interrogation centre tied and blindfolded, sleep deprived and in a state of fear. Unlike their Israeli counterparts, Palestinian children have no right to be accompanied by their parents during interrogation, and in practice, do not get to meet with a lawyer until long after their interrogation is over. Although children in the military detention system are supposed to have the right to silence, few are ever informed of this right in a manner in which they can understand. Many children remain painfully tied for the duration of their interrogation, which is generally mentally and physically coercive, resulting in the provision of confessions, some of which are written in Hebrew, and many of which are of dubious veracity (DCI; 2012a; 38).

The use of coerced confessions during trial is against IHL, this also relates to the use of solitary confinement. The use of solitary confinement has been used as a technique in order to force confessions from those detained by Israeli officials. *“The purpose behind placing children in solitary confinement appears to be to facilitate the obtaining of a confession, and most commonly occurs at the Al Jalame, Petah Tikva and Al Mascobiyya interrogation centres inside Israel”* (DCI; 2012b; 13).

### Solitary Confinement

During detention, many children have reported being subject to solitary confinement, *“Between 2008 and 31 May 2012, DCI has documented 50 cases in which children report being held in solitary confinement for an average period of nine days”* (DCI; 2012b; 13). The use of solitary confinement is discouraged, especially when it relates to children. The treatment during detention should take into account the age and vulnerability of the detained person. Furthermore, as seen below, the UN Special Rapporteur on torture banned the use of solitary confinement on children. This strengthens the case for Israel to be tried for ‘torture’, and more specifically the use of torture as a war crime and crime against humanity.

The detrimental psychological and physical effects of detaining persons in solitary confinement are well documented and include: panic attacks; fear of impending death; depression, including clinical depression; social withdrawal; a sense of hopelessness; unprovoked anger; short attention span; disorientation; paranoia; psychotic episodes; self-mutilation; and attempted suicide. For these reasons, the UN Special Rapporteur

on Torture, Mr Juan Mendez, called for a complete ban on the use of solitary confinement on children, in a report submitted to the UN General Assembly in October 2011 (DCI; 2012b; 13-14).

### Trial

During the trial period, Palestinian children have a harsh experience, their access to legal representation is not easy and they rarely are unshackled when in court (DCI; 2012a; 41). Furthermore the Israeli Security Agency (ISA) can authorise the court, based on ‘secret’ evidence, to issue administrative detention orders (DC; 2012a; 44). The experience a Palestinian minor faces during this time is in direct violation of ICCPR Article 14; the right to a fair trial. Further, the SR Richard Faulk re-stated right to a fair trial set out by the Fourth GC: “articles 71 to 73 indicate that any kind of prison sentence must be pronounced by a competent court in which the person accused has access to the evidence against them and the opportunity to present evidence with the assistance of legal counsel” (Falk, R; UNHRC; 2012).

The ICCPR also prohibits the inhumane treatment of detainees and states the right to a fair trial. Israel is a signatory to the ICCPR and should be bound by the treaty.

Articles 7, 9, and 10 of the International Covenant on Civil and Political Rights are clear in their prohibition of —inhumane and degrading treatment and of —arbitrary detention as well as the rights of anyone accused of criminal conduct to have an opportunity to mount a defense in a competent court. For instance, article 9, paragraph 2 declares: —Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of the charges against him (Falk, R; UNHRC; 2012).

Israel uses separate laws when governing Palestinian citizens compared to Israeli citizens, more than that, Israel does not afford adequate legal representation for Palestinians when they are tried in military courts in the West Bank.

Representation through the public defender system is available to Palestinians and Israelis alike if they are tried in courts in Israel or East Jerusalem. No such representation is available to those tried in military courts in the West Bank. Many children tried in military courts rely on representation by NGOs and voluntary organisations (FCO; 2012; 23).

### Administrative Detention (Use and Validity)

“Administrative detention is a procedure whereby a person is detained without charge or trial, by order of a military commander” (DCI; 2012a; 44). The Foreign and Commonwealth Office (FCO) stated explicitly that when it comes to children, administrative detention should never be used: “No child should be the subject of administrative detention” (FCO; 2012; 35). However, Israel has made no changes to the current legislation; the UK should work on this issue and urge the Israeli authorities to cease the use of administrative detention when dealing with children. DCI has advised that Administrative detention should never be “a substitute for criminal prosecution where there is insufficient evidence to obtain a conviction” (DCI; 2009; 74). This is particularly important for children, as the UN

Committee against Torture has set out that administrative detention can amount to cruel, inhuman or degrading treatment or punishment (DCI; 2012a; 44).

In 2009, the UN Committee against Torture expressed the view that Israel's extensive use of administrative detention on Palestinians frequently amounts to cruel, inhuman or degrading treatment or punishment and deprives detainees of basic safeguards including the right to challenge the evidence. The Committee found that the procedure was being used for "inordinately lengthy periods." In 2010, the UN Human Rights Committee also expressed concern at the "frequent and extensive" use of administrative detention and recommended that Israel refrain from using the procedure, in particular, for children (DCI; 2012a; 44).

Administrative detention is permitted under international law in strictly limited circumstances, only if "the security of the state ... makes it absolutely necessary" and only in accordance with "regular procedure". Further, international law to which Israel is bound, provides that "[No] child should be deprived of his or her liberty arbitrarily and detention should only be used as a measure of last resort for the shortest appropriate period of time" (DCI; 2009; 74).

The law being pertained to by DCI includes Article 42 of the Fourth Geneva Convention; Article 4 of the ICCPR and Article 37(b) of the CRC. This shows that Israel is continually violating many laws by continuing to use administrative detention. Tamar Pelleg-Sryck, an advocate in the Legal Department of HaMoked, Center for the Defence of the Individual has stated that the reason Israel use administrative detention is not in fact for security reasons, but in reality it "*was to expand and reinforce Israeli rule in the Occupied Palestinian Territory, in violation of international legal standards* (UNGA; GA/PAL/1186; 2011).

The UN Special Rapporteur on the OPT; Richard Falk has clearly prohibited the use of administrative detention in nearly all situations.

It is the judgment of the Special Rapporteur that the use of administrative detention, other than in rare circumstances where a demonstration of extraordinary and imminent security justification supported by evidence is made before a judge in conference with the lawyer of the defendant, who is given an opportunity to contest evidence and charges, constitutes a violation of the rights of a protected person under international law (Falk, R; UNHRC; 2012).

### **Relevant bodies of IHL and IHRL**

As we have already seen, the Geneva Conventions of 1949 are the main bodies of law which make up IHL. Israel is a signatory to all four Geneva Conventions and therefore can be held accountable by these Conventions. The Geneva Convention relative to the Protection of Civilian Persons in Time of War 1949 (the 'Fourth Geneva Convention') is the most relevant to the premise of this dissertation. The Rome Statute of the ICC can claim jurisdiction over war crimes and crimes against humanity, despite the fact that Israel is no longer a signatory.

IHRL most relevant to this dissertation includes the Convention against Torture; the Convention on the Rights of the Child; and the International Covenant on Civil and Political

Rights. Israel is a signatory to all three of these Human Rights Treaties; currently this is not reflected in its treatment of Palestinian minors held in detention. There is also soft law such as the UN Rules for the Protection of Juveniles Deprived of their Liberty, 1990; and the UN Standard Minimum Rules for the Administration of Juvenile Justice, 1985. These also do not seem to affect the treatment of Palestinian minors held in Military detention by Israel.

### **Analytical framework**

#### Children in Military Detention (Foreign and Commonwealth Office; 2012)

In September 2011 nine lawyers visited Israel and the Occupied Palestinian Territories, specifically the West Bank, in order to investigate the situation of Palestinian minors in detention by Israel. The United Kingdom Foreign and Commonwealth Office (FCO) funded this visit and also provided diplomatic support. The report ‘Children in Military Custody’ was published in June 2012 (FCO; 2012). The team’s job was “*to undertake an evaluative analysis of Israeli military law and practice as they affect Palestinian children in the West Bank by reference to the standards of international law and international children’s rights*” (FCO; 2012; 2). The report clearly sets out how life under Military law is in practical terms and with specific regard to how it affects Palestinian minors within the prison/court system. The delegation met with various stakeholders and parties who are involved in the arrest and trial of a Palestinian minor. These included “*lawyers, former child prisoners, former Israeli soldiers, NGOs, UN agencies, Israeli Government departments, the then Chief Justice of the Israeli Supreme Court, and senior military judges and prosecutors at the military courts at Ofer prison (outside Jerusalem)*” (FCO; 2012; 3).

The report mentions many Military orders, including 1644 which created the juvenile military court (FCO; 2012; 4). A key point to note in relation to this dissertation is that the delegation has clearly identified Israel as an Occupying Power, and thus responsibility for Palestinian welfare belongs to Israel. “*Israel, as the Occupying Power in the West Bank, carries its international human rights obligations with it*” (FCO; 2012; 6). Furthermore, the report states that the military law governing Palestinians should conform to two minimum standards, that of ‘respect for human rights and non-discrimination’ (ibid). The report goes on to determine that the UN Convention on the Rights of the Child does apply to Israel with respect to Palestinian children.

Article 2(1) of the Convention provides: ‘State Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind...’. Israel is a full party to the UNCRC and has entered no reservations or representations as to its territorial application (ibid. 9).

The report mentions previous legal action by the Committee against Torture, whereby the use of one plastic hand tie behind a child was changed to make sure hands are only tied at the front and using three plastic ties. However the practice of using one hand tied behind the back is still occurring, as reported by DCI. It has been confirmed by the delegation which has noted that it is a ‘cause for concern’ (FCO; 2012; 15). This shows that Israel is going against direct action by the Committee against Torture and is therefore violating IHRL. The report

goes on to mention its own personal account of a court case whereby the use of shackles was over used, and remained on the child for the whole hearing. *“The United Nations Standard Minimum Rules provide that chains and irons shall not be used as restraints; that any other restraints should only be used as a protection against escape during transfer provided they are removed when the prisoner appears before a judicial authority (or on medical grounds or to prevent injury); and that they should not be applied for any longer period than necessary. The practice of the military courts is not in accordance with these rules (FCO; 2012; 23).*

The delegation brings up the issue of solitary confinement and their interview with a 16 year old who had been a victim of solitary confinement. The delegation notes that it could not clarify whether this was in fact true or not, but if indeed it was the case then it would be a direct violation of IHRL. *“...we record the view of the United Nations Special Rapporteur on Torture that ‘the imposition of solitary confinement, of any duration, on juveniles is cruel, inhuman or degrading treatment and violates article 7 of the International Covenant on Civil and Political Rights and article 16 of the Convention against Torture’. If solitary confinement is to be used for juveniles, it can only be for pressing reasons and with stringent safeguards (FCO; 2012; 27).*

The delegation of FCO call for investigation of the Israeli Military system in the OPT: *“We are troubled by the differences between the responses we received from departments of the Israeli Government and the military to some of the issues we raised. Such inconsistencies emphasise the clear need for a comprehensive and independent monitoring and investigative system” (FCO; 2012; 29).* The report finishes with a clear statement of how Israel is responsible for the OPT and specifically responsible for the minors held in Military detention. *“International law, international humanitarian law and the UN Convention on the Rights of the Child apply to the Occupied Palestinian Territories and therefore should be fully and effectively implemented” (FCO; 2012; 32).*

### Bound, Blindfolded and Convicted: Children in Military Detention (DCI; 2012)

In April 2012 the Defence for Children International published a report entitled ‘Bound, Blindfolded and Convicted: Children in Military Detention’. The FCO delegation mentions this report many times in their report as it is very detailed regarding the treatment of Palestinian children held in Military detention from the time of arrest through to their situation after being released. DCI obtained testimony from 311 children who had been subject to Military detention by Israel, the report claims that on average 500 -700 children a year are detained by Israel (DCI; 2012a; 7). *“The testimonies reveal that most children undergo a coercive interrogation, mixing verbal abuse, threats and physical violence, generally resulting in a confession. The most common offence children confess to is throwing stones (DCI; 2012a; 7).*

*“The Report finds that when the totality of the evidence is considered, a pattern of systematic ill-treatment emerges, much of which amounts to cruel, inhuman or degrading treatment or punishment, as defined in the UN Convention against Torture, and in some cases, torture – both of which are absolutely prohibited” (DCI; 2012a; 7).* The report ends with several recommendations to Israel to resolve the issues leading to human rights abuses

against minors while in detention. It seems that the intention of the report is to provide protective measures that Israel can utilise and put into practice. *“These recommendations include a call for an end to night time arrests, children to have access to a lawyer prior to questioning, all interrogations to be audio-visually recorded, and every child to be accompanied by a parent”* (DCI; 2012a; 8). The report does not mention legal action for the perpetrators of torture and/ or cruel, inhuman or degrading treatment or punishment. None of the literature already in existence looks at or calls for the prosecution of those involved in acts which can fit the definition of torture as defined by the Convention against Torture.

## PART TWO

### CONSEQUENCES OF MILITARY RULE ON MINORS

#### What is justifiable?

Under military rule the army arrests and detains many civilians including minors. Accordingly, when these individuals are mistreated and have their human rights abused then it is the army, and therefore the State, which is responsible for these abuses continuing with impunity. If the State continues to overlook or fails to investigate these claims then they should also be held accountable for the torture that occurs.

Military Order 1676 also makes provision for the notification of a detained child's parents... This provision is seriously flawed as it only applies to the Israeli police, and not the army. In practice, it is the Israeli army that conducts arrests in the West Bank, and it is the army that has custody of the child for many hours and sometimes days before they are handed over to the police (DCI; 2012b; 9-10).

The laws of war allow the creation of military courts; however certain guidelines have to be followed. *Whilst Israel, as an Occupying Power, has the right under international humanitarian law to establish military courts... applicable international human rights and humanitarian law restricts the jurisdiction of such courts, and guarantees certain fundamental fair trial rights* (DCI; 2009; 9). Military rule does allow the use of administrative detention; however various UN committees have advised that the use be limited, especially when dealing with children. The UN Human Rights Committee has stipulated that: *“Resort to military tribunals should be exceptional and limited to cases where regular civilian courts are unable to undertake trials with regard to the specific class of individuals and offences”* (DCI; 2009; 14).

The authority of Israel to establish military courts in the Occupied Palestinian Territory in which to prosecute local civilian residents is found in international humanitarian law, otherwise known as the laws of war. Generally speaking, a local population living under military occupation should continue to be bound by their own penal laws and tried in their own courts. However, local laws may be **repealed** or suspended by the occupying power “in cases where they constitute a threat to its security” and replaced with military orders enforced in “properly constituted, non-political military courts.” However, it is important to note that this authority rests on an underlying principle that military occupations must be temporary in nature, and cannot be legally maintained indefinitely (DCI; 2012; 16).

#### What is not justifiable/ legal under Military Law?

The right to a fair trial is guaranteed under both IHL and IHRL; this must be followed at all times. The UN Human Rights Committee has stated that: *“A state of emergency may*



*never be invoked as a justification for deviating from fundamental principles of fair trial*” (DCI; 2009; 14). Furthermore, the courts must make provisions for a fair trial: “*Military tribunals should afford the full guarantees stipulated in Article 14 of the International Covenant on Civil and Political Rights*” (DCI; 2012; 14). GC IV sets out that nothing should impede the right to a fair trial, even if the individual is suspected of crimes against national security (1949; Article 5). This is clearly applicable to the situation Israel claims, whereby it claims minors are held in administrative detention based on ‘secret’ evidence which is vital to the security of the State. It is in clear violation of IHL.

Under IHRL it is not permissible to use coerced confessions against someone in court, even in times of armed conflict. DCI has reported numerous times that children recount interrogation techniques which force them into confessing even when they have not committed a crime, just so that the harsh treatment would stop.

Proceedings in the military courts disregard many basic fair trial rights and general principles of juvenile justice are simply not applied. In almost all cases, the primary evidence against the children is the confession extracted during a coercive interrogation. With no faith in the system and the potential for harsh sentences, approximately 95% of cases end in the child pleading guilty, whether the offence was committed or not (DCI; 2009; 6).

DCI has raised the point of whether military courts used to try civilians can ever meet IHL, as it is difficult to achieve a fair and impartial tribunal when: “*the judges are all serving officers subject to military discipline and dependent on superiors for promotion* (DCI; 2009; 14-15).

The threshold of evidence required before an Israeli soldier arrests a Palestinian child on suspicion of throwing stones is so low in some cases as to suggest the existence of a policy of collective punishment, rather than any serious attempt to identify those actually involved in any unrest. It should be noted that all forms of collective punishment are prohibited by the Fourth Geneva Convention (DCI; 2009; 25).

Israel cannot deprive the Palestinian minors of the rights afforded to them under IHRL. “*Juveniles deprived of their liberty shall not for any reason related to their status be denied the civil, economic, political, social or cultural rights to which they are entitled under national or international law, and which are compatible with the deprivation of liberty*” (Havana Rules; Article 13). The Havana Rules apply to all detention facilities which deprive juvenile of their liberty (Havana Rules; 1990; Article 15).

Juveniles who are detained under arrest or awaiting trial (“untried”) are presumed innocent and shall be treated as such. Detention before trial shall be avoided to the extent possible and limited to exceptional circumstances. Therefore, all efforts shall be made to apply alternative measures. When preventive detention is nevertheless used, juvenile courts and investigative bodies shall give the highest priority to the most expeditious processing of such cases to ensure the shortest possible duration of detention. Untried detainees should be separated from convicted juveniles (Havana Rules; Article 17).

## **WHAT LAWS ARE BEING BROKEN BY ISRAEL?**

The FCO Report on Military detention of children has clearly stated that both IHL and IHRL applies to the OPT: “*International law, international humanitarian law and the UN Convention on the Rights of the Child apply to the Occupied Palestinian Territories and therefore should be fully and effectively implemented*” (FCO; 2012; 32).

The ill-treatment and torture of Palestinian children by Israeli authorities is widespread, systematic and institutionalised. This system operates within a general culture of brutality and impunity. Between 2001 and 2008, over 600 complaints were filed against Israeli Security Agency (ISA) interrogators for alleged ill-treatment and torture. To date, there has not been a single criminal investigation. Unless and until there is some level of accountability for what amounts to serious breaches of the Fourth Geneva Convention, the UN Convention Against Torture and the UN Convention on the Rights of the Child, both at the domestic and international level, the ill-treatment and torture of Palestinian children at the hands of Israeli authorities will continue unchecked (DCI; 2009; 7).

### **International Humanitarian Law (IHL)**

GC IV prohibits the use of torture at any time against ‘protected persons’ (Article 32); and states if a High Contracting Party is found to have breached the prohibition of torture or inhuman treatment (Article 147), then it is the responsibility of the remaining Parties to prosecute the individuals in their own courts, regardless of nationality (Article 146). The FCO report documented other breaches of IHL, including the transfer of prisoners out of their nation state which is prohibited by GC IV.

Transportation of child prisoners into Israel is in breach of article 76 of the Fourth Geneva Convention. Failure to translate Military Order 1676 from Hebrew is a violation of article 65 of the Fourth Geneva Convention. With regard to what is set out in paragraph 101, we record our view that to hold children routinely and for substantial periods in solitary confinement would, if it occurred, be capable of amounting to torture in breach not only of article 37(a) of the UNCRC but of other well-known international instruments” (FCO; 2012; 30).

### **International Human Rights Law (IHRL)**

The delegation for FCO found that there are many human rights abuses occurring at the hands of the Israeli State. To begin with, if we look at the CRC, FCO stated that there “...are certain undisputed facts which compel us to conclude that Israel is in breach of articles 2 (discrimination), 3 (child’s best interests), 37(b) (premature resort to detention), (c) (non-separation from adults) and (d) (prompt access to lawyers) and 40 (use of shackles)” (FCO; 2012; 30). As well as these violations, FCO has said that if certain testimonies of arrest and detention they received are found to be true, then Israel would be guilty of the most heinous of crimes, that of torture (FCO; 2012; 30).

According to a DCI report (2012a; 17) IHRL does apply to the OPT, this view is supported by the ICJ, which states Israel is responsible for citizens of the OPT (ICJ Wall Opinion; 2004). Accordingly Israel as the occupying power has signed and ratified the CRC, CAT and ICCPR, therefore should abide by the law and ensure human rights are afforded to Palestinians under their jurisdiction (DCI; 2012a; 17).

These treaties relevantly provide that: in all actions concerning children their best interests shall be a primary consideration; children should only be detained as a measure of last resort and for the shortest appropriate period of time; all persons shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal; the rights contained in these treaties must be applied without discrimination; and torture and ill-treatment is absolutely prohibited, without exception (DCI; 2012; 17).

### Convention on the Rights of the Child (CRC)

As mentioned above, the ICJ advised that Israel is responsible for Palestinian minors in the OPT. The ICJ Wall Opinion categorically stated that the CRC does apply to Israel in its treatment of Palestinian minors in the OPT. The FCO report reaffirms this opinion, and relates it to the treatment of Palestinian minors arrested and detained by Israel.

In our judgment it is factually and legally unreal to suggest that children who are arrested by the Israeli Defence Force, interrogated by either the Israeli police or the Israeli Security Agency, held in Israeli prisons and judged by Israeli military courts, are not within the jurisdiction of the State of Israel. We recognise the International Court of Justice's 2004 Advisory Opinion which concludes categorically that the UNCRC is applicable in the Occupied Palestinian Territories (FCO; 2012; 10).

The UN CRC explicitly sets out that due to the vulnerable nature of children, policies should always be in their 'best-interests' and detention should be the very last resort of the State (Article 37(c)). DCI has expressed the view that when it relates to the issue of prosecution, adherence to the rights set out by the CRC are even more vital. This is because fewer 'fair trial protections' exist when prosecution is taking place before a military tribunal. Furthermore, "*juvenile justice standards appear almost non-existent*" (DCI; 2009; 15). Article 40(1) of the CRC requires States to ensure that convicted children are treated in such a way that will promote their reintegration into society. However, the abuse reported by DCI also shows that minors face a lot of difficulty post-release, due to the abuses they experienced while in detention (DCI; 2012a). Article 37 of the CRC prohibits the use of torture: '*no child should be subject to torture*' (CRC; 1989). This is supported by customary law and CAT, which both state that torture is never justified and always prohibited.

The CRC Committee has narrowly defined the circumstances which allow the use of force and restraint on a detained child. It also recommends training for any personnel dealing with children.

"only when the child poses an imminent threat of injury to him or herself or others, eliminating the use of restraint for serious destruction of property" and states that the

use of force or restraint should be under the direct and close control of a medical and/or a psychological professional. The Committee on the Rights of the Child recommends training for staff on the rules and standards governing the use of force and restraint. Where staff violates these rules, they should be subject to disciplinary measures (SIDA; 2011; 50).

### Convention against Torture

DCI has reported that there have been hundreds of cases of complaints filed against the Israeli Security Agency (ISA) for ill-treatment and torture (DCI; 2009; 20). Nothing has been done about these allegations to date; Israel has been lax when it has come to investigating these crimes. *“The Police Investigation Department of the Ministry of Justice, the relevant authority charged with investigating these complaints, did not conduct a single criminal investigation”* (DCI; 2009; 20). The occurrence of these violations is severe enough, that by not rectifying the situation and prosecuting those responsible, the State is failing its obligations set out in IHL and IHRL. The International Criminal Tribunal for the former Yugoslavia has further clarified the definition of torture which should be applied to the experiences faced by Palestinian minors while in detention. *“There is no requirement for an act to constitute torture that any injury suffered be permanent or that evidence of the suffering be visible after the act”* (DCI; 2009; 22).

What should be pointed out though is that there are long-lasting effects of the ill-treatment faced by minors while in detention at the hands of Israeli officials.

The severity of the pain or suffering required for an act to constitute torture will depend on the circumstances of each individual case. ‘In assessing the seriousness of any mistreatment, the objective severity of the harm inflicted must be considered, including the nature, purpose and consistency of the acts committed. Subjective criteria, such as the physical or mental condition of the victim, the effect of the treatment and, in some cases, factors such as the victim’s age, sex, state of health and position of inferiority will also be relevant in assessing the gravity of the harm’ (DCI; 2009; 21).

Nowak and McArthur state that if you read Article 1 and Article 16 of CAT, then the definition of torture is:

an aggravated form of cruel, inhuman or degrading treatment or punishment. Both torture and the less serious act of ill-treatment are both absolutely prohibited under the Convention Against Torture. However, unlike in cases of torture, a finding of ill-treatment does not require the element of intention and may be caused negligently. Further, degrading treatment or punishment may be defined as the infliction of pain or suffering, whether physical or mental, which aims at humiliating the victim (2008; 558).

In 2009 the Committee against Torture held its 42<sup>nd</sup> session, the committee made recommendations to Israel regarding the treatment of Palestinians, including children in

detention, in the OPT (DCI; 2009; 94). The recommendations relating to this dissertation are as follows:

All allegations of torture and ill-treatment should be promptly and effectively investigated and all perpetrators should be prosecuted and, if applicable, appropriately punished; Military Order 132 should be amended to ensure that the definition of a child is 18, in line with international standards. (Currently under Israeli military law applied to Palestinians in the West Bank, the age of majority is 16); All child detainees should be afforded basic safeguards, before and during interrogations, including prompt access to an independent lawyer, an independent doctor and family member from the outset of their detention; Children should not be convicted in the military courts based solely on the evidence of a confession given during interrogation; A youth court should be established as a matter of priority. Israeli authorities should make every effort to facilitate family visits to child detainees, including expanding the right of freedom of movement of relatives to travel to Israel where most children are detained; All interrogations should be video recorded as a means to prevent torture and ill-treatment; Israeli authorities should review, as a matter of priority, its policies regarding administrative detention (detention without charge or trial) as they currently constitute cruel, inhuman or degrading treatment or punishment in contravention of Article 16 of the Convention Against Torture (DCI; 2009; 95).

The Committee clearly stipulated that no reason would justify torture, this includes ‘security’; ‘war’; or threat to state security (DCI; 2009; 95). This means the justification Israel currently uses to continue the use of military detention is unacceptable. The harsh treatment children suffer while in detention due to ‘secret’ evidence is not acceptable. The ‘secret evidence’ of the threats Israel faces to their national security cannot justify the use of torture. Furthermore, CAT prohibits the use of evidence gained from torture in trials (CAT; Article 15).

### International Covenant on Civil and Political Rights

The right to a fair trial has been set out by the ICCPR, which also states that certain rights can be derogated from in times of emergency as long as it does not contradict IHL (Article 4). There are certain rights that can never be derogated from; these include the prohibition of torture (Article 7). Article 9 sets out conditions for the arrest and detention of persons under the jurisdiction of the State. As we have already seen, IHRL is applicable to the OPT, and Israel, as the occupying power is responsible, therefore, the conditions set out in the ICCPR, especially Article 9, should be adhered to. This Article sets out that arbitrary arrest or detention is not permissible; the person must be informed of reasons for the arrest at the time; trial must occur within a reasonable time frame or the individual should be released; finally and importantly a victim of unlawful arrest or detention should be granted the enforceable right to compensation (ICCPR; 1989; Article 9).

### UN Rules for the Protection of Juveniles Deprived of their Liberty

In 1990 the UN General Assembly (GA) adopted the ‘Rules for the Protection of Juveniles Deprived of their Liberty (also known as the Havana Rules). One of the key features of these rules was to ensure the protection of minors in detention and to make sure their human rights were upheld during that time.

The Rules are intended to establish minimum standards accepted by the United Nations for the protection of juveniles deprived of their liberty in all forms, consistent with human rights and fundamental freedoms, and with a view to counteracting the detrimental effects of all types of detention and to fostering integration in society (Havana Rules; 1990; Article 3).

Article 31 states that: “*Juveniles deprived of their liberty have the right to facilities and services that meet all the requirements of health and human dignity*” (Havana Rules; 1990; Article 31).

These rules also re-stated the prohibition of torture against detainees and mentions that solitary confinement is also completely prohibited. “*All disciplinary measures constituting cruel, inhuman or degrading treatment shall be strictly prohibited, including... placement in a dark cell, closed or solitary confinement or any other punishment that may compromise the physical or mental health of the juvenile concerned*” (Havana Rules; 1990; Article 67). It is Israel’s responsibility to incorporate the Havana Rules into its domestic legislation and apply it to the OPT. “*States should incorporate the Rules into their legislation or amend it accordingly and provide effective remedies for their breach, including compensation when injuries are inflicted on juveniles. States should also monitor the application of the Rules*” (Havana Rules; 1990; Article 7). This is clearly not the case with Israel at present; however the State should recognise these rules and implement them immediately.

### UN Standard Minimum Rules for the Administration of Juvenile Justice

Prior to the above rules being adopted, the UN had already put in place ‘Standard Minimum Rules for the Administration of Juvenile Justice’ in 1985, also known as the Beijing Rules. These rules set out that contact between a law official and a minor while in detention should take into account the vulnerable nature of a child: “*contact between law enforcement agencies and a child shall be managed in such a way as to respect the legal status of the child, promote the well-being of the child and avoid harm to her or him, with due regard to the circumstances of the case* (The Beijing Rules; 1985; Article 10.3). Currently the treatment of Palestinian minors by Israel does not adhere to these UN rules. The international community must take action to end the inhuman or degrading treatment of minors while in detention. The international community must act to protect those minors who are in a vulnerable position due to their age and their status as detainees.

## **WHAT IS THE ARGUMENT AGAINST RESPONSIBILITY? (BY ISRAEL)**

Israel has put forward many reasons as to why it is not responsible for those living in the OPT, more specifically Palestinians living in the OPT, as there are Israeli citizens living in the West Bank. One argument presented by Israel is that they are not in fact ‘occupying’ the OPT but ‘administering’ some parts of it, while the rest is under the jurisdiction of the Palestinian Authority (PA). This argument is a bit weak as Palestinian minors are arrested and detained by Israeli forces. So even if the location was not under Israeli jurisdiction, the fact that it is Israeli officials responsible for arresting and detaining Palestinian minors means Israel is responsible. It also means that responsibility for recompense and justice lies in the hands of the State of Israel.

The FCO report found that Israel justifies the arrest and detention conditions of Palestinian children as being due to the ‘threat’ of terrorism. These children are seen as potential terrorists and therefore it is justifiable that they face severe conditions and harsh punishments.

It may be that much of the reluctance to treat Palestinian children in conformity with international norms stems from a belief, which was advanced to us by a military prosecutor, that every Palestinian child is a “potential terrorist”. Such a stance seems to us to be the starting point of a spiral of injustice, and one which only Israel, as the Occupying Power in the West Bank, can reverse (FCO; 2012; 30).

Other arguments put forward by Israel include the assertion that human rights treaties are only applicable to the state and its ‘own citizens’; and further due to nature of ‘conflict’ only IHL applies and not IHRL. This view has been rejected by the international community and the UN (this includes the ICJ Wall opinion and findings of the UN Human Rights Committee and the Committee on the Rights of the Child): “*it is argued that in a conflict situation the appropriate law is humanitarian law, not human rights law. These arguments have found no international support and have been consistently rejected*” (DCI; 2012a; 133). Furthermore, the ICJ Wall Opinion also stated that both IHL and IHRL can apply to the OPT: “*it considers that the protection offered by human rights conventions does not cease in case of armed conflict*” (2004).

## **ARE THESE VALID?**

As mentioned above, the international community does not accept Israel’s rejection of IHRL applicability to the OPT. Furthermore, despite Israel’s claim that IHL and IHRL cannot be applied at the same time during a time of conflict; the FCO report has highlighted a decision of the ICJ which refutes this claim:

The occurrence of hostilities or physical conflict in the Occupied Palestinian Territories does not alter or dilute Israel’s consequent obligations. The International Court of Justice considers that in times of war, human rights obligations are not suspended, save by the recognised process of derogation, but that they operate in harness with international humanitarian law – the body of law which applies to

situations of armed conflict. As the Grand Chamber of the European Court of Human Rights has held in the case of *Al-Skeini v United Kingdom* (55721/07; 7 July 2011), a state in military occupation of a territory is obliged, by virtue of its adherence to an international human rights treaty, to accord those rights in full to the persons over whom, without assuming full sovereignty, it exercises ‘physical power and control’, or who inhabit an area of which the contracting state has effective control. The population of the West Bank is within the physical power and control of Israel, and Israel has effective control of the territory. Our visit dispelled any doubts we might have had about this (FCO; 2012; 10).

If Israel is guilty of condoning and sanctioning the conditions which amount to torture, of Palestinian minors while in detention. Then there will be no arguments applicable to justifying these actions. The crime of torture can never be derogated from, from this stems the knowledge that even if Israel was found not to be responsible for the OPT or its citizens. The crime of torture which it has inflicted on Palestinian minors must be prosecuted.

The prohibition against torture is universally recognised as a peremptory norm or jus cogens under customary international law. This means that it ranks above treaty law and ordinary principles of customary international law and cannot be derogated from under any circumstances. Experience has shown that those in positions of authority will, from time to time, be tempted to use prohibited techniques for extracting information that they say is vital to national security and necessary for the protection of the public. These arguments are without legal merit. The Convention Against Torture is clear and unambiguous on this point: ‘No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture (DCI; 2009; 22).

It is clear that the reasons’ Israel uses to justify its’ continued inaction to stop human rights abuses of Palestinian minors is not valid. The excuses are not accepted by the UN or other States. Israel must change its course of action and accept that both IHL and IHRL apply to the OPT, and that it is their obligation to ensure those rights are met. Despite this obvious obligation, Israel continues to refuse responsibility for the OPT and the minors who are detained by its own military officials. The Director of Ensan Center for Democracy and Human Rights, Shawqi al Issa has stated that:

Israel had a long-standing position of refusal to apply United Nations Security Council and General Assembly resolutions, as well as the opinions of the International Court of Justice. Despite a unanimous stance that the Fourth Geneva Convention should be applied in the Occupied Palestinian Territory, Israel had refused to implement the text. In fact, it had used all possible pretexts to refrain from its implementation because the Convention contained articles banning Israel from doing what it was doing — namely, torturing Palestinians, detaining them and so forth (UNGA; GA/PAL/1186; 2011).



## **PART 3**

### **WHAT SHOULD ISRAEL BE PROSECUTED FOR?**

As we have seen, Israel is violating many international humanitarian laws as well as international human rights law. These violations include the use of torture on minors while in detention (including the use of solitary confinement); difficult access to legal representation and thus the right to a fair trial; the use of administrative detention; the age and vulnerable nature of minors is not taken into account; and the State is not investigating complaints of torture and ill-treatment. The state of Israel is allowing those in violation of IHL and IHRL to continue with impunity, this must be stopped and prosecution must occur against those found to be practicing the worst of crimes which are defined as war crimes and crimes against humanity.

Israel has made attempts to rectify the situation faced by minors in detention; however these policy changes have had little real impact. This means that further action is needed, especially from the international community to ensure any changes are effective and long lasting.

The establishment of a military juvenile court and recent amendments to the military law in respect of children have had no discernable beneficial impact on the treatment of children during the first 48 hours after their arrest – it is during this time frame that the evidence indicates the most serious violations occur (DCI; 2012b; 9).

### **Universal Jurisdiction**

The overriding view we get when looking at the treatment of Palestinian minors in Israeli detention is that the conditions they face amount to torture and cruel, inhuman or degrading treatment or punishment. Accordingly the Fourth Geneva Convention provides universal jurisdiction over the crime of torture. This means any State can intervene to stop these human rights abuses from continuing. It is obligatory on all States Parties of the GC to ensure perpetrators of torture are prosecuted. This is important to note, as Israel is no longer a signatory to the Rome Statute of the ICC. So cannot be investigated for war crimes and crimes against humanity based on individual complaints.

Every state has an obligation to take effective measures to prevent acts of torture in territories under its jurisdiction and to criminalise, investigate and prosecute such acts. Further, signatories to the Fourth Geneva Convention are obliged to search for persons alleged to have committed acts of torture, wherever the acts may have occurred, and to prosecute them in their own courts under the principle of universal jurisdiction. Universal jurisdiction is based on the premise that certain crimes are so serious that in effect they are crimes against all humanity, and so should be prosecuted in any court, regardless of where the crime took place. It must also be noted that the duty to search for alleged perpetrators of such crimes is an active duty: As soon as a contracting party realises that there is on its territory a person who has committed ... a [grave] breach, its duty is to ensure that the person concerned is

arrested and prosecuted with all speed. The necessary police action should be taken spontaneously, therefore, not merely in pursuance of a request from another State. The purpose behind the principle of universal jurisdiction is to ensure that there is nowhere to hide for perpetrators of the most serious of crimes, such as genocide, slavery and torture. In many countries the laws are already in place, all that is now required is the necessary will and resources to provide effective remedies to the victims of torture and perhaps an effective deterrent against the use of such practice (DCI; 2009; 24).

Under the Fourth Geneva Convention, High Contracting Parties can prosecute those responsible for violating IHL; this can be done via their own courts. A High Contracting Party can operate under universal jurisdiction to ensure legal action is taken against all those complicit in the torture of Palestinian Minors while held in military detention.

The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article. Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case (GC IV; 1949; Article 146).

### **Torture: War Crime and Crime against Humanity**

As set out in the Havana rules, the use of restraint should only be for exceptional cases. This does not seem to be the case of Israel in its treatment of Palestinian Prisoners. All the points mentioned in Article 64 are currently being broken by Israel. Israel should be held accountable and prosecuted for the crimes they have committed.

Instruments of restraint and force can only be used in exceptional cases, where all other control methods have been exhausted and failed, and only as explicitly authorized and specified by law and regulation. They should not cause humiliation or degradation, and should be used restrictively and only for the shortest possible period of time. By order of the director of the administration, such instruments might be resorted to in order to prevent the juvenile from inflicting self-injury, injuries to others or serious destruction of property. In such instances, the director should at once consult medical and other relevant personnel and report to the higher administrative authority (Havana Rules; 1990; Article 64).

Following on from this, we can see that the conditions of a detainee must be in accordance with international law. The Havana Rules sets out that ‘respect and protect’ should be vital in the treatment of detained minors.

In the performance of their duties, personnel of detention facilities should respect and protect the human dignity and fundamental human rights of all juveniles, in particular, as follows:

No member of the detention facility or institutional personnel may inflict, instigate or tolerate any act of torture or any form of harsh, cruel, inhuman or degrading treatment, punishment, correction or discipline under any pretext or circumstance whatsoever;...All personnel should ensure the full protection of the physical and mental health of juveniles, including protection from physical, sexual and emotional abuse and exploitation, and should take immediate action to secure medical attention whenever required (Havana Rules; 1990; Article 87).

The treatment of Palestinian minors consistently and recurrently breaks IHL and IHRL, these violations are repeatedly 'seen' by people who should ensure that minors are protected. Judges consistently see coerced confessions time and again and should refuse to accept these confessions as set out by IHL. IHL clarifies that forced confessions should never be used as evidence in the trial of the individual in question. Medical professionals also see the physical evidence of abuse at the hands of Israeli officials and yet choose to turn a blind eye and not report this abuse (DCI; 2009; 101). "*This system imposed by Israel in the Occupied Palestinian Territory operates beyond international legal norms and within a general culture of impunity*" (DCI; 2009; 101).

As we see above, both legal and medical professionals refuse to report the abuse inflicted upon Palestinian minors at the hands of Israeli military. If people in positions of power within Israel refuse to take action, what can be done? We can look at obligations of the international community. States which are signatories to the Fourth Geneva Convention have certain obligations to the rest of the World. These states have a direct responsibility to prosecute anyone found to be in violation of the Fourth Geneva Convention (GC IV; 1949; Articles 146 and 147).

The international community which is itself bound by a number of legal obligations to ensure that these violations are fully investigated, and where appropriate, prosecuted and that such conduct is not rewarded. Without some measure of accountability, it is unlikely that the situation endured by Palestinian children...will improve (DCI; 2009; 101).

## **Jurisdiction of the ICC**

The International Criminal Court was created by the Rome Statute of 1998. The preamble of the Rome Statute encourages international action to stop serious crimes, "*the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation*" (Rome Statute of the ICC; 1998). Article 5 establishes ICC jurisdiction over war crimes and crimes against humanity. One definition of crime against humanity is torture, and torture is defined as: "*the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions*" (Rome Statute; 1998; Article 7 (1(f) and 2(e)). As we have already seen, the conditions faced by Palestinian minors who are held in military detention by Israel match up the above definition of torture.

The Rome statute has defined a war crime as including the following violations: “Torture or inhuman treatment” (2(ii)); “Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial” (2(vi)); and “Unlawful deportation or transfer or unlawful confinement” (2(vii)). These violations do occur in relation to the treatment of Palestinian minors when in detention by Israel; these conditions are consistently being violated. The conditions of a minor can thus be defined as both war crimes and crimes against humanity, thereby placing the situation in the OPT under the jurisdiction of the ICC.

One challenge to the jurisdiction of the ICC is that Israel is not a signatory to the Rome Statute. This can be overcome as according to the Statute; jurisdiction can be accessed by a State not a party to the statute itself. The Rome Statute states that the non-Party can make a complaint if it is the party that is being affected. Palestine has requested this in the past for other crimes however the ICC did not accept this jurisdiction. This could be for a number of reasons; including the fact that jurisdiction is seen as the first step by many for Palestine to gain ‘Statehood’. However this should not be a justification for the continuing war crimes and crimes against humanity to continue with impunity.

As the ICC did not accept jurisdiction under the complaint of Palestine, it can claim jurisdiction under a different Article. Article 13 of the Rome Statute clarifies that the court can consider a case against Israel if a different State, which is a party to the Statute, refers the case. Under this Article, even if the case is referred by the Security Council acting under chapter VII of the UN Charter, then jurisdiction can be claimed. Article 14 sets out that for a case to be considered the crime needs to fall under the jurisdiction of the ICC, meaning the crime of genocide; crimes against humanity; war crimes; and the crime of aggression (Article 5). As we have already established, Israel is guilty of crimes which fall under the definition of both war crimes and crimes against humanity. This means that the ICC can investigate and prosecute Israel despite Israel no longer being a signatory to the Rome Statute. This also means there is more need for the international community, i.e. States Parties to the Rome Statute, to take action and put an end to the continued torture of Palestinian minors at the hands of Israeli military. Article 14 also calls for there to be supporting documentation accompanying any complaint; the FCO report of 2012 provides this necessary evidence. As it was funded by the United Kingdom Foreign and Commonwealth Office, it seems only natural that the UK leads this referral to the ICC.

If for any reason the ICC cannot prosecute Israeli officials for war crimes and crimes against humanity then we can look to Human Rights Treaties to provide justice. Under CAT, Israel as a signatory, should seek to prosecute those ‘individuals’ responsible for torture and other violations of IHL and IHRL. Israel has to-date done very little to ensure these crimes are brought to justice. However, if the international community applied pressure and encouraged the State of Israel to end this impunity, we may see justice served. One problem with this course of action is that currently the human rights violations seem to be state sponsored as a reaction to ‘national security’. Therefore can Israel be impartial enough to investigate and hold accountable every individual responsible for crimes amounting to torture?

## Jurisdiction of the Fourth Geneva Convention

An Advocate and Legal Researcher based in AL Haq, Ramallah, Nasser Alryyes has recommended that *“the United Nations should exercise its Charter-based legal responsibility to pressure the Israeli side to fulfil its obligations as regarded detainees. States parties could resort to article 146 in the case of Israeli failure to do so within a specific time frame”* (UNGA; GA/PAL/1186; 2011). Article 146, refers to the Fourth Geneva Convention, which states that:

The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article Database...Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation hand such persons over for trial to another High Contracting Party concerned provided such High Contracting Party has made out a 'prima facie' case (GC IV; 1949; Article 146).

This clearly sets out that the international community has a direct obligation to intervene in the right abuses (those mentioned in the GC) occurring in the OPT at the hands of the Israeli forces and the State. The Specific abuses outlined in Article 147 include ‘torture or inhumane treatment’, as well as *“wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person... wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention”* (GC IV; 1949; Article 147).

Those who are violating IHL can be tried in the court of a High Contracting Party of the Fourth Geneva Convention. This should be acted upon if the ICC cannot apply jurisdiction. This clear obligation calls into question certain facts. For example, the question of timing, why have high Contracting Parties not intervened sooner, when it is obligatory upon them to take action against those who violate IHL.

## **CONCLUSION**

From the beginning of this dissertation we have seen that the situation in the OPT does not meet International norms. The treatment of Palestinian minors while in Israeli detention violates both IHL and IHRL. Israel, as the Occupying Power, is responsible for the welfare of all citizens living in the OPT. Whether they are Israeli or Palestinian should make no difference to the human rights they are entitled to. The international community as a whole have recognised that Israel is 'Occupying' the OPT and not just 'administering' certain parts of it. The reasons Israel puts forward for 'no responsibility' towards the Palestinian citizens is repeatedly rejected.

The topic of military detention of Palestinian children has been researched and published by only a small number of NGOs and the FCO in 2012. Apart from this, it has received little attention from the international community; despite the fact this situation has been on-going since 1967. Little has been done to ensure Israel meets its obligations towards Palestinian children held in detention. Israel has declared a state of emergency for the OPT and therefore refuses to afford certain rights to those 'Palestinians' in the OPT. IHL clearly set out that during armed conflict or occupation 'protected persons' must be afforded certain basic rights, no matter what the 'threat' is. A protected person includes individuals those in military detention of the occupying power. The few basic rights they should be afforded include, being treated with humanity and conditions to ensure the right to a fair trial.

Currently the treatment of Palestinian minors fits the definition of 'torture' as defined by the Rome Statute and CAT. Palestinian minors constantly face extreme interrogation techniques such as the use of shackles, beatings, verbal threats, sensory deprivation and the use of solitary confinement is routinely used. Furthermore, administrative detention is used in certain cases whereby the evidence against the minor is 'secret and thus cannot be argued against'. This allows minors to be held in detention without trial indefinitely. The age of a detainee should always be addressed, according to IHL and IHRL, due to the vulnerable nature of minors. However this is not the case in the treatment of Palestinian minors by Israeli officials, which seem to overlook the age and vulnerability of children in their custody.

As we have seen, at all stages of the arrest and detention process, Palestinian minors constantly have their human rights abused. The Human Rights Treaties most applicable to their situation include the Convention on the Rights of the Child; the Convention against Torture; and the International Covenant on Civil and Political Rights. Israel has signed all three and should therefore be held accountable for the violations which occur. Israel is also a State Party to the Fourth Geneva Convention which regulates times of war and occupation. The Fourth Geneva Convention provides jurisdiction to prosecute those found in 'serious breaches' of its Articles. This jurisdiction should be used to prosecute Israeli officials guilty of torture and other acts which amount to cruel and inhumane treatment.

As mentioned above, the jurisdiction of the Fourth Geneva Conventions states that it is the obligation of all State Parties to the Convention to ensure those found guilty of crimes outline in Article 147, should be sought out and prosecuted in a State Party's own court. This is relevant to the crimes of torture inflicted upon Palestinian minors held in Israeli detention because Israel is not a signatory to the Rome Statute of the ICC. Under the Rome Statute, torture is defined as both a war crime and crime against humanity. In order for Israel to be prosecuted by the ICC one of two things must occur. The first being, another State Party to the Statute submits a complaint against Israel with supporting documentation. The prosecutor can apply jurisdiction in this way, otherwise jurisdiction can also be applied if the situation is referred by the UN Security Council.

## **RECOMMENDATIONS**

1. Israel to put an end to practices that amount to torture and investigate those responsible.
2. Investigate all complaints and look at records of all minors who have been held in military detention by Israel since its creation.
3. Prosecute those who were directly involved in torture.
4. Prosecute those who gave the orders resulting in torture.
5. Prosecute those who, by omission, allowed torture to continue (i.e. doctors and judges).
6. If Israel refuses to take action, then under the Rome Statute of the ICC, another State Party should submit a complaint to the ICC for war crimes and crimes against humanity undertaken by the State of Israel. All other parties should submit a joint complaint as Israel is no longer a signatory, and a joint complaint will strengthen any case against Israel.
7. If other States do not submit a complaint, the UN Security Council should refer the situation to the Prosecutor for investigation.
8. If the ICC cannot claim jurisdiction, the High Contracting Parties of the Fourth Geneva Convention must take action and prosecute those responsible for torture as well as other grievous breaches of the Convention via their own courts.

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