

Palestinian Children's Rights in Israeli Military Detention

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Introduction

Overview of the Phenomenon

This research aims to investigate Palestinian children¹'s rights violations inflicted in the various phases pre and *post*-trial under the Israeli military detention. According to United Nations (below UN), in the last ten years, approximately 7.000 Palestinian children have been detained, prosecuted and/or arrested under the Israeli military justice system, an average of two Palestinian children each day².

Israel imposed military law on the Occupied Palestinian Territory (below OPT) in June 1967 through a military order that gives the Israeli area commander full legislative, executive and judicial authority³.

In the West Bank, indeed, there are two separate legal systems⁴ operating in the same territory: Palestinian population is prosecuted in military courts, while Israeli settlers, living in the area, are subject to the Israeli civilian and criminal legal system⁵.

Based on the establishment of military law, successive Israeli military commanders in the West Bank have issued over 1.600 Military Orders. These Orders relate to a range of issues, including the establishment and jurisdiction of the military courts; detention, arrest, procedure and evidence in military courts; categories of offences and more recently, in September 2009, the establishment of a juvenile military court in response to documentation of the prosecution of children as young as twelve in adult military courts⁶.

Moreover, the majority of children arrested and prosecuted in the military courts are charged with throwing stones, which is an offence under Section 212 of the Military Order No. 1651 (Jerusalem, 1 November 2009).

In this regards, in November 2015, the Israeli Knesset⁷ passed a law that authorizes longer prison sentences for children convicted of throwing stones⁸.

According to UNICEF each year approximately 700 Palestinian children aged 12 to 17 are arrested and detained by Israeli army, police and security agents. Moreover the precise number of

¹ In accordance with art. 1 of the Convention of the Rights of the Child (New York, 20 November 1989), the term "child" refers to under 18 years old individual.

² UNICEF, *Children in Israeli Military Detention Observations and Recommendations*, February 2013. The report is available at the website: http://www.unicef.org/oPt/UNICEF_oPt_Children_in_Israeli_Military_Detention_Observations_and_Recommendations_-_6_March_2013.pdf (consulted 15 April 2016) p. 9.

³ UNICEF, *Children in Israeli Military Detention*, p. 6.

⁴ For further information please visit the website: http://www.dci-palestine.org/issues_military_detention.

⁵ UNICEF, *Children in Israeli Military Detention*, p. 6.

⁶ *Ibidem*.

⁷ The Knesset is the unicameral national legislature of Israel.

⁸ Human Rights Watch, *Israeli Police Abusing Detained Children*, 11 April 2016. The report is available at the website: <https://www.hrw.org/news/2016/04/11/palestine-israeli-police-abusing-detained-children> (consulted 22 April 2016).

Palestinians detained and arrested is not published by Israeli authorities. Therefore the number provided is estimation obtained combining the data provided by the Israel Prison Service and the lawyers from organizations involved with the military courts⁹.

Methodology

This investigation includes a deep analysis of the legal international framework and references to Israeli legislation applied to protect Palestinian children's rights arrested in Israeli military system. Furthermore, the phenomenon will be investigated in his various phases of arrest, transfer, administrative detention, trial and *post*-trial detention, including a review of the related existing reports and projects on-going from UN bodies and Israeli and Palestinian non-governmental groups. The paper will also include a final paragraph of recommendations and best practises proposed in light of the investigation conducted to increase the level of child protection for Palestinian children under Israeli military detention¹⁰.

⁹ *Ivi*, p. 21.

1. Analysis of the Pre-Trial Phases

1.1. The Arrest

The term “arrest” refers to “*any apprehension of a person that commences a deprivation of liberty*”¹¹. For what concerns Israeli international legal standards relevant in the context of reference, the arrest is taken into account by art. 3¹² of the Universal Declaration of Human Rights (Paris, 10 December 1948; below UDHR)¹³, arts. 37¹⁴ and 40¹⁵ of the Convention on the Rights of the Child

¹¹ Human Rights Committee, *General Comment No. 35-Article 9 (Liberty and Security of person)*, CCPR/C/GC/35, 16 December 2014, para. 13.

¹² According to art. 3 of the UDHR: “*Everyone has the right to life, liberty and security of person*”.

¹³ The text of the UDHR is available at the website: <http://www.un.org/en/universal-declaration-human-rights/> (consulted 21 April 2016).

¹⁴ According to article 37 of the CRC: “*States Parties shall ensure that: (a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age; (b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. 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; (c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances; (d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action*”.

¹⁵ In accordance with art. 40 of CRC: “*1. States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society. 2. To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that: (a) No child shall be alleged as, be accused of, or recognized as having infringed the penal law by reason of acts or omissions that were not prohibited by national or international law at the time they were committed; (b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees: (i) To be presumed innocent until proven guilty according to law; (ii) To be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defence; (iii) To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians; (iv) Not to be compelled to give testimony or to confess guilt; to examine or have examined adverse witnesses and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality; (v) If considered to have infringed the penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law; (vi) To have the free assistance of an interpreter if the child cannot understand or speak the language used; (vii) To have his or her privacy fully respected at all stages of the proceedings. 3. States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular: (a) The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law; (b) Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected. 4. A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence*”.

(New York, 20 November 1989; below CRC)¹⁶, rule 10¹⁷ of the United Nations Standards Minimum Rules for the Administration of Juvenile Justice (New York, 29 November 1985; below Beijing Rules)¹⁸ and arts. 14¹⁹ and 9²⁰ of the International Covenant on Political and Civil Rights (New York, 16 December 1966; below ICCPR)²¹, this last expressly named “Right to Liberty and Security of Person”.

¹⁶ The CRC entered into force 2 September 1990. The text of the Convention is available at the website: <http://www.ohchr.org/en/professionalinterest/pages/crc.aspx> (consulted 26 March 2016).

¹⁷ According to rule 10 of the Beijing Rules: “1. Upon the apprehension of a juvenile, her or his parents or guardian shall be immediately notified of such apprehension, and, where such immediate notification is not possible, the parents or guardian shall be notified within the shortest possible time thereafter. 2. A judge or other competent official or body shall, without delay, consider the issue of release. 3. Contacts between the law enforcement agencies and a juvenile offender shall be managed in such a way as to respect the legal status of the juvenile, promote the well-being of the juvenile and avoid harm to her or him, with due regard to the circumstances other case”.

¹⁸ General Assembly, Resolution No. 40/33, A/RES/40/33, 29 November 1985.

¹⁹ In accordance with art. 14 of ICCPR: “1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children. 2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law. 3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him; (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing; (c) To be tried without undue delay; (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it; (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court; (g) Not to be compelled to testify against himself or to confess guilt. 4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation. 5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law. 6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him. 7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country”.

²⁰ According to article 9 of the ICCPR: “1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law. 2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him. 3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement. 4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful. 5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation”.

²¹ The International Covenant on Civil and Political Rights entered into force 23 March 1976. The text of the Covenant is available at the website: <https://treaties.un.org/doc/Publication/UNTS/Volume%20999/volume-999-I-14668-English.pdf> (consulted 23 March 2016).

A large number of arrests of Palestinian children in OPT are accompanied by violence and intimidation²², it is therefore important to distinguish between right to liberty and right to security. Right to liberty prohibits different kinds of conducts aimed to the deprivation of freedom like police custody, remand detention, house arrest, administrative detention and involuntary transportation, while right to security protects individuals against intentional infliction of bodily or mental insults.

Right to liberty, differently from right to security, is not absolute. Sometimes, indeed, the arrest is justified (for example in the enforcement of criminal law)²³ but, as specified by the CRC, when arrest involves children it must be used only as a measure of last resort and for the shortest period of time, taking into account the best interest of the child²⁴.

Despite that, the same article prohibits arbitrary arrest, which lacks any legal basis²⁵. The Committee on Human Rights affirmed that:

“‘arbitrariness’ is not to be equated with ‘against the law’ but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality²⁶”.

For instance, arrest as punishment for the legitimate exercise of the rights guaranteed by the ICCPR could be arbitrary, including freedom of religion²⁷, freedom of opinion and expression²⁸, freedom of assembly²⁹ and freedom of association³⁰.

Furthermore, it should be noted that the International Convention on the Elimination of All Forms of Racial Discrimination (New York, 21 December 1965; below Convention on the Elimination of Discrimination)³¹ specifies that the above mentioned freedoms are guaranteed without distinction of race, colour, national or ethnic origin³².

With regards to this, Israeli military order No. 1651 breaches the disposition which prohibits arbitrary arrest, because it allows any soldier or police officer to arrest persons (even children) without

²² UNICEF, *Children in Israeli Military Detention*, p. 10.

²³ ICCPR, art. 9, para. 1; CRC, art. 37, letter *b*.

²⁴ CRC, art. 37, letter *d*. See also Human Rights Committee, case *D. and E. vs. Australia*, Communication No. 1050/2002, U.N.doc. CCPR/C/87/D/1050/2002, 9 August 2006, para 7.2.

²⁵ ICCPR, art. 9, para. 1.

²⁶ Human Rights Committee, *General Comment No. 35*, para. 12.

²⁷ ICCPR, art. 18.

²⁸ *Ivi*, art. 19.

²⁹ *Ivi*, art. 21.

³⁰ *Ivi*, art. 22.

³¹ The International Convention on the Elimination of All Forms of Racial Discrimination entered into force 4 January 1969. The text of the Convention is available at the website: <https://treaties.un.org/doc/Publication/UNTS/Volume%20660/volume-660-I-9464-English.pdf> (consulted 26 March 2016).

³² *Ivi*, art. 5, para. 1, letter *d*, points *vii*, *viii* and *ix*. “Non discrimination” is also a fundamental principle of the CRC, enshrined in art. 2.

a warrant where they have a suspicion that the individual has committed a “security offence³³” in Israeli military law³⁴.

It is necessary to bear in mind that since the moment of the arrest³⁵ the child has some legal guarantees.

First of all, the child alleged or accused of having infringed the penal law and her/his parents or legal guardians have the right to be informed promptly³⁶ and directly³⁷ of the charges against her/him as well as the right to challenge the legality of the deprivation of her/his liberty before a court or other competent, independent³⁸ and impartial³⁹ authority⁴⁰. Corollary of the present requirement is that notification of arrest’s reasons must be given in a language that the arrested children and her/his guardians or parents understand and that, if not, they can have the free assistance of an interpreter⁴¹.

As noticed by the Committee on the Right of the Child: “*this may require a presentation of the information in a foreign language but also a ‘translation’ of the formal legal jargon often used in a criminal/juvenile charges into a language that the child can understands*⁴²”.

Defence for Children International-Palestine Section (below, DCI-Palestine) reports⁴³ that, according to witnesses, 60% of the arrests are made between midnight and 5:00 a.m., furthermore the 88.1% of a group of 429 cases of Palestinian children detained from 2012 and 2015 were not informed of reason for arrest⁴⁴.

Some of the children arrested, indeed, reported to Human Rights Watch that they signed confessions written in Hebrew, a language they do not understand, after interrogators threatened them. A boy detained revealed that the police “punched and kicked” him, then presented him with the

³³ Military order No. 1651, paras. 222 (a) and (d), defines as security offences: throwing objects, including stones at a person, or property, or moving vehicle; insulting or offending a soldier’s honour and any act or omission that entails harm, damage, disturbance or danger to the security of the region or to the operation and using of a road, dirt path, vehicle or any property of the State of Israel.

³⁴ Military Order No. 1651, paras. 31 (a) and 32 (a).

³⁵ It means that all the following guarantees are valid during all the phases of the proceeding.

³⁶ The term “promptly” requires the information be given at the time of the arrest or within the shortest time thereafter.

³⁷ Art. 37, letter d, of the CRC specifies that, sometimes, the best interest of the child requires the present communication is given through parents.

³⁸ The requirement of independence refers, in particular, to the procedure and qualifications for the appointment of judges.

³⁹ The requirement of impartiality has two aspects. First, judges mustn’t allow their judgement to be influenced by personal bias, prejudices, preconceptions or act in ways that improperly promote the interests of one of the parties to the detriment of the other. Second, the tribunal must also appear to a reasonable observer to be impartial.

⁴⁰ CRC, art. 37, letter d, art. 40, para. 2, letter b, point ii; ICCPR art. 9, paras. 2-4 and art. 14, para. 3, letter a; Beijing Rules, rule. 10, para 1.

⁴¹ CRC, art. 40, para. 2, letter b, point vi; ICCPR art. 14, para 3, letter f.

⁴² Committee on the Rights of the Child, *General Comment No. 10-Children’s Rights in Juvenile Justice*, CRC/C/GC/10, 25 April 2007, para. 47.

⁴³ DCI-Palestine, *Bound, Blindfolded and Convicted*, 30 April 2012. The report is available at the website: http://www.dci-palestine.org/bound_blindfolded_and_convicted (consulted 20 April 2016).

⁴⁴ DCI-Palestine, *No Way to Treat a Child*, 14 April 2016. The report is available at the website: http://www.dci-palestine.org/palestinian_children_in_the_israeli_military_detention_system (consulted 20 April 2016), p. 22.

Hebrew confession to sign⁴⁵. In addition, also the notification of the arrest and the related documentation is often provided to the families in Hebrew.

The second additional requirement consists in the right of the arrested child to have (and to be informed of the possibility to have) legal or other appropriate assistance on how to choose the preparation or presentation of her/his defence since the moment of the arrest, even if he/she or her/his family doesn't have means to pay for it⁴⁶.

A first element of discrimination between Israelis and Palestinian children is the maximum period of time since the arrest without access to a lawyer. For Palestinian children, indeed, it amounts to 90 days⁴⁷ while for Israelis is 48 hours⁴⁸.

Despite the long term, according to a research conducted by the UN, the 78%⁴⁹ of detained Palestinian children reported not being adequately notified of their legal rights, in particular the right to counsel and the right to remain silent.

Finally, the child must be free from compulsory self-incrimination, that is, to not be compelled to give testimony or to confess guilt⁵⁰.

With regards to this last requirement, it is important to specify that there are a lot of ways to coerce or lead the child to a confession. The term "compelled", indeed, should be interpreted in a broad manner and not be limited to physical force⁵¹.

The Committee on the Rights of the Child affirmed that:

"The age of the child, the child's development, the length of interrogation, the child's lack of understanding, the fear of unknown consequences or of a suggested possibility of imprisonment may lead him/her to a confession that is not true. That may become even more likely if rewards are promised such as: 'You can go home as soon as you have given us the true story'⁵²".

All these conducts represent a violation of the right to security, protected by art. 9 of ICCPR⁵³ but when, in regard of the duration, the mental and physical effects of the treatments, the age, the state of

⁴⁵ Human Rights Watch, *Israel: Security Forces Abuse Palestinian Children*, 19 July 2015. The report is available at the website: <https://www.hrw.org/news/2015/07/19/israel-security-forces-abuse-palestinian-children> (consulted 26 April 2016).

⁴⁶ CRC, art. 40, para. 2, letter *b*, point *ii*; ICCPR, art. 14, para. 3, letters *b* and *d*.

⁴⁷ Military Order No. 1651, paras. 58 and 59.

⁴⁸ DCI-Palestine, *No Way to Treat a Child*, p. 48.

⁴⁹ UNICEF conducted a research where 163 Palestinian children out of a group of 208, reported not being adequately notified of their legal rights, in particular the right to counsel and the right to remain silent. For further information please visit the above mentioned UNICEF's report *Children in Israeli Military Detention*, p. 3.

⁵⁰ CRC, art. 40, para. 2, letter *b*, point *iv*; ICCPR, art. 14, para. 3, letter *g*; IV Geneva Convention, art. 31.

⁵¹ Committee on the Rights of the Child, *General Comment No. 10*, para 57.

⁵² *Ibidem*.

⁵³ *Supra*, para. 1.1.

health and the sex of the victim the ill-treatment attain a “*minimum of severity*”⁵⁴ amount to torture, cruel, inhuman or degrading treatment.

Many Palestinian children detained declared that during the arrest their wrists were painfully tied together with a plastic tie-rop and many of them reported they have been blindfolded. Moreover, according with a report conducted by a multidisciplinary group of Dutch experts in collaboration with the organizations Gate 48 and Palestine Link, many children indicated that, months after their arrest, they still had trouble sleeping related to the shocking moment of the arrest⁵⁵.

These conducts constitute a grave violation of the right of the child to not be subjected to similar treatments, protected (in the contest of reference) under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (New York, 10 December 1984; below Convention against Torture)⁵⁶, the CRC⁵⁷, the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War (Geneva, 12 August 1949; below Fourth Geneva Convention)⁵⁸ the ICCPR⁵⁹ and the UNHR⁶⁰.

Furthermore, it must be observed that “*because of the importance of the values it protects, the prohibition of torture has evolved into a jus cogens norm, that is a norm that enjoys a higher rank in the international hierarchy that treaty law and even ‘ordinary’ customary rules*”⁶¹.

According to article 1 of the Convention against Torture:

⁵⁴ European Court of Human Rights, case *Ireland vs. United Kingdom*, Court Plenary, Application No. 5310/71, 18 January 1978, para. 162.

⁵⁵ For more details, please visit the following website: <https://openaccess.leidenuniv.nl/bitstream/handle/1887/37616/Palestinian%20Children%20and%20Military%20Detention%20report.pdf?sequence=>.

⁵⁶ The Convention against Torture entered in force 26 June 1987. The text of the Convention is available at the website: <https://treaties.un.org/doc/Publication/UNTS/Volume%201465/volume-1465-I-24841-English.pdf> (consulted 31 March 2016), art. 2. In mind of art. 2: “1. *Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction. 2. 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. 3. An order from a superior officer or a public authority may not be invoked as a justification of torture*”.

⁵⁷ CRC, art. 37, letter a.

⁵⁸ The Fourth Geneva Convention entered in force 21.10.1950. The text of the Convention is available at the website: <https://www.icrc.org/ihl/INTRO/380> (consulted 2 April 2016), art. 31. In mind of art. 31: “*No physical or moral coercion shall be exercised against protected persons, in particular to obtain information from them or from third parties*”.

⁵⁹ ICCPR, art. 7. In mind of art. 7: “*No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation*”.

⁶⁰ UDHR, art. 5. In mind of art. 5: “*No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment*”.

⁶¹ International Criminal Tribunal for the Ex-Yugoslavia, case *The Prosecutor vs. Furundzija*, case No. IT-95-17/1, Trial Chamber, 10 December 1998, para. 153 and International Court of Justice, *Questions Relating to the Obligation to Prosecute or Extradite* (case *Belgium vs. Senegal*), Application No. 144/1999, 20 July 2012, para. 99. It occurs to specify that the *ius cogens* norms are absolute. This means that no derogation or exceptional circumstances, such as war, terrorism and similar public emergency threatening the life of the nation could be invoked as a justification. Likewise, an order of a superior of a superior officer cannot be invoked as a justification of an act in violation of a *ius cogens* norm.

“For the purpose of this Convention the term ‘torture’ means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he or a third person has committed or is suspected of having committed or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in a official capacity. It doesn’t include pain or suffering arising only from, inherent or incidental to lawful sanctions”.

The criteria for distinguishing torture for cruel, inhuman and degrading treatment may be identified to be the purpose of the conduct and the powerlessness of the victim.

This means that the ill-treatments committed against an arrested child will more likely amount to torture⁶².

1.2. The Transfer

The phase of transfer to the interrogation can take many hours; the children are usually brought to Gush Etzion and Ari’el, as well as Ofer Prison and Huwwara Interrogation Centre, in West Bank, but in a few cases the children can be transferred in centres in Israel⁶³ (*Please see annexe No. 1 at the bottom of the paper*).

After the arrest many children reported physical or verbal abuse and the transfer process often includes intermediate stops at settlements, including in some cases prolonged exposure to lack of water, food or toilet facilities⁶⁴. Some of the children arrested suffer from painful restraints or from being forced to lie on the hard floor of the vehicle⁶⁵.

From the juridical point of view, the forcible transfer of a protected children accused of offence⁶⁶ from occupied territory to the territory of the Occupying Power is taken into account by arts. 49⁶⁷ and

⁶² MCARTHUR and NOVAK, *United Nations Convention against Torture*, New York, 2008, p. 77.

⁶³ UNICEF, *Children in Israeli Military Detention*, p. 11.

⁶⁴ *Ivi*, p. 10.

⁶⁵ UNICEF, *Children in Israeli Military Detention Observations and Recommendations*, Bol. No. 2, February 2015. The report is available at the website: http://www.unicef.org/oPt/Children_in_Israeli_Military_Detention_-_Observations_and_Recommendations_-_Bulletin_No._2_-_February_2015.pdf (consulted 14 April 2016), p. 3.

⁶⁶ The Fourth Geneva Convention protects civilian persons in time of war.

⁶⁷ According with art. 49 of the Fourth Geneva Convention: “1. *Individual or mass forcible transfers, as well as deportation of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive.* 2. *Nevertheless, the Occupying Power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons so demand. Such evacuations may not involve the displacement of protected persons outside the bounds of the occupied territory except when for material reasons it is impossible to avoid such displacement. Persons thus evacuated shall be transferred back to their homes as soon as hostilities in the area in question have ceased.* 3. *The Occupying Power undertaking such transfers or evacuations shall ensure, to the greatest practicable extent, that proper accommodation is provided to receive the protected persons, that the removals are effected in satisfactory conditions of hygiene, health, safety and nutrition, and that members of the same family are not separated.* 4. *The Protecting Power shall be informed of any transfers and evacuations as soon as they have taken place.* 5. *The Occupying Power shall not detain protected persons in an area particularly exposed to the dangers of war unless the security of the population or imperative military reasons so demand.*

76⁶⁸ of the Fourth Geneva Convention and art. 33⁶⁹ of the Standard Minimum Rules for Treatment of Prisoners⁷⁰.

Art. 49, para. 1, generally prohibits individual or mass forcible transfer of a protected person from occupied territory to the territory of the Occupying Power.

However, in case of arrested people this prohibition appears to be less certain. For this reason, art. 76, para. 1, specifies that also a protected person accused of offences shall be detained in the occupied country, and if convicted he/she shall serve her/his sentence therein.

In addition, art. 76, para. 4, affirms that a special treatment is due to minors. This phrase can be interpreted to the light of the the CRC and especially in accordance with CRC's leading principles: non discrimination⁷¹, best interest of the child⁷², right to life, survival and development⁷³ and right to be heard⁷⁴.

6. *The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies*".

⁶⁸ According with art. 76 of the Fourth Geneva Convention: "1. *Protected persons accused of offences shall be detained in the occupied country, and if convicted they shall serve their sentences therein. They shall, if possible, be separated from other detainees and shall enjoy conditions of food and hygiene which will be sufficient to keep them in good health, and which will be at least equal to those obtaining in prisons in the occupied territory.* 2. *They shall receive the medical attention required by their state of health.* 3. *They shall also have the right to receive any spiritual assistance which they may require.* 4. *Women shall be confined in separate quarters and shall be under the direct supervision of woman.* 4. *Proper regard shall be paid to the special treatment due to minors.* 5. *Protected persons who are detained shall have the right to be visited by delegates of the Protecting Power and of the International Committee of the Red Cross, in accordance of the provisions of Article 143.* 6. *Such persons shall have the right to receive at least one relief parcel monthly*".

⁶⁹ In accordance with rule 33 of the Standard Minimum Rules for Treatment of Prisoners: "*Instruments of restraint, such as handcuffs, chains, irons and strait-jackets, shall never be applied as a punishment. Furthermore, chains or irons shall not be used as restraints. Other instruments of restraint shall not be used except in the following circumstances: (a) As a precaution against escape during a transfer, provided that they shall be removed when the prisoner appears before a judicial or administrative authority; (b) On medical grounds by direction of the medical officer; (c) By order of the director, if other methods of control fail, in order to prevent a prisoner from injuring himself or others or from damaging property; in such instances the director shall at once consult the medical officer and report to the higher administrative authority*".

⁷⁰ Economic and Social Council, *Standard Minimum Rules for Treatment of Prisoners*, Res. No. 663, 31 July 1957 and Res. No. 2076, 13 May 1977.

⁷¹ Principle of non discrimination is governed by art. 2 of the CRC, in mind of which: "1. *States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.* 2. *States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members*".

⁷² Principle of the best interest of the child is governed by art. 3 of the CRC, in mind of which: "1. *In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.* 2. *States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.* 3. *States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision*".

⁷³ Right to life, survival and development is governed by art. 6 of the CRC, in mind of which: "1. *States Parties recognize that every child has the inherent right to life.* 2. *States Parties shall ensure to the maximum extent possible the survival and development of the child*".

⁷⁴ Right to be heard is governed by art. 12 of the CRC, in mind of which: "1. *States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the*

The prohibition at issue allows only the exceptions stipulated in art. 49, para. 2, which authorizes the Occupying Power to evacuate an occupied territory wholly or partly, if the security of the population or imperative military reasons so demand. It moreover specifies that in any case the evacuations may take place inside the bounds of the occupied territory except when for material reasons it is impossible doing so.

In any case, during the transfer, instruments of restraint, such as handcuffs, chains, irons and strait-jackets, shall never be applied as a punishment can be used only to prevent the escape and only for the strictly necessary. In contrary, these transfer's methods could amount to degrading treatments⁷⁵.

1.3. The Arbitrary Detention

The detention which is not imposed in contemplation of prosecution on a criminal charge is called “administrative detention⁷⁶”. It is directed to prevent a deemed danger for the society, therefore it has not a retributive or rehabilitative function. For these reasons administrative detention is “*a measure of last resort*⁷⁷”.

In the context of reference, the administrative detention's phase is governed by arts. 37 and 40 of the CRC; arts. 9 and 14 of the ICCPR, arts. 3 and 9 of the UDHR and rules 33 and 34⁷⁸ of Standard Minimum Rules for Treatment of Prisoners.

As it concerns the requirements for the legality of the administrative detention, it should be observed that it can be used by States only in accordance with the principles of necessity, proportionality and reasonableness above mentioned in relation of the arrest's phase⁷⁹.

It follows that, firstly, the State must prove that the individual poses such an imminent threat to her/himself or to others that it cannot be addressed by alternative measures, including the criminal justice system⁸⁰.

views of the child being given due weight in accordance with the age and maturity of the child. 2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law”.

⁷⁵ *Supra*, para. 1.1.

⁷⁶ Administrative detention is also called “internment” or “security detention”.

⁷⁷ CRC, art. 37, letter *b*.

⁷⁸ In accordance with rule 34 of the United Nations Standard Minimum Rules for Treatment of Prisoners: “*The patterns and manner of use of instruments of restraint shall be decided by the central prison administration. Such instruments must not be applied for any longer time is strictly necessary*”.

⁷⁹ *Supra*, para. 1.1.

⁸⁰ Human Rights Committee, *General Comment. No. 35*, para. 15.

Secondly, the administrative detention mustn't last longer than absolutely necessary to prevent the danger feared, especially when it involves children⁸¹. In this last case, indeed, detention must be “*much shorter than that set for adults*”⁸².

With regards to this, Military Order No. 1721 (Jerusalem, 2 April 2013) and 1726 (Jerusalem, 6 October 2013), state that a police officer can issue an arrest warrant for a maximum detention period of 24 hours from the arrest for a child under 14 years old (below “boys”) suspected of committing a security offence. This period, instead, doubles to 48 hours for over 15 years old (below “young adults”). Lastly, the period doubles further for boys to 48 hours and for young adults to 96 hours if the police officer believes a “*necessary interrogation must take place*”⁸³.

A court judge, indeed, can detain a minor for interrogation by issuing an arrest warrant for a maximum period of 40 days⁸⁴.

Finally, anyone who is detained is entitled to be brought before a competent authority⁸⁵ to examine the legality of the deprivation of liberty within 24 hours since the arrest and to have a review of the lawfulness of her/his detention preferably every two weeks⁸⁶.

In order to conditions of detention, it should be observed, that in accordance with art. 37, letter *c*, of the CRC: “*Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes account the needs of persons of his or her age*”.

It follows that handcuffs, chains, irons and strait-jackets can never be used as punishment but only as a precaution in exceptional circumstances such as, for example, to prevent the detainee from injuring himself or others, from damaging property or in deference to medical reasons⁸⁷. In any case, these methods of restraint can be used only for the strictly necessary⁸⁸.

In addition, the Committee on the Rights of the Child has stated this last affirming that, in all cases of deprivation of liberty, due regard must be given to specific children's needs for privacy, sensory stimuli, opportunities to associate with their peers (for example in sports), physical exercise, arts, leisure time activities and, mostly, for education⁸⁹.

⁸¹ CRC, art. 37, letter *b*; ICCPR, art. 9, para. 3

⁸² Committee on the Rights of the Child, *General Comment No. 10*, para. 52.

⁸³ DCI-Palestine, *No way to treat a child*, April 2016, p. 15.

⁸⁴ *Ibidem*.

⁸⁵ The locution “*competent authority*” includes both courts and other authorities possessing the same attributes of independence and impartiality.

⁸⁶ Committee on the Rights of the Child, *General Comment No. 10*, para. 83; CRC, art. 37, letter *d*; ICCPR, art. 9, paras. 3 and 4.

⁸⁷ Standard Minimum Rules for Treatment of Prisoners, rule 33, letters *b* and *c*.

⁸⁸ *Ivi*, rule 34.

⁸⁹ Committee on the Rights of the Child, *General Comment No. 10*, para. 89.

On the basis of the many cases analysed, the Human Rights Committee considers that administrative detention presents severe risk of arbitrary deprivation of liberty⁹⁰.

Indeed, in many cases the administrative detention hasn't been used to prevent a deemed danger but "*as a means of stigmatizing certain groups*"⁹¹, among which children.

States, indeed, often use the administrative detention as a means to perpetrate more easily further violations of human rights, especially the right to not be subjected to torture and other cruel, inhuman or degrading treatments and the right to a fair trial.

In particular, these rights risk to be infringed during the child's interrogation.

1.3.1. The Interrogation

The interrogation is the moment in which the investigated children are questioned, generally⁹², by the Prosecutor in order to ascertain the facts of which they are accused. Interrogation often takes place during the administrative detention.

For what concerns the right not to be subjected to torture and other cruel, inhuman or degrading treatment, it should be observed that, even though the above mentioned privilege against self-incrimination is actual since the moment of the arrest, it becomes especially relevant during the interrogation.

During this phase, indeed, according with DCI-Palestine, children reported that are led into a room still tied and blindfolded and forced to sit on a chair. In some cases, children remained tied for the duration of the interrogation, which can last for several hours⁹³.

It follows that, *ut supra* better explained, child must never be compelled to testify against her/himself or to confess guilt⁹⁴, even during interrogation.

In order, instead, to ensure the respect of the child's right to a fair trial during interrogation's phase, it must be preliminary recalled that the above mentioned guarantee to be questioned and informed about the charge against her/him is in a language that he/she can understand⁹⁵.

⁹⁰ Human Rights Committee, *Consideration of Reports Submitted by States Parties under Art. 40 of the Covenant, Concluding Observations of the Human Rights Committee-Colombia*, CCPR/C/COL/CO/6, 4 August 2010, para. 20; Human Rights Committee, *Consideration of Reports Submitted by States Parties under Art. 40 of the Covenant, Concluding Observations of the Human Rights Committee-Jordan*, CCPR/C/JOR/CO/4, 18 November 2010, para. 11.

⁹¹ Human Rights Committee, *Consideration of Reports Submitted-Colombia*, para. 20.

⁹² The interrogation could be led by Police Officers too.

⁹³ DCI-Palestine, *Palestinian Children Detained in the Israeli Military Court System*, 25 June 2013. The report is available at the website: http://www.dci-palestine.org/issues_military_detention (consulted 20 April 2016), p. 7.

⁹⁴ *Supra*, para. 1.1.

⁹⁵ *Ibidem*.

In addition, it should be observed that the child being questioned must have access to a legal or appropriate representative and he/she should be able to request the presence of her/his parents during questioning⁹⁶.

Furthermore, the State should guarantee the effective protection of particularly vulnerable persons (such as detained children). For this purpose, for example, time and place of all interrogations should be audio-visually recorded, along with the names of all those present and this information should also be available for judicial or administrative proceedings purposes⁹⁷.

Further elements of discrimination between Israelis and Palestinian children occurs during the interrogation phase.

For what concerns Palestinian children, Military Order No. 1676 breaches this disposition, affirming that, even if their parents may receive notice, they have no legal entitlement to be present during their child's interrogation⁹⁸. In the same way, Palestinian children have not the legal right to have a lawyer present during interrogation⁹⁹. According to a 2015 study by Military Court Watch, a nongovernmental group, just 3 percent of Palestinian children arrested in the West Bank reported that their parents were present throughout their interrogation by security forces¹⁰⁰.

Similarly, to parent's presence, the Military Order No. 1745 (Jerusalem, 10 September 2014) narrows the protection afforded by international law. Indeed, the order allows not to use audio-video recording for the interrogations of minors suspected of committing a security offence¹⁰¹.

Whit regard to Israeli children, instead, there's no difference of treatment with the Palestinian those in order to lawyer presence and audio-visual record during interrogation¹⁰², but parents can presence the questioning¹⁰³.

Lastly, it should be observed that, with regard to interrogation, there is a deep connection between the right to a fair trial and the right not to be subjected to torture and other cruel, inhuman or degrading treatment. As noticed by the Human Rights Committee, indeed: "*keeping under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment is an effective means of preventing cases of torture and ill-treatment*"¹⁰⁴.

⁹⁶ Committee on the Rights of the Child, *General Comment. No. 10*, para. 58.

⁹⁷ Human Rights Committee, *General Comment No. 20-Article 7 (Prohibition of Torture, or other Cruel, Inhuman or Degrading Treatment)*, U.N. Doc. HRI/GEN/1/Rev.1, 10 March 1992, para. 11; Committee against Torture, *General Comment No. 2*, CAT/C/GC/CRP.1/Rev.4, 23 November 2007, para. 14.

⁹⁸ Israeli Youth Law (1971), para. 9.

⁹⁹ DCI-Palestine, *No Way to Treat a Child*, p. 48.

¹⁰⁰ Human Rights Watch, *Israeli Police Abusing Detained Children*.

¹⁰¹ Military Order No. 1651, para 136 (d) (6) as amended by Military Order No. 1745.

¹⁰² DCI-Palestine, *No Way to Treat a Child*, p. 48.

¹⁰³ *Ibidem*.

¹⁰⁴ *Ibidem*.

2. Description and Investigation of the Trial and *Post-Trial* Detention

2.1. The Criminal Trial

The criminal trial is the judicial *iter* with which the accused's criminal responsibility is decided. Taking into account Israeli international legal framework, this phase is governed by rules 4¹⁰⁵ and 14¹⁰⁶ of the Beijing Rules, art. 15¹⁰⁷ of the Convention against torture, art. 40 of the CRC, arts. 14 and 15¹⁰⁸ of the ICCPR and art. 10 of the UDHR¹⁰⁹.

Preliminarily, it's necessary to specify that no international Convention mentions a specific minimum age below which children shall be presumed not to have infringed the penal law (below MACR), in consequence their age may range from a very low like 7 or 8 to 14 or 16¹¹⁰. The Beijing Rules, however, recommend that the MACR is not fixed at too low age level, bearing in mind the facts of emotional, mental and intellectual maturity¹¹¹.

Despite that, the child can be convicted only if the court believes that he/she has the maturity in regard. Clearly this system leaves much to discretion of the court and may result in discriminatory practices¹¹².

To cope with this problem, the Committee on the Rights of the Child has stated that the MACR should be fixed at the age of 12¹¹³.

In accordance with art. 1 of the CRC, indeed, the upper age-limit for juvenile justice is fixed at the age of 18. This means that every child over the age of 12 and under the age of 18 who is alleged as, accused of, or recognized having infringed the penal law has the right to be treated in accordance

¹⁰⁵ According to rule 4 of the Beijing Rules: "*In those legal systems recognizing the concept of the age of criminal responsibility for juveniles, the beginning of that age shall not be fixed at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity*".

¹⁰⁶ According to rule 14 of the Beijing Rules: "1. *Where the case of a juvenile offender has not been diverted (under rule 11), she or he shall be dealt with by the competent authority (court, tribunal, board, council, etc.) according to the principles of a fair and just trial. 2. The proceedings shall be conducive to the best interests of the juvenile and shall be conducted in an atmosphere of understanding, which shall allow the juvenile to participate therein and to express herself or himself freely*".

¹⁰⁷ According to art. 15 of the Convention against Torture: "*Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made*".

¹⁰⁸ According to art. 15 of the ICCPR: "1. *No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, or correspondence, nor to unlawful attacks on his or her honour and reputation. 2. The child has the right to the protection of the law against such interference or attacks*".

¹⁰⁹ In accordance with art. 10 of the UDHR: "*Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him*".

¹¹⁰ Committee on the Rights of the Child, *General Comment No. 10*, para. 30.

¹¹¹ Beijing Rules, rule 4.

¹¹² Committee on the Rights of the Child, *General Comment No. 10*, para. 30.

¹¹³ *Ivi*, para. 32.

with the provisions of the CRC¹¹⁴. This solution is in line with Israeli military order No. 1676 (Jerusalem, 29 October 2011), which changed the definition of minor from person under the age of 16 to those under 18. However, this amendment does not apply to sentencing provisions, so that minors age 16 and 17 face the same penalties as adults.

Whit regard to Israeli children, it should be noted that, even if MACR is fixed at 12¹¹⁵ and the upper age limit at 18¹¹⁶, they do not face the same penalties as adults¹¹⁷.

Once a child becomes defendant in a criminal trial, he/she has the right to a fair trial. This right articulates in several guarantees directed to ensure the correctness of the proceeding.

Firstly, no child can be charged with or sentenced under the penal law for acts or omissions which, at the time they were committed, were not prohibited under national or international law¹¹⁸. Similarly, no child can be punished with a heavier penalty than the one applicable at the time of her/his infringement of the penal law, but if a charge of law after the act provides for a lighter penalty, the child must benefit from this charge¹¹⁹.

Secondly, the child alleged or accused of having infringed the criminal law has the benefit of doubt until the charge against her/him is proven beyond any reasonable doubt¹²⁰. With regards to this, the Committee on the Rights of the Child has affirmed that the authorities should not consider automatically the suspicious manner with which the child behave as a sign of guilt, because it could be also due to the lack of understanding of the process, immaturity, fear or other reasons¹²¹.

Thirdly, the child has the right to a fair and public hearing by a competent, independent and impartial tribunal¹²².

The notion of fair trail includes the guarantee of a fair and public¹²³ hearing. The publicity of hearing, indeed, ensures the transparency of proceeding providing an important safeguard for the interest of the individual and of the society, while the hearing's fairness entails the absence of any

¹¹⁴ The Committee on the Rights of the Child has emphasized that if there's no proof of age, the child is entitled to a reliable medical or social investigation that may establish her/his age and, in case of conflict, the child shall have the right to the rule of the benefit of the doubt. To cope with the problem of the proof of age, the Committee has affirmed that is crucial the full implementation of art. 7 of the CRC requiring, *inter alia*, that every child shall be registered immediately after birth.

¹¹⁵ DCI-Palestine, *No Way to Treat a Child*, p. 48.

¹¹⁶ *Ibidem*.

¹¹⁷ *Ibidem*.

¹¹⁸ CRC, art. 40, para. 2, letter *a*; ICCPR, art. 15, para. 1.

¹¹⁹ ICCPR, art. 15, para. 1.

¹²⁰ CRC, art. 40, para. 2, letter *b*, point *i*; ICCPR, art. 14, para. 2.

¹²¹ Committee on the Rights of the Child, *General Comment No. 10*, para. 42.

¹²² CRC, art. 40, para. 2, letter *b*, point *iii*; ICCPR, art. 14, para. 1.

¹²³ The right to a public hearing must be balanced with the right of protection of privacy enshrined in art. 16, of the CRC, according with: "1. *No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, or correspondence, nor to unlawful attacks on his or her honour and reputation.* 2. *The child has the right to the protection of the law against such interference or attacks*".

direct or indirect influence, pressure, intimidation or intrusion from whatever side and for whatever reason. The Fairness of the trial has important implications in terms of evidence.

In primis, any statement obtained by torture cannot be invoked as an evidence in the proceeding¹²⁴.

In secundis, the child has the right to effectively participate in the trial; to comprehend the charge against her/him and possible consequences and penalties; to challenge witnesses and to make appropriate decisions about evidence, testimony and measures¹²⁵. For this purpose, the proceeding should be conducted in an atmosphere of understanding to allow the child to express her/himself freely¹²⁶. Parents or legal guardians should also be present at the proceeding because they can provide general psychological and emotional assistance to the child¹²⁷.

Furthermore, the child has the right to be heard in any judicial or administrative proceeding affecting her/him, either directly or through a representative or an appropriate body depending on her/his best interest¹²⁸. In other words, the child must be given the opportunity to express her/his views freely, and this views should be given due weight in compliance with the age and maturity of the age¹²⁹.

All these guarantees apply to all courts and tribunals, ordinary or specialized, civilian or military.

Regarding the specific fact that in many countries military courts try civilians, first of all it should observed that even though the international law does not prohibit the trial of civilians in military courts, it requires that such trials are in full conformity with the requirements of art. 40 of the CRC and art. 14 of the ICCPR. It means that these guarantees cannot be limited or modified because of the military character of the court concerned.

Furthermore, focusing on the Palestinian case, the national tribunals must continue to apply the Palestinian penal law despite the occupation with the exception that it may be repealed or suspended by the Occupying Power in case where it constitutes a threat to its security or an obstacle to the application of the Fourth Geneva Convention¹³⁰.

Lastly, the Human Rights Committee has noticed that:

“Trials of civilians by military or special courts should be exceptional and limited to cases where the State party can show that resorting to such trials is necessary and justified by objective and serious reasons and

¹²⁴ Convention against Torture, art. 15, para. 1.

¹²⁵ Committee on the Rights of the Child, *General Comment No. 10*, para. 46; CRC, art. 40, para. 2, letter *b*, point *iv*.

¹²⁶ Beijing Rules, rule 14.

¹²⁷ Committee on the Rights of the Child, *General Comment No. 10*, para. 53; CRC, art. 40, para. 2, letter *b*, point *iii*.

¹²⁸ CRC, art. 12, para. 2.

¹²⁹ *Ivi*, para. 1.

¹³⁰ Fourth Geneva Convention, art. 64, para. 1.

where, with regard to the specific class of individuals and offences at issue, the regular civilian courts are unable to undertake the trial¹³¹”.

With regards to this, it is necessary to observe that, firstly, the development of an armed conflict cannot be considered an “exceptional case”, so that the above mentioned exceptionality of the civilian’s process by military courts applies also in situation of armed conflicts¹³².

Secondly, considering that, in the context of reference, the defendants are children and the imputation is to throw stones, it is not possible to affirm that the regular civilian courts are unable to undertake the trial.

Despite that, over 18 years old Palestinian persons are processed by regular military Court while, according with Military Order No. 1644 (Jerusalem, 27 September 2009), persons over the age of 12 and under the age of 18 are under the jurisdiction of the Juvenile military court.

2.2. The *Post-Trial Detention Conditions*

The number of Palestinian children detained under Israeli military system is increasing in the last years. At the end of February, a total of 440 Palestinian children were imprisoned. This is the highest number of children detained since data became available in January 2008. Furthermore, also the number of girls reached the highest number from 2008 with twelve girls imprisoned¹³³.

The *post-trial* detention is a type of punishment of custodial nature imposed by Court for particularly serious offences.

In the context of reference, the detention’s phase is governed by arts. 37 and 40 of the CRC, arts. 9 and 14 of the ICCPR, rules 33¹³⁴ and 34¹³⁵ of Standard Minimum Rules for Treatment of Prisoners and arts. 3 and 9 of the UDHR.

¹³¹ Human Rights Committee, *General Comment No. 32-Right to Equality before Courts and Tribunals and to a Fair Trial*, CCPR/C/GC/32, 27 July 2007, para 20. See also, Human Rights Committee, case *Madani vs. Algeria*, Communication No. 1172/2003, CCPR/C/89/D/1172/2003, 21 June 2007, para. 8.7.

¹³² Human Rights Committee, *General Comment No. 31-Nature of the General Legal Obligation on States Parties to the Covenant*, CCPR/C/21/Rev.1/Add., 29 March 2004, para. 1.

¹³³ DCI-Palestine, *No way to treat a child*. The full list of data are available at the website: http://nwttac.dci-palestine.org/data_military_detention.

¹³⁴ *Supra*, para. 1.3.

¹³⁵ *Ibidem*.

Equally to administrative detention¹³⁶, this kind of detention should be a measure of last resort¹³⁷ and the detained children must be treated with sense of dignity and worth¹³⁸. Furthermore, the *post-trial* detention's treatment must have some specific characteristics.

Firstly, the treatment should reinforce the child's respect for the human rights and freedoms of others. This consideration is in line with the consideration in CRC's preamble and art. 29, para. 1, letter *a*¹³⁹, according which the child should be brought up in the spirit and the ideals proclaimed in the Charter of the United Nations (San Francisco, 26 June 1945; below UN Charter)¹⁴⁰ and in the respect for human rights and freedom¹⁴¹.

Secondly, the *post-trial* detention must have a rehabilitative function¹⁴². It follows that the treatment should take into account the child's age and it should promote child's reintegration in the society¹⁴³.

In this regards, it is essential for the child to have access to educational programmes, (formal and non-formal) including after school activities during detention.

According to Addameer¹⁴⁴, the Prisoner Support and Human Rights Association located in Jerusalem, the arrest of Palestinian children leads to the disruption of their education and, in consequence, to substantial reintegration problems, with many children dropping out of school upon release. Furthermore, very limited provisions are made for the education of Palestinian children detained.

¹³⁶ *Supra*, para. 1.3.

¹³⁷ Human Rights Committee, *General Comment No. 35*, para. 18. With regards to this, according to art. 12 of the CRC, the child should be given the opportunity to express her/his views concerning the alternative measures that may be imposed, and the specific wishes or preferences he/she may have in this regard should be given due weight.

¹³⁸ This principle reflects the fundamental human right explicitly recalled by the CRC's preamble and enshrined in art. 1 of the Universal Declaration of Human Rights, which stipulates that all human beings are born free and equal in dignity and rights.

¹³⁹ According to art. 29 of the CRC: "1. *States Parties agree that the education of the child shall be directed to: (a) The development of the child's personality, talents and mental and physical abilities to their fullest potential; (b) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations; (c) The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own; (d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin; (e) The development of respect for the natural environment.* 2. *No part of the present article or article 28 shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principle set forth in paragraph 1 of the present article and to the requirements that the education given in such institutions shall conform to such minimum standards as may be laid down by the State*".

¹⁴⁰ The UN Charter entered in force 24 October 1945. The text of the Charter is available at the website: <http://www.un.org/en/charter-united-nations/> (consulted 22 April 2016).

¹⁴¹ Committee on the Rights of the Child, *General Comment No. 10*, para. 13.

¹⁴² ICCPR, art. 14, para. 4.

¹⁴³ Committee on the Rights of the Child, *General Comment No. 10*, para. 13.

¹⁴⁴ Addameer is a Jerusalem based Palestinian non-governmental, civil institution offering support for Palestinian prisoners and torture victims.

According to Human Rights Watch in November 1997¹⁴⁵, a Tel Aviv court ordered the prison authority to provide detained Palestinian children with an education equivalent to that offered to detained Jewish children, with the exception of instruction in subjects defined only as those that “*threaten the security of Israel*”¹⁴⁶

On the basis of this clause, subjects such as religion, geography, history and civics have been banned. Accordingly, the Israel Prison Service (below IPS) has since then been providing a limited number of taught classes to children under 16 years of age, allowing them to study mathematics and humanities only¹⁴⁷. The teaching of all sciences is indeed forbidden for “security concerns”. On the other hand children detained at Ofer have begun to study Hebrew. For each of the juvenile sections, IPS provides a small number of teachers. Israeli Ministry of Education selects the teachers from Palestinians who hold Israeli citizenship¹⁴⁸.

According to a DCI-Palestine the absence of an appropriate education system for Palestinian children in Hasharon and Meggido prisons also contrasts sharply with the education offered to Israeli minors in jail¹⁴⁹”.

Thirdly, the respect for the dignity of the child requires that all forms of violence in the treatment of detained children must be prohibited and prevented¹⁵⁰.

In Al Jalame prison in northern Israel a cell, the No. 36, is become famous among the children detained, it is one of a handful of cells where Palestinian children are locked in solitary confinement for days or even weeks. Once one 16 year old reported that he had been kept in cell No. 36 for 65 days¹⁵¹.

Solitary confinement and the *incommunicado* detention¹⁵², are among the most practised forms of inhuman treatments during detention.

¹⁴⁶ Human Rights Watch, *Children in Conflict with the Law*, 2001. The report is available at the website: <https://www.hrw.org/legacy/wr2k1/children/child4.html> (consulted 25 April 2016).

¹⁴⁷ For further details, please see more: http://www.addameer.org/key_issues/access_to_education#sthash.zKM3SoAu.dpuf.

¹⁴⁸ DCI-Palestine, *No way to treat a child*, p. 58

¹⁴⁹ DCI-Palestine, *Israel Prison Service Denies Jailed Palestinian Minors Education*, 20 March 2013. The report is available at the website: http://www.dci-palestine.org/israel_prison_service_denies_jailed_palestinian_minors_education (consulted 28 April 2016).

¹⁵⁰ Committee on the Rights of the Child, *General Comment No. 10*, para. 13.

¹⁵¹ The Guardian, *The Palestinian Children – Alone and Bewildered – in Israel's Al Jalame Jail*, 22 January 2012. The article is available at the website: <http://www.theguardian.com/world/2012/jan/22/palestinian-children-detained-jail-israel> (consulted 28 April 2016).

¹⁵² The *incommunicado* detention is a form of solitary confinement that in reason of the stringency of measure, the conditions, its duration, the objective pursued and its effects on the person concerned, is not tolerated.

With regards to this the European Court of Human Rights affirmed that: “*Complete sensory isolation, coupled with total social isolation can destroy the personality and constitutes a form of inhuman treatment which cannot be justified by the requirements of security or any other reasons*¹⁵³”.

These kind of treatments, indeed, are not conformed to the rehabilitative function of the *post*-trial detention but it only aims at the vilification of the detainee.

The Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment has affirmed that, regarding juvenile, has affirmed that: “*the imposition of solitary confinement (and a fortiori the incommunicado detention), of any duration, on juveniles is cruel, inhuman or degrading treatment and violates art. 7 of the ICCPR and art. 16*¹⁵⁴ *of the Convention against Torture*¹⁵⁵”.

In addition, it must be observed that the child deprived of liberty should be separated from adults unless it is considered in the child's best interest not to do so and he/she should have the right to maintain contact with her or his family through correspondence and visits, save in exceptional circumstances¹⁵⁶.

Lastly, particular attention must be due to the specific attention of female detainees.

With regards to this, for example, toilettes and cells should be different from those of males so that the right of privacy can be fully respected¹⁵⁷.

In contrary, this circumstance could amount to “sexual humiliation”, considered, as the case, by the Committee against Torture a form of torture, cruel, inhuman or degrading treatment¹⁵⁸.

¹⁵³ European Court of Human Rights, case *Messina vs. Italy*, Second Section, Application No. 25498/94, 28 December 2000, para. 191. See also: Inter-American Court of Human Rights, case *Castillo-Petruzzi et al. vs. Perú*, 30 May 1999, para. 195; African Commission on Human Rights, case *Leisbeth Zegveld and Messie Ephrem vs. Eritrea*, Communication No. 250/2002, 20 November 2003, para. 55.

¹⁵⁴ According to art. 16 of the Convention against Torture: “1. *Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment.* 2. *The provisions of this Convention are without prejudice to the provisions of any other international instrument or national law which prohibits cruel, inhuman or degrading treatment or punishment or which relates to extradition or expulsion*”.

¹⁵⁵ Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment, *Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment*, U.N. Doc. A/66/268, 5 August 2011, para. 179.

¹⁵⁶ CRC, art. 37, letter c.

¹⁵⁷ Right to privacy is enshrined by art. 17 of the ICCPR, according to which: “1. *No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.* 2. *Everyone has the right to the protection of the law against such interference or attacks*”.

¹⁵⁸ Committee against Torture, *Concluding Observations on USA*, UN Doc. CAT/C, 25 July 2006, para. 24.

Conclusions and Observations

Despite the efforts made by UNICEF, other UN bodies, NGOs and all the other actors involved to negotiate better solutions for Palestinian children detained by Israeli military system, the number of Palestinian children arrested by Israeli forces has more than doubled since October 2015¹⁵⁹.

The condition of violence and intimidation reported by Palestinian children and families involved, unfortunately, is not decreasing and according with DCI in 2016 three children out of four experience physical violence during interrogation or arrest.

In 2013 in light of the violations inflicted to Palestinian children in the Israeli Military detention UNICEF published 38 recommendations¹⁶⁰ to be addressed to Israeli authorities, according to the follow-up conducted by the UN a part have been partially accomplished and a part of them are still under discussion. Firstly, the use of violence, physical and mental inflicted to arrested Palestinian children should be avoided.

No child should be prosecuted in military courts which lack comprehensive fair trial and juvenile justice standards and children should only be detained as a measure of last resort and for the shortest appropriate period of time.¹⁶¹ Moreover, the Israeli military orders should reflect the guarantees and protection offered by international legal standards so should be aligned to the highest form of defence in the best interest of the child.

The different phases pre and *post*-trial should guarantee child friendly practices in order to ensure special protection that the child being a child is entitled to. Any forms of violence and abuse should be avoided, reported and condemned. The children should have access to legal representation and in case of abuse or violence experienced he/she should have the opportunity to report it to neutral focal point appointed. The children under arrest should not be kept away from their families. Furthermore, the visits should be encouraged and promoted. Therefore, the centre of detention and the visit time should be arranged in order to be accessible for the families of the children arrested. Solitary confinement (and *a fortiori*, incommunicado detention) should be avoided, furthermore the children should be detained in child friendly spaces separate from adults prisoners.

People involved with children under Israeli police, Israel Prison Service and the Military court should be familiar with child protection policies and gender sensitive issues. The staff involved with Palestinian children should be trained in order to guarantee the highest standards of protection of children's rights. Furthermore according to the increasing number of girls arrested under Israeli

¹⁵⁹ Human Rights Watch-Palestine, *Israeli Police Abusing Detained Children*.

¹⁶⁰ UNICEF, *Children in Israeli Military Detention, Bulletin No. 2*.

¹⁶¹ DCI-Palestine, *Palestinian Child Prisoners*, 9 March 2011. The report is available at the website: http://australiansforpalestine.com/wp-content/uploads/2011/03/EU_Parliament_Prisoners_MAR_20111.pdf (consulted 28 April 2016).

military court it is important to stress the fact that the Israeli system should guarantee child friendly spaces taking into account also different gender needs.

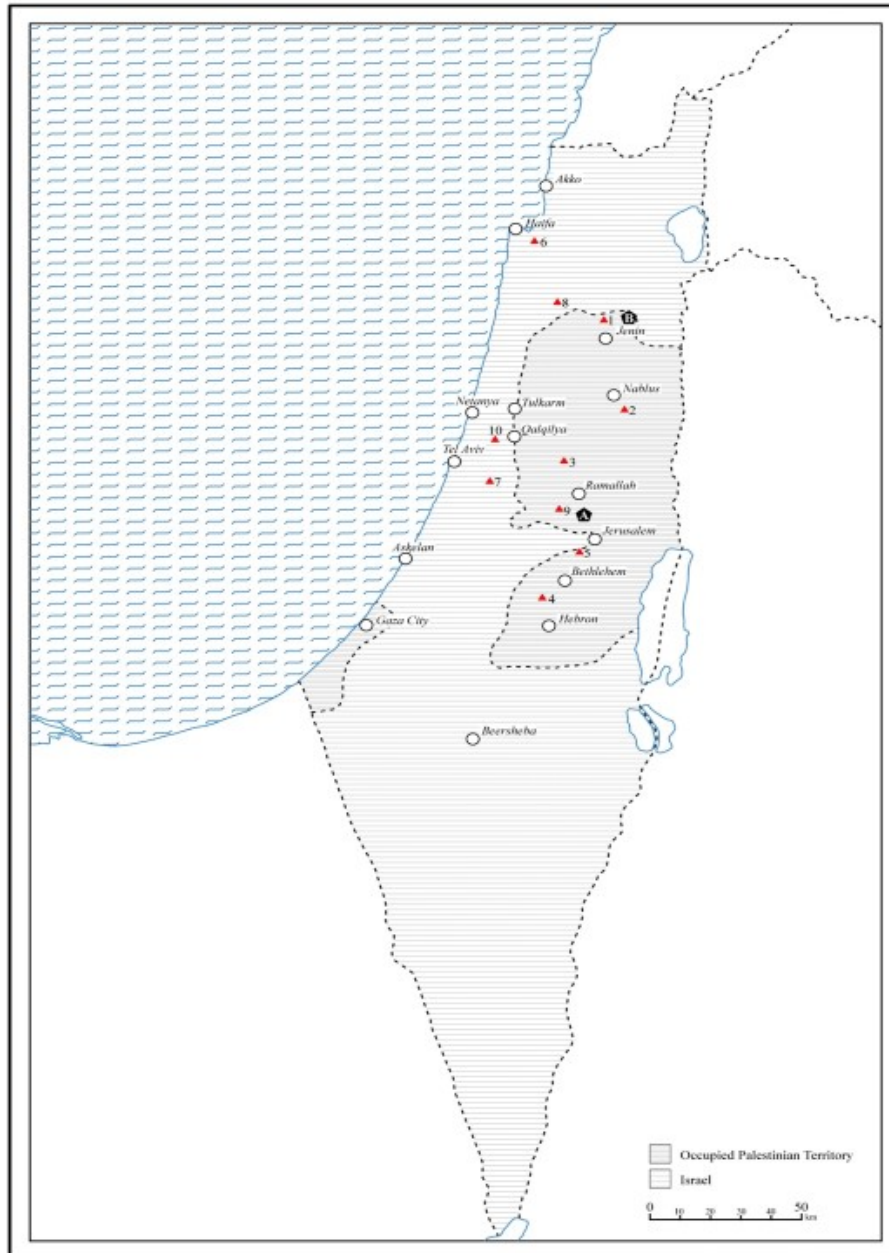
Furthermore, while analysing the concept of child protection from a broader perspective it is necessary to find a balance between a necessity of ensuring Israeli internal security measures and on the other hand protecting the rights of arrested Palestinian children. Israeli authorities in collaboration with the actors involved in the defence of children's rights, should plan a structured schedule of development to ensure the reintegration of the children prisoners in the society after the period of arrest. Furthermore, in order to guarantee a rehabilitative function of the prison the staff should be trained and equipped to ensure child friendly development programmes. Education, learning and non-formal education should be promoted as a starting point for the children under arrest. Moreover, to promote a better understanding of the difficult mutual situation in Israel and OPT, Hebrew should be taught to Palestinian as well as Arabic courses should be promoted for detained Israeli.

In the wake of the campaign promoted in 2013 by Lawyers for Palestinian Human Rights (below LPHR) and DCI-Palestine called "Know Your Rights" for Palestinian children to secure their basic rights, it would be great to reinforce children awareness through specific trainings. UNICEF asked Israeli authorities to identify different focal points to manage the violation of Palestinian children's rights, it would be important also to identify dates and schedule for each different problem and violation still in progress.

During this investigation the lack of updated data related to the Palestinian children under military court was challenging, in this regards Israeli Authorities should ensure transparency and free access to data related to arrest, transfer, trial and detention of Palestinian minors. A shared and open database would be crucial in order to plan a corporate strategy to protect children's rights violations acting policies, programmes and specific projects.

In conclusion, this paper investigated the best form of protection that the international legal framework should ensure to Palestinian children under Israeli military detention, with the hope that the Israeli authorities will cooperate to guarantee from now on that all these forms of legal protection will be respected for a real improvement of the state of Palestinian children's rights in the future.

Annexe n. I: Occupied Palestinian Territories with Principal Interrogation Centers, Prisons and Military Courts (map created by Marco Taccagni)¹⁶².



- | | |
|--|--------------------------|
| ▲ Principal Interrogation Centers | ▲ Prisons |
| .1 Salem | .8 Megiddo - Israel |
| .2 Huwwara | .9 Ofer - West Bank |
| .3 Ariel | .10 HaSharon - Israel |
| .4 Gush Etzion | |
| .5 Mascobiyya - Jerusalem | ▲ Military Courts |
| .6 Jalame - Israel | ▲ Ofer Military Court |
| .7 Petah Tikva Israel | ▲ Salem Military Court |

¹⁶² Source: DCI-Palestine, *Bound, Blindfolded and Convicted*, p. 13.

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