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Protecting Palestinian minor detainees:
a fragile category in a border area between International
Humanitarian Law and Human Rights

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Chapter 1: Introduction

Section 1: The situation

“The ill-treatment of children who come in contact with the [Israeli] military detention system appears to be widespread, systematic and institutionalized throughout the process, from the moment of arrest until the child’s prosecution and eventual conviction and sentencing. It is understood that in no other country are children systematically tried by juvenile military courts that, by definition, fall short of providing the necessary guarantees to ensure respect for their rights. All children prosecuted for offences they allegedly committed should be treated in accordance with international juvenile justice standards, which provide them with special protection. Most of these protections are enshrined in the Convention on the Rights of the Child.”¹

Since 2007, the UNICEF office in the Palestinian Territories has been gathering data on serious violations against minors arrested and incarcerated in the Israeli military detention system. The information has been collected in the UNICEF Monitoring and Reporting Mechanism Database (MRM Database), that contains a review of practices related to children who come into contact with the Israeli military detention system from the notification of arrest until detention. As a result of this research, the UN Found published a 2013 report, named “Children in Israeli military detention: observations and recommendations”. Since then, UNICEF started a dialogue with Israeli authorities on the issue of the protection of Palestinian minors and, at the same time, regularly reported the data gathered to the United Nations Security Council Working Group on Children and Armed Conflict, via the Office of the Special Representative of the Secretary-General for Children and Armed Conflict². A second UNICEF report, published in 2015, listed the important progresses that have been achieved by the Israeli government, especially in terms of military legislation and standard procedures. However, UNICEF stated: “The data demonstrates the need for further actions to improve the protection of children in military detention, as reports of alleged ill-treatment of children during arrest, transfer, interrogation and detention have not significantly decreased in 2013 and 2014.”³

¹ UNICEF. *Children in Israeli military detention: Observations and Recommendations*, (February 2013), p. 2, available at https://www.unicef.org/oPt/UNICEF_oPt_Children_in_Israeli_Military_Detention_Observations_and_Recommendations_-_6_March_2013.pdf;

² *Ibid.*;

³ UNICEF. *Children in Israeli Military Detention: Observations and Recommendations*, Bulletin No. 2, (February 2015), p. 2, available at https://www.unicef.org/oPt/Children_in_Israeli_Military_Detention_-_Observations_and_Recommendations_-_Bulletin_No._2_-_February_2015.pdf;

This is the consequence of a very unique situation in the Palestinian Territories. Moreover, the reason why it is difficult to address these rights' violations is to be found itself in the very unique legal status of these territories. In a grey area between International Humanitarian Law (hereafter IHL) and Human Rights Law (hereafter HRL), the inhabitants of the Palestinian territories, minors included, are often exposed to rights' violations that are difficult to address. Undoubtedly, the issue of the lack of an enforcing mechanism in International Law is extremely relevant, but it has been already addressed by various scholars and it is not exhaustive with regard to the very specific context of the Palestinian-Israeli conflict.⁴ Therefore, this analysis is not going to discuss the issue further, but it is trying to understand the weight of the debate on the legal status of the Palestinian Territories on the protection of its inhabitants. The debate regarding the unique legal status, under International Law, of the Palestinian Territories and the consequences of its very existence on the protection of the rights of Palestinian inhabitants is the focus of this analysis. The motivations behind this choice are explained in this introduction.

Section 2: The research

Firstly, an analysis of the detention system is going to tackle what the author believes is the core of the Palestinian-Israeli conflict: the long-term military administration of the territory. A focus on military detention is going to highlight the main problems regarding the application of the provisions of IHL related to the military control of an area conquered by war. Secondly, an analysis of rights' violations in the "juvenile" detention system is going to highlight the lack of protection at its extreme: when it affects a vulnerable and specially protected category, like minors. The focus on minors is going to underline the issues related to the application of HRL and the relative Conventions. Instruments of HRL conceived for protected categories are going to be useful, like the Convention on the Rights of the Child (hereafter CRC), adopted and opened for signature by the General Assembly resolution 44/25 of 20 November 1989 and ratified by the Knesset, the Israeli Parliament, on August 4, 1991.

Therefore, the research question can be summarized as it follows: what are the obligations of Israel, under IL, regarding the protection of minors from the West Bank? The methodological approach is going to be mainly legal, but it is also going to consider some political and historical aspects. The research is based on books and papers written by eminent Israeli and international scholars in International Law.⁵ These works

⁴ For more information on the matter see Beyerlin, Ulrich. "Sanctions," in *United Nations: Law, Policies and Practice* (Rev. ed. 1995); Blokker, Muller. *Towards More Effective Supervision by International Organizations* (1994); Doxey, Margaret P. *International Sanctions in Contemporary Perspective* (1987); Kausch, Langenfeld. "Embargo," in *Encyc. of Public International Law* (1995), p. 58-67;

⁵ The main ones are going to be Benvenisti, Eyal. *The International Law of Occupation*, (Oxford: Oxford University Press, 2012); Dinstein, Yoram. *The International Law of Belligerent Occupation*, (Cambridge: Cambridge University Press, 2009); Kretzmer, David. "The law of belligerent occupation in the Supreme Court of Israel", in *International Review of the Red Cross*, Vo. 94, N. 885, (Spring 2012); Ben-Naftali, Orna. *International Humanitarian Law and International Human Rights*

are going to be useful to frame the reality as described by various UN documents, especially two reports provided by UNICEF⁶ on Palestinian children in Israeli military detention, and by International Organizations, that are UN partners.⁷ Moreover, the analysis will consider the main instruments of IHL and HR law in order to investigate their applicability and the possible violations. From a first analysis, the protection of minors is an unchallengeable obligation. However, some scholars and some Israeli authorities tried to refuse Israel's responsibility in the matter. This work aims to analyze the Israeli position and to challenge it, in order to reaffirm the inalienability of the right of minors that live in any regions of the world, even in the complex legal contest represented by the Palestinian Territories. In doing so, two main resources are going to be extremely useful. The first is an article, "The Missing Reversioner: Reflections on the Status of Judea and Samaria"⁸, written by the Israeli scholar and ambassador to the UN, Yehuda Blum. The second is a paper, "The Observance of International Law in the Administered Territories"⁹, written by the former Israeli Military Advocate General, Colonel Meir Shamgar.

Finally, the author is aware of how politicized and debated every topic related to the ongoing Palestinian-Israeli conflict is. This study aims to analyze the reasons behind disagreements that are based on different historical narratives and subsequent legal outcomes. Therefore, with a mainly legal approach, the research will attempt to present the arguments of both sides in a balanced manner. However, it is also true that this study starts from rights' violations that are enacted by the State of Israel at the expense of Palestinian minors. In this regard, it is important to underline that not being biased, it does not entail to ignore facts and to not acknowledge violations, especially when proven by credible researches supported by International Organizations. In this case, credible reports have emerged of ill-treatment within the Israeli military system. Reports on the matter have come from international, Palestinian and Israeli lawyers; human rights organizations; and independent UN experts and bodies such as the Committee on the Rights of the Child, the Committee against Torture and the Human Rights Committee¹⁰.

Law: Pas de Deux, (Oxford, 2011); Ben-Naftali, Shany. "Living in Denial: The Application of Human Rights in the Occupied Territories", in *Israel Law Review*, n. 17, (2003);

⁶ UNICEF. *Children in Israeli military detention: Observations and Recommendations*, supra note 1 and 3;

⁷ Defense for Children International. *No way to treat a child. Palestinian children in the Israeli military detention system*, Ramallah, (April 2016), p. 52;

⁸ Blum, Yehuda Z. "The Missing Reversioner: Reflections on the Status of Judea and Samaria", in *Israel Law Review*, Volume 3, Issue 2, (April 1968);

⁹ Shamgar, Meir. "The Observance of International Law in the Administered Territories", in *Israel Yearbook on Human Rights*, (1971);

¹⁰ UNICEF. supra note 1;

Section 3: The terms of the research

Before moving on, it is important to specify the terms that we are going to use in this analysis. For minors and child, we refer to all persons below the age of 18, in line with the terminology used in the Convention on the Rights of the Child. In fact, the CRC, at art. 1, defines a “child” as a person “below the age of 18, unless the laws of a particular country set the legal age for adulthood earlier”¹¹. On 27 September 2011, the Israeli military commander in the West Bank issued Military Order 1676, that raised the age of majority in the military courts from 16 to 18 years.¹² Therefore, Palestinian are considered to be minor, under military law, until they turn 18. The term child can be used as a synonym.

Moreover, for Palestinian Territories, this research refers to the West Bank, Gaza Strip and East Jerusalem, in accordance with the terminology used by the International Committee of the Red Cross¹³. The International Community tends to refer to these territories as “Palestinian Occupied Territories”. Even if the occupation has been recognized and strongly criticized by the UN for decades, Israel still rejects being defined as an Occupying Power. In order to present the Israeli position on the matter, we abstain, when it is possible, to define the Palestinian Territories as occupied and we leave the issue for the conclusions. The West Bank, the Gaza Strip and East Jerusalem are the territories that Israel conquered from Jordan and Egypt, after the 1967 Arab-Israeli war, also called the Six-Day war. During that war, Israel also conquered the Golan Heights from Syria and the Sinai Peninsula from Egypt. However, as we are going to highlight in this analysis, the Israeli-Palestinian conflict is characterized by its length and complexity. Each and every one of these territories has a different history, different sovereignties, different inhabitants and therefore different destinies. In order to simplify this complexity, this research focuses only on the West Bank. The reason is that the West Bank is the widest and most representative Palestinian reality, if compared with East Jerusalem. Moreover, if we compare it with the Gaza Strip, it is extremely more accessible. The reality of the Gaza Strip needs to be analyzed separately for several reasons, included the ongoing land, air, and sea blockade that have been imposed by Israel and Egypt since 2007 and the subsequent difficult conditions in which the population is living. Because of the extreme problems in approaching the issue, the difficulties in obtaining reliable statistics and because of other uncountable reasons, this analysis is not going to consider the Gaza Strip.

Concerning East Jerusalem, the historical, social and legal context is also very specific, and it is difficult to include it in the analysis. In fact, East Jerusalem is today annexed to the Israel territory, an act that was condemned and considered “void and null” by the United Nations Security Council Resolution 478, adopted on 20 August 1980. Another six UNSC resolutions were adopted in the following years, all

¹¹ Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 (20 November 1989), available at <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>;

¹² UNICEF. *supra* note 1, p. 8;

¹³ ICRC. *The occupied Palestinian territories: Dignity Denied*, (Geneva, December 2007);

condemning Israel's annexation of East Jerusalem. As is well known, on December 6, 2017, the US President, Donald Trump, formally recognized Jerusalem as the capital of Israel and stated that the American embassy would be moved from Tel Aviv to Jerusalem. This decision was certainly political, because the legal reality of Jerusalem is extremely more complex. The United Nations considers East Jerusalem as part of Israeli-Occupied Territories.¹⁴ Resolution 181 of the UN General Assembly, passed on 29 November 1947, stated that: "The City of Jerusalem shall be established as a *corpus separatum* under a special international regime and shall be administered by the United Nations." Since then, the UN maintained the official position declared in resolution 181, that Jerusalem should be placed under a special international regime. This analysis is not going to consider Jerusalem; however, East Jerusalem Palestinian inhabitants are a perfect example of the consequences of atypical legal status. After 1967, Israel unilaterally annexed 72 square kilometers, including the eastern part of Jerusalem and 28 neighboring villages, to the Jerusalem municipality. In this area there were 66,000 Palestinian residents, 24 percent of the new municipality's population. A small percentage of these acquired Israeli citizenship, while a huge number were granted only a "permanent residence permit". These inhabitants are stateless, and their permits can be revoked. According to Human Rights Watch, "nearly 80 percent of permanent residency revocations during Israel's 50-year-occupation according to Israeli government figures have taken place since 1995 when the Interior Ministry, based on a 1988 decision of the High Court of Justice, began requiring Palestinians to show that their "center of life" is in East Jerusalem in order to maintain their residency."¹⁵ The totally different legal framework and the specific issues regarding the detention of Palestinian inhabitants in Jerusalem requires a separate analysis that is not going to be present in this research.

Section 4: The outline of the research

This analysis is going to start with an overview of the Israeli military detention system and it is going to move to the main problems related to the application of IHL and HRL in this specific context. In the first chapter, we are going to consider the evolution of the Israeli detention system and its functioning today, with special regards to minors. In this part, we will explore the system conformity with International Humanitarian Law, assuming its full applicability, and we are going to analyze the violations reported by UNICEF in light of the Human Rights Conventions ratified by Israel. If the first chapter is asserting the situation, the second and the third chapters are going to investigate for its causes in the extremely complex legal context that comes out of, at least, two different narratives.

The second chapter is going to deal with the issue of the applicability of IHL. When acting in the Palestinian Territories, is Israel bounded by all norms of IHL? The analysis will explore the theory of the "missing reversioner", conceived by the Israeli scholar and ambassador to the UN, Yehuda Blum. That was the first

¹⁴ Lapidot, Ruth. *Jerusalem – Some Legal Issues*, Jerusalem Institute for Israel Studies ed., (Jerusalem, 2011), pp. 21–26;

¹⁵ Available at <https://www.hrw.org/news/2017/08/08/israel-jerusalem-palestinians-stripped-status>;

theory that claimed the inapplicability of some norms of IHL in the Palestinian Territories. According to this narrative, the violations of IHL identified in the first chapter are not violations, because these norms are considered to be inapplicable. In this part, the analysis is going to try to present how much of this theory is anchored in the current position of the Israeli government towards the legal status of the territories. Hence, the chapter is going to refer to the jurisprudence of the Supreme Court of Israel, sitting as High Court of Justice. Finally, it will consider the position of International Committee of the Red Cross, an impartial institution acting as grantor of IHL since its inception, and it will examine the resolutions and opinions of the UN and of the ICJ on the matter. This last part represents the second and opposing narrative on the issue. At the end of this chapter it will already be possible to make some considerations about the consequences of this incessant debate on the protection of the inhabitants of the West Bank.

The third chapter is going to examine the very complex issue of the application of HRL in the territory. The State of Israel refuses to be held responsible for the implementation of the Human Rights Conventions outside the territory of the state. On the other hand, international institutions, like the ICJ, held that Israel must be considered accountable for HRL implementation, because it detains jurisdiction over the Palestinian Territory.¹⁶ The rights of Palestinian minors from the West Bank have been paused because of the existence of two opposite sides with opposing irreconcilable views. Understanding the two sides of this debate and the serious consequences of the existence of incompatible positions on the protection of minors is the aim of this analysis.

The last chapter is going to focus on the issues related to the protection of minors in the context that the research highlighted. The hope is that acknowledging the weight of this war of stances would result in a renovate effort from both parts to bring back the focus of this discussion to the real world. A world where both Israel and the International Community are going to be held responsible for the ill-treatment of a protected category that had the misfortune to be born in a grey area of International Law, a place that has become more and more a legal patchwork: the Palestinian Territories.

¹⁶ see ICJ. *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, I. C. J. Reports (1996), p. 239, para. 25 and ICJ. *Advisory Opinion on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, I. C. J. Reports (2004), p. 180, para. 111;

Chapter 2: Israeli military justice system in the West Bank and IL

The Israeli military justice system in the West Bank was established a few days after the Six Day War of 1967. Before that conflict, the West Bank was under Jordanian control, as a result of the previous 1948 war. Since 1967 until today, the military justice system exists in parallel with other normative systems inside the West Bank. Understanding the complexity of this reality is important in analyzing the situation regarding detention of minors living in the West Bank. In numerous cases, these minors have to face the Israeli military system and, according to a 2013 UNICEF report, “the ill-treatment of children who come in contact with the military detention system appears to be widespread, systematic and institutionalized throughout the process.”¹⁷ Therefore, this chapter is going to focus on the evolution of the military justice system in the West Bank, in order to underline its characteristics and to highlight the main issues regarding its conformity with International Law, assuming the applicability of International Humanitarian Law (IHL) and Human Rights Law (HRL). We are going to question this applicability in the second and third chapters. The starting point of this study is going to be the 7th June 1967, when the Israeli Military Commander, Chaim Herzog, announced “Proclamation No. 2, concerning the assumption of government by the Israeli Defense Forces”. On the same day, Herzog, promulgated “Proclamation No. 3, concerning the effective date of Security Provisions Order”, a document that prepared the ground for the establishment of West Bank Military Courts. The original proclamation, written both in Hebrew and Arabic, is currently on sale on the website of the British auction house, Christie’s¹⁸. However, there is no evidence of this text in the Israeli government’s selected documents about Foreign Relations from 1947-1974, published on their official website.¹⁹ In that regard, before moving to the main focus of this chapter, it is important to mention some problems that affected this analysis.

Section 1: Research challenges and tools

The problem of availability of sources is the first one that should be mentioned. This chapter is going to highlight the fact that, since 1967, the West Bank was subject to an Israeli militarization of the judiciary, together with the legislative and executive²⁰. Since the end of the war, the West Bank Commander assumed

¹⁷ UNICEF. *supra* note 1, p. 1;

¹⁸ The document is available at <https://www.christies.com/lotfinder/Lot/six-day-war-5-10-june-1967-establishment-5989803-details.aspx>;

¹⁹ Israel Ministry of Foreign Affairs. *Israel's Foreign Relations Vols. 1-2: 1947-1974*, available at <http://www.mfa.gov.il/MFA/ForeignPolicy/MFADocuments/Yearbook1/Pages/TABLE%20OF%20CONTENTS.aspx>;

²⁰ UN. *The legal status of the West Bank and Gaza*, (January 1982), available at <https://unispal.un.org/DPA/DPR/unispal.nsf/0/9614F8FC82DCA5DF852575D80069E0C0>;

full legislative power through the issue of military orders²¹. Here the difficulty arises: Israeli military provisions, that are going to be central in this section, were not always officially published.²² According to a scholar they were only distributed among practicing lawyers, whilst non-lawyers were refused copies²³. No public library in the West Bank had a set of military orders and the courts were not provided with law libraries.²⁴ According to another scholar, a military order called “Proclamation concerning law and administration the military commander” stated that the publication of military orders could be made in “any manner I may deem fit”²⁵. If we start considering International Law, the practice of not publishing the military provisions could be considered a violation of art. 65 of the Fourth Geneva Convention, which states: “The penal provisions enacted by the Occupying Power shall not come into force before they have been published and brought to the knowledge of the inhabitants in their own language”. The fact that military orders were not regularly published was a problem at the time and it still results in a challenge today. Nowadays, it is difficult to access the military provision of the first decades after 1967. However, it is possible to find a collection of the most important and recent military orders, but these are available in Hebrew and Arabic and the translations in English are second-hand and often biased. Therefore, they could not be considered reliable sources for a research. In order to overcome this problem, this analysis is going to refer to official documents that are directly quoting the military orders. The main reference for the first section of this chapter is going to be the 1986 UN document “The legal status of the West Bank and Gaza.”²⁶ This UN study focuses on the years between 1967 and 1986 and it contains a specific section about the changes in the judiciary system of the West Bank and Gaza. This source will be useful to highlight the process of Israeli militarization of the judiciary that was enacted mostly through military orders, but also through the modification of Jordanian laws, previously in force in the West Bank. Another, more recent, source is the report of the United Nations International meeting on Palestine, addressing the plight of Palestinian political prisoners in Israeli prisons, held in Vienna, on 7 and 8 March 2011.²⁷ Moreover, this analysis is going to refer to military orders cited in the two UNICEF reports on “Children in Israeli military

²¹ *Ibid.*;

²² Shehadeh, Raja. *The West Bank and the Rule of Law*, ed. International Commission of Jurists, (1980), p. 103;

²³ *Ibid.*;

²⁴ *Ibid.*;

²⁵ Benvenisti, Eyal. *The International Law of Occupation*, (Oxford: Oxford University Press, 2012), p. 212;

²⁶ UN. *The legal status of the West Bank and Gaza*, supra note 20;

²⁷ UN. *International meeting on the question of Palestine, The urgency of addressing the plight of Palestinian political prisoners in Israeli prisons and detention facilities*, (March 2011), available at <http://www.un.org/depts/dpa/qpal/docs/2011%20Vienna/final%20printed%20p1%20iyad%20misk%20e.pdf>;

detention: observations and recommendations” of 2013²⁸ and 2015²⁹. Finally, the UN documents will be integrated with the publications of the renowned Israeli attorney and legal academic, Eyal Benvenisti.

There is a second challenge that is important to highlight, because it is going to lay the basis of this research. If we analyze the two main 1967 proclamations, No. 2 and No. 3, we can see that they were compliant with International Humanitarian Law. In fact, proclamation No. 3 specifically referred to the Fourth Geneva Convention. These proclamations represented a first initial approach of the Israeli authorities. However, this approach of compliance with International Law changed a few months after the 1967 War. As we are going to highlight later in this analysis, Israeli authorities changed their position towards the Palestinian Territories and, according to the scholar Benjamin Rubin, “this change of heart was based on an article published by Yehuda Blum.”³⁰ This article, named “The Missing Reversioner: Reflections on the Status of Judea and Samaria,” is going to be central in this research in the second chapter, because it contributed to forming the basis of the current Israeli position towards the legal status of the Palestinian territories. Today, Israel rejects the definition of the West Bank as an occupied territory and it consequently claims the inapplicability of IHL on its inhabitants. The result is that the West Bank is a border area of International Law: the protection of its inhabitants is divided between International Humanitarian Law, which applies in case of occupation, and International Human Rights Law, guaranteed to all individuals. The issue of jurisdiction is also very important in the matter, but we are going to analyze it later. We should now mention that, generally, International Humanitarian Law constitutes *lex specialis* and it prevails over any other general law, according to an opinion of the International Court of Justice.³¹ Therefore, the provisions of the GCIV concerning the judgment of civilians in military courts should prevail over other rules of HRL. However, IHL is not considered applicable in the West Bank, according to Israeli authorities. The consequences of this complex legal contest are numerous and the obligations of Israel, under International Law, in the treatments of minor detainees depends on the applicability of International Humanitarian Law and/or Human Rights Law. We are going to focus on this aspect in the second chapter, but for now it is important to highlight that the West Bank is a grey area and that the military provisions, that we are going to analyze, initially applied IHL and subsequently changed this attitude. That shift affected the establishment of the judicial system in the West Bank and it is certainly affecting the protection of minors from this area that are detained in Israeli prisons.

²⁸ UNICEF. *supra* note 1;

²⁹ UNICEF. *supra* note 3;

³⁰ Rubin, Benjamin. *Israel, Occupied Territories*, (October 2009), available at

<http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1301?prd=EPIL>;

³¹ ICJ. *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*, *I.C.J Reports*, (2004), para. 112;

Furthermore, another issue arises. If IHL does not apply in the West Bank, but HRL does, there are only few provisions that concern trials under military jurisdiction and the scope of application is limited.³² However, as we are going to see throughout the analysis, the general rules of fair trial are relevant in this situation. Articles 14 and 15 of The International Covenant on Civil and Political Rights³³ (ICCPR) are the main references. According to art. 14, tribunals must be “independent and impartial”, but, as scholars and UN representatives stated, military tribunals face problems in fulfilling this requirement. The judges are members of the armed forces, they are subject to military discipline and they are generally under the authority of the executive power. Therefore, “it is highly questionable whether military courts can reach the level of independence and impartiality required by human rights law and the legal doctrine of the separation of powers.”³⁴ In fact, on the regard of judging civilians in military courts, United Nations Special Rapporteur on the independence of judges and lawyers concluded that “international law is developing a consensus as to the need to restrict drastically, or even prohibit, that practice”.³⁵ The military nature of the tribunals represents a challenge to the respect of general rules of fair trial, especially in light of the endurance of a status quo based on emergency provisions and military control. However, from the Israeli prospective, the state of emergency is non-negotiable.

In fact, as a last point, we should remind that Israel declared the state of emergency in 1948, the year of its foundation, and it has renewed it ever since. This prolonged period of emergency is the consequence of the geopolitical situation, but it is also due to the maintenance of the complex system of norms set by Israel during the last 70 years. This aspect is briefly but effectively summarized on the official page of the Knesset, the Israeli Parliament:

“Despite the fact that the circumstances which prevailed during the first years of the State of Israel's existence have changed, a national state of emergency has existed since the country's inception in 1948. It has been regularly extended by the Knesset and the Government due to the fact that over the years the Knesset has enacted many laws which include directives that are conditioned by the existence of a state of emergency. The cancellation of the state of emergency will lead to the annulment of these directives.”³⁶

³² Weill, Sharon. “The judicial arm of the occupation: the Israeli military courts in the occupied territories”, in *International Review of the Red Cross*, Volume 89, Number 866, (June 2007), p. 399 available at https://www.icrc.org/eng/assets/files/other/irrc_866_weill.pdf;

³³ International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, available at <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>;

³⁴ Weill, Sharon. *supra* note 32, p. 400;

³⁵ United Nations Special Rapporteur, UN Doc. E/CN.4/1998/39/Add.1, para. 78;

³⁶ Source available at https://knesset.gov.il/lexicon/eng/DeclaringStateEmergency_eng.htm;

The legal basis of the state of Israel have been developing in this situation and the results is a very complex and unique system. This situation, however, has relevant consequences on the protection of fundamental rights. For example, it is on the basis of the state of emergency that, on the West Bank and Gaza Strip, Israel has applied the Defence Emergency Regulations of 1945, a set of provisions adopted by the former Mandatory Power, the United Kingdom of Great Britain. These regulations “permitted detention without trial along with other measures derogating from normal protections, such as deportation, curfew, and suppression of publications.”³⁷ Moreover, it is on the basis of the state of emergency that Israel invoked art. 4 of the International Covenant on Civil and Political Rights³⁸ (ICCPR) that permits derogations in case of “public emergency”³⁹. Israel specifically derogated from the restrictions to detention listed at art. 9 of the Covenant. The dialogue on this issue between Israel and the Human Rights Committee, an institution established under the Covenant to monitor compliance with the Covenant's norms by state parties, is still ongoing. We will focus on this in the next chapters, but for now it is important to highlight the fact that the legal system in Israel is complex and the consequences on the obligations under International Law can be extremely relevant.

Before moving to the analysis of the Israeli military detention system, it is important to mention the instruments of IL that are going to be relevant for this study. This is only a brief list, because, later in the text, we are going to consider these instruments in light of the specific provisions and context. Firstly, for what concern IHL, the main sources are going to be Customary international law; the 1907 Hague Convention (IV) respecting the Laws and Customs of War on Land and its annex: Hague Regulations concerning the Laws and Customs of War on Land⁴⁰ (hereafter Hague Convention and Hague Regulations); 1949 Convention (IV) relative to the Protection of Civilian Persons in Time of War⁴¹ (hereafter GCIV) and the Additional Protocol Relating to the Protection of Victims of International Armed Conflicts⁴² (Protocol I) to the GCIV.

³⁷ Quigley, John. “Israel's Forty-Five Year Emergency: Are There Time Limits to Derogations from Human Rights Obligations?”, in *Michigan Journal of International Law*, Vol. 15, Issue 2, (1994) p. 493 available at <http://repository.law.umich.edu/mjil/vol15/iss2/4https://repository.law.umich.edu/cgi/viewcontent.cgi?referer=https://www.google.co.il/&httpsredir=1&article=1565&context=mjil>;

³⁸ International Covenant on Civil and Political Rights, supra note 33, art. 4;

³⁹ *Ibid.*;

⁴⁰ Hague Convention (IV) respecting the Laws and Customs of War on Land and its annex: Hague Regulations concerning the Laws and Customs of War on Land (The Hague, 18 October 1907) available at <https://ihl-databases.icrc.org/ihl/INTRO/195>;

⁴¹ Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (Geneva, 12 August 1949) available at <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=AE2D398352C5B028C12563CD002D6B5C&action=openDocument>;

⁴² Additional Protocol Relating to the Protection of Victims of International Armed Conflicts (Geneva, 12 August 1949) available at https://www.icrc.org/en/doc/assets/files/other/icrc_002_0321.pdf;

For what concern, instead, HRL, the analysis will consider if the practices in the Israeli military detention system are in conformity with the 1989 Convention on the Rights of the Child⁴³ (hereafter CRC), ratified by Israel in August 1991, and the 1984 UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment⁴⁴ (hereafter UNCAT), ratified by Israel also in 1991. The International Covenant on Civil and Political Rights⁴⁵ (hereafter ICCPR) is also going to an important tool. Finally, we are going to consider the conformity with an instrument of soft law as the UN Standard Minimum Rules for the Treatment of Prisoners⁴⁶ (known also as Mandela Rules), that seek to “set out what is generally accepted as being good principle and practice in the treatment of prisoners and the management of institutions.”⁴⁷ It is also important to mention that, for this research, more recent data on the situation related to the detention of Palestinian minors (for the years 2016, 2017 and 2018) have been furnished by an International Organization working on the field, that is also a UN partner and that participated in the collection of information for the UNICEF reports. The name of this institution is Defence for Children, Palestine section, and the data furnished by the Legal Unit of the organization are available in the appendix 1 of this research.

Section 2: Parallel justice systems in the West Bank

According to the Association for Civil Rights in Israel, “one of the most prominent and disturbing characteristics of Israeli military rule in the West Bank is the creation and development of an official and institutionalized legal regime of two separate legal systems, on an ethnic-national basis.”⁴⁸ This statement refers to the fact that the military rule should be applicable, according to the principle of territoriality, to all persons that are found in the region, including the 399.300 Israeli citizens that also live in the West Bank⁴⁹. However, these Israeli citizens are also bound in parallel, on a personal and extraterritorial basis, by extensive sections of Israeli law. This includes Criminal Law, National Health Insurance Law, taxation

⁴³ Convention on the Rights of the Child, supra note 11;

⁴⁴ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984, available at <https://www.ohchr.org/en/professionalinterest/pages/cat.aspx>;

⁴⁵ International Covenant on Civil and Political Rights, supra note 33;

⁴⁶ Standard Minimum Rules for the Treatment of Prisoners, Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, available at https://www.unodc.org/pdf/criminal_justice/UN_Standard_Minimum_Rules_for_the_Treatment_of_Prisoners.pdf;

⁴⁷ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, supra note 44, art. 1;

⁴⁸ Limor, Suci, Palgi-Hecker, Bendel, Jaraisy, Shalev, Feldman. *One Rule, Two Legal Systems: Israel's Regime of Laws in the West Bank*, Association for Civil Rights in Israel, (October 2014), p. 6;

⁴⁹ Data referring to 2018 and are available at https://eeas.europa.eu/headquarters/headquarters-homepage/48438/six-month-report-israeli-settlements-occupied-west-bank-including-east-jerusalem_en#_ftn2;

laws, laws pertaining to Knesset elections and more⁵⁰. It should also be mentioned that these Israeli citizens live in settlements that are considered illegal under International Law, as reaffirmed by UN Security Council Resolution 2334 of 2016⁵¹. The Association for Civil Rights in Israel underlined that “two types of communities were created in the West Bank: Palestinian cities and villages, which are subject to Jordanian law and Israeli military orders, and Jewish local and regional councils, which are subject to Israeli law and enjoy the benefits and budgets granted by Israeli legislation.”⁵² This analysis is focusing mainly on the Military Law system in force in the West Bank. However, it is relevant to underline the complex stratification of the legal regime in force in the West Bank. This regime is based on Israeli Civil Law for Israeli citizens, on Israeli Military Law and on the local law in force in the Territories before the occupation, for Palestinian inhabitants. Local law, in this case, refers to Jordanian Law. For the Israeli authorities, local law includes also the Emergency Defence Regulations of 1945. We will highlight this point later in the analysis. For what concerns the main parallel systems in force in the West Bank, the scholar Benvenisti stated that “the pre-occupation local law formed the second tier of the two-tiered legal system of the territories.” The first tier refers to the Military Law and the second one to the local law in force in the Territories. In order to understand the legal regime imposed on minors in the West Bank we are going to focus on the two tiers and on their development from 1967 until today.

According to the 1986 UN document, previously mentioned⁵³, section 2 of “Proclamation No. 2 concerning the assumption of government by the Israeli Defense Forces” stated:

"All laws which were in force in the area on 7 June 1967, shall continue to be in force as far as they do not contradict this, or any other proclamation or order made by me (The West Bank Area Commander) or conflict with the changes arising by virtue of the occupation of the Israeli Defense Forces of the area."⁵⁴

Benvenisti, in his book “The International Law of Occupation” mentioned the same proclamation, but with a different translation from Hebrew⁵⁵. In this second source, the word “occupation” is not mentioned and the translation privileged the word “government” instead. However, as stated before, the occupation of a territory is allowed as long as it is compliant with the specific norms of IHL. At this stage, Israel was compliant with these obligations. In fact, Proclamation No. 2 was coherent with the International Law. Art. 64 of the 1949 Convention (IV) relative to the Protection of Civilian Persons in Time of War⁵⁶, that states:

⁵⁰ Limor, Suci, Palgi-Hecker, Bendel, Jaraisy, Shalev, Feldman, *supra* note 48;

⁵¹ Available at <http://www.un.org/webcast/pdfs/SRES2334-2016.pdf>;

⁵² *ivi*, p. 5;

⁵³ UN. *The legal status of the West Bank and Gaza*, *supra* note 20;

⁵⁴ UN. *The legal status of the West Bank and Gaza*, *supra* note 20;

⁵⁵ Benvenisti, Eyal. *supra* note 5, p. 212;

⁵⁶ Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, *supra* note 41;

“The penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention. Subject to the latter consideration and to the necessity for ensuring the effective administration of justice, the tribunals of the occupied territory shall continue to function in respect of all offences covered by the said laws.”⁵⁷

Similarly, article 43 of The Hague Regulations states:

“The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.”⁵⁸

According to IHL, occupation is a temporary measure⁵⁹ and, therefore, the life of the population should be conducted as it used to be, when it is possible, and “the occupying power is forbidden to extend its own legal system to the territories it is occupying”.⁶⁰

Therefore, after 1967 war, as a general rule, local courts in the West Bank were permitted to continue to exercise the jurisdiction conferred upon them before the occupation⁶¹, but only regarding offences that did not involve the Israeli forces. However, that was not going to last. The Israeli military government in the West Bank enacted a process that gradually reduced the jurisdiction of local courts. This process started with the establishment of a parallel system of military courts dealing with specific “security offences”. First, we are going to focus on the military system establishment and then we are going to underline the wider militarization of all legal systems in West Bank. As already mentioned, West Bank Military Courts were established, by “Proclamation No. 3, concerning the effective date of Security Provisions Order”, that was amended several times and finally replaced in 1970 by Military Order 378, the Security Provisions Order (SPO). The definition of “security offences” was explicated in the SPO and it will be clarified in the next paragraph, which focuses on the Security Provision Order of 1970. At this stage, the court establishment process was still compliant with IHL. In fact, as mentioned, art. 64 of the Fourth Geneva Convention provides two conditions under which the occupying power might suspend the local penal legislation: if they constitute a threat to its security or if they constitute an obstacle to the application of the Convention. Therefore, art. 64 states:

⁵⁷ Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, *supra* note 41, art. 64;

⁵⁸ Hague Convention (IV) respecting the Laws and Customs of War on Land, *supra* note 40, art. 43;

⁵⁹ Benvenisti, Eyal. *supra* note 5, p. 5;

⁶⁰ *Final Records of the Diplomatic Conference of Geneva of 1949*, Vol. II, (Geneva 1949) p. 640;

⁶¹ Gerson, Allan. *Israel, the West Bank and International Law*, (1978), p. 124;

“The Occupying Power may subject the population of the Occupied Territory to provisions which are essential to enable the Occupying Power to fulfil its obligations under the present Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration [...]”⁶²

Moreover, according to art. 66 of the Fourth Geneva Convention, in case of a breach of the penal provisions promulgated to maintain the orderly government of the territory, the Occupying Power may hand over the accused to its properly constituted, non-political military courts, on condition that the said courts sit in the Occupied country.⁶³ In these cases, jurisdiction of local courts over soldiers of the Occupying Power and over inhabitants of the Occupied Region involved may be abrogated. Breaches by soldiers will be tried by a martial-court of the Occupying Power and breaches by inhabitants may be tried by the properly constituted, non-political military courts.⁶⁴ This was the basis of the first establishment of the military courts in the territory. However, with the time, more and more issues were subsequently allocated to military courts⁶⁵ and not only the ones regarding “security offences”. The military legal system became gradually predominant.

This process was enacted over decades. Despite the initial compliance of Israeli authorities with International Humanitarian Law, it is possible to underline a trend towards a “militarization” of the judiciary in the West Bank that gradually started to replace the local courts. This happened through the institution of military courts in 1970, but also with numerous and extensive modifications of Jordanian Law. The first important change in that direction was the establishment of the Objection Committee under Military Order No. 172, dated 22 November 1967. The Committee was a tribunal composed only of military officers. It had exclusive jurisdiction to hear objections against decisions made regarding a large list of subjects such as: expropriation of land, payment of taxes, pension, rights, etc.⁶⁶ This was the beginning of the replacement of local courts by military courts. Even if that was not violating a specific international norm, it represents a trend of replacement of local courts with Israeli military courts. Such replacement would not be compliant with the previously mentioned art. 64 of the Fourth Geneva Convention. Furthermore, Military Order No. 310 represents another important step in the process of militarization of the justice system in the West Bank. This military order applied changes to the Jordanian Law No. 2, transferring the powers of the Minister of Justice to “the person responsible” defined as “whoever the Military Commander of the West Bank area appoints for the purposes of the order.”⁶⁷ Moreover, the Judicial Council, an institution responsible for

⁶² Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, supra note 41, art. 64;

⁶³ *Ivi*, art. 66.;

⁶⁴ *Ibid.*;

⁶⁵ Benvenisti, Eyal. supra note 5, p. 216;

⁶⁶ UN. *The legal status of the West Bank and Gaza*, supra note 20;

⁶⁷ *Ibid.*;

matters related to civil judges under the Jordanian law, has been replaced by a military committee and its powers have been transferred to a special court appointed by the military Commander of the Area. Finally, Military Order No. 164, issued the 3rd November 1967, prohibited the courts of the West Bank to hear any case or issue, any order or decision against: the State of Israel and its branches and employees; the Israel Defense Forces and its members; the authorities which have been appointed by the Area Commander or those delegated by him to work in the area; persons employed by such authorities; whoever works in the service of the Israeli army or is empowered by it.⁶⁸ Considering that Israel detained the authority over the West Bank, this order violated the right to bring to court a case against the Government or its representatives, as granted by art. 102 of the Constitution of Jordan. All these provisions strongly influenced the local Penal Law system. At this point, it is important to mention that even if the Occupying Power detains capabilities or enacts certain changes, it should also respect certain limits, especially towards local sovereignty and local law. An ICRC Commentary of the Forth Geneva Convention, in fact, underlines that even if the occupying power has changed the composition of local courts, it is the local penal law that should be enforced⁶⁹ and that the legislative capacities of the Occupying Power are very extensive and complex, but that the consequent measures “must not under any circumstances serve as a means of oppressing the population.”⁷⁰ Surely, the Military Orders affected the local law and the consequences of the justice system that derived are part of this analysis.

As previously mentioned, this military legislation existed in parallel with two other normative systems: Jordanian Criminal Law, that was in force before 1967 in the West Bank and the British Defense Emergency Regulations of 1945, enacted during the British mandate and reactivated by Israel after 1967.⁷¹ The Emergency Regulations of 1945 are legal instruments imposed on the West Bank by The British High Commissioner for Palestine and, according to some sources, they were in force from 1922 to 1947. In this regard, the State of Israel argued that the Emergency Regulations were maintained during the Jordanian administration of the West Bank, therefore they were part of the law of the land.⁷² The Israeli administration was not reactivating them, but simply implementing them as part of local legislation. One of these regulations, No.119, is still used in the West Bank to impose house demolitions of suspected terrorists. Others are used to issue detention orders. Surely, the Israeli military authorities were either re-enacting or implementing a set of colonial rules that a prominent Israeli authority, the Israeli Attorney General and Minister of Justice, Yacob Shimshon Shapira, strongly criticized. According to H. D. Nakkara, the future

⁶⁸ *Ibid.*;

⁶⁹ ICRC. *Commentary to IV Geneva Convention*, ed. by Pictet, Jean. (Geneva, 1960), p. 336;

⁷⁰ *ivi*, p. 337;

⁷¹ Shehadeh, Raja. *supra* note 22, p. 24;

⁷² Viterbo, Ben-Naftali, Sfar. *The ABC of the OPT: A Legal Lexicon of the Israeli Control over the Occupied Palestinian Territory*, (Cambridge: Cambridge University Press, 2018), p. 165;

Minister of Justice of the State of Israel described the regulations as follows: “The regime established in Palestine with the publications of the Emergency Regulations is quite unique for enlightened countries. Even Nazi Germany didn’t have such laws [...]. No government is entitled to enact legislation of this kind.”⁷³ Finally, when it comes to analyzing the hierarchy of the two main legal systems the situation has been made clear by Benvenisti: “The pre-occupation local law formed the second tier of the two-tiered legal system of the territories. It was subordinate to the primary tier, which was the legislation of the military administration.”⁷⁴ Furthermore, Benvenisti quoted the Order Concerning Interpretation No. 130, issued in 1967, that provided that “security enactments supersede any law, even if the former does not explicitly nullify the latter.”⁷⁵ This provision, still in force, makes clear the absolute primacy of the military legal system in the West Bank.

Section 3: Evolution of Military detention: a focus on minors

Around 1600 military orders were issued between 1967 and 2013⁷⁶, 20 of them regarded detention. The most relevant for this part of the analysis is Military Order 378, which served as a criminal code in force in the West Bank until 2010. This order was also defined as Security Provisions Order (hereafter SPO) and it came in to force in April 1970. It established military courts in the West Bank and it defined the “security offences” that were under the jurisdiction of military courts. The Rules of Criminal Responsibility Order and the Order Concerning Punishment, issued in 1968, were complementary criminal regulations absent from the SPO.⁷⁷

According to Military Order 378⁷⁸, the courts could be of two types: a three-members court, composed of a President, that was an Israeli army officer, and two other officers and a one-member court, composed of a simple judge. A specific amendment requiring all judges of first-instance courts to have legal training was only introduced in 2004. Before 2004, in three-members courts, only the President was required to be a lawyer, while the two other judges could be ordinary officers.⁷⁹ Issues arose from this composition regarding the compliance of the military courts with general rules of fair trial, which would result in consequent violations of art. 3 of the Fourth Geneva Convention. Sentences required the authentication of

⁷³ Nakkara, Hanna Dib. “Israeli Land Seizure under Various Defense and Emergency Regulations”, in *Journal of Palestine Studies*, Vol. 14, No. 2, (1985), pp. 13-14;

⁷⁴ Benvenisti, Eyal. *supra* note 5, p. 212;

⁷⁵ *ivi*, p. 390;

⁷⁶ UNICEF. *supra* note 1, p. 6;

⁷⁷ Weill, Sharon. *supra* note 32, p. 401;

⁷⁸ UN. *International meeting on the question of Palestine*, *supra*note 27;

⁷⁹ *Ivi*, p. 401;

the Area Commander who could accept or annul them. Furthermore, no appeal existed⁸⁰, in violation of another fundamental principle of the rule of law. Art. 3 of the Fourth Geneva Convention prohibits "the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affecting all the judicial guarantees which are recognized as indispensable by civilized peoples." In 1988, a recommendation of the Israeli Supreme Court, sitting as High Court of Justice⁸¹, suggested the establishment of a Court of appeal. The Military Court of Appeal was therefore created on April 1989, it was (and still is) situated in Ofer Camp, between the cities of Ramallah and Giv'at Ze'ev, and its rulings provides guidance to the lower courts.⁸² As we mentioned before, the military legal system was meant to deal with specific "security offences" that involve the Israeli security forces. Military Order 378 listed the offences and the consequent sentences under the military jurisdiction as follows: "the destruction of Israeli Army property, which carries a maximum sentence of life imprisonment; membership of a group, one of whose members has intentionally caused death, which carries a maximum sentence of life imprisonment; insulting a soldier or attacking his honor and status as a soldier, which carries a maximum sentence of 10 years; throwing any object, including a stone, at a person or property, which carries a maximum sentence of 10 years; throwing a stone at a moving car with a view to damaging it or harming its passengers, which carries a maximum sentence of 20 years."⁸³ According to a report of a UN associate, Defense for Children, the most widespread charge against children in military courts is the throwing of stones⁸⁴.

When we start analyzing child detention under military laws, we should mention Military Order 132 and Military Order 1644.⁸⁵ The first order was about adjudication of "Juvenile Delinquents" and it set the age of majority for Palestinians at 16 and the minimal age for criminal liability at 12. This order also divided the minors in to three categories: under 12 they were "child", between the ages of 12 and 14 they were "youth" and between ages 14 and 16 they could be considered "young adults". While Israeli children under Israeli civil law reached majority at the age of 18, Palestinian children under Israeli military law were considered adults when they turned 17. A further evolution of the military detention regime for minors is represented by Order 1644. This order was issued on 29 July 2009 and it established a specific military court for Palestinian minors, that became effective on 1 October 2009.⁸⁶ It was the first and only juvenile

⁸⁰ UN. *The legal status of the West Bank and Gaza*, supra note 20;

⁸¹ HCJ. *Arjub v. The Military Commander in the West Bank*, 87/85, (1988), p. 353;

⁸² Weill, Sharon. supra note 32, p. 402;

⁸³ *Ibid.*;

⁸⁴ Defense for Children International. *No way to treat a child. Palestinian children in the Israeli military detention system*, Ramallah, (April 2016), p. 52;

⁸⁵ UNICEF, supra note 1, p. 6;

⁸⁶ UN. *International meeting on the question of Palestine*, supra note 27;

military court in the world.⁸⁷ Previously, Palestinian minors were sentenced before the same courts as Palestinian adults. However, according to the 2011 UN report on Palestinian political prisoners in Israeli prisons, in terms of operation, there were “no substantive differences between the children’s court and the regular military courts, with the exception of a few formalities, including the requirements that there should be closed-door proceedings and separate trials for individual children, subject to counsel’s request.”⁸⁸ In this regard, the report defined the establishing of a children’s court as a “formal and cosmetic measure”, that was “meant to improve the image of the military courts”.

However, these two orders were both incorporated in Military Order 1651, that came into effect on 2 May 2010 and it is still in force today.⁸⁹ The reality of Palestinian minors in Israeli military detention nowadays depends on this specific military order. For this reason, the 2013 UNICEF report, previously mentioned, focused on Military Order 1651 and it underlined the main issues relating to its conformity with the Convention on the Rights of the Child, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the ICCPR. Therefore, in this part of the analysis, we are going to briefly summarize the main issues underlined by the UNICEF report to highlight the main violations attributed to Israel in the military legislation that regards minors.

Military Order 1651 set the time limits of punishments for minors: between the age of 12 and 13, the sentence should not exceed 6 months; between 14 and 15, the maximum penalty is 12 months, unless the crime specifies a penalty of more than 5 years. This clause is extremely important if we consider that the most common charge for Palestinian minors is throwing stones. According to Section 212 of Military Order 1651: “Throwing an object, including a stone, at a person or property with the intent to harm the person or property carries a maximum penalty of 10 years’ imprisonment.”⁹⁰ Moreover, the same section states: “Throwing an object, including a stone, at a moving vehicle with the intent to harm it or the person travelling in it carries a maximum penalty of 20 years’ imprisonment.” Therefore, the clause erases the limit of the sentence for this very common charge and makes it possible to detain a 14-year-old for 20 years, for stone throwing. The existence of this clause could result in a sentence that would violate art. 37 (b) of the CRC, that states: “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.”⁹¹

UNICEF raised other concerns regarding Military Order 1651, specifically regarding the separation of minors and adults. The first issue is related to Section 138(a) and (b) of the Military Order. This section, in fact, exempts part of the trial from being held in military juvenile courts. According to UNICEF, section

⁸⁷ UNICEF. *supra* note 1, p. 6;

⁸⁸ UN. *International meeting on the question of Palestine*, *supra* note 27;

⁸⁹ UNICEF. *supra* note 1, p. 6;

⁹⁰ *Ibid.*;

⁹¹ Convention on the Rights of the Child, *supra* note 11, art. 37;

138 provides that “remand hearings, bail applications and hearings to determine whether a child remains in detention pending the conclusion of the case [...] can be heard in the military courts used for adults.”⁹² Moreover, according to Order 165, Military juvenile judges should be selected from the ranks of military court judges and given “appropriate training”⁹³. However, UNICEF underlined how little value is attributed to the specific training for juvenile judges. In fact, according to Section 140(a) and (b) of the same military order, an adult military court can hear a minor case, if this case is brought in front of the court by mistake. If that happens, the adult court is authorized to “act as if it were a military juvenile court”⁹⁴, even though the judge may not have received the “appropriate training”. These provisions would result in violations of art. 10(3) of the ICCPR, that states: “Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.”⁹⁵ UNICEF underlines that Military Order 1651 is not protecting this right, in violation of art. 10(3) of the ICCPR, as mentioned, but also in violation of Rule 112 (2) of the UN Standard Minimum Rules for the Treatment of Prisoners, that provides that “Young untried prisoners shall be kept separate from adults and shall in principle be detained in separate institutions.” Another example is the fact that the article provides separation of adults and minor, but only “to the extent possible”⁹⁶. Minors are to be brought separately to and from court “to the extent possible” and minors’ hearings are to be separate from adults’ hearings “to the extent possible”. However, it must be noticed that section 142 of the Military Order provides that, if “a grave miscarriage of justice” would result from this provision, the President of the Military Court of Appeals is allowed to order a retrial. Finally, for what concerns the report analysis of this Military Order 1651, UNICEF underlined the fact that children are bounded by the same provisions as adults regarding the time during which a minor can be denied access to a lawyer and the guidelines relating to a child’s release on bail. We will focus on this later in the analysis. However, it is undoubted that the military order, in this regard, failed in recognizing the special vulnerabilities of minors not setting any specific rules.

Furthermore, for what concern this Military Order 1651 it is important to mention that article 285 of this order forms the basis for administrative detention.⁹⁷ A broad definition of this practice is the following: “detention is considered administrative detention if, *de jure* and/or *de facto*, it has been ordered by the executive and the power of the decision rests solely with the administrative or ministerial authority, even if

⁹² UNICEF. *supra* note 1, p. 7;

⁹³ *Ibid.*;

⁹⁴ *Ibid.*;

⁹⁵ International Covenant on Civil and Political Rights, *supra* note 33, art. 10(3);

⁹⁶ *Ibid.*;

⁹⁷ High Commissioner for Human Rights. *Human rights situation in the Occupied Palestinian Territory, including East Jerusalem*, annual report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner, 26 February – 23 March 2018, (2018), p. 6;

a remedy *a posteriori* does exist in the courts against such a decision. The courts are responsible only for considering the lawfulness of this decision and/or its proper enforcement and not for taking the decision itself.”⁹⁸ Article 285 of Order 1651 empowers a military commander who “has reasonable grounds to believe that a certain person must be held in detention for reasons to do with regional security or public security” to order the detention of that person for up to six months. The detention order can be renewed indefinitely, and it does not require to be motivated⁹⁹. Furthermore, the Order does not define “regional security” and “public security” and interpretation is left to military commanders¹⁰⁰. According to the scholar Benvenisti, “the strict restrictions against administrative detention are another potential area of serious conflict between human rights law and occupation law.”¹⁰¹ In fact, under IHL, administrative detention can be used only as an exceptional and temporary measure. Article 78 of the Fourth Geneva Convention allows an occupying power to hold a civilian in administrative detention only “for imperative reasons of security”. Moreover, detainees must be granted the right of appeal and review of the detention order, according to art. 43 and 78 of the GCIV and this process must guarantee “independence and impartiality”, according to the ICRC.¹⁰² A review exists according to Israeli military law, but the all review process is not considered compliant with rules of fair trials. In this regard, the International Commission of Jurists, stated that “under Order 1651, the review is carried out by a “judge”, defined as “officers in the IDF with the rank of captain or higher, with at least five years of legal experience”, who therefore lacks the requisite independence.” The fact that the judge in charge of reviewing the order of detention is not required to have legal training could definitely result in a violation of the provisions previously mentioned. Moreover, the Human Rights Committee, in 2003, has criticized the practice of administrative detention as a violation of Article 9 of the ICCPR, especially because of its effect of “endangering the protection against torture and other inhuman treatment”¹⁰³. More recently, the United Nations High Commissioner for Human Rights, in a report that covers the time period from 1 November 2016 to 31 October 2017, stated that: “Arbitrary detention of Palestinians by Israeli authorities, including the practice of administrative detention, including of children, continued to be a major concern during the reporting period. According to official data provided by the Israeli Prison Service, as of 30 June 2017, 5.916 Palestinians, including 318 children, were in Israeli

⁹⁸ UN. *Report on the Practice of Administrative Detention*, U.N. Doc. E/CN.4/sub.2/1989/27, (1989), para. 17;

⁹⁹ High Commissioner for Human Rights. *supra* note 76;

¹⁰⁰ The International Commission of Jurists. *ICJ submission to the Universal Periodic Review of Israel*, July 2012, p. 3 available at <http://www.icj.org/wp-content/uploads/2012/07/ICJ-UPR15-Israel.pdf>;

¹⁰¹ Benvenisti, Eyal. *supra* note 5, p. 75;

¹⁰² ICRC. *Commentary to IV Geneva Convention*, ed. by Jean Pictet, (Geneva, 1960) p. 260;

¹⁰³ UN HRC. *UN Human Rights Committee: Concluding Observations*, (Israel, 21 August 2003), CCPR/CO/78/ISR, available at: <https://www.refworld.org/docid/3fdc6bd57.html>;

detention. This included 444 individuals in administrative detention, including 2 children.”¹⁰⁴ All this detention orders are issued on the basis of Military Order 1651.

Finally, we should conclude this part of the analysis stating that UNICEF described some improvements in the Israeli military detention system for minors in a second report, issued on 2015. We are going to focus on these changes in the next section of this chapter, because they did not affect the military legislation, but mostly the procedures, with few exceptions. However, one of these improvements should be mentioned at this point. On 27 September 2011, the Israeli military commander issued Military Order 1676, that raised the age of majority in the military courts from 16 to 18 years, in compliance with article 1 of the Convention on the Rights of the Child. However, as stated by UNICEF and as proven also by some more data collected during this research, in practice, Palestinian children older than 16 are still sentenced according to the same provisions of adults¹⁰⁵.

Section 4: Courts and detention today: the main violations

Understanding the current composition of military courts and the process from arrest until detention is important to proceed in the analysis and to detect the main violations of HRL that UNICEF highlighted. In the legal appendix of the book “*Courting Conflict: The Israeli Military Court System in the West Bank and Gaza*”, Lisa Hajjar describes the structure of the military courts. With the help of this source, this paragraph is going to underline some of the main features of this system. The goal is to understand the military structure and to describe the main procedures applied during and after arrest, especially the ones concerning the arrest, interrogation and detention of minors, in order to list the main human rights violations attributed to Israel.

The Israeli military court system is headed by the Military Commander of the region, that has “supreme” legislative authority “to issue, amend, and repeal military orders”¹⁰⁶. The legal administrative substructure of the Israeli Defence Forces (IDF) is formed by: military judges, that are subordinated to the Presidents of Military Courts and that respond to the President of the Military Court of Appeals. The Military Advocate General (MAG) is the chief of this hierarchy. The prosecution is administratively distinct from the judiciary, but it is also headed by the MAG. All prosecutors, that can be full-time or reservists, have legal immunity

¹⁰⁴ Report of the Office of the United Nations High Commissioner for Human Rights on the Human rights situation in Palestine and other occupied Arab territories, A/HRC/37/38 (2018), p. 7;

¹⁰⁵ UNICEF. supra note 1, p. 8;

¹⁰⁶ Hajjar, Lisa. *Courting Conflict: The Israeli Military Court System in the West Bank and Gaza*, (Berkeley: University of California Press, 2005), p. 253;

for their work¹⁰⁷. There are three main classes of offences. “Hard cases” involve charges of security violations with serious implications, including murder and attempted murder, attacks and weapons possession, and membership of an illegal organization. “Simple cases” involve security violations with incidental or minor implications, such as throwing stones, without injuring anyone, demonstrating, displaying the Palestinian flag or national colors, writing graffiti and building or manning barricades. The third type also involves simple offences that regards violations of public order such as driving violations, tax evasion and permit violations¹⁰⁸. Prosecutors have the right to make plea bargains with defense lawyers on “simple cases”, while all plea bargains for “hard cases” must be done in consultation with the court’s Head prosecutor. Furthermore, it is relevant to mention that Military Courts’ decisions do not represent legally binding precedents for future decisions. The consequence is a great deal of disparity in the sentences issued for similar charges.¹⁰⁹ Most cases are concluded through a plea bargain. In 2016, the 100% of minors were convicted out of plea bargains, 77 on 77.¹¹⁰ As mentioned, military courts of first-instance are distinguished by the number of judges (one or three) and the maximum sentencing power.¹¹¹ Small courts judge simple cases involving charges with lesser maximum sentences, while three-judge courts handle hard cases and are empowered to pass sentences up to the maximum of life in prison or the death penalty. Death sentence are and always have been commuted to life sentences. The Military Court of Appeals is composed of three judges. The Military Commander, as supreme head of this system, has the authority to reduce or commute the sentence of any military court. As we mentioned earlier, since 1967 a process of militarization of the judiciary resulted in an expansion of the use of the military courts to try West Bank inhabitants, for additional crimes unrelated to security violations. Local courts gradually lost the jurisdiction, while the Israeli military courts gained, a wide jurisdiction instead. Military courts can “try Palestinian residents of the territories for crimes committed anywhere (i.e., personal jurisdiction); any crimes committed in the territories (i.e., territorial jurisdiction); or crimes committed anywhere that might have an impact on the security situation in the territories (i.e., extraterritorial jurisdiction).”¹¹² Every Israeli soldier has the authority to arrest any person suspected of committing, planning, or conspiring to commit an offense.¹¹³ Arrests are generally ordered by the General Security Services (GSS) and are carried out by the military.

This part of the research is going to highlight the main violations suffered by minors from the West Bank and the relative instruments of IL that should protect the violated right. The sources are the UNICEF reports,

¹⁰⁷ *ivi*, p. 254;

¹⁰⁸ *ivi*, p. 256;

¹⁰⁹ *Ibid.*;

¹¹⁰ Defence for Children, Palestine, see appendix 1 and 2;

¹¹¹ *ivi*, 255;

¹¹² Hajjar, Lisa. *supra* note 106, p. 255;

¹¹³ *ivi*, p. 190;

previously mentioned, and the recent data furnished by Defence for Children Palestine, for more recent years, available in appendix 1 and 2. The analysis is going to follow the journey of an arrested Palestinian minor, from notification until conviction.

a. The practice of night arrests and the arrest notification

For what concern the arrest, UNICEF documented practices that results in severe violations of the rights of the minors. Firstly, the moment of the arrest can be very traumatic. UNICEF reported that “furniture and windows are sometimes broken, accusations and verbal threats are shouted, and family members are forced to stand outside in their night clothes as the accused child is forcibly removed from the home and taken away with vague explanations such as “he is coming with us and we will return him later”, or simply that the child is “wanted”. Few children or parents are informed as to where the child is being taken, why or for how long.”¹¹⁴ These practices represents clear violations of the minors’ rights. Firstly, all children and their parents should be informed of the reasons for the arrest, at the time of the arrest and in an understandable language. The minor should be authorized to be accompanied by a legal guardian during the transfer from the house to the interrogation center. These rights are stated in the ICCPR at art. 9 (1) and (2) and in the Beijing Rules, at Rule 10¹¹⁵. The Beijing Rules are the UN Standard Minimum Rules for the Administration of Juvenile Justice, adopted on 29 November 1985 by the United Nations General Assembly. In 2017, on 137 documented cases of arrested minors¹¹⁶, 114 (the 83%) were not informed of reason for arrest and 132 (the 96%) had no lawyer or family member present during interrogation. In 2018, on 120 documented cases¹¹⁷, 109 (the 90%) were not informed of reason for arrest and 115 (the 95%) had no family member present during interrogation. Moreover, the arrest practices reported by UNICEF are even more traumatic if we consider the time in which the arrest usually take place. In fact, pre-planned night-time arrest operations are very common, also in case of the arrest of minors.¹¹⁸ In fact, the Israeli army conducted 162 night-time arrests of minors in 2013, equal to approximately 25% of the total number of cases (654)¹¹⁹. In the subsequent report of 2015, UNICEF stated that, in February 2014, the Israeli authorities implemented a pilot-test in the West Bank based on the replacement, when possible, of the practice of night arrests of children with a summons procedure¹²⁰. The effort was recognized to be extremely positive and it was encouraged. There is no subsequent information about the further implementation of this test, but the results

¹¹⁴ UNICEF. *supra* note 1, p. 10;

¹¹⁵ Standard Minimum Rules for the Administration of Juvenile Justice, adopted by General Assembly resolution 40/33 (29 November 1985), available at <https://www.ohchr.org/Documents/ProfessionalInterest/beijingrules.pdf>;

¹¹⁶ Data furnished by Defence for Children, Palestine, see appendix 1;

¹¹⁷ *Ibid.*;

¹¹⁸ UNICEF. *supra* note 3, p. 3;

¹¹⁹ UNICEF. *supra* note 3, p. 9;

¹²⁰ UNICEF. *supra* note 3, pp. 2, 5;

do not seem to have solved the problem. In fact, in 2017 there have been 69 documented cases of night arrests in the West Bank, approximately the 50% of the total number of cases (137)¹²¹. In 2018 there have been 74 documented cases of night arrests, the 61% of the total number (120)¹²². Even if the practice of night arrests is not addressed in a specific provision of HRL, a general norm of the CRC can be considered relevant. This norm is art. 3, which provides that “in all actions concerning children [...] the best interests of the child shall be a primary consideration.” Exposing a minor to such traumatic experiences definitely does not take in consideration the interest of the minor itself.

b. Transfer and interrogation practices

UNICEF highlighted the fact that, after the arrest, “many children are subjected to ill-treatment during the journey to the interrogation center.”¹²³ Defence for Children Palestine documented cases of ill-treatments as well: use of hand ties, the practice of blindfolding the minor, lack of water and food, exposure to cold and hot temperatures and long and uncomfortable journeys¹²⁴. Moreover, UNICEF stated that “the transfer process can take many hours and often includes intermediate stops at settlements or military bases.”¹²⁵ According to these sources, the minor’s journey from the place of arrest to the interrogation site can take from one hour to an entire day. Then, the arrested minor arrives to a police station, where the interrogation can begin. According to UNICEF:

“The interrogation mixes intimidation, threats and physical violence, with the clear purpose of forcing the child to confess. Children are restrained during the interrogation, in some cases to the chair they are sitting on. This sometimes continues for extended periods of time, resulting in pain to their hands, back and legs. Children have been threatened with death, physical violence, solitary confinement and sexual assault, against themselves or a family member. Most children confess at the end of the interrogation. The interrogator prints out some forms and orders the child to sign them, though the child often lacks a proper understanding of their contents. In most cases the forms are in Hebrew, which the overwhelming majority of Palestinian children do not understand.”¹²⁶

The practices of interrogation, here summarized, results in several violations of different norms of International Law. First, there must be independent scrutiny of the methods of interrogation. This would include the presence of a legal and relative (or legal guardian). Moreover, audiovisual recording is prescribed in case of interrogations involving minors. The relevant norms are: CRC, art 40(2)(b)(ii) and (iv); ICCPR, art 14(3)(b); UNCAT, art. 2. Relevant decisions and opinions on the matters are: Convention

¹²¹ Data furnished by Defence for Children, Palestine, see appendix 1;

¹²² Data furnished by Defence for Children, Palestine, see appendix 2;

¹²³ UNICEF. *supra* note 1, p. 10;

¹²⁴ Defense for Children International, *supra* note 84, pp. 20-46;

¹²⁵ UNICEF. *supra* note 1, p. 10;

¹²⁶ UNICEF. *supra* note 1, p. 11;

on the Rights of the Child General Comment No. 10, para 58; HRC General Comment No. 20, para 11; HRC Concluding Observations, Israel (29 July 2010), ICCPR/C/ISR/ CO/3, para 22; UN Committee against Torture, General Comment No. 2, para 14, and Concluding Observations, Israel (14 May 2009), CAT/C/ISR/CO/4, paras 15, 16, 27 and 28. In 2017, on 137 documented cases of arrested minors¹²⁷, 63 of them (the 46,0%) were transferred on the floor of the vehicle. 130 minors (the 94%) had hands and legs tied during the transfer. 120 minors (the 87%) were blindfolded. In 2018, on 120 documented cases¹²⁸, 68 (the 56%) were transferred on the floor of the vehicle. 119 minors (the 99%) had hands and legs tied during the transfer and 113 minors (the 94%) were blindfolded.

c. Interrogation and methods of restraint

Secondly, the Israeli procedures of interrogation often involves the use of instruments and methods of restraint¹²⁹. In this regard, IL provides that minors should be restrained only if they pose an imminent threat to themselves or to others. Moreover, all other means should have been exhausted, or methods of restraint should be a precaution against escape during transfer. However, these methods should be used only for as long as is strictly necessary. The relevant norm at this regard is art. 37(c) of the CRC. The same restrictions to such practice are expressed by the CRC General Comment No. 10¹³⁰, para 89, by the UN Standard Minimum Rules¹³¹, at rules 33-34 and by the Tokyo Rules¹³², at rule 64. At this regard, in 2009, the Public Committee Against Torture filed a petition¹³³ in the Supreme Court of Israel. Prior to judgement, in March 2010, the MAG communicated that new procedures were introduced on the use of hand ties. The procedures were aimed to prevent pain and injury for the minor and they instruct the following: “hands should be tied from the front, unless security considerations require tying from behind; three plastic ties should be used, one around each wrist, and one connecting the two; there should be the space of a finger between the ties and the wrist; the restraints should avoid causing suffering as much as possible; and the officer in charge is responsible for ensuring compliance with these regulations.”¹³⁴ The MAG communicated the new procedures to Human Rights associations in a letter, thereby further court action was considered unnecessary.

¹²⁷ Data furnished by Defence for Children, Palestine, see appendix 1;

¹²⁸ Data furnished by Defence for Children, Palestine, see appendix 2;

¹²⁹ *Ibid.*;

¹³⁰ Convention on the Rights of the Child General, Comment No. 10 (2007), available at <https://www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.10.pdf>;

¹³¹ Standard Minimum Rules for the Treatment of Prisoners, supra note 46;

¹³² United Nations Standard Minimum Rules for Non-custodial Measures, adopted by General Assembly resolution 45/110 (14 December 1990), available at <https://www.ohchr.org/Documents/ProfessionalInterest/tokyorules.pdf>;

¹³³ H.C.J. *Public Committee Against Torture in Israel v Prime Minister of Israel*, H.C.J. 5553/09 (2009);

¹³⁴ UNICEF. supra note 1, p. 20;

d. Interrogation, self-incrimination and use of evidences

Thirdly, interrogated minors should be free from compulsory self-incrimination. This is provided by the CRC, art 40(2)(b); by the UNCAT, art. 15; by the ICCPR, art 14(3)(g) and (4) and also by the GCIV, art. 31. UNICEF, in fact, noted that the age of the minor, the length of the interrogation and other factors, as fear and lack of understanding, may result in a confession that is not true¹³⁵. Moreover, International Law prescribes the exclusion of all evidence obtained by torture, according to art. 15 of UNCAT, that provides: “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.” In 2017, on 137 documented cases of arrested minors¹³⁶, 91 minors (the 66%) were not properly informed of their rights and 90 (the 65%) had no access to counsel prior to interrogation. 75 minors (the 54%) were showed or had to sign a paper in Hebrew, a language that the majority of Palestinian minors does not know. In 2018, on 120 documented cases¹³⁷, 80 minors (the 66%) were not properly informed of their rights and 80 (the 66%) had no access to counsel prior to interrogation. 81 minors (the 67%) were showed or had to sign a paper in Hebrew. The Supreme Court of Israel also addresses the issue of cruel, inhuman or degrading treatment in a 1999 decision.¹³⁸ This is extremely relevant because, no matter the legal status of West Bank, this decision is legally binding on the Israeli military courts. The ruling, in fact, concerned any interrogation performed by Israeli authorities, not limited by territory, and to Israeli Security Agency interrogations in particular. Moreover, the decision enlarged the field and comprehended also ill-treatments. In fact, according to the Court, a reasonable interrogation is necessarily one free of torture and cruel, inhuman or degrading treatment, and that this prohibition is considered to be absolute¹³⁹. However, recent data shows a different trend. In 2017, on 137 documented cases of arrested minors¹⁴⁰, 102 minors (the 74%) was victim of physical violence and 85 minors (the 62%) experienced verbal abuse, humiliation, and intimidation. 109 minors (the 79%) were strip searched, 50 minors (the 36%) were denied adequate food and water. 26 minors (the 19%) were held in solitary confinement for more than 2 days. In 2018, on 120 documented cases¹⁴¹, 92 minors (the 76%) were victim of physical violence and 67 minors (the 55%) experienced verbal abuse, humiliation, and intimidation. 112 minors (the 93%) were strip searched, 53 minors (the 44%) were denied adequate food and water. 22 minors (the 18%) were held in solitary confinement for more than 2 days.

¹³⁵ UNICEF. *supra* note 1, p. 11;

¹³⁶ Data furnished by Defence for Children, Palestine, see appendix 1;

¹³⁷ Data furnished by Defence for Children, Palestine, see appendix 2;

¹³⁸ HCJ. *Public Committee Against Torture in Israel and others v. The State of Israel* (1999);

¹³⁹ *ivi*, para. 23;

¹⁴⁰ Data furnished by Defence for Children, Palestine, see appendix 1;

¹⁴¹ Data furnished by Defence for Children, Palestine, see appendix 2;

e. Place of interrogation and detention

Most of the arrested minors from the West Bank are brought to interrogation centers that are situated inside Israeli settlements, in the West Bank. In a few cases, the children have been transferred to the Al Mascobiyya Interrogation Centre in Jerusalem or to the Al Jalame Interrogation Centre, near Haifa, in Israel¹⁴². The fact that Palestinian minors from the West Bank are transferred to Israel to be interrogated is a clear violation of IL. In fact, articles 49 and 76 of the GCIV prohibits holding detainees in the territory of the Occupying power. In addition, two of the three prisons with “juvenile” sections, where the majority of Palestinian minors serve their sentences, are located inside Israel. Hasharon and Megiddo prisons are inside Israel, while Ofer prison is located in the West Bank, near the city of Ramallah¹⁴³. As already mentioned, detaining Palestinians from the West Bank in Israel contravenes article 76 of the GCIV, that provides that “protected persons accused of offences shall be detained in the occupied country, and if convicted they shall serve their sentences therein.”¹⁴⁴ In this regard, we should also consider the existence of Israeli regulations that preclude Palestinians from the West Bank, without specific permits, to enter Israeli territories.¹⁴⁵ That would result in the impossibility for the family to visit the minor detainee, in violation of article 37(c) of the CRC, which states that a child “shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances”.

f. Right to be brought before a judge and to challenge the legality of the detention

After arrest and before being brought to court, the detainees tend to be held incommunicado, unable to meet with a lawyer¹⁴⁶. These practices violated the principles stated in several general norms, from the rule of fair trial stated in article 14 of the ICCPR to the rights reserved to minors detainees by art. 37 of the CRC. Generally, arrested Palestinian adults from the West Bank can be held in detention for eighteen days before being brought before a judge. Arrested minors, instead, face a reduced pre-trial detention. According to Military Order 1711, issued on 28 November 2012 and in effect since April 2013, minors under 14-years-old should be brought before a judge within 24 hours of arrest and children between 14 and 18 years old within 48 hours.¹⁴⁷ UNICEF highlighted the fact that military provisions recognized the vulnerability of minors in this case. However, the 2013 report underlined the fact that the treatment is still not in line with international standards, which recommend that the legality of the arrest should be reviewed by a judge

¹⁴² UNICEF. *supra* note 1, p. 11;

¹⁴³ Defense for Children International. *supra* note 84, p. 54;

¹⁴⁴ Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, *supra* note 41, art. 76;

¹⁴⁵ Defense for Children International., *supra* note 84, p. 57;

¹⁴⁶ Hajjar, Lisa. *supra* note 106, p. 191;

¹⁴⁷ UNICEF, *supra* note 1, p. 9;

within 24 hours for all persons under 18 years.¹⁴⁸ Moreover, the legality of continued detention should be reviewed by a judge every two weeks and every minor should enjoy the right to challenge the legality of its detention. The International provisions on the matter are: CRC, art. 37(d) and ICCPR art. 9 (3) and (4). Moreover, we can refer to the Convention on the Rights of the Child General Comment No. 10, paras. 52 and 83 and to Human Rights Council General Comment No. 8, para 2.

g. Denied bails

Incarceration of children should always be a measure of last resort and for the shortest possible time, as provided by art. 37(b) of the Convention on the Rights of the Child. In case of conviction of a minor, detention should, therefore, be a measure of last resort and, except in extreme circumstances, release on bail should be the standard procedure. However, in the case of Palestinian minors from the West Bank, bail is often denied¹⁴⁹. In fact, one of the recommendations of the 2013 UNICEF report was to revise the conditions under which bails were granted, to make them consistent with the CRC. UNICEF started a dialogue on the matter with the Israeli authorities, that is reported in the 2015 document. “The Military Prosecutor noted that when a person is arrested, the Military Court decides on remand based on whether there is a sufficient suspicion, a specific reason for detention (security risk, flight risk, interference with ongoing investigation) and severity of the offense, as is also provided in Israeli law. In such decisions, the Judge takes into consideration the age and circumstance of the child.”

Such consideration lead to a very little number of releases on bails. The Israeli authorities underlined the fact that, in 2013, of the 654 cases referred to the Military Advocate General, 91 children were released on bail pending decision by the Military Prosecutor regarding an indictment (13% of the total). Of the 465 indicted children, 80 were released on bail pending trial (17% of the total). These statistics could not be considered in line with the obligations of detaining minors only as a measure of last resort.

h. Right to access education

Finally, both IHL and IHRL provide for the right of detainees to education. This right has been recognized for all in art. 26 of the Universal Declaration of Human Rights. Moreover, the ICESCR, ratified by Israel in 1991, states that “education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms”. Moreover, art. 94 of the GCIV encourages the “Detaining Power” to “take all practicable measure to ensure the exercise” of “intellectual, educational and recreational pursuits”. It further states that “all possible facilities shall be granted to internees to continue their studies or to take up new subjects. The education of children and young people shall be ensured; they shall be allowed to attend schools either within the place

¹⁴⁸ *Ibid.*;

¹⁴⁹ UNICEF. *Supra* note 1, p. 12;

of internment or outside”. When detained, Palestinian minors face numerous difficulties in pursuing their education¹⁵⁰. Examples are the fact that the Israeli Prison Services “does not provide any form of education to children between the age of 16 and 18, which constitutes the largest age group among child detainees”. Moreover, the school curriculum differs from the ones approved by the Palestinian Authority, the allocated daily teaching time is short and there is a lack of educational material and appropriate spaces. Defence for Children also reported that “on some occasions, the Israeli Prison System does not allow Palestinian children to complete the general matriculation exam known as *tawjihi*. The *tawjihi* exam is currently the only official Palestinian exam available to Palestinian high school students.”¹⁵¹ With a poor education and without access to the final exam, the minors have very little possibility once they are out of prisons and back to the reality of the Palestinian society.

This chapter has provided an overview of the Israeli military detention system in the West Bank and it highlighted the main violations of the norms of IHL and HRL that UNICEF and UN partners underlined. It is important to further recall the fact that this reality is shaped by the political, social and legal context of the West Bank. The next two chapters are going to analyze the main legal issues that regards the debate on the applicability of the instruments of IHL and HRL that we mentioned.

¹⁵⁰ Defense for Children International. *supra* note 84, pp. 59-60;

¹⁵¹ *ivi*, p. 60;

Chapter 3: The applicability of International Humanitarian Law in the West Bank

The term “occupied territories” has become more and more associated with Israel’s control of the West Bank and Gaza. In fact, numerous sources refer to the Palestinian territories in this way. On the contrary, other sources¹⁵², and the State of Israel itself, reject the definition of the West Bank and Gaza as occupied territories and they consequently claim the inapplicability of the Fourth Geneva Convention of 1948. In some cases, the application of the 1907 Hague Convention resulted problematic as well. International Customary Law, the 1907 Hague Convention and its annex and the GCIV are the main legal instruments of IHL. Denying the occupation of the West Bank has consequences in the applicability of IHL in the territory and this can have relevant consequences in the protection of the rights of the population. This is true, especially if we consider the category of minors in the complex system that we outlined in the previous chapter. However, Israel stated several times that respect of fundamental humanitarian rights is granted, no matter the legal status of the territories. What is meant for “fundamental humanitarian rights” is unclear and a deeper analysis on the matter is needed. This chapter is going to highlight the debate on the occupation and the consequent application of IHL and IHRL in the West Bank.

Firstly, we are going to describe the relations between occupation and International Humanitarian Law, in order to underline the importance of defining the legal status of the Palestinian Territories and specifically, in the case of our analysis, of the West Bank. The main references for this part are going to be “The International Law of Belligerent Occupation”, written by Y. Dinstein, and “International Law of Occupation”, a book by E. Benvenisti. Secondly, we are going to focus on the theoretical debate on the definition of the West Bank as an occupied territory. From the Israeli prospective, recognizing the Palestinian territories as occupied would mean to accept certain assumptions and the related consequences. The reasonings behind the Israeli position are clearly stated in different legal documents. The main and first scholar that rejected this definition was a young lecturer at the Hebrew University of Jerusalem, Yehuda Blum, with his article “The missing reversioner: reflections on the status of Judea and Samaria”, published in 1968. This article, together with statements and writings of the former Israeli Military Advocate General, Colonel Meir Shamgar, are going to be the bases of the first part of this chapter. Moreover, we are going to consider the position of the Supreme Court of Israel on the matter and, finally, we will outline the point of

¹⁵² See Kretzmer, David. *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories*, (New York: State University of New York Press, 2002), pp. 32–33. See also Imseis, Ardi. “On the Fourth Geneva Convention and the Occupied Palestinian Territories”, in *Harvard International Law Journal*, (Winter 2003), p. 69;

view of scholars and institutions that affirmed several times that the Palestinian territories are under Israeli occupation.

This chapter is going to underline the main issues regarding the application of International Humanitarian Law in the West Bank in order to highlight the legality of the Israeli military control over the West Bank. The main aim of this part of the analysis is to highlight the consequences of the debate about the legal status of the territory on the protection of the rights of West Bank inhabitants, especially for what concern minors.

Section 1: International Humanitarian Law and Occupation

As mentioned before, International Law is divided in International Humanitarian Law, the law of international armed conflict, and International Human Rights Law, based on treaties. Occupation can be considered part of international armed conflicts and, therefore, the main source of law that regulates situations of occupation is International Humanitarian Law. When it concerns occupation, IHL has four main sources: Customary International Law, The Hague Regulations, the GCIV and Additional Protocol I. The correlation between occupation and war is underlined by historical evidences (occupations are usually consequences of wars) and by scholars. In fact, when we refer to the international regime that applies in case of occupation, it is usually defined as the International Law of Belligerent Occupation. This is the case for the ICRC¹⁵³ and this is at the base of the book written by Y. Dinstein and named, in fact, “The International Law of Belligerent Occupation”¹⁵⁴. The adjective “belligerent” refers to the fact that occupation is part of the *ius in bello*¹⁵⁵. Similarly, the scholar E. Benvenisti stated that “the law of occupation developed as part of the law of war”¹⁵⁶. However, he added that “the linkage between the occupation and war is not indispensable”¹⁵⁷ and he cited cases, in the history of the twentieth century, that shown the evolution of the concept of occupation. In our case, the occupation of the West Bank was surely the outcome of the 1967 war, but the evolution of the legal concept of occupation is extremely relevant, because of the specific context and the unprecedented length of this phenomenon in the West Bank. Hence, this is extremely relevant when we consider the debate on the applicability of Human Rights Law in occupied territories. The formal applicability of the general body of laws of human rights to occupation is not generally accepted¹⁵⁸. The reasons were to be found in the exceptionality of the occupation and in its

¹⁵³ ICRC. *Occupation and International humanitarian law: questions and answers*, (4 August 2016), available at <https://www.icrc.org/en/doc/resources/documents/misc/634kfc.htm>;

¹⁵⁴ Dinstein, Yoram. *The International Law of Belligerent Occupation*, (Cambridge: Cambridge University Press, 2009);

¹⁵⁵ *ivi*, p. 11;

¹⁵⁶ Benvenisti, Eyal. *supra* note 5, p. 2;

¹⁵⁷ *Ibid.*;

¹⁵⁸ *ivi*, p. 13;

correlation with war. In this debate, in fact, “some have claimed that when armed conflict erupts, most “peacetime” human rights are temporarily superseded by the humanitarian laws of war”¹⁵⁹. On the other hand, an opposite stance has been supported by the UN¹⁶⁰, the Inter-American Commission for Human Rights¹⁶¹ and, ultimately, by the ICJ¹⁶². The consequences of this debate on Palestinian minor detainees from the West Bank are enormous, because the obligations of Israel under Human Rights treaties depend on this. We are going to discuss this matter in the next chapter. For now, we only need to highlight that the debate on the applicability of IHL, or more specifically of International Law of Occupation, is not the only dispute that endanger the protection of the rights of the West Bank inhabitants.

The International Law of Occupation, whether we want to consider it belligerent or not, is the focus of this chapter. To understand the consequences of occupation on the Occupying Power and on the inhabitants of the Occupied Territories, we should highlight the norms of IHL that applies in case of occupation. According to Y. Dinstein, the International Law of Occupation is embodied in four main sources of customary and treaty law.¹⁶³

a. Customary international law.

International custom is considered a “general practice accepted as law”¹⁶⁴. Therefore, customary law is not written, but it is a practice that have been incrementally consolidated in the general conduct of States. It is binding all States, whether they participated in creating it or not.¹⁶⁵ The main problem with occupation and customary international law is the fact that, “on a host of issues, the practice of States in the domain of belligerent occupation is desultory”¹⁶⁶. Hence, the existence of a general practice accepted as law can be questioned. In fact, general practice in the interaction between Occupying Power and occupied territories is difficult to precisely be addressed. Moreover, “the only contemporary practice which is both extensive and detailed, spread over more than forty years of belligerent occupation, is that of Israel.”¹⁶⁷ One state practice is not a “general practice”. Moreover, the “Israeli

¹⁵⁹ *Ibid.*;

¹⁶⁰ See UN. GA Resolution 2727 (XXV) of December 15, 1970, see also UN. Respect for Human Rights in Armed Conflict: Report of the Secretary General, 24, Supp. n. 61, at 12, Doc. A/7720 (November 20, 1969);

¹⁶¹ See *Salas and others v. the United States*, Case n. 10.573, Report No. 31/93, OEA/Ser.L/V/II.85Doc. 9 rev. at 312 (1994);

¹⁶² ICJ. *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons* (1996) Rep. 226, para. 240; ICJ, *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (2004) Rep. 136, para. 106;

¹⁶³ Dinstein, Yoram. *supra* note 138, p. 4;

¹⁶⁴ Statute of the International Court of Justice, Annexed to Charter of the United Nations, 1945, Article 38(1)(b);

¹⁶⁵ Dinstein, Yoram. *The Interaction between Customary International Law and Treaties*, (2006) pp. 82-83;

¹⁶⁶ Dinstein, Yoram. *supra* note 138, p. 4;

¹⁶⁷ *Ibid.*;

practice is not always in harmony with what is commonly viewed as the customary *lex lata*.”¹⁶⁸ Therefore, for this analysis, customary International Law is not going to be extremely relevant.

b. The Hague Regulations.

These regulations resulted from the Peace Conferences of 1899 and 1907, that took place in The Hague. These instruments are extremely relevant in our case. In fact, Section III of the Regulations Respecting the Laws and Customs of War on Land, address precisely the situations of occupation. The relevant articles are the ones from 42 to 56. This specific regulation was first composed as annexed to The Hague Convention of 1899 and subsequently revised and annex to the general framework of The Hague Convention (V) of 1907¹⁶⁹. The present analysis refers to the version of 1907. According to Dinstein, these regulations gradually became customary international law, because the norms contained in the Conventions were generally recognized as a practice worldwide and these norms gradually became the basis of the laws and customs of war.¹⁷⁰ In fact, the military tribunals judging war crimes after World War II¹⁷¹ referred to these norms and they stated that, by 1939, The Hague Conventions and its annex were regarded as being “declaratory of the laws and customs of war”¹⁷². Regarding the relationship between The Hague Regulations and the Law of Occupation, the ICJ expressed two relevant opinions: the 2004 Advisory Opinion on the Wall¹⁷³ and the 2005 Judgment in the Armed Activities case, referring to Congo and Uganda¹⁷⁴. The ICJ formally recognized the declaratory nature of the provisions contained in The Hague Convention. This entails that the legal source has become binding on all States, whether or not they are Contracting Parties to The Hague Conventions of 1899/1907.¹⁷⁵ This is the case of Israel¹⁷⁶. The main limit of the Conventions in cases of occupation are to be found in the fact that these norms were formulated prior to the two World Wars. Therefore, “the protection that they afford

¹⁶⁸ *Ibid*;

¹⁶⁹ *Ibid*;

¹⁷⁰ *ivi*, p.5;

¹⁷¹ See International Military Tribunal (Nuremberg), 1947, 41 AJIL 172, pp. 248–9 and International Military Tribunal for the Far East (Tokyo), 1948, 15 ILR 356, pp. 365–6;

¹⁷² International Military Tribunal (Nuremberg), 1947, 41 AJIL 172, pp. 248–9;

¹⁷³ ICJ. *Advisory Opinion on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, I.C.J. Reports (2004), pp. 136-221 available at <https://www.icj-cij.org/files/case-related/131/131-20040709-ADV-01-00-EN.pdf>;

¹⁷⁴ ICJ. *Case Concerning Armed Activities on the Territory of the Congo (Congo, Uganda)*, 2005, 45 ILM 271, 317 (2006);

¹⁷⁵ Dinstein, Yoram. *supra* note 138, p. 5;

¹⁷⁶ For a list of the State parties to the Hague Convention (IV) respecting the Laws and Customs of War on Land and its annex, see [https://ihl-](https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=195)

[databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=195](https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=195);

to the inhabitants of occupied territories is of fundamental value, but – as we shall see when we analyze these provisions in concrete form – their focus is property rights. Although the life and liberty of the inhabitants are also safeguarded in The Hague Regulations, this is done in a more abstract manner.”¹⁷⁷ The scholar Benvenisti stated that The Hague Regulations differ in their emphasis from the other sources of IHL because of the historical context of development¹⁷⁸. The ICJ similarly stated: “Whilst the drafters of the Hague Regulations of 1907 were as much concerned with protecting the rights of a State whose territory is occupied, as with protecting the inhabitants of that territory, the drafters of the Fourth Geneva Convention sought to guarantee the protection of civilians in time of war, regardless of the status of the occupied territories, as is shown by Article 47 of the Convention.”¹⁷⁹ It is important to mention that Israel is not a party to the Hague Convention to which the Regulations are appended.¹⁸⁰ However, it considers these norms as customary international law and it is, therefore, bound by them.

c. Geneva Convention (IV).

On the other hand, more recent sources of IHL are the four Conventions for the Protection of War Victims, that were adopted in Geneva, in 1949. The first three Conventions redrafted previous texts, but the fourth was new and it is also the more relevant for our analysis. The Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War and includes a specific section dealing with aliens in the territory of a party to the conflict (section II, from art. 35 to 46) and another one dealing specifically with occupation (section III, from art. 47 to 78). As stated by art. 156, the Convention is ‘supplementary’ to The Hague Regulations. The fundamental purpose of the Convention was to provide the population of occupied territories with enhanced protection, as compared to the one granted by The Hague Regulations, in order to prevent the horrors of World Wars. All four Geneva Conventions of 1949 are universally applicable, given that all States consented to be bound by them. Israel ratified all Geneva Conventions in 1951, but never incorporated them in parliamentary legislation.¹⁸¹ The consequences, as we will see, are extremely relevant for the application of the GCIV.

¹⁷⁷ Dinstein, Yoram. *supra* note 138, p. 6;

¹⁷⁸ Benvenisti, Eyal. *supra* note 5, p. 13;

¹⁷⁹ ICJ. *supra* note 158, p. 175;

¹⁸⁰ Ben-Naftali, Shany. “Living in Denial: The Application of Human Rights in the Occupied Territories”, in *Israel Law Review*, n. 17, (2003), p. 27;

¹⁸¹ Kretzmer, David. “The law of belligerent occupation in the Supreme Court of Israel”, in *International Review of the Red Cross*, Vo. 94, N. 885, (Spring 2012) p. 212;

d. Additional Protocol I.

In 1977, an Additional Protocol Relating to the Protection of Victims of International Armed Conflicts (Protocol I) was added to the Geneva Conventions¹⁸² and some of its clauses deal with occupation. This protocol complements the Geneva Conventions, but, in some explicit cases, it substitutes previous Geneva provisions¹⁸³. The problem is that, contrary to the Geneva Conventions, Protocol I is not universally accepted¹⁸⁴. The US, in 1987, declared that the Protocol was “fundamentally and irreconcilably flawed”¹⁸⁵ and it refused to ratify it. Israel followed the example of the ally. Nevertheless, both the US and Israel recognized the validity of some provisions of the Protocol. The Supreme Court of Israel, for example, has expressly acknowledged that some of these norms enshrine customary international law¹⁸⁶. That can be found in the Targeted Killings Case¹⁸⁷, in the Fuel and Electricity Case¹⁸⁸ and in other instances¹⁸⁹.

These are the four main instruments of IHL that apply in case of occupation. As we already saw in the previous chapter, the most relevant source when we analyze the Israeli military detention system is the GCIV. Its application in the West Bank, however, is strongly contested by the State of Israel, for reasons that we are going to analyze in this chapter. The debate on the legal status of the West Bank is extremely important to understand the legality, under International Law, of the Israeli detention system. The legality of this system, therefore, is central in the matter of the protection of Palestinian minors in Israeli military detention. However, before moving to the main positions in the debate, we should mention another important issue: occupation is permitted under International Law, but it is also strictly disciplined. Therefore, we cannot ignore that the consequences of acknowledging the status of Occupying Power are numerous and the consequent restrictions are also very relevant. In this regard, Benvenisti noted:

“Since the adoption of the GCIV, which imposed on occupants extended obligations over civilians in occupied territories, and later with the adoption of several human rights conventions that added to those

¹⁸² Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1977, in *The Laws of Armed Conflicts: A Collection of Conventions, Resolutions and Other Documents*, (4th edn, D. Schindler and J. Toman eds., 2004), p. 711;

¹⁸³ For more information see Benvenisti, Eyal. *The International Law of Occupation*, (Oxford: Oxford University Press, 2004) pp. 64, 65, 96, 182, 281;

¹⁸⁴ See Dinstein, Yoram. *supra* note 138, p. 7;

¹⁸⁵ Message from the President of the United States to the Senate, 1987, 26 ILM 561, 562 (1987);

¹⁸⁶ Dinstein, Yoram. *supra* note 138, p. 8;

¹⁸⁷ HCJ. *Public Committee against Torture in Israel et al. v. Government of Israel et al.*, (2005), para. 29;

¹⁸⁸ HCJ. *Ahmed et al. v. Prime Minister et al.*, (2008), paras. 13–14;

¹⁸⁹ See HCJ. *Adallah – Legal Centre for Arab Minority Rights in Israel et al. v. Commander of the Central Region et al.*, (2007);

obligations, occupants found little interest in asserting their status as such. This entailed significant positive obligations toward the occupied population. The derogatory connotation that the term “occupation” has gained, particularly during the second half of the twentieth century added to this reluctance. Moreover, the outlawing of war provided incentives for invaders to act through proxies and deny their responsibility. In the early twenty-first century occupation has become for the occupant an unnecessary liability. The growing demands of the law to protect the inhabitants from the occupant’s arbitrary power and the constraints imposed on the use of domestic resources reduce whatever incentive remains for assuming public authority over foreign population.”¹⁹⁰

The fact that occupation has become an “unnecessary liability” is extremely relevant. This is not necessarily the case of Israel, also because the Israeli position toward the legal status of the West Bank has been defined before the twenty-first century. However, it is also true that, in the very exceptional circumstances of the Palestinian-Israeli conflict, being strongly bounded by the obligations of the GCIV was not in the interest of Israel. In fact, the scholar added: “For Israel, the temporary nature of the occupation, while initially comported with its indecision concerning the future of the territories it occupied in 1967, enabled it to deflect accusations of illegal foreign domination of others’ land.”¹⁹¹ This consideration introduces the Israeli position in the matter of the application of IHL, but it is not exhaustive. The considerations made by the State of Israel and its authorities started from the very complex historical and political changes that have taken place in the area. Therefore, the analysis is going to be based on facts that happened immediately after 1967 and, throughout the chapter, it is going to highlight the current positions in this debate.

Section 2: Rejecting the Occupation: Israel and the doctrine of the “missing reversioner”

The rejection of the Occupation by Israeli authorities developed some months after the conquest of the West Bank and Gaza. A fact is often mentioned when referring to the shift from the initial Israeli approach to the rejection of occupation. In July 1967, only few weeks after the Six-Day War, Colonel Meir Shamgar gave a speech in front of a parliamentary committee of the State of Israel. The speech specifically regarded the intentions and the duties of the Israeli army in the newly conquered territories of West Bank, Gaza and Golan Heights. An English translation of this parliamentary session is available on the website of the Akevot Institute for Israeli-Palestinian Conflict Research¹⁹². Moreover, the Israeli scholar Benvenisti reported the MAG speech in this specific occasion, asserting that Shamgar began his presentation by stating:

¹⁹⁰ Benvenisti, Eyal. *supra* note 5, p. 10;

¹⁹¹ *Ibid.*;

¹⁹² Available at <http://akevot.org.il/wp-content/uploads/2016/09/MAG-Briefing-Eng.pdf>;

“In terms of the legal background, our point of departure is that we have to respect both the fundamental pursuits of the State of Israel as its military forces begin to control an area that has been liberated by the IDF, and the rules of public international law that apply to the actions of any military in control of an area that was, until its entry, subject to the sovereignty of a foreign political entity. The guiding rules in this realm are the rules of public international law, which are reflected in The Hague Regulations of 1907[...] and in the [...] Fourth Geneva Convention on the Protection of Civilians in Times of War.”¹⁹³

This speech clearly stated the intention of applying IHL in the conquered territories, assuming its applicability. In fact, the Order Concerning Security Provisions of August 1967 stipulated, in art 35, that Israeli Military Courts in the West Bank shall observe the provisions of the Geneva Convention in any matter connected with judicial proceedings¹⁹⁴. Furthermore, the Order stated that, in case of contradiction between the Military norms and the Convention, the provisions of the GCIV shall prevail.¹⁹⁵ However, on 29 December 1967, Art. 35 was repealed¹⁹⁶ and the position of Israeli authorities changed radically. In August 1967, the military commander of the area replaced the section in which this provision appeared with another provision that had nothing to do with the Geneva Convention.¹⁹⁷ David Kretzmer, an Israeli expert in international and constitutional law, stated that this represented the way in which the formal legislative adoption of the Geneva Convention, as the supreme norm of military law in the Territories, was repealed¹⁹⁸. The reasons behind the Israeli position are to be found in the texts that we are going to examine in this part of the chapter. If we analyze Blum’s article, “The missing reversioner: reflections on the status of Judea and Samaria”, published in 1968, and Shamgar’s article, “The Observance of International Law in the Administered Territories”, published in 1971, it is possible to see how much the first document influenced the second. The second source, in this case, represented (and it still represents, with little variations) the official position of Israeli state authorities towards the applicability of IHL in the West Bank. This part of the analysis is going to focus on the content of Blum’s article. Hence, it is going to underline the similarities with Colonel Shamgar’s official stance and, finally, it is going to present the current Israeli position towards the legal status of the West Bank and the consequent applicability of IHL. Critics and contrary views are left to the subsequent part of the analysis.

¹⁹³ Benvenisti, Eyal. “The Missing Argument: The Article That Changed the Course of History?”, in *Israel Law Review*, Volume 50, Issue 3, (November 2017) p. 270;

¹⁹⁴ *Ibid.*;

¹⁹⁵ *Ibid.*;

¹⁹⁶ Rubin, Benjamin. “Israel, Occupied Territories”, in *Max Planck Encyclopedia of Public International Law*, (October 2009), available at <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1301>;

¹⁹⁷ Rubinstein, Amnon. “The Changing Status of the ‘Territories’ (West Bank and Gaza): From Escrow to Legal Mongrel,” *Tel Aviv Studies in Law* (1988) pp. 59, 63;

¹⁹⁸ Kretzmer, David. *supra* note 152, p. 33;

The main point of Blum's and Shamgar's articles is that Israel is not occupying the Palestinian Territories, but it is administrating "disputed areas", which are characterized by a "*sui generis*" legal status¹⁹⁹. It is interesting to mention a recurring trend for scholars that share Blum's view: through the all article, the author is going to refer to this territory as "Judea and Samaria", the biblical name of the region. Yehuda Z. Blum started his analysis from a case: he referred to two decisions of two local Palestinian courts²⁰⁰ that, in his view, highlighted some legal problems arising from the Israeli control of the West Bank. The two Palestinian courts, in fact, applied different interpretations of Military Order No. 145, a provision that concerned the status of Israeli advocates in the Palestinian courts.²⁰¹ Article 2 of this Order stated that "notwithstanding any existing provisions to the contrary, any party to civil proceedings and any defendant in criminal proceedings may authorize an Israeli advocate to represent him in such proceedings."²⁰² The application of this norm, however, was not always accepted. The first magistrate, in a decision of February 5, 1968, disqualified an Israeli lawyer appearing before the Hebron court. Blum summarized the judge's reasoning as it follows:

"(a) The "West Bank" constitutes an integral part of the Kingdom of Jordan which remains the legitimate sovereign over it, in spite of the temporary occupation of the territory by Israel; (b) The occupying authorities may not legislate for the occupied territory or alter in any manner the law in force there, save as far as is required for the protection of their military forces and for the promotion of their military objectives; (c) Order No. 145 constitutes as impermissible act of legislation and an unauthorized interference with the activities of the courts of the legitimate sovereign"²⁰³. On the other hand, Blum highlighted that a Bethlehem magistrate, in a decision of February 27, 1968, reached "a diametrically opposed legal conclusion concerning the validity of Order No. 145"²⁰⁴.

In this case, the magistrate stated that he was not entitled to question the legality of the said Order and he allowed the Israeli advocate to plead before him. According to Blum's article, the magistrate held that it was for the occupant alone to determine whether the military provision was in fact necessary for the purposes of maintaining public order and safety in the occupied territory, as provided by art. 43 of The

¹⁹⁹ Shamgar, Meir. "The Observance of International Law in the Administered Territories", in *Israel Yearbook on Human Rights*, (1971), by Yoram Dinstein, p. 266;

²⁰⁰ The author refers to the decisions by the Hebron magistrate, Mr. Hussein El-Shajuchi, and by the Bethlehem magistrate, Mr. Tawfik El-Sakka, on February 5, 1968 and on February 27, 1968, respectively;

²⁰¹ Blum, Yehuda Z. "The Missing Reversioner: Reflections on the Status of Judea and Samaria", in *Israel Law Review*, Volume 3, Issue 2, (April 1968) p. 279;

²⁰² *Ibid.*;

²⁰³ *ivi*, p. 280;

²⁰⁴ *Ibid.*;

Hague Regulations and art. 64 of the GCIV. According to this decision, the occupant's pronouncement on this point could not be challenged by the local courts.²⁰⁵

Hence, Blum outlined the four main issues that arose from these conflicting decisions. The first issue that he outlined is going to lay the bases of the theory of the missing reversioner as, in fact, it concerned “what is the juridical status, under international law, of Judea and Samaria, and what are the respective rights of Jordan and Israel over that territory”²⁰⁶. Thus, in the second section of the article, titled “The International Juridical Status of Judea and Samaria”, Blum questioned the premise that both magistrates started from: the fact that legal sovereignty over Judea and Samaria is vested in the Kingdom of Jordan. On the contrary, Blum stated that “the Kingdom of Jordan never acquired, from the point of view of International Law, the rights of a legitimate sovereign over those parts of former Mandatory Palestine, that came under its control in the course of the Palestine hostilities of 1948-9.”²⁰⁷ The author, thereby, referred to a number of theories about the location of sovereignty over territories under a Mandate, concluding that “no mandated territory can be regarded, on the termination of the mandate over it, as a *res nullius* open to acquisition by the first comer.”²⁰⁸ In the West Bank, the first comer, in his regard, was Jordan. Moreover, the article underlined that the military intervention of Jordan in the West Bank, after the end of the British Mandate, constituted a use of force in violation of Article 2(4) of the United Nations Charter, which imposes on Members the duty “to refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the Purposes of the United Nations.”²⁰⁹ Blum, therefore, concluded that the armed intervention of the Arab States, including Jordan, in the Palestinian territories was a violation of International Law. Moreover, he suggested that the real aim of this intervention “was of course to crush by military force the newly-established State of Israel”²¹⁰. Blum also referred to another factor that, in his opinion, would prove the illegal Jordanian control over the West Bank. Between February 24 and July 20 of 1948, Israel signed General Armistice Agreements (thereafter GAAs) with Egypt, Jordan, Lebanon, and Syria.²¹¹ These were UN–sponsored armistice agreements with the Arab countries that were involved in the 1948 war and that shared a border with Israel. In this regard, the author pointed out that the effect of the General Armistice Agreements between Israel and the Arab neighbor country was “to freeze, as it were, the rights and claims of the parties as they existed on the day

²⁰⁵ *ivi*, p. 281;

²⁰⁶ *Ibid.*;

²⁰⁷ Blum, Yehuda Z. *supra* note 201, p. 281;

²⁰⁸ *Ibid.*;

²⁰⁹ UN, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, art. 2(4) available at <https://www.refworld.org/docid/3ae6b3930.html>;

²¹⁰ Blum, Yehuda Z. *supra* note 201, p. 287;

²¹¹ *Ibid.*;

of their conclusion.”²¹² Consequently, as long as the Agreements were in force, unilateral acts could not affect the rights of any party as they existed when the Agreements were concluded. Hence, the West Bank annexation by the Kingdom of Jordan “was, from the point of view of international law, devoid of any legal effect.”²¹³ Blum stated that the most favorable explanation of the Jordanian military presence in the Palestinian territories, after 1948, was that the Kingdom of Jordan was enjoying the rights of a belligerent occupant. As stated before, occupation does not displace nor transfer sovereignty and the annexation of an occupied territory is forbidden under IHL. Hence, according to the author, it was not surprising that the annexation of the West Bank, enacted by a resolution of the Houses of the Jordanian Parliament on April 24 of 1950, has not met with international recognition. According to Blum, Jordan could not be considered a legitimate sovereign over the West Bank, but it could be defined “at the most” a belligerent occupant. For the author, the quotation marks reflected the doubts arising about the status of Jordan in the West Bank, because of its illegal acquisition of control over the territory, that for the author represented a violation of Article 2(4) of the United Nations Charter.

Finally, Blum set two features that would characterize an occupying power and concluded that Israel, on these bases, could not be easily defined this way. Blum stated that:

“the traditional rules of international law governing belligerent occupation are based on a twofold assumption, namely, (a) that it was the legitimate sovereign which was ousted from the territory under occupation; and (b) that the ousting side qualifies as a belligerent occupant with respect to the territory.”²¹⁴

Therefore, non-recognizing Jordan as a “legitimate sovereign” undermined the very existence of the reversionary rights of the ousted sovereign in the West Bank. Here is the main point of the analysis: according to Blum, International Law is protecting not the right of the people in occupied territories, but the right of the ousted governor of the area. Consequently, he stated that “those rules of belligerent occupation directed to safeguarding that sovereign's reversionary rights have no application”. These considerations were introducing the main conclusion of Blum’s analysis, that it is summarized in the following two sentences:

“The legal standing of Israel in the territories in question is thus that of a State which is lawfully in control of territory in respect of which no other States can show a better title. Or, if it is preferred to state the matter in terms of belligerent occupation, then the legal standing of Israel in the territories in question is at the very least that of a belligerent occupant of territory in respect of which Jordan is not entitled to the

²¹² *ivi*, 288;

²¹³ *Ibid.*;

²¹⁴ *ivi*, 293;

reversionary rights of a legitimate sovereign.”²¹⁵ As we will see in the next sections, this stance has been challenged and refused. According to the ICJ, the fact that there is a missing sovereign of a presently occupied territory does not entail that the occupier or administrator of the territory does not have the obligation to fulfil the right of self-determination of the population. This is clearly stated in the 1975 Advisory Opinion on Western Sahara²¹⁶, where the Court has found that disputes on the previous sovereignty cannot affect the application of General Assembly resolution on the matter and, in particular, they cannot affect the application of the principle of self-determination.

In conclusion, it is interesting to highlight a last point in Blum’s article, for what concerns the applicability of International Humanitarian Law. The author stated that laws of occupation could not entirely apply, but suggested that “the traditional laws of occupation must be maintained in such a situation only within the humanitarian field and that outside that field there might be room for giving such an occupant a privileged position [...] part of the law of occupation applies which is intended to safeguard the humanitarian rights of the population.”²¹⁷ This stance would result in derogations from some obligations normally imposed to an occupying power and it would also bind Israel to respect a general “safeguard” of humanitarian rights of the population living in the West Bank. The fact that the “humanitarian rights of the population” are not specifically identified is leaving a relevant degree of freedom to the Israeli authorities when operating in the West Bank.

The author of this text, Yehuda Blum, served as Ambassador and Permanent Representative of Israel to the United Nations for six years, from 1978 to 1984. Hence, his stance could already be considered as official. However, a further official source is represented by the article of the former Israeli Military Advocate General, Colonel Meir Shamgar, “The Observance of International Law in the Administered Territories”, published in 1971. This second document referred directly to Blum’s article and share the main ideas, but with different weightiness. We should, in fact, keep in mind that Blum was a young lecturer at the Hebrew University of Jerusalem, while Shamgar is a chief in the military system in place in the West Bank. Shamgar devoted the first section of his analysis to the “Application of Conventions”, referring to the conventions in matters of IHL. Later in the text, he started underlining problems associated with IHL application and suggesting that the interplay of legal and political aspects is fundamental in the matter. He, in fact, stated that “any attempt of separation of the legal and political problems involved, and rules of applicability, would create great difficulties”²¹⁸. These considerations introduced the idea that International Law does not apply in each and every armed conflict in the same way. On the contrary, according to the author, IHL

²¹⁵ Blum, Yehuda Z. *supra* note 201, pp. 293,294;

²¹⁶ ICJ. Advisory Opinion on Western Sahara (1975) available at <https://www.icj-cij.org/files/case-related/61/6197.pdf>;

²¹⁷ Blum, Yehuda Z. *supra* note 201, p. 294;

²¹⁸ Shamgar, Meir. *supra* note 199, p. 262;

application depends on a set of circumstances. Specifically, Shamgar stated that “territory conquered does not always become occupied territories to which the rules of the Fourth [Geneva] Convention apply.”²¹⁹ The author initially stressed the fact that IHL concerns itself with the victims of wars, not States and their special interests. However, a paragraph later, he stated that “the whole idea of the restriction of military government powers is based on the assumption that there had been a sovereign who was ousted and that he had been the legitimate sovereign”²²⁰. As in Blum’s analysis, Shamgar totally bypassed the rights of Palestinians and referred to States as main actors in this contest. Hence, automatic application of the GCIV on the conquered territories of “Judea and Samaria” is excluded. The reasons behind this stance are the same mentioned by Blum. Firstly, Israel never recognized that Jordan annexed the territories lawfully. Shamgar as well mentioned the GAAs and the fact that the Jordanian annexation of the territories was recognized only by two countries: Great Britain and Pakistan. Furthermore, the author underlined that Jordan and Egypt were actually acting like Occupying powers respectively in the West Bank and Gaza Strip. That would be proven by the fact that, as provided by Proclamation No. 2 of General Hashem of the Kingdom of Jordan, they kept the local laws in force. In the West Bank, Jordan was in charge mainly of the preservation of security and order, the main tasks of an Occupying power under IHL. To support his stance, Shamgar quoted the same personalities that Blum referred to: Tarasenko, the representative of the Ukraine to the Security Council of the UN, and of Senator Austin, the U.S. delegate. Both representatives underlined the unlawfulness of the Jordanian and Egyptian presence in the West Bank and Gaza after 1948. Shortly after, Shamgar directly quoted Blum’s article to reinforce his stance. The Colonel specifically referred to the part of Blum’s text that this analysis quoted. Finally, Shamgar concluded that “the territorial position is thus *sui generis*, and the Israeli government tried therefore to distinguish between theoretical juridical and political problems, on the one hand and the observance of the humanitarian provisions of the Fourth Geneva Convention on the other hand.”²²¹ The last sentence of Shamgar’s article reinforced the idea that, *de jure*, the Convention does not apply to the West Bank and Gaza, but Israel decided, *de facto*, to apply some of the provisions in order to protect humanitarian rights of the inhabitants of these territories. What he meant with humanitarian rights was not specified.

These articles are very important to understand the Israeli governmental position on the matter. However, the texts are outdated. More recent similar stances are still based on Blum’s assumption about the lack of a lawful government before Israel took control of the West Bank²²². The Israeli government had always preferred to refer to the Territories as “administered,” rather than occupied and it openly contests the

²¹⁹ *ivi*, 263;

²²⁰ *Ibid.*;

²²¹ Shamgar, Meir. *supra* note 199, p. 266;

²²² see Kretzmer, David. *supra* note 152, pp. 32–33. See also Imseis, Ardi. ‘On the Fourth Geneva Convention and the Occupied Palestinian Territories’, in *Harvard International Law Journal*, (2003) p. 69;

application of the GCIV to the West Bank and in Gaza.²²³ The official legal argument against the Convention's application is based on the interpretation of article 2 of the GCIV, that refers to its application. Specifically, art. 2 states:

“In addition to the provisions which shall be implemented in peace-time, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.”²²⁴

The argument rejecting the application is based on the second paragraph. The claim is that the West Bank was not the territory of an “High Contracting Party” when conquered by Israel in 1967. Therefore, the Convention does not formally apply²²⁵. This position has been openly presented by Israel Foreign Minister, Moshe Dayan, in a speech before the 32nd session of the UN General Assembly in 1977²²⁶. Since then, this interpretation of art. 2 guided the legal stand of Israel's representatives in international bodies.²²⁷ This argument has been opposed by numerous states and institutions, as the UN and the ICRC, that consider the GCIV “fully applicable to all the territories occupied by Israel in 1967”.²²⁸ We are going to focus on this opposite stance in the next paragraph. However, for now, it is just important to mention that the argument based on the interpretation of art. 2 of the GCIV is not strong. In fact:

“The drafting history of article 2 reveals that the second paragraph was introduced to ensure application of the Convention in cases of occupation that did not result from armed conflict. This was thought necessary as a result of the Nazi occupation of Denmark, which did not initially meet with armed resistance. The second paragraph is irrelevant in cases of occupation arising from armed conflict, as these are covered by the first paragraph.”²²⁹

In the Israeli case, the occupation would derive from the 1967-armed conflict, therefore, the second paragraph is not relevant. However, Israel still strongly support this stance and it affirms that strict

²²³ Kretzmer, David. *supra* note 152, p. 33;

²²⁴ Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, *supra* note 41;

²²⁵ Kretzmer, David. *supra* note 152, pp. 33-34;

²²⁶ See UN Doc. A/32/PV. 27 p. 83–85;

²²⁷ Kretzmer, David. *supra* note 152, p. 34;

²²⁸ Permanent Observer Mission of Palestine to the UN. *Israel's Belligerent Occupation of the Palestinian Territory, including Jerusalem and International Humanitarian Law*, (Geneva, 15th July 1999) available at <https://www.un.org/unispal/document/israeli-occupation-and-international-humanitarian-law-conf-of-high-contracting-parties-to-4th-genevaconvention-paper-by-palestine-non-un-document/>;

²²⁹ Kretzmer, David. *supra* note 152, p. 34;

application of the convention would imply a recognition of Jordan as the legitimate sovereign of the territory. An unacceptable stance for the State of Israel, for the reasons that we stated before.

Finally, there is a recent trend that we should mention: in the last decades, Israel is less likely to approach the matter of the inapplicability *de jure* of the GCIV. As we are going to see in the last part of this chapter, this stance has been strongly criticized by the ICRC, that is the guardian of the Geneva Conventions, by the UN, by UN bodies and it has been opposed by an advisory opinion of the ICJ. At the same time, Israeli authorities have been less inclined to take the strong stances that Blum and Shamgar took in the documents that we analyzed. Today, the Israeli government refers to the GCIV when it comes to certain matters²³⁰, but it avoids direct confrontation on its application, when it comes to discuss the issue during international conferences. An example is the Conference of High Contracting Parties to the Fourth Geneva Convention of 17 December 2014, that regarded this specific matter and that was convened after the terrible events that took place in Gaza in the summer of 2014, in the context of Israel's Operation Protective Edge and attacks by Palestinian armed groups²³¹. Israel was not represented and publicly criticized the existence of the conference. The Israeli government strongly condemned the decision of the Government of Switzerland to accede to Palestinian demands to hold a conference of the signatory states of the Geneva Conventions²³². Moreover, it stated that "the conference of signatories is a political move whose sole purpose is to exploit the important stage of the Geneva Conventions for the sake of assailing Israel."²³³ Similarly, after the Conference, in a public reaction, the Israeli Government stated: "Whether the convening of this conference is the result of Arab pressure, a distorted interpretation of the Geneva Conventions, a desire to coerce Israel into succumbing to a political dictate or any other motive, it will serve only to further immune terrorist groups targeting civilians and using their own civilians as human shields. However, it won't stop Israel from implementing its primary obligation to its citizens - to provide them with security and protect them from merciless and fanatic terrorists, who do not hide their desire to see Israel wiped-off the map of the Middle East."²³⁴

²³⁰ On the website of the Israeli government, the compliance of Israeli policies with the GCIV is underlined in the case of administrative detention orders. Source available at <https://mfa.gov.il/MFA/AboutIsrael/State/Law/Pages/ado.aspx>;

²³¹ Lanz, Max, Hoehne. "The Conference of High Contracting Parties to the Fourth Geneva Convention of 17 December 2014 and the duty to ensure respect for international humanitarian law", in *International Review of the Red Cross* (2014), pp. 1115–1133;

²³² Israel Ministry of Foreign Affairs, *The Conference of Fourth Geneva Convention Signatories*, (11 Dec 2014), available at <https://mfa.gov.il/MFA/PressRoom/2014/Pages/The-Conference-of-Fourth-Geneva-Convention-Signatories-11-December-2014.aspx>;

²³³ *Ibid.*;

²³⁴ *Ibid.*;

The Israeli government stressed the issue of Israel security, but did not address the issue itself and it lost a good opportunity to do so, in front of the Signatory States of the Convention. Furthermore, on the website of the Israel Ministry of Foreign Affairs, a similar attitude is showed. The matter that is discussed in the document is not the one of this analysis, but it concerns the issue of Israeli Settlements under International Law. However, the second section is interesting for this study. It is titled “International Humanitarian Law in the West Bank and Gaza Strip” and, after a specific argumentation on settlements, it tackles the issue of the status of the Palestinian territories and IHL. In fact, it states:

“In legal terms, the West Bank is best regarded as territory over which there are competing claims which should be resolved in peace process negotiations - and indeed both the Israeli and Palestinian sides have committed to this principle. Israel has valid claims to title in this territory based not only on the historic Jewish connection to, and long-time residence in this land, its designation as part of the Jewish state under the League of Nations Mandate, and Israel's legally acknowledged right to secure boundaries, but also on the fact that the territory was not previously under the legitimate sovereignty of any state and came under Israeli control in a war of self-defense. At the same time, Israel recognizes that the Palestinians also entertain claims to this area. It is for this reason that the two sides have expressly agreed to resolve all outstanding issues, including the future of the settlements, in direct bilateral negotiations to which Israel remains committed.”²³⁵

This position is extremely interesting, because it is still based on Blum’s assumption, but it avoids taking a strong position. On the contrary, the uncertainty of the current situation is the focus of the stance. It recalls Israel right to secure its boundaries and it leaves the legal issues to be solved in future peace process negotiations. However, in its actions, Israel still claims a *de jure* inapplicability of the GCIV, even if it applies *de facto* certain provisions of the same convention. This position consents a high degree of freedom to the State of Israel in deciding what is binding and what is not. This study is going to analyze the different positions on the matter, but it is important to highlight that the actual protection of the West Bank inhabitants depends on what Israel considers its own boundaries in the territories “administrated”. The stance that we presented have been challenged since its inception, but with very little results. The aim of this research is not to add another voice in this already crowded debate, but rather to understand the basis of the disagreement and the very strong consequences on the defense of a protected category as children, living in the West Bank. In order to have a comprehensive view of the Israeli prospective, we have to consider the current position and the possible influence of a very relevant actor: The Supreme Court of Israel.

²³⁵ Israel Ministry of Foreign Affairs. “International Humanitarian Law in the West Bank and Gaza Strip” (2015) available at <https://mfa.gov.il/mfa/foreignpolicy/peace/guide/pages/israeli%20settlements%20and%20international%20law.aspx>;

Section 3: Not addressing the Occupation: The Supreme Court of Israel

It is important to mention the role of the Supreme Court of Israel in this complex legal context. Meir Shamgar served as Advocate General in 1967 and was later to become a judge of the Supreme Court, and ultimately its president. However, the position of the Court was not as clear as the one of Shamgar. In fact, “the anomalies inherent in Israel’s desire to respect in general the provisions of the Fourth Convention without admitting to its binding force in the West Bank are evidenced in the judgements of its Courts”²³⁶. In the context of the Palestinian-Israeli conflict, the role of the Supreme Court of Israel and its functioning are unique. In fact, the Court can intervene in the Territories. Inhabitants of the Palestinian territories “can appear before the Supreme Court in Jerusalem, sitting as a High Court of Justice (HCJ), in order to challenge any act of the Government of Israel or one of its organs”²³⁷. The first petitions came before the Court shortly after 1967 war, but an important question was raised: on what bases would the Court intervene? Initially, the HCJ accepted government acquiescence as sufficient basis for its jurisdiction.²³⁸ However, this would not grant a strong base of action, because it implied that, if the government would have changed its position, the Court might have to admit that it had acted out of its jurisdiction. Therefore, in a 1983 decision²³⁹, the HCJ stated that the legal basis of its jurisdiction was to be found in its competence to judge all authorities, bodies and persons “carrying out public functions under law”, as stated in art 15(d)(2) of the Basic Law²⁴⁰. This implied that the Court could review the legality of all the decisions taken by the Israeli authorities, included the military, with no territorial limits. It is interesting to mention that the judicial review process is conducted by the Supreme Court in the framework of “both Israeli constitutional-administrative law and norms of international law incorporated into the Israeli legal system.”²⁴¹ This results in the possibility of petitioners, that can be Palestinians from the West Bank, to prevail in court against the military government of Israel with arguments based on International Law. Statistically, it did not happen very often²⁴². On the

²³⁶ Kuttner, T. S. “Israel and the West Bank: Aspects of the Law of Belligerent Occupation”, in *Israel Yearbook of International Law*, vol. 7 (1977) p. 170;

²³⁷ Dinstein, Yoram. *supra* note 138, p. 25;

²³⁸ For an analysis of the Court’s jurisdiction in the Palestinian territories, see Eli, Nathan. “The power of supervision of the High Court of Justice over military government”, in Meir Shamgar (ed.), *Military Government in the Territories Administered by Israel, 1967–1980: The Legal Aspects*, Harry Sacher Institute for Legislative Research and Comparative Law, (Jerusalem, 1982), pp. 170–103;

²³⁹ HCJ. 393/82, *Jami’at Ascan et al., v. IDF Commander in Judea and Samaria et al.*, (hereafter Jami’at Ascan case), 37(4) PD, p. 785 (1983);

²⁴⁰ Available at https://www.knesset.gov.il/laws/special/eng/basic8_eng.htm;

²⁴¹ Dinstein, Yoram. *supra* note 138, p. 26;

²⁴² *Ibid.*;

other hand, we can affirm that “the mere threat of petitioning the Court has had a chilling effect on the military government, which then either revoked or revised its original scheme of action.”²⁴³

Hence, the application of International Law by the Court in the West Bank is an important matter and we are going to underline how it developed. At the outset, the first petitions against military actions in the Palestinian Territories regarded alleged violations of norms of belligerent occupation, as expressed in The Hague Regulations and in the GCIV.²⁴⁴ Initially, when questioned by the Court, the Israeli authorities argued that “even though it was not clear whether the territories were indeed occupied, in practice the military authorities complied with the norms of belligerent occupation and were therefore prepared for their actions to be assessed under these norms.”²⁴⁵ That would result in the fact that Israeli actions in the Palestinian territories could be judged in the framework of the law of belligerent occupation. Israel accepting *de facto* the applicability of the law of belligerent occupation, unconstrained the Court from the necessity of ruling on whether Israel should be considered or not an occupying power. However, as clearly stated by Shamgar, a *de facto* acceptance of respecting provisions of IHL does not entail a *de jure* applicability of the norms. The consequence is that the Court has a certain degree of freedom in applying provisions of IHL that are accepted *de facto*, but that are not applicable *de jure*. In fact, the scholar Y. Dinstein, author of several books related to belligerent occupation, stated that the Court “not always construed the law of belligerent occupation in a manner that can be deemed satisfactory.”²⁴⁶ To understand the application of the norms of belligerent occupation by the HCJ, we must understand the status of International Law before the domestic courts of Israel. This point has been summarized by the scholar Kretzmer:

“Israel follows the English approach, under which norms of customary international law will be enforced by the domestic courts as long as they are not incompatible with primary legislation, while the provisions in international conventions that bind the state will not be enforced by the courts unless they have become part of customary law or have been adopted by parliamentary legislation.”²⁴⁷

Therefore, being The Hague Regulations considered customary law²⁴⁸, they are directly applicable. The provisions of the GCIV, instead, should be adopted by parliamentary legislation. However, in the Christian

²⁴³ *Ibid.*;

²⁴⁴ See HCJ. *Electricity Company for Jerusalem District v. Minister of Defence et al.*, H CJ 256/72, (1972) p. 124 (hereafter Hebron Electricity case); HCJ. *Christian Society for the Holy Places v. Minister of Defence*, H CJ 337/71, (1971) p. 574 (hereafter Christian Society case); HCJ. *Hilu v. Government of Israel*, H CJ 302/72, (1972) p. 169 (hereafter Hilu Case); HCJ. *Ayyub v. Minister of Defence*, H CJ 606/78, (1978) p. 113 (hereafter Beth El case);

²⁴⁵ Kretzmer, David. *supra* note 181, p. 210;

²⁴⁶ Dinstein, Yoram. *supra* note 138, p. 26;

²⁴⁷ Kretzmer, David. *supra* note 181, p. 211;

²⁴⁸ See p.

Society Case²⁴⁹ and in the Hilu Case²⁵⁰, the HCJ considered both The Hague Regulations and the GCIV as treaty law. Later, in the Beth El Case²⁵¹, the Court admitted the mistake and recognized that the provisions of the 1907 Hague Regulations are part of customary law²⁵². In addition, in the same ruling, the HCJ held that “the provisions of the Fourth Geneva Convention are not necessarily all part of such law.”²⁵³ This has relevant consequences, because the State of Israel ratified the Geneva Conventions, but never adopted them by national legislation. In any case, a very relevant issue is the fact that, in case of conflict between a provision of International Law (whether it is customary or treaty law) and internal law, the Israeli norm prevails.²⁵⁴ This is very relevant for our analysis. In fact, in *Sajedia v. Minister of Defence* Case²⁵⁵, the HCJ held the superiority of an Israeli statute over Article 76 of GCIV. The internal Israeli norm provides that “protected persons accused of offences shall be detained in the occupied country, and if convicted they shall serve their sentences therein”. As already mentioned in the second chapter, detaining Palestinians from the West Bank in Israel contravenes article 76 of the GCIV, that provides that “protected persons accused of offences shall be detained in the occupied country, and if convicted they shall serve their sentences therein.”²⁵⁶ The superiority of an Israeli provision over the GCIV, with the support of the HCJ, creates conditions for an extreme freedom of the Israeli government in the Palestinian Territories. The mentioned norm is going to be applied in the case of the transfer of minors from the West Bank in Israel, with the consequence of being apart from their family, often not allowed to cross the border to visit them. In these very common cases, the families could plead the violation in front of the Court, but with no result. Generally, we can notice that the approach of the HCJ is in line with the recent trend of the Israeli government: not taking a strong stance. In 2010, for example, in the case of *Yesh Din et al., v. Commander of IDF Forces in the Judea and Samaria et al.*²⁵⁷, the petitioners argued that the provisions of GCIV should be considered as Customary Law. The Court decided to not rule on the argument. However, it stated that

²⁴⁹ *Christian Society Case*, supra note 244;

²⁵⁰ *Hilu Case*, supra note 244;

²⁵¹ *Beth El Case*, supra note 244, p. 120;

²⁵² Kretzmer, David. supra note 181 p. 212;

²⁵³ *Ibid.*;

²⁵⁴ In HCJ. *Sajedia v. Minister of Defence*, HCJ 253/88, (1988) pp. 801, 815–817, 829, the Court applied this principle to a clash between an Israeli statute and Article 76 of GC IV, which states that protected persons accused of offences shall be detained in the occupied country. For more information on the status of international law in the domestic courts of Israel, see David Kretzmer, ‘Israel’, in David Sloss (ed.), *The Role of Domestic Courts in Treaty Enforcement: A Comparative Study*, Cambridge University Press, Cambridge, 2009, pp. 273–325

²⁵⁵ HCJ. *Sajedia v. Minister of Defence*, HCJ 253/88, (1988), pp. 815–817, 829;

²⁵⁶ Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, supra note 41, art. 76;

²⁵⁷ HCJ. *Yesh Din et al., v. Commander of IDF Forces in the Judea and Samaria et al.*, HCJ 2690/09 (2010) cited in Kretzmer, David. supra note 181, p. 213;

customary provisions of the GCIV would still be treated as part of directly applicable law. Similarly, HCJ has been quite ready to rely on the Convention. According to Kretzmer:

“Sometimes it has done so after government counsel declared that the authorities’ action was compatible with provisions of the Convention. At other times the Court has simply relied on provisions of the Fourth Geneva Convention without any explanation. In many cases, the Court has latched onto the government undertaking to abide by the humanitarian provisions of the Convention as the basis for relying on its provisions, without formally ruling whether the Convention applies or may be enforced by domestic courts.”

This attitude shows a very strong interconnection between the executive and the judiciary on the application of norms of International Law. However, IHL should, if necessary, constrain the actions of a government in order to protect the rights of the inhabitants of an Occupied Territory. In this case, the government did not recognize the occupation, but confirmed the respect of norms of belligerent occupation. This resulted in the fact that the Supreme Court decided to not rule on the matter and the government is therefore not bound by all the norms of IHL, that it is respecting only on the bases of a *de facto* applicability. It appears that the Supreme Court of Israel, sitting as HCJ, relies on governmental political stances instead of applying the provisions of International Law. Another example is the Alpehi Menashe Case²⁵⁸. The ruling on this case referred to the ICJ’s Advisory Opinion²⁵⁹ that held the applicability of the GCIV in the Palestinian Territories and it stated that the applicability was not depended on the government’s undertaking to apply the humanitarian provisions of IHL²⁶⁰. We are going to analyze this ruling in the next section of this chapter. However, it is important to highlight that, despite the content of the ICJ Advisory Opinion, the Court refused to review its position. In the Alpehi Menashe Case, in fact, the HJC confirmed that “as it was accepted by the government that the humanitarian norms of the Convention were applicable, it saw no need to rule on this question.”²⁶¹ Therefore, the HCJ relied on the position of the Israeli Government and it never ruled on the applicability of the GCIV in the Palestinian Territories nor on the fact that its provisions can be considered part of customary law. The consequence is that the norms of the GCIV are overcome by internal norms and that results in a great margin of political discretion for the application of the provisions of the Convention.

²⁵⁸ HCJ. *Zaharan Yunis Muhammad Mara’abe et al., v. The Prime Minister et al.*, H CJ 7957/04 (2005) p. 477 (hereafter Alpehi Menashe Case);

²⁵⁹ ICJ. *Advisory Opinion on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, supra note 173;

²⁶⁰ *Ibid.*;

²⁶¹ Kretzmer, David. supra note 181, p. 210;

On the other hand, as we stated before, the 1907 Hague Regulations are directly applicable. The provision that prescribes the fundamental obligations of an Occupying Power is art. 43, that “may be regarded as the ‘mini-constitution’ of an occupation regime.”²⁶² The HJC itself referred to the article in this way. In fact, in the Quarries Case²⁶³ judgment, the Court stated: “As is well known, Article 43 has been recognized in our jurisprudence as a quasi-constitutional framework provision that sets out the general framework for the way the duties and powers of the military commander must be exercised in occupied territory.”²⁶⁴ As we stated before, the safeguard to the life and liberty of the inhabitants granted by The Hague Regulations is not very concrete, because of the historical context in which it was codified. Article 43, in fact, provides:

“The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.”²⁶⁵

The main obligations under IHL recognized by Israel towards the West Bank, therefore, are two: to ensure public order and safety and to respect the laws in force in the country ‘unless absolutely prevented’. The interpretation of this article depends on the meaning attributed to the words “public order and safety”. The obligations recognized by Israel government, as well, depends on the meaning attributed to these terms. In the Christian Society Case, that was the first HCJ published decision regarding the Palestinian Territories, a Justice highlighted the fact that, in the original French text of the Regulations, the words used are “*l’ordre et la vie publique*”²⁶⁶. The term “public life”, that would be the exact translation from French, has a wider interpretation if compared to “public order and safety”. The HCJ clarified the meaning of “public life” in the in *Tabeeb Case*²⁶⁷. For the Court, “public life” includes “conducting a proper administration on all its branches accepted nowadays in a well-functioning country, including security, health, education, welfare and also, inter alia, quality of life and transportation”²⁶⁸. However, for the Court ensuring “public order and public life” often resulted to be difficult. The problems usually derive from the extremely unusual characteristic of the Israeli administration of the West Bank, especially for what concern the length of the Israeli presence in the territory²⁶⁹, that counts 52 years nowadays.

²⁶² *ivi*, p. 218;

²⁶³ HCJ. *supra* note 257;

²⁶⁴ *Ibid.*;

²⁶⁵ Hague Convention (IV) respecting the Laws and Customs of War on Land, *supra* note 40, art. 43;

²⁶⁶ Kretzmer, David. *supra* note 181, p. 218;

²⁶⁷ HCJ. *Tabeeb et al., v. Minister of Defence et al.*, HCJ 202/81 (1981);

²⁶⁸ *ivi*, p. 629;

²⁶⁹ see Kretzmer, David. *supra* note 181, pp. 219-222;

Section 4: Israel as an Occupying Power: the ICRC, the UN and the ICJ

The UN immediately identified the Israeli presence in the West Bank as a belligerent occupation. In fact, following the 1967 war, the UN Security Council adopted resolution 242 of 22 November 1967, which emphasized the international law principle of “the inadmissibility of the acquisition of territory by war”. The resolution also called for the “withdrawal of Israel armed forces from territories occupied in the recent conflict” and the “termination of all claims or states of belligerency and respect for and acknowledgment of the sovereignty, territorial integrity and political independence of every State in the area and their right to live in peace within secure and recognized boundaries free from threats or acts of force.”²⁷⁰ Moreover, in 1968, the UN General Assembly established the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and other Arabs of the Occupied Territories, that has submitted periodic reports to the General Assembly. Similarly, the ICRC expressed a very early opinion on the Israeli presence in the West Bank. The Committee, with its function of “incorruptible guardian” of IHL²⁷¹, intervened on the matter, in a note handed to the Israeli government, on the 24 May 1968²⁷². This note regarded the supra-mentioned Israeli interpretation of the art. 2 of the GCIV. The ICRC opposed the Israeli interpretation of the second paragraph of the article and it gave its own interpretation. The Committee stated that the automatic application of the GCIV subsisted in every case “where territory under the authority of one of the parties passes under the authority of an opposing party.”²⁷³ On the 16 June 1968, Israel replied that it agreed to allow the ICRC “to continue its humanitarian work in the territories, but expressly declined to accept its interpretation of article 2.”²⁷⁴ Similarly, the General Assembly resolution 242 of 22 November 1967 was never implemented by the State of Israel and, in the context of the 1973 war, known as Yom Kippur war, the Security Council adopted resolution 338, on the 22 October 1973. This resolution called “upon all parties to the present fighting to cease all firing” and to “start immediately after the cease-fire the implementation of Security Council resolution 242 (1967) in all of its parts”. The number of resolutions of both the General Assembly and the Security Council of the UN that dealt with the occupations is very high. The General Assembly, in particular, insisted on the issue of the applicability of the GCIV on the Palestinian Territories²⁷⁵, especially since 1997. Similarly, the Security Council affirmed

²⁷⁰ UN Security Council. *Resolution 242 of 22 November 1967*, S/RES/242 (1967);

²⁷¹ Colb, R. "The Relationship Between International Humanitarian Law and Human Rights Law: A Brief History of the 1948 Universal Declaration of Human Rights and the 1949 Geneva Conventions", in *International Review of the Red Cross*, vol. 38, (1998) pp. 414-413;

²⁷² Kuttner, T. S. "Israel and the West Bank: Aspects of the Law of Belligerent Occupation", in *Israel Yearbook of International Law*, vol. 7 (1977) p. 169;

²⁷³ ICRC. "Middle East activities of the ICRC", in *International Review of the Red Cross*, 10 (1970) p. 426;

²⁷⁴ *Ibid.*;

²⁷⁵ The main GA Resolutions on the applicability of the Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War to the Occupied Palestinian Territory, including East Jerusalem, and the other occupied Arab territories, are:

the applicability of the Convention, in several resolutions²⁷⁶ that tackled different issues relative to the Palestinian-Israeli conflict. Similarly, during the XXIV International Conference of the Red Cross that took place in Manila, in 1981, a resolution on the application of the Fourth Geneva Convention in the “territories of Middle East” was adopted.²⁷⁷ In this document, the Committee expressed a deep concern for Israeli continuous refusal of recognizing the applicability of the GCIV and to meet its full obligations. Therefore, the Conference reaffirmed “the applicability of the Fourth Geneva Convention to the occupied territories in the Middle East.”²⁷⁸

As introduced before, the question of the applicability of the GCIV is centered on whether the Convention is “people-oriented” or “territory-oriented”.²⁷⁹ This analysis already clarified that Israel support the last option. On the other hand, the UN and the ICRC held that the Convention’s main aim is the protection of the inhabitants of war-zones, as suggested in the name of the Convention itself. Hence, they support the “people-oriented” focus of the Convention. These institutions insisted on “the unique and universal character of international humanitarian law (IHL)”, therefore “respecting and ensuring respect for its rules constitutes a legal obligation for *all* parties to conflicts, without exception.”²⁸⁰ The ICRC specifically referred to Israel on the matter and stated that “Israel’s sovereign right to safeguard its legitimate security interests must therefore be balanced with its core legal obligation to positively administer the territories it occupies, and to meet the specific needs of the Palestinian population.”²⁸¹ The universal character of IHL has been recognized specifically for what concern the GCIV, that started to be considered Customary International Law by the United Nations. A stand that scholars in International Law supported.²⁸² In fact, a 1993 report of the UN Secretary-General, Pursuant to Paragraph 2 of Security Council Resolution 808, states that: “the part of conventional international humanitarian law which has beyond doubt become part

A/RES/73/97 (2018), A/RES/72/85 (2017), A/RES/71/96 (2016), A/RES/70/88 (2015), A/RES/69/91 (2014), A/RES/68/81 (2013), A/RES/67/119 (2012), A/RES/66/77 (2011), A/RES/65/103 (2010), A/RES/64/92 (2009), A/RES/63/96 (2008), A/RES/62/107 (2007), A/RES/61/117 (2006), A/RES/60/105 (2005), A/RES/59/122 (2004), A/RES/57/125 (2003), A/RES/58/97 (2003) and A/RES/51/132 (1997);

²⁷⁶ The main relevant Security Council resolutions are: S/RES/242 (1967), S/RES/338 (1973), S/RES/446 (1979), S/RES/452 (1979), S/RES/465 (1980), S/RES/476 (1980), S/RES/478 (1980), S/RES/904 (1994), S/RES/1073 (1996), S/RES/1397 (2002), S/RES/1515 (2003), S/RES/1544 (2004), S/RES/1850 (2008) and S/RES/1860 (2009);

²⁷⁷ CICR, *Manuel du Mouvement international de la Croix-Rouge et du Croissant-Rouge*, (Geneva, 1994) pp. 770-771 ;

²⁷⁸ *Ibid.*;

²⁷⁹ Boyd, S. “The applicability of International Law to the Occupied Territories”, in *Israel Yearbook of Human Rights*, (1971) p. 258;

²⁸⁰ ICRC, *Fifty years of occupation: Where do we go from here?* (2 June 2017) available at <https://www.icrc.org/en/document/fifty-years-occupation-where-do-we-go-here>;

²⁸¹ *Ibid.*;

²⁸² For more information on the matter see Meron, T. “The Geneva Conventions as Customary Law”, in *The American Journal of International Law*, Vol. 81, No. 2 (1987) pp. 348-370;

of international customary law is the law applicable in armed conflict as embodied in: the Geneva Conventions of 12 August 1949 for the Protection of War Victims, [...]”²⁸³ The fact that the GCIV has been widely recognized and it has been adopted by a large number of states²⁸⁴ contributed to its definition as Customary International Law. As mentioned, Israel and its Supreme Court do not consider the GCIV as part of Customary Law. The consequences of such recognition would be, in fact, the direct applicability of the Convention.

There are two main moments that this analysis is going to highlight for what concern the efforts in forcing Israel to recognize the Palestinian Territories as Occupied Territories and the GCIV as *de jure* applicable. The first step is represented by the Conferences of the High Contracting Parties to the Fourth Geneva Convention meeting in Geneva and the second is the Advisory Opinion of the International Court of Justice on the “Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory”, rendered on 9 July 2004. The continuous efforts of the UN and of the ICRC against the Israeli Occupation of the West Bank are represented by their activities in that regard and the events that led to the first 1999 Conference of the High Contracting Parties are extremely relevant. In fact, thirty years after the Six-Days War, the General Assembly of the UN called for the 10th emergency special session, after the Israeli government approval, in February of 1997, of a plan for the construction of a new Jewish settlement between Jerusalem and Bethlehem, in violations of art. 49(6) of the GCIV. The decision to call for an extraordinary session of the General Assembly was taken after the US vetoed a Security Council resolution dealing with the new settlement.²⁸⁵ The 10th emergency session dealt specifically with “Illegal Israeli actions in Occupied East Jerusalem and the rest of the Occupied Palestinian Territory”²⁸⁶. In the frame of this extraordinary session, resolution E-10/3 was approved. Among other things, this resolution condemned the failure of the Government of Israel to comply with the demands made by the General Assembly in the previous resolutions and it recommended “that the High Contracting Parties to the Geneva Convention relative to the Protection of Civilian Persons in Time of War convene a conference on measures to enforce the Convention in the Occupied Palestinian Territory, including Jerusalem, and to ensure its respect, in accordance with common article 1”.²⁸⁷ A previous ES-10/2 already demanded that “Israel accept the *de jure*

²⁸³ UN. *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808* (1993) available at https://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/ICTY%20S%2025704%20statute_re808_1993_en.pdf;

²⁸⁴ A list of the States Parties to the Fourth Geneva Convention is available at https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_treatySelected=380&xp_viewStates=XPages_NORMStatesParties;

²⁸⁵ Fux, Zambelli. *supra* note 269, p. 664;

²⁸⁶ For an overview of the extraordinary sessions of the GA and the approved resolution, see http://www.un.org/depts/dhl/resguide/remergency_table_en.htm;

²⁸⁷ UN GA, *Illegal Israeli actions in Occupied East Jerusalem and the rest of the Occupied Palestinian Territory*, A/RES/ES-10/3 (15 July 1997), available at http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/ES-10/3;

applicability of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949,³ to all the territories occupied since 1967, and that it comply with relevant Security Council resolutions”²⁸⁸. To reinforce its requests, the General Assembly adopted resolution ES-10/4 that reiterated the recommendations and further suggested “to the Government of Switzerland, in its capacity as the depository of the Geneva Convention, to undertake the necessary steps, including the convening of a meeting of experts in order to follow up on the above-mentioned recommendation, as soon as possible” and further requested “to invite the Palestine Liberation Organization” to the convention of the High Contracting Parties to the GCIV. The ICRC was present during the extraordinary session that led to the approval of resolution ES-10/4 and it reminded, in front of the General Assembly, the obligations of the States Parties to the GCIV to “ensure respect” for the Convention “in all circumstances” and it reiterated its opinion on the applicability of the GCIV to the territories occupied by Israel in 1967.²⁸⁹ Finally, after other two GA resolutions, on 15 July 1999, the Conference of High Contracting Parties to the Fourth Geneva Convention took place in Geneva, in the UN and ICRC headquarters. During that meeting the Parties “reaffirmed the applicability of the Fourth Geneva Convention to the Occupied Palestinian Territory, including East Jerusalem. Furthermore, they reiterated the need for full respect for the provisions of the said Convention in that Territory. Taking into consideration the improved atmosphere in the Middle East as a whole, the Conference was adjourned on the understanding that it will convene again in light of consultations on the development of the humanitarian situation in the field.”²⁹⁰ Two more conferences of High Contracting Parties to the GCIV took place, one on the 5 December 2001 and another on 17 December 2014 and all reiterated the same points and testified the efforts, with no results, in condemn Israel for its stand, and for its consequent policies, on the matter.

The last point that we are going to illustrate is probably the more relevant in the debate about the applicability of IHL in the West Bank and it concerns the Advisory Opinion of the International Court of Justice on the legal consequences of the construction of a wall in the occupied Palestinian territory²⁹¹, rendered on 9 July 2004. With resolution ES-10/14 of 8 December 2003²⁹², the General Assembly requested the ICJ to “urgently” render an advisory opinion on the following question:

²⁸⁸ UN GA, *Illegal Israeli actions in Occupied East Jerusalem and the rest of the Occupied Palestinian Territory*, A/RES/ES-10/2 (25 Apr. 1997), available at http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/ES-10/2;

²⁸⁹ Fux, Zambelli. *supra* note 269, pp. 664-5;

²⁹⁰ *Conference of High Contracting Parties to the Fourth Geneva Convention: Declaration*, (Geneva, 15 July 1999);

²⁹¹ ICJ. *Advisory Opinion on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *supra* note 173, pp. 136-203;

²⁹² UN GA. *Illegal Israeli actions in Occupied East Jerusalem and the rest of the Occupied Palestinian Territory*, A/RES/ES-10/14 (18 Dec. 2003), available at http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/ES-10/14;

“What are the legal consequences arising from the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, as described in the report of the Secretary-General, considering the rules and principles of international law, including the Fourth Geneva Convention, of 1949, and relevant Security Council and General Assembly resolutions?”²⁹³

The Court replied to the question put forth by the General Assembly with a 67 pages document that is going to be extremely relevant for this analysis. The main point of the opinion was the fact that the construction of the wall built by Israel in the Palestinian Territory, including in and around East Jerusalem, and its associated regime, are contrary to International Law. However, the Court also tackled other issues related to the Israeli presence in the Palestinian Territories, included the refusal to consider the Fourth Geneva Convention *de jure* applicable to the territory. The Court specifically referred to the Israeli government’s position on the matter and it devoted few pages of the Advisory Opinion to analyze this specific issue²⁹⁴. A detailed summary of the opinion of the ICJ is a good way for concluding this chapter. In fact, the Court referred to all the previously mentioned positions on the issue and it mentioned all the relevant documents and institutions regarding this specific matter. Finally, the opinion of the ICJ is going to tackle the issue in an effective manner and it is going to give an authoritative opinion, considering all the parties, that cannot be ignored. The Court started this section stating that:

“With regard to the Fourth Geneva Convention, differing views have been expressed by the participants in these proceedings. Israel, contrary to the great majority of the other participants, disputes the applicability *de jure* of the Convention to the Occupied Palestinian Territory.”²⁹⁵

Then, the Court briefly referred to Israel position, as summarized in the report of the Secretary-General, considering the rules and principles of international law²⁹⁶. Next, the ICJ recalled the ratification of the Convention by Israel, made on 6 July 1951, and by Jordan, made on 29 May 1951. Hence, the Court stressed the fact that Israel and Jordan are both parties to this Convention and that neither of the two states has made any reservation to it. Moreover, “Palestine gave a unilateral undertaking, by declaration of 7 June 1982, to apply the Fourth Geneva Convention”²⁹⁷. This was not an extremely relevant argument, because if Palestine can be considered as party to the Convention is not clear. In fact, the ICJ Opinion reported that Switzerland, the depositary State of the GCIV, deemed the undertaking as valid, but added that it was not in the position of deciding if the request of access to the Convention “can be considered as an instrument of accession”.

²⁹³ *ivi*, p. 3;

²⁹⁴ ICJ. *supra* note 273, pp. 173-177;

²⁹⁵ ICJ. *supra* note 273, pp. 173;

²⁹⁶ *Ibid.*;

²⁹⁷ *Ibid.*;

However, the Court focused on the purpose of determining the scope of application of the Convention and it recalled common art. 2 of the four Conventions of 12 August 1949. As mentioned, the article states:

"In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them. The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance. Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof."

Moreover, the Court recalled art. 35 of Military Order No.3, that was mentioned earlier in this chapter. The article, later suppressed, stated: "the Military Court [...] must apply the provisions of the Geneva Convention dated 12 August 1949 relative to the Protection of Civilian Persons in Time of War with respect to judicial procedures. In case of conflict between this Order and the said Convention, the Convention shall prevail."

The Court then referred to the Israeli main argument on the issue, the fact that Jordan was not the legitimate sovereign over the West Bank and stated: "According however the great majority of other participants in the proceedings, the Fourth Geneva Convention is applicable to those territories pursuant to Article 2, paragraph 1, whether or not Jordan had any rights in respect thereof prior to 1967."²⁹⁸ As mentioned, the ICJ noted that the first paragraph of art. 2 is the relevant part of the provision and according to this paragraph, the "Convention is applicable when two conditions are fulfilled: that there exists an armed conflict (whether or not a state of war has been recognized); and that the conflict has arisen between two contracting parties. If those two conditions are satisfied, the Convention applies, in particular, in any territory occupied in the course of the conflict by one of the contracting parties."²⁹⁹

The reasoning then recalled customary international law, as expressed in Article 31 and 32 of the Vienna Convention on the Law of Treaties of 23 May 1969. According to art. 31, "a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in light of its object and purpose". Moreover, article 32 provides that: "Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31 [...] leaves the meaning ambiguous or obscure; or [...] leads to a

²⁹⁸ ICJ. *supra* note 273, pp. 174;

²⁹⁹ *Ibid.*;

result which is manifestly obscure or unreasonable." Here the ICJ refers to other relevant judgements³⁰⁰ where these two articles were relevant to interpret a treaty. In our case, the aim of the second paragraph is not to limit the scope of application of the Convention, but to extend the applicability to the cases where the occupation met no armed resistance. In fact, this interpretation reflects the intention of the drafters of the GCIV "to protect civilians who find themselves, in whatever way, in the hands of the occupying Power"³⁰¹ and it is confirmed by the preparatory works of the Convention. To confirm that, the Court cited the Report on the Work of Conference of Government Experts convened by the International Committee of the Red Cross in Geneva in 1947. In this report the drafters recommended the applicability to any armed conflict "whether [it] is or is not recognized as a state of war by the parties" and "in cases of occupation of territories in the absence of any state of war"³⁰² According to the Court, the drafters had in mind the recent cases of occupation without combat like the ones of Bohemia and Moravia by Germany in 1939. Therefore, the Court referred to all the authoritative institutions that affirmed and re-affirmed the applicability of the Fourth Geneva Convention to the Occupied Palestinian Territory, including East Jerusalem. It started from the supra-mentioned Conferences of the State Parties to the GCIV, it also mentioned the ICRC and it underlined the fact that the ICRC "special position with respect to execution of the Fourth Geneva Convention must be recognized and respected at all times by the parties, pursuant to Article 142 of the Convention."³⁰³ Moreover, the Court referred to the most relevant resolutions of the General Assembly and the Security Council, from 1967 until 2004. Finally, the Court referred to the Supreme Court of Israel and specifically to a 2004 judgement that affirmed the applicability of the GCIV to the military operations of the Israeli Defence Forces in Rafah. In conclusion, the ICJ stated: "The Court considers that the Fourth Geneva Convention is applicable in any occupied territory in the event of an armed conflict arising between two or more High Contracting Parties. Israel and Jordan were parties to that Convention when the 1967-armed conflict broke out. The Court accordingly finds that that Convention is applicable in the Palestinian territories which, before the conflict, lay to the east of the Green Line and which, during that conflict, were occupied by Israel, there being no need for any enquiry into the precise prior status of those territories."³⁰⁴

³⁰⁰ See ICJ. *Islamic Republic of Iran v. United States of America*, Preliminary Objection, Judgment, I. C. J. Reports (1996), p. 812, para. 23; see, similarly, *Kasikili/Sedudu Island Case (Botswana/Namibia)*, Judgment, I. C. J. Reports (1999), p. 1059, para. 18; see also *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malesia)*, Judgment, I. C. J. Reports (2002), p. 645, para. 37;

³⁰¹ ICJ. supra note 273, pp. 175;

³⁰² *Report on the Work of the Conference of Government Experts for the Study of the Conventions for the Protection of War Victims*, (Geneva, 14-26 April 1947), p. 8;

³⁰³ ICJ. supra note 273, pp. 175-6;

³⁰⁴ ICJ. supra note 273, pp. 177;

As we stated before, this authoritative and exhaustive opinion should not be ignored. Indeed, it is. The violations of the Fourth Geneva Convention, as reported in the second chapter, have been perpetrated despite this opinion and the government of Israel continues to oppose this stance. The aim of this analysis is not to solve the debate, but more to describe the main positions and to remind, at every step, that the consequences of this disagreements are represented by the violations suffered by children, as described in the last part of the second chapter. The Fourth Geneva Convention does not protect Palestinian minors and it is unable to secure this “protected category” that found itself in the hands of an Occupying Power, trapped in a military detention system. If this instrument of IHL is not effective, what about the instruments of Human Rights Law? What is the debate behind the non-application of Human Rights Convention to minors from the West Bank? Is this non-application backed by strong stances in favor of inapplicability? The next chapter is going to tackle these issues.

Chapter 4: The applicability of Human Rights Law in the West Bank

This chapter will analyze the issues regarding the applicability of the instruments of HR law in the West Bank. In order to do so, the research will investigate the possible coexistence of the IHL regime and HR law, a matter that is extremely relevant when we consider International Law in the context of the Israeli-Palestinian conflict. The IHR law is a body of international law that is based on treaties for the tutelage of numerous different kinds of human rights. There are nine main international human rights instruments³⁰⁵ and each one has a relative Committee of experts that is monitoring the implementation of the treaty's provisions by States parties. In addition, some of the treaties are complemented with optional protocols. As mentioned, in 1991, Israel ratified five of these human rights treaties: the ICCPR, the ICESCR, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the International Covenant on Economic, Social and Cultural Rights and (ICESCR) the and the Convention on the Rights of the Child (CRC). Previously, in 1979, Israel also ratified the International Convention for the Elimination of All Forms of Racial Discrimination (ICERD). All these treaties are important, however some of them, like the CAT and CRC, are more relevant when considering the detention of Palestinian minors from the West Bank, in light of the considerations made in the previous chapters. The application of HR treaties in the West Bank is a matter for discussion. Not surprisingly, on the issue, "the Israeli government and international human rights bodies have taken antithetical positions."³⁰⁶ The UN, the ICJ and other institutions for the protection of Human Rights declared the applicability of Human Rights' treaties in occupied territories³⁰⁷. On the other hand, Israel applies the Conventions internally, but it refuses to respond to the monitoring committees regarding the implementation of such treaties in the Palestinian Territories. This chapter will analyze and discuss the main reason behind Israel's claims for irresponsibility regarding human rights implementation in the West Bank. For this chapter, the works³⁰⁸ of the scholar O. Ben-Naftali are going to be extremely relevant.

³⁰⁵ A list is available at <https://www.ohchr.org/en/professionalinterest/pages/coreinstruments.aspx>;

³⁰⁶ Ben-Naftali, Shany. *supra* note 180, p. 26;

³⁰⁷ see ICJ. *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, I.C.J. Reports (1996); ICJ, *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, I.C.J. Reports (2004); Concluding Observations of the Human Rights Committee: Israel, UN Doc. CCPR/C/79/Add.93, para. 10 (1998);

³⁰⁸ see Ben-Naftali, Orna. *International Humanitarian Law and International Human Rights Law: Pas de Deux*, (Oxford, 2011) and Ben-Naftali, Shany. *supra* note 180;

Section 1: The basis of the debate

Ben-Naftali, together with the Israeli academic Y. Shany, listed three main arguments behind the Israeli claim of irresponsibility with regard to the implementation of HR's treaties in the West Bank.³⁰⁹ The first is the "the mutual exclusivity argument", that claims that IHR law and IHL regime cannot be simultaneously applicable. The second is "the treaty interpretation argument", according to which the jurisdictional clauses of the human rights treaties to which Israel is a party should be construed as limited to the sovereign territory of the State parties.³¹⁰ The third is the "effective control argument" that is based on the fact that the Israeli-Palestinian Interim Agreement transferred the jurisdiction in civil spheres (including economic, social and cultural) to the Palestinian Council.³¹¹ Therefore, Israel arguably lacks an effective control over the Palestinian Territories and the implementation of HR law it is not its responsibility. We are going to tackle this argument already in this section, as it lays the basis of the existing debate. From the Israeli prospective, the consequence of these three arguments combined is that Israel cannot be held responsible for the implementation of HR law in the West Bank and it is not obliged to report upon the implementation of HR's treaties in the Occupied Territories.

The debate on the application of HR law in the West Bank is well represented by the continuous dialogue between the State of Israel and the Human Rights Committee (HRC), the monitoring body for the ICCPR. The confrontation on the matter started in 1998, when the HRC, in its concluding observations, stated that it was "deeply concerned that Israel continues to deny its responsibility to fully apply the Covenant in the occupied territories" and that "the Covenant must be held applicable to the occupied territories and those areas of southern Lebanon and West Bank where Israel exercises effective control."³¹² HCR precedents are not considered binding, but their importance is relevant for our analysis. In fact, the Committee represents the most prominent international organ responsible for overseeing compliance with the ICCPR.³¹³ Moreover, other UN human rights treaty bodies have raised the same issue.³¹⁴ Mr. Alan Baker, Legal

³⁰⁹ Ben-Naftali, Shany. *supra* note 180, p. 26;

³¹⁰ *Ibid.*;

³¹¹ *Ibid.*;

³¹² Concluding Observations of the Human Rights Committee: Israel, UN Doc. CCPR/C/79/Add.93, para. 10 (1998);

³¹³ Ben-Naftali, Shany. *supra* note 180, p. 71;

³¹⁴ See Concluding Observations of the Committee on the Rights of the Child: Israel, 9 Oct. 2002, UN Doc.

CRC/C/15/Add.195 (2002) para. 2; Concluding Observations of the Human Rights Committee: Israel, 18 Aug. 1998, UN Doc CCPR/C/79/Add.93 (1998) para. 10; Concluding Observations of the Committee on the Elimination of Racial Discrimination: Israel, 30 March 1998, UN Doc. CERD/C/304/Add.45 (1998) para. 12; Concluding Observations of the Committee on the Elimination of Racial Discrimination: Israel, 19 Aug. 1994, UN Doc. A/49/18 (1994) para. 74; Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Israel, 12 August 1997, UN Doc. A/52/38/Rev.1 (1997) para. 170, 132-183. See also Committee on Economic, Social and Cultural Rights: Concluding Observations of the Committee on Economic, Social and Cultural Rights: Israel, 31 Aug. 2001, UN Doc. E/ C. 12/I/Add.69 (2001) para. 11-12;

Advisor of the Israel Ministry of Foreign Affairs, gave his response to the HRC on behalf of the State of Israel and he argued:

“In light of this changing reality, and the jurisdiction of the Palestinian Council in these areas, Israel cannot be internationally responsible for ensuring the rights under the Covenant in these areas. The fact that the Palestinian Council does not represent a State, does not, in itself, preclude its responsibility in the sphere of human rights protection.”³¹⁵

This response recalls the “effective control argument”, previously mentioned. However, in order to understand this matter and respond to this stance, we should mention what is the Palestinian Council and what territory it actually controls. To do so, we need a brief historical *excursus* that brings us back to the Oslo process. In the Middle East, the 1990s were dominated by the diplomatic and political efforts characterized by the Oslo Accords, known also as Interim Agreements. In 1993, the Prime Minister of the State of Israel, Yitzhak Rabin, and the leader of the Palestinian Liberation Organization, Yasir Arafat, concluded the Oslo I agreement³¹⁶. Oslo I and the other agreements that were negotiated in the next years were part of a project that was meant to pacificate the area. The most important agreement for our analysis is the Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, signed on September 28 of 1995³¹⁷ by the Government of the State of Israel and the Palestine Liberation Organization. Art. I (1) of this Accord specifically deals with the transfer of powers and responsibilities, “as specified in this Agreement”³¹⁸, from the Israeli military government and its Civil Administration to the Palestinian Council. The provision also stated that Israel could continue to exercise powers and responsibilities that were not transferred.³¹⁹ Further, art. I (2) provided that “the powers and responsibilities transferred to the Council shall be exercised by the Palestinian Authority”³²⁰. Articles from I to IX concern the structure, the powers and other matters relative to the Palestinian Council. However, the importance of this agreement for our analysis is represented by the effective transferal of jurisdiction to the Palestinian Council provided under art. XI. The transferal was, in fact, set in this agreement and its annexes.³²¹ To summarize it, the West Bank

³¹⁵ Response of Mr. Alan Baker, Legal Advisor of the Israel Ministry of Foreign Affairs on the Applicability of the ICCPR to the Current Situation in the West Bank and Gaza Strip, Geneva, (15 May 1998) available at <https://mfa.gov.il/MFA/MFA-Archive/1998/Pages/Legal%20Advisor%20of%20the%20Israel%20Ministry%20of%20Foreign%20Af.aspx>;

³¹⁶ Cleveland, W. L. *A History of the Modern Middle East*, 4th ed. (Westview Press: Philadelphia, 2009), p. 506;

³¹⁷ Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip (Washington D.C., September 28, 1995) available at <https://mfa.gov.il/mfa/foreignpolicy/peace/guide/pages/the%20israeli-palestinian%20interim%20agreement.aspx>;

³¹⁸ Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, *supra* note 317, art. I (1);

³¹⁹ *Ibid.*;

³²⁰ Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, *supra* note 317, art. I (2);

³²¹ The documents are available at <https://mfa.gov.il/MFA/ForeignPolicy/Peace/Guide/Pages/THE%20ISRAELI-PALESTINIAN%20INTERIM%20AGREEMENT%20-%20Annex%20I.aspx>;

was divided into three different areas of jurisdiction: Area A, that comprehends the main Palestinian cities, with an exclusive jurisdiction of the Palestinian Authority (PA); Area B, that comprehends the rural areas around the main cities and that is under a mixed Israeli-Palestinian jurisdiction; and Area C, that comprehends the rest of the West Bank, including Jewish settlements, and that is under full Israeli control. It is important to notice that, at the time, the percentage of jurisdiction was distributed as it follows: Area A, under the direct control of the PA counted the 3 percent of the West Bank; Area B, with mixed jurisdiction, was the 24 percent of the territory; finally, Israel would retain total control of Area C, that represented 74 percent of the West Bank.³²² After some troubled years, in 2013, Area C, the area that is under full Israeli control, represented the 61 percent of the West Bank.³²³ The percentage of territory that remained under exclusive Israeli jurisdiction is already representative of the “failure of the Oslo Accords”.

In this regard, in fact, Ben-Naftali and Shany stated:

“Following the collapse of the peace process in the year 2000, Israel has re-occupied some areas in these territories, and has left the PA largely incapacitated to exercise governmental powers even in areas nominally subject to its control. Israel has been further engaged in various activities in these areas, including closures, assigned residence, targeted killings etc., which entail severe humanitarian implications.”³²⁴

Therefore, despite the PA has gained some authority over Palestinians and over a small percentage of the Palestinian territories, the inhabitants of the West Bank still remain under Israeli military control and the majority of the territory is under Israeli jurisdiction. There are numerous other issues³²⁵ related to the Interim Agreements that led to a strong disappointment in the Palestinian population and in the international community. We have no time to discuss it further here, but it is important to underline that the Oslo process did not transfer all the jurisdiction to the Palestinian institutions. On the contrary, more than half of the West Bank remains under the exclusive control of the State of Israel.

These considerations undermine the “effective control argument” that Israel invoke to support its irresponsibility regarding human rights implementation in the West Bank. The West Bank is under effective control of Israel for more than half of its territory and that is a reality supported by the existence of the Israeli military legislation in the territory, that we analyzed in the second chapter. In light of these considerations, the Israeli control over the West Bank can be considered effective. However, the argument regarding the mutual exclusivity of the two legal regimes and the one regarding the interpretation of the

³²² Cleveland, W. L. *supra* note 316, p. 506;

³²³ World Bank, *Area C and the future of Palestinian economy* (2013) available at <https://openknowledge.worldbank.org/bitstream/handle/10986/16686/AUS29220REPLAC0EVISION0January02014.pdf?sequence=1>;

³²⁴ Ben-Naftali, Shany. *supra* note 180, p. 23;

³²⁵ for further information see Barak, Oren. “The Failure of the Israeli-Palestinian Peace Process, 1993-2000” in *Journal of Peace Research*, Vol. 42, No. 6 (2005), pp. 719-736;

treaties to define its scope of applications still need to be analyzed. The next section will deal with the first stance, that is more wide-ranging, and that concern the “mutual exclusivity argument”. Finally, the last section will focus specifically on the treaties and on its “jurisdictional clauses” and scopes of application, in order to challenge the “the treaty interpretation argument”.

Section 2: Human Rights Law and Occupation

The principle of universality of Human Rights, that implies the fact that no one can be excluded from enjoying these rights, is the general assumption behind the applicability of HR law in situation of occupations.³²⁶ When it comes to the specific situation of occupations, scholars suggested an even stricter relation between IHL and IHRL. Ben-Naftali and Shany, in fact, stated: “It is the very interaction between IHL and IHR law which determines the precise scope of the legal obligations the Belligerent Occupant has to shoulder vis-à-vis the population and the corresponding scope of the protection the latter enjoy, in any concrete situation.”³²⁷

On the other hand, other scholars recognized that most human rights exist in peace time, but they may disappear completely in case of warfare.³²⁸ That would be a temporary consequence of the exceptionality of the situation, that would results in freezing the Human Right’s Conventions, as provided by certain conventions itself. However, the consequences of such practice, on the long term, could be problematic for the protection of the rights on the inhabitants of occupied territories. When it comes specifically to the Israeli-Palestinian context, the length of the occupation should certainly be considered.

As introduced, Israel opposes the coexistence of IHL regimes and IHR law. Scholars usually refer to this stance as the “the mutual exclusivity argument”. In sum, war and peace are distinct, therefore the legal regime of wartimes should be different from the legal regime of peacetimes. According to the scholars Ben-Naftali and Shany, this position may be substantiated on five inter-related grounds³²⁹. The first is “theoretical substantiation” and it is based on the fact that HR law is not only the law of peace, but it is *jus contra bellum*³³⁰ and it was created with the aim of avoiding wars. IHL was conceived for a totally different purpose. “Arguably, the two regimes, signifying the law of war and the law of peace, govern not only different, but mutually exclusive situations.”³³¹ The scholar also noticed that this distinction was recognized

³²⁶ Ben-Naftali, Orna. *supra* note 308, p. 5;

³²⁷ Ben-Naftali, Shany. *supra* note 180, p. 24;

³²⁸ See Dinstein, Y. “Human Rights in Armed Conflict: International Humanitarian Law”, in *Human Rights in International Law Review* 345, T. Meron ed. (1985), pp. 350-352;

³²⁹ Ben-Naftali, Shany. *supra* note 180, pp. 27-30;

³³⁰ Pictet, Jean. *Humanitarian Law and the Protection of War Victims* (Leiden, Henry Dunant Institute, 1975) p. 15;

³³¹ Ben-Naftali, Shany. *supra* note 180, p. 29;

in the International 1968 Conference on Human Rights of Teheran, acknowledging that "peace is the underlying condition for the full observance of human rights and war is their negation."³³² As we will see, this conference is going to be relevant also in the subsequent part, that opposes this stance. Hence, the second ground is the one of "historical substantiation". As mentioned, the origin of these two legal regimes are distinct: IHL is the oldest branch of IL as it derives from the medieval culture of chivalry³³³, while HR law is relatively new and represents a post-World Wars achievement, inspired by post-Enlightenment constitutional law.³³⁴ The different historical backgrounds reflect the different *raison d'etre* and the different scopes of applicability³³⁵. Further, the third ground is the one of "institutional substantiation", that is based on the fact that the separation of IHL and IHR law is proved by the separated institutions that are responsible for ensuring compliance with respective obligations³³⁶. As mentioned, the International Committee of the Red Cross (ICRC) is the guardian of humanitarian law and it is a non-political organization. On the other hand, the United Nations (UN), together with other human rights bodies, are in charge of ensuring HR law. The UN is "a clearly political body, having outlawed war in its Charter, has proceeded to distance itself from the laws of war."³³⁷ The existence of two different institutions would prove the distance between the two regimes. Hence, the last two arguments on which IHL and HR law are not simultaneously applicable are: the "practical substantiation" and the "legal substantiation". The first concerns practical issues related to the separation of the two legal regimes. It concerns, specifically, the fact that, in cases of war, IHL is more effective than HR law. The reason is that State Parties are more likely to comply with a regime that has been conceived taking account of military considerations, as IHL.³³⁸ The last consideration is legal, and it concerns the fact that, in the texts, IHL is more detailed and complex than HR law. The first, in fact, focuses on the duties of a party to a conflict and it restricts its actions. The latter, instead, is listing a series of rights and it does not consider all the issues related to combatants. Furthermore, Ben-Naftali noticed that HR law is different from IHL because of the existence of a distinction between civil and political rights and socio-economic and cultural ones, the so-called "third generation" of rights.

³³² see Resolution XXIII, *Human Rights in Armed Conflicts, Final Act of the International Conference on Human Rights*, UN. Doc. A/Conf.32/41 (13 May 1969), p. 680;

³³³ Meron, Theodor. "The Humanization of Humanitarian Law", in *American Journal of International Law*, No. 94 (2000) pp. 242-243;

³³⁴ Shestack, Jerome J. "The Jurisprudence of Human Rights" in Meron, Theodor. *Human Rights in International Law: Legal and Policy Issues* (Oxford, Clarendon Press, 1984), pp. 75-98;

³³⁵ Ben-Naftali, Shany. *supra* note 180, p. 30;

³³⁶ *Ibid.*;

³³⁷ *Ibid.*;

³³⁸ Dinstein, Yoram. "The International Law of Inter-State Wars and Human Rights" in *Israel Year Book of Human Rights*, (1977), p. 153;

While the first requires a stricter compliance, the latter is more uncertain. This distinction is foreign to IHL.³³⁹

All these arguments are extremely relevant, as well as challengeable. The same scholars, in fact, held that “this theoretical division [between IHL and IHR], however, is becoming ever harder to sustain in the face of a humbling awareness of the indeterminacy of either war or peace and of the dynamic symbiosis that characterizes their relationship.”³⁴⁰ The scholars analyzed the Israeli position and challenged it, in order to prove the existence of a new pattern. In fact, they proved that, after the world wars experiences, a new trend in IL started to develop. This new trend was based on a growing “human rights’ consciousness”³⁴¹. According to this new pattern, IHL cannot be considered as an alternative to IHR law, but more as a regime that allows some exceptions to the complete applicability of the latter. This position is based on the universality of human rights and on the fact that the aim of both IHL and HR law is the protection of human dignity.³⁴² Nobody can be excluded, and derogations are possible only if a concrete situation requires them. Part of the international community, and definitely its institutions, are aligned on this new paradigm. The 1968 Conference on Human Rights of Teheran, that we previously mentioned as reinforcing the “the mutual exclusivity argument”, can be actually considered the first step towards the new paradigm.³⁴³ Is it true that the Conference underlined that peace is the condition for “full observance of human rights” and war is the negation of this condition³⁴⁴. However, in the reports of the UN Secretary-General related to that conference³⁴⁵, and in the resolutions of the General Assembly that adopted the reports³⁴⁶, the traditional distinction between IHL and HR law has been rejected and a new paradigm was, instead, affirmed. In situations of armed conflict both regimes apply and the one complete the other.³⁴⁷ The exceptions are regulated by the derogations previewed by the conventions itself. We will consider this aspect in the next section.

In light of this new paradigm, Ben-Naftali has challenged the Israeli argument in favor of the strict separation between IHL and HR law. He held that the nature of conflicts has changed with time and “the

³³⁹ Ben-Naftali, Shany. *supra* note 180, p. 32;

³⁴⁰ Ben-Naftali, Shany. *supra* note 180, p. 41;

³⁴¹ *Ibid.*;

³⁴² Ben-Naftali, Shany. *supra* note 180, p. 61;

³⁴³ Ben-Naftali, Shany. *supra* note 180, p. 42;

³⁴⁴ see Resolution XXIII, *Human Rights in Armed Conflicts, Final Act of the International Conference on Human Rights*, UN Doc. A/Conf.32/41 (13 May 1969), p. 680;

³⁴⁵ UN Secretary-General. *Respect for Human Rights in Armed Conflicts*, UN Doc. A/7720 (1969); UN Secretary-General. *Respect for Human Rights in Armed Conflicts*, UN Doc. A/8052 (1970);

³⁴⁶ UN GA. *Respect for human rights in armed conflicts*, Res. 2674 (1970), available at <https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/349/39/IMG/NR034939.pdf?OpenElement>;

³⁴⁷ Ben-Naftali, Shany. *supra* note 180, p. 42;

change most relevant for the purposes of this discussion is from inter-state to intra-state or mixed conflicts not of an international character *stricto sensu*.”³⁴⁸ The scholar deeply analyzed the idea that IHL and IHRL are complementary, rather than alternative regimes in his work “International Humanitarian Law and Human Right Law: Pas de Deux”³⁴⁹. In doing so, he specifically referred to the Israeli-Palestinian conflict,³⁵⁰ as an important example. The scholar defined the idea of combining IHL and HR law as a “paradigmatic shift in the international legal discourse”, that replaced “the former convention which maintained that the two are mutually exclusive.”³⁵¹ As we will see, this shift is going to have important consequences on the protection of the inhabitants of the West Bank.

In fact, one of the main points of the new paradigm is that war no longer concerns two or more states fighting each other and this is the case of the Palestinian-Israeli conflict. This changing nature of war brought humanitarian law and human rights law closer. Ben-Naftali, in fact, stated: “the changing face of war from inter-state to intra-state or mixed conflicts, with the experience that ‘the first line of defense against international humanitarian law is to deny that it applies at all’, generated a new paradigm according to which IHL is not an alternative to IHRL but an exception to the full application of the latter.”³⁵² Moreover, the strict interconnection between the two legal regimes contributed to this new paradigm: IHL set the groundwork for the conception of HR law. The scholars further suggested that HR law is today influencing IHL in a new direction under the guide of both the ICRC and the UN.³⁵³ As mentioned, the aim of both regimes is the one of protecting the human person and that brings them very close to each other. In underling that, Ben-Naftali specifically mentioned the Israeli-Palestinian conflict and he stated that:

“With the United Nations relying on both human rights and humanitarian norms in order to enhance the protection accorded to the human person in a multitude of conflicts of varying nature, including, but not limited to, the territories occupied by Israel, the argument that it should not be thus engaged as it encroaches on the ICRC's mandate, is legalistically anachronistic. Indeed, from an institutional perspective, the differences between the ICRC and human rights organizations seem to support the co-application of IHL and IHR law as the two complement each other: the ICRC, precisely because of the confidentiality of its method of operation and its cooperation with the occupying power can often gain access to information withheld from human rights' agencies; the latter's appeal to public opinion, on the other hand, may well encourage compliance in situations where the ICRC fails to secure the support of the occupying power.”³⁵⁴

³⁴⁸ Ben-Naftali, Shany. *supra* note 180, p. 46;

³⁴⁹ Ben-Naftali, Orna. *supra* note 308;

³⁵⁰ Ben-Naftali, Orna. *supra* note 308, pp. 131-200;

³⁵¹ *ivi*, p. 5;

³⁵² *Ibid*;

³⁵³ Ben-Naftali, Shany. *supra* note 180, p. 47;

³⁵⁴ Ben-Naftali, Shany. *supra* note 180, pp. 47-48;

In the complexity of the contemporary world, and especially in the complexity of the West Bank reality, that we tried to underline, the co-application of both regimes would result to be the more effective approach for the protection of human dignity. In this complex contemporary world, the differences between these two legal regimes make them not mutually excludible, but complementary. Again, this is especially true if we consider the Palestinian-Israeli reality, as delineated in the second chapter: the length of the occupation in the West Bank, the parallel legal systems, the jurisdiction that is both Israeli and Palestinian, and sometimes mixed. In this context, there is not a clear division between wartime and peace time, therefore a co-application of IHL and HR law would seem the most appropriate approach. Moreover, we should recall the fact that not all instruments of IHL are considered applicable in the West Bank by Israeli authorities and that makes the protection of Palestinian human dignity very fragile. The fact that IHL and HR law have different roots and scopes of applications would make them more effective if combined. Furthermore, we should highlight the importance of the length of the occupation in the West Bank. War and peace are difficult to separate in the contest of the Palestinian-Israeli conflict and that depends from the unprecedented length of the Israeli presence in the territory. According to Ben-Naftali, “the longer the occupation, the heavier is the weight to be accorded to the human rights of the occupied population.”³⁵⁵ In fact, it might be true that HR law is not as effective in addressing issues related to armed conflicts, but a co-application regime can be effective in a situation of complex equilibrium between war and peace. HR law should never substitute IHL, but it should only supplement the law of war, with its non-derogated provision. “In its supplementary role, any deficiencies associated with IHR law would not detract from the continued application of IHL, and the former regime would add to, rather than detract from, the protection afforded to potential victims.”³⁵⁶

Moreover, the idea of co-application of HR law was suggested not only by scholars, but also by International Conferences and institutions. We already cited the 1968 Conference of Tehran. The 1977 Protocols Additional to the Geneva Conventions are another example. These protocols, in fact, are IHL instruments that were influenced by HR law: they make explicit references to human rights³⁵⁷ or they took specific human rights into consideration.³⁵⁸ Further, at art. 5, the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts, states: “Nothing in the present Protocol shall be construed as precluding provisions in the law of a State Party or in international instruments and international humanitarian law that are more conducive to the realization of the rights of

³⁵⁵ Ben-Naftali, Orna. *supra* note 308, p. 140;

³⁵⁶ Ben-Naftali, Shany. *supra* note 180, p. 50;

³⁵⁷ see e.g., Protocol I, *supra* note 182, art. 72;

³⁵⁸ see e.g., Protocol I, *supra* note 182, art. 1(4), 75(4);

the child.”³⁵⁹ This provision surely reinforces the idea of co-application of IHL and HR law. Moreover, this idea was present in the 1990 Declaration of Minimum Humanitarian Standards³⁶⁰. Another example could be the fact that the Statute of the International Criminal Court forbids crimes against humanity in both situations of peace and war. Finally, we should consider the opinion of the ICJ on the matter. The Court expressed two Advisory Opinions³⁶¹ that affirmed that “the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights.” Moreover, the Court expressly mentioned the issue of coexistence of IHL and HR law. And it stated:

“As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law.”³⁶²

The ICJ, therefore, recognized the interconnection between the two law regimes and it held the possibility of coexistence of IHL and HR law. As we analyzed, the idea of co-application of HR law is developing on this strong basis. This new paradigm undermines the “the mutual exclusivity argument” supported by Israel to exclude the applicability of HR law in the West Bank. The next paragraph is going to consider the main Israeli argument, with the aim of finally proving that HR provisions should be considered applicable in the West Bank.

Section 3: Interpreting Human Rights’ Treaties

The main stance behind the Israeli “treaty interpretation argument” is that “the jurisdictional clauses of the six human rights conventions should be narrowly construed so as to cover only persons present within the sovereign territory of State parties or within other areas governed by their laws.”³⁶³ In defending this stance, Israel recall art. 29 of the 1969 Vienna Convention on the Law of Treaties (hereafter Vienna Convention),

³⁵⁹ See Optional Protocol to the Convention on the Rights of the Child, on the involvement of children in armed conflict, adopted and opened for signature, ratification and accession by General Assembly Resolution A/RES/54/263 of 25 May 2000 entry into force 12 February 2002, the document is available at

<https://www.ohchr.org/en/professionalinterest/pages/opaccrc.aspx>;

³⁶⁰ Declaration of Minimum Humanitarian Standards, 2 Dec. 1990, U.N. Doc. E/CN.4/Sub.2/ 1991/55 (1990);

³⁶¹ ICJ. *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, I.C.J. Reports (1996); ICJ, *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, I.C.J. Reports (2004);

³⁶² ICJ. *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, I.C.J. Reports (2004), para. 106;

³⁶³ Ben-Naftali, Shany. *supra* note 180, p. 33;

that states: "Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect to its entire territory."³⁶⁴ The Vienna Convention is a treaty concerning International Law on treaties between states and is normally considered as reflective of International Customary Law.³⁶⁵ Therefore, on this basis, Israel claims the territorial applicability of HR's Conventions, if it is not differently provided by the treaty itself. Here arises the importance of the jurisdictional clauses, that are the provisions that specify the scope of application of a Convention. The ICCPR, the CAT and the CRC are all provided with jurisdictional clauses, at the same article. In fact, Art. 2 (1) of the ICCPR provides that: "each State party [...] undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant". Art. 2 (1) of the CAT, states: "Each State Party shall take effective [...] measures to prevent acts of torture in any territory under its jurisdiction". Finally, art. 2(1) of the CRC affirms that "States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction".

For what concern the ICCPR, Israel supports a literal interpretation of the clause, that results in the need of meeting both conditions: the one of territoriality and the one of jurisdiction. This position is also supported by scholars³⁶⁶. For what concern the CAT and CRC, instead, Israel holds that these clauses should be interpreted according to a specific construction of the term "jurisdiction". In fact, according to Ben-Naftali, "Israel, [...] seems to construe the term 'jurisdiction' in a far narrower manner than the one advanced here, equating it with the application of national laws."³⁶⁷ This analysis is going to challenge these stances. However, the research considered the fact that Israel's position on the interpretation of HR treaties could be motivated by historical, theoretical and practical considerations. The first is based on the recognition that, historically, IHR law was conceived to govern the relations between a State and its own citizens.³⁶⁸ Furthermore, from a theoretical perspective, IHR regime developed "in the context of intra-societal relations - i.e., relations between governments and individuals, which correspond to the existing State system."³⁶⁹ This conception of HR is based on a certain conception of "social contract": the protection of

³⁶⁴ Vienna Convention on the Law of Treaties (Vienna, 23 May 1969), available at

https://treaties.un.org/doc/Treaties/1980/01/19800127%2000-52%20AM/Ch_XXIII_01.pdf;

³⁶⁵ See ICJ. *Sovereignty over Pulau Ligitan and Pulau Sipadan* (Indonesia/Malaysia) (2001), para. 37; ICJ. *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, I.C.J. Reports (1996) pp. 66, 75; ICJ. *Kasikili/Sedudu Island* (Botswana/Namibia) I.C.J. Reports (1999) pp. 1045, 1059, 1075;

³⁶⁶ See Schindler, Dietrich. "Human Rights and Humanitarian Law: Interrelationship of the Laws" in *American University Law Review* No. 31 (1982) pp. 935-939; Schwelb, Egon. "Civil and Political Rights - The International Measures of Implementation" in *American Journal of International Law* No. 62 (1968) p. 827, 863; Meyrowitz, Henri. "Le Droit de la guerre et les droit de l'homme" in *Revue de droit public et de la science politique en France* (1972) p. 1059, 1087;

³⁶⁷ Ben-Naftali, Shany. supra note 180, p. 65;

³⁶⁸ see Henkin, Louis. *International Law: Politics, Values and Functions* (Dortrecht, 1995) p. 173; Ignatieff, Michael. *Human Rights as Politics and Idolatry* (Princeton, 2001);

³⁶⁹ Ben-Naftali, Shany. supra note 180, p. 36;

fundamental human rights is provided by the government, in exchange for the limitations of the freedom of the citizens and the acceptance of certain duties.³⁷⁰ In this context, is the relationship between the government and the citizens that assures the protection of human rights and there is no “transferability of IHR from the intra-societal to the extra-societal sphere.”³⁷¹ Finally, from a practical prospective, the application of HR law behind the boundary of the state can result very difficult, because the ability to control areas situated outside the State is usually limited.³⁷² This section summarized a comprehensive analysis of the Israeli position on the proper interpretation of the HR’s treaties that has been provided by the scholars Ben-Naftali and Shany.³⁷³ The same document provides a detailed critique to the same matter, that considers all the main points that are important to underline for this research and to reach a final conclusion on the matter.

The Israeli “treaty interpretation argument” can be challenged on numerous grounds. Firstly, we are going to consider the language of the jurisdictional clauses of four Conventions that Israel ratified. All the jurisdictional clauses of the mentioned Conventions (ICCPR, CAT and CRC) contains the term “jurisdiction”. Specifically, art. 2(1) of the CAT mentioned “the territory under their jurisdiction”. This implies the relevance of the exercise of jurisdiction, inside or outside its sovereign territory, in determining the scope of application of the Covenant. For what concern the CRC, art. 2(1) provides the respect of the rights of each child within the jurisdiction of the State Party. This formulation indicates not a territorial, but a personal method of application. Therefore, to determine the scope of applicability, “the decisive test is jurisdiction over persons.”³⁷⁴ The formulation of the ICCPR is probably the most important to analyze. As we mentioned, it refers to two conditions: “within its territory” and “subject to its jurisdiction”. Here, the reference to territory can be interpreted as sovereign territory and the doubt arises if one or both conditions should be satisfied in order to determine the scope of applicability. To solve this issue, the scholars decided to consider the object and the purpose of the treaty. Thus, the interpretation of the jurisdictional clause should be done in light of the object and purpose of the ICCPR. This reading has been supported by most experts.³⁷⁵ With this contextual and teleological approach, they all concluded that the two conditions should be interpreted as disjunctive. The main argument that supports this view is art. 1 of the First Optional

³⁷⁰ For more information, see Henkin, Louis. *The Age of Rights* (New York, Columbia University Press, 1996);

³⁷¹ Ben-Naftali, Shany. *supra* note 289, p. 37;

³⁷² *Ibid.*;

³⁷³ Ben-Naftali, Shany. *supra* note 180, pp. 33-38;

³⁷⁴ Ben-Naftali, Shany. *supra* note 180, p. 59;

³⁷⁵ See e.g. Meron, Theodor. “The 1994 U.S. Action in Haiti: Extraterritoriality of Human Rights Treaties” in *A.J.I.L.* 78, (1995) pp. 79-81; Frowein, Jochen Aber. “The Relationship between Human Rights Regimes and Regimes of Belligerent Occupation” in *Israel Year Book of Human Rights* (1998) p. 6;

Protocol³⁷⁶ (hereafter OP) to the ICCPR. This article affirms the competence of the Committee to receive and consider communications from “individuals subject to its jurisdiction” who claim to be victims of a violation by that State Party. Therefore, “since the procedural right to bring communications cannot exceed the substantive right to enjoy protection under the Covenant, it would seem strange to construe article 1 of the OP more broadly than article 2(1) of the ICCPR. It is thus more plausible to read the latter as containing two alternative (though usually overlapping) conditions, and to read the OP as encompassing only one of them.”³⁷⁷

Furthermore, the Israeli position can be undermined by a different interpretation of art. 29 of the Vienna Convention. According to Ben-Naftali and Shany, the concise language of the article “merely prescribes a minimum scope of application - the entire territory of the State [...] and there is nothing in the text which indicates that article 29 intended to restrict the extra-territorial application of treaties.”³⁷⁸ This stance, apparently weak, is strengthened by the preparatory works of the Vienna Convention. In fact, following a proposal to clarify the extraterritorial applicability of some treaties, the Special Rapporteur answered that the clarification was unnecessary because “the [rule on territorial application] hardly seems open to the construction that by implication it excludes the application of a treaty beyond the territories of the parties.”³⁷⁹ Moreover, the final report stated that “to attempt to deal with all the delicate problems of extra-territorial competence in the present article would be inappropriate and inadvisable.”³⁸⁰ Finally, we should also consider that the interpretative presumption against extra-territorial application of treaties should be reconsidered in light of the nature of the obligations introduced by the treaty in question. In the case of HR treaties, therefore in the case of the ICCPR, the principle of universality undermines a possible interpretation against extra-territorial application³⁸¹.

Moreover, another relevant instrument to oppose the Israeli narrow interpretation of HR treaties is the international jurisprudence on extra-territorial application of Human Rights treaties in Occupied Territories. In fact, the issue of territorial or extra-territorial application of HR treaties has been addressed by human rights bodies, like the HRC, the monitoring body of the ICCPR. As mentioned for the interpretation of the jurisdictional clause of the ICCPR, the HRC claims that “extra-territorial exercise of governmental authority over individuals could fall under the scope of article 1 of the OP to the ICCPR”. The most relevant precedents, in this regard, are the two cases in which the government of Uruguay was accused of kidnapping

³⁷⁶ Optional Protocol to the International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 59, U.N. Doc. A/6316 (1966);

³⁷⁷ Ben-Naftali, Shany. *supra* note 180, p. 69;

³⁷⁸ Ben-Naftali, Shany. *supra* note 180, p. 69;

³⁷⁹ UN Special Rapporteur (Humphrey Waldoock) *Sixth Report on the Law of Treaties*, UN Doc. A/CN.4/186 (1966) p. 66;

³⁸⁰ ILC. *Final Draft Commentary* in Wetzel, Rauschnig. *The Vienna Convention on the Law of Treaties - Travaux Préparatoires* (Frankfurt, 1978) p. 225;

³⁸¹ Ben-Naftali, Shany. *supra* note 180, p. 67;

two Uruguayan citizens, that were living in another country³⁸². The citizens Lopes Burgos and Casariego have appealed to the HRC for the violations of their rights under the ICCPR. On the other hand, the State of Uruguay claimed the inapplicability of the Covenant outside the sovereign territory. In both cases, the HRC stated:

"The reference in article 1 of the Optional Protocol to 'individuals subject to its jurisdiction' does not affect the above conclusion because the reference in that article is not to the place where the violation occurred, but rather to the relationship between the individual and the State in relation to a violation of any of the rights set forth in the Covenant, wherever they occurred. Article 2 (1) of the Covenant places an obligation upon a State party to respect and to ensure rights 'to all individuals within its territory and subject to its jurisdiction', but it does not imply that the State party concerned cannot be held accountable for violations of rights under the Covenant which its agents commit upon the territory of another State, whether with the acquiescence of the Government of that State or in opposition to it [...] It would be unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory"³⁸³

Moreover, in the same cases, the HRC underlined that an interpretation that would preclude the extra-territoriality application would result in a violation of art. 5 of the ICCPR, that affirms that the interpretation of the Covenant cannot be construed in a way that allows any act "aimed at the destruction of any of the rights and freedoms recognized herein."³⁸⁴ Therefore, these cases support the view in favor of the extra-territorial application of the treaty, on the basis of the nature of the relationship between the person and the State and not on the basis of the location of the violation. In fact, Ben-Naftali and Shany stated that:

"The Covenant is construed to impose general obligations of conduct, which apply in the context of certain de facto relations of power - when an individual is placed under the effective control of a government or is directly affected by its actions. This must entail, inter alia, that situations of belligerent occupation and other forms of political domination should fall under the scope of the ICCPR (and arguably other conventions as well)."³⁸⁵

³⁸² See *Lopez Burgos v. Uruguay*, UN. Doc. A/36/40 (1981); *Casariego v. Uruguay*, UN Doc. CCPR/C/OP/1 (1984);

³⁸³ Burgos, supra note 374, para. 12.2-12.3; Casariego, supra note 374, para. 10.2-10.3;

³⁸⁴ International Covenant on Civil and Political Rights, supra note 33, art. 5(1);

³⁸⁵ Ben-Naftali, Shany. supra note 180, p. 72;

To support this position the scholars refers to other relevant cases³⁸⁶ that all resulted in the following proposition:

“State A is responsible for human rights violations taking place in State B, if the ‘necessary and foreseeable consequence’ of a decision made by State A with regard to a person subject to its jurisdiction will be the violation of that person's rights in State B.”³⁸⁷

Moreover, as mentioned, the issue of the scope of application of HR treaties was also addresses in the evaluation of periodic reports submitted by State parties. The approach of the UN treaty bodies³⁸⁸ was the same that we highlighted and similarly concluded the extra-territorial applicability of HR law. Therefore, we can conclude that the International jurisprudence on the matter is indicative of the dominance of the extra-territoriality application, after an “effective control and direct effect” test over formal sovereignty.

Finally, it is important to mention the jurisprudence of the Israeli High Court of Justice (HCJ) on the matter. The result of the analysis made by Ben-Naftali and Shany is in line with the consideration that this research made about the HCJ, in the previous chapter. In fact,

“The HCJ has neither espoused nor rejected explicitly the Israeli position. While it has, on numerous occasions, though by no means as a matter of course, referred in its decisions to IHR law [...], very few decisions relating to the Occupied Territories have been rendered on the basis of this law.”³⁸⁹

However, we have to mention that the judgments have different approaches³⁹⁰ in dealing with the application of IHR in the Palestinian Territories. To sum up, even if the decisions are taken in reference to HR law, the HR provisions are usually not mentioned, with the exception of stating its irrelevance or inapplicability.³⁹¹ An interesting approach, that is important to underline for this analysis, is the one of Chief Justice Barak. This Justice’s approach was the only one that included explicit references to HR provisions in the normative framework of the decisions. However, in this approach the judgment is

³⁸⁶ See *Lichtensztein v. Uruguay*, UN Doc. CCPR/C/OP/2 (1990); *Vidal Martins v. Uruguay*, U.N. Doc. Supp. No. 40; A/37/40 (1982); *Montero v. Uruguay*, U.N. Doc. CCPR/C/OP/2 (1990); *VarelaNunez v. Uruguay*, UN Doc. CCPR/C/19/D/108/1981 (1983); see also *Kindler v. Canada*, U.N. Doc. CCPR/C/48/D/470/1991, para. 6.2 (1993); *Ng v. Canada*, U.N. Doc. CCPR/C/49/D/469/1991, para. 6.2 (1994);

³⁸⁷ Ben-Naftali, Shany. *supra* note 180, p. 74;

³⁸⁸ *Concluding Observations of the Human Rights Committee: Yugoslavia*, para. 8, UN Doc. CCPR/C/79/Add.16 (1992); *Concluding Observations of the Committee on the Elimination of Discrimination against Women: Cyprus*, UN Doc. A/51/38, para. 44 (1994); *Concluding Observations of the Committee on Elimination of Racial Discrimination: Moldova*, UN Doc. CERD/C/60/CO/9, para. 3 (2002); See also Special Rapporteur (Walter Kalin) *Report on the Situation of Human Rights in Kuwait under Iraqi Occupation*, UN Doc. E/CN.4/1992/26 (1992) p. 17;

³⁸⁹ Ben-Naftali, Shany. *supra* note 180, p. 87;

³⁹⁰ Ben-Naftali, Shany. *supra* note 180, pp. 91-93;

³⁹¹ Ben-Naftali, Shany. *supra* note 180, p. 92;

“exclusively or predominantly” based on the Court’s interpretation of the HR norms. The judgments rendered by Chief Justice Barak are important because undermined the “mutual exclusivity argument” and recognized the possible application of IHL and HR law in the Palestinian Territories. In this regard, the Mar'ab Case³⁹² is extremely relevant for our analysis. In this case, the petitioner challenged a military order that provided the detention of a Palestinian individual without judicial review. Justice Barak recognized that the GCIV failed to regulate the case and, therefore, the decision relied on art. 9 of the ICCPR, on an HRC Comment³⁹³ and on the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment³⁹⁴. On this basis, the decision concluded that the military order was invalid, because it resulted in the violation of IL.³⁹⁵ In light of this decision and considering the general approach supported by Chief Justice Barak, we can conclude that the position of the Israeli HCJ differs from the one of the State of Israel. However, there is still a strong reluctance to rely on HR law.

However, the results of Justice Barak’s approach on the protection of the Palestinian inhabitants from the West Bank is still very little. For what concerns all the other judgments, IL seems to be in pause in the Palestinian Territories. Even if scholars and International institutions strongly support the applicability of instruments of IHL and HR law, the State of Israel refuses to accept it. The Israeli institutions, especially the Supreme Court, in this context, are extremely important in supporting a development in favor of a reasonable degree of protection under IL of the Palestinian inhabitants. The applicability of HR law is extremely relevant in the complex context of the Palestinian-Israeli conflict, in light of the considerations made throughout the entire research. Palestinians are entitled to the same human dignity recognized to all other human beings and the sole existence on a debate on the matter is already undermining their fundamental rights.

³⁹² HCJ. *Mar'ab et al. v IDF Commander in the West Bank et al. Judgment*, H CJ 3239/02, (2002);

³⁹³ *Human Rights Committee, General Comment 8, Article 9* (1982), U.N. Doc. HRI\GEN\1\Rev.1 (1994);

³⁹⁴ *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, (1988);

³⁹⁵ HCJ. *Mar'ab et al. v IDF Commander in the West Bank et al. Judgment*, H CJ 3239/02, (2002) para. 27;

Chapter 5: Unprotected Palestinian minor detainees from the West Bank

The previous chapters described the situation related to juvenile detention in the West Bank and investigated the applicability of both IHL and HR law in the territory. In light of this analysis, this last chapter is going to respond to the research question delineated in the introduction: what are the obligations of Israel, under IL, regarding the protection of minors from the West Bank? Stated the applicability of both IHL and HR law, the analysis will consider what are the main provisions of both regimes that protect minor detainees and what are, therefore, the main obligations of Israel under IHL and HR law. As already clarified in the previous chapter, this analysis supports the new paradigm in favor of a co-application of the two legal regimes. However, for organizational purposes, we are going to refer to the Israeli obligations under IHL first, and we will consider the ones under HR law, in the subsequent section. However, as we will see, it is not possible to clearly divide the obligations under the two legal regimes. Supporting the strong inter-connection between IHL and HR law, based on the shared aim to protect human dignity, a violation of a humanitarian provision usually results in a violation of a human right. We will see that throughout the chapter. Moreover, when considering the main obligations of Israel regarding juvenile detention, the reality of Palestinian minor detainees is extremely important. In the second chapter, we already underlined the main violations in the Israeli detention system, as reported by UNICEF. This section is going to recall these violations, in light of the applicable regimes of IHL and HR law, and it is going to underline the more urgent ones. In order to do that, we will refer to the dialogue on the matter established by UNICEF with the Israeli authorities since 2013³⁹⁶ and we will compare the 2013 UNICEF report, with the consequent one of 2015 and with the more recent data on juvenile detention in the West Bank, as provided by Defence for Children, Palestine. One of the conclusions of this research, that we will delineate in this chapter, is that Palestinian minors are unprotected and extremely vulnerable in this complex context. Another one is that Israel is not accountable for the violations toward this fragile category. In fact, in the last section, we will consider the issue of domestic and international accountability of Israel, specifically referring to the violations regarding detention of Palestinian minors.

Section 1: Israel's obligations under IHL

The two central chapters of this research are extremely relevant to understand Israel's obligations towards Palestinian minor detainees from the West Bank. In light of the considerations made in the chapter regarding the applicability of IHL, the "missing reversioner argument" resulted weak and it has been strongly

³⁹⁶ UNICEF. *supra* note 3, p.1;

opposed.³⁹⁷ Moreover, the consequent position of the State of Israel, claiming a *de facto* and opposing a *de jure* applicability of the GCIV, has been rejected by the Conferences of the High Contracting Parties to the Fourth Geneva Convention³⁹⁸ and by the Advisory Opinion of the International Court of Justice on the “Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory”³⁹⁹, rendered on 9 July 2004. As we stated before, these authoritative and exhaustive opinions should not be ignored. Indeed, they are. In this regard, the position of the Supreme Court of Israel contributed to underestimate the Israeli obligations under the GCIV. As mentioned, the approach of the HCJ is in line with the recent trend of the Israeli government: not addressing the Occupation. An example could be the 2010 case of *Yesh Din et al., v. Commander of IDF Forces in the Judea and Samaria et al.*⁴⁰⁰, when the petitioners argued that the provisions of GCIV should be considered as Customary Law. In this case, the Court decided to not rule on the argument. Similarly, the Israeli government refers to the GCIV when it comes to certain matters⁴⁰¹, but it avoids direct confrontation on its application, when it comes to discuss the issue, for instance, during international conferences. An example is the Conference of High Contracting Parties to the Fourth Geneva Convention of 17 December 2014, that regarded the applicability of the GCIV and that was convened after the terrible events that took place in Gaza in the summer of 2014, in the context of Israel’s Operation Protective Edge and of the attacks perpetrated by Palestinian armed groups⁴⁰². Israel was not represented, and it publicly criticized the conference. The Israeli government strongly condemned the decision of the Government of Switzerland to accede to Palestinian demands to hold a conference of the signatory states of the Geneva Conventions.⁴⁰³ Moreover, it stated that “the conference of signatories is a political move whose sole purpose is to exploit the important stage of the Geneva Conventions for the sake of assailing

³⁹⁷ see Benvenisti, Eyal. “The Missing Argument: The Article That Changed the Course of History?”, in *Israel Law Review*, Volume 50, Issue 3, (November 2017);

³⁹⁸ The first one was the *Conference of High Contracting Parties to the Fourth Geneva Convention: Declaration*, (Geneva, 15 July 1999);

³⁹⁹ ICJ. *Advisory Opinion on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, I.C.J. Reports (2004);

⁴⁰⁰ HCJ. *Yesh Din et al., v. Commander of IDF Forces in the Judea and Samaria et al.*, (2010) cited in Kretzmer, David. *supra* note 181, p. 213;

⁴⁰¹ On the website of the Israeli government, the compliance of Israeli policies with the GCIV is underlined in the case of administrative detention orders. Source available at <https://mfa.gov.il/MFA/AboutIsrael/State/Law/Pages/ado.aspx>;

⁴⁰² Lanz, Matthias. Max, Emilie. Hoehne, Oliver. *supra* note 231;

⁴⁰³ Israel government, *The Conference of Fourth Geneva Convention Signatories*, (11 Dec 2014), available at <https://mfa.gov.il/MFA/PressRoom/2014/Pages/The-Conference-of-Fourth-Geneva-Convention-Signatories-11-December-2014.aspx>;

Israel.”⁴⁰⁴ In other occasions⁴⁰⁵, Israel recalled its right to secure its boundaries and left the legal issues to be solved in future peace process negotiations. What are the political considerations behind this stance is not a matter for this research. What are the consequences of the Israeli claim for irresponsibility under IHL and HR in the West Bank, instead, is the extremely relevant. This research concluded that IHL fully apply to the West Bank and this part of the analysis will investigate what are the main obligations of Israel under IHL towards Palestinian minor detainees in the Israeli military detention system.

Generally, IHL prohibits Israeli forces from targeting civilians, including minors, and it specifically obligates the State of Israel to protect minors from all acts of violence. A minor, in fact, enjoys special protection under IHL.⁴⁰⁶ Children are part of the category defined as “protected persons”⁴⁰⁷ and their protection is specifically addressed at art. 50 of the GCIV. This article states some the obligations of the Occupying Powers towards children. The main ones are listed as it follows: facilitation of the proper working of all institutions devoted to the care and education of children; identification and registration of the children’s parentage; prohibition to change the personal status of children; maintenance and education of children who are orphaned or separated from their parents.⁴⁰⁸ Further protection, especially referring to minor detainees, is provided by art. 77 of Protocol Additional to the GCIV and relating to the Protection of Victims of International Armed Conflicts (Protocol I). This article specifically states that:

“Children shall be the object of special respect and shall be protected against any form of indecent assault. The Parties to the conflict shall provide them with the care and aid they require, whether because of their age or for any other reason.”⁴⁰⁹

Moreover, the article states that children should not take a direct part in the hostilities and they cannot be recruited.⁴¹⁰ Finally, the article provides that “if arrested, detained or interned for reasons related to the armed conflict, children shall be held in quarters separate from the quarters of adults [...]”⁴¹¹ and prohibits death penalty for offences committed before the age of eighteen.⁴¹²

⁴⁰⁴ *Ibid.*;

⁴⁰⁵ Israel Ministry of Foreign Affairs. “International Humanitarian Law in the West Bank and Gaza Strip” (2015) available at <https://mfa.gov.il/mfa/foreignpolicy/peace/guide/pages/israeli%20settlements%20and%20international%20law.aspx>;

⁴⁰⁶ See Geneva Convention (IV) supra note 41, arts. 23, 27, 50; See also Protocol Additional to the Geneva Conventions, supra note 182, art. 77;

⁴⁰⁷ Geneva Convention (IV) supra note 41, art. 27;

⁴⁰⁸ *Ibid.*;

⁴⁰⁹ Protocol I Additional to the Geneva Conventions, supra note 182, art. 77(1);

⁴¹⁰ *ivi*, art. 77(2), 77(3);

⁴¹¹ *ivi*, art. 77(4);

⁴¹² *ivi*, art. 77(5);

Stated the full applicability of the GCIV on the West Bank and stated the main provisions regarding minors under IHL, we should analyze what are the main violations that the Israeli military authorities should address and the main obligations in that regard. For what concern IHL, the most problematic issue is the one of the location of interrogation and detention. As we mentioned in the second chapter, Palestinian minors from the West Bank are transferred to Israel to be interrogated. This results in the violation of articles 49 and 76 of the GCIV, that prohibit holding detainees in the territory of the Occupying power. In addition, two of the three prisons with “juvenile” sections, where the majority of Palestinian minors serve their sentences, are located inside Israel. Hasharon and Megiddo prisons are inside Israel, while Ofer prison is located in the West Bank, near the city of Ramallah.⁴¹³ As just mentioned, detaining Palestinians from the West Bank in Israel contravenes article 76 of the GCIV, that provides that “protected persons accused of offences shall be detained in the occupied country, and if convicted they shall serve their sentences therein.”⁴¹⁴ This practice has been highlighted by the 2013 UNICEF report, that recommended to take appropriate measures in order to end this violation.⁴¹⁵ However, in the subsequent report of 2015, in the section regarding the status of the recommendations in light of the dialogue between UNICEF and the Israeli authorities, the recommendation on “location of detention and access to relatives” results to be rejected. According to UNICEF⁴¹⁶, the Israeli military prosecutor claimed that the matter has been subject to judicial review by the Israeli High Court of Justice in 1998 and in 2010. In both cases, the HCJ affirmed that the practice is in line with Israeli law.⁴¹⁷ Therefore, on this basis, the military prosecutor stated that no further action will be taken.⁴¹⁸ This is the most problematic violation under IHL, especially in light of the attitude of Israeli authorities to not even discuss the matter. Moreover, we should underline that this violation under IHL generates another violation, this time, under HR law. In fact, given the existence of Israeli regulations that preclude Palestinians from the West Bank, without specific permits, to enter Israeli territories.⁴¹⁹ That would result in the impossibility for the family to visit the minor detainee, in violation of article 37(c) of the CRC, which states that a child “shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances”.

Moreover, it is possible to detect three other main violations of IHL regarding Palestinian minor detainees: the first concerns administrative detention, the second relates the separation of children and adults and the

⁴¹³ Defense for Children International. *supra* note 84, p. 54;

⁴¹⁴ Geneva Convention (IV) *supra* note 41, art. 76;

⁴¹⁵ See UNICEF. *supra* note 1, p. 17;

⁴¹⁶ UNICEF. *supra* note 3, p. 7;

⁴¹⁷ HCJ. *Sejdia v. The Minister of Defense*, HCJ 253/88 (1998) and HCJ. *Yesh Din v. Commander of the IDF forces in the West Bank* HCJ 2690/09 (2010);

⁴¹⁸ UNICEF. *supra* note 3, p. 7;

⁴¹⁹ Defense for Children International. *supra* note 84, p. 57;

third is about education. These three matters are covered by IHL, even if they also concern HR law. As we already mentioned in the second chapter, under IHL, administrative detention can be used only as an exceptional and temporary measure. Article 78 of the GCIV allows an occupying power to hold a civilian in administrative detention only “for imperative reasons of security”. Moreover, detainees must be granted the right of appeal and review of the detention order, according to art. 43 and 78 of the GCIV. Furthermore, this process must guarantee “independence and impartiality”, according to the ICRC.⁴²⁰ Often, military tribunals face problems in fulfilling this requirement. As mentioned, the military judges are members of the armed forces, they are subject to military discipline and they are generally under the authority of the executive power. Therefore, “it is highly questionable whether military courts can reach the level of independence and impartiality required by human rights law and the legal doctrine of the separation of powers.”⁴²¹ Furthermore, we should mention the fact that, also in this case, a violation of IHL is linked to violations of HR provisions. In fact, the Human Rights Committee, in 2003, has criticized the practice of administrative detention, that was recognized to violate art. 9 of the ICCPR, because of its effect of “endangering the protection against torture and other inhuman treatment”⁴²². More recently, the United Nations High Commissioner for Human Rights, in a report that covers the time period from 1 November 2016 to 31 October 2017, stated that: “Arbitrary detention of Palestinians by Israeli authorities, including the practice of administrative detention, including of children, continued to be a major concern during the reporting period. According to official data provided by the Israeli Prison Service, as of 30 June 2017, 5.916 Palestinians, including 318 children, were in Israeli detention. This included 444 individuals in administrative detention, including 2 children.”⁴²³ The matter might be not extremely urgent for what concern Palestinian minor detainees. However, we consider important to highlight that Israel should fulfill its obligations under IHL and HR law in this regard, in order to safeguard these individuals.

Moreover, if we consider the military legislation regarding children detention, we have to further underline the problems related to Military Order 1651, specifically regarding the separation of minors and adult detainees. The first issue is related to Section 138(a) and (b) of the Military Order. This section, in fact, exempts part of the trial from being held in military juvenile courts. According to UNICEF, section 138 provides that “remand hearings, bail applications and hearings to determine whether a child remains in detention pending the conclusion of the case [...] can be heard in the military courts used for adults.”⁴²⁴

⁴²⁰ ICRC. *Commentary to IV Geneva Convention*, ed. by Jean Pictet, (Geneva, 1960) p. 260;

⁴²¹ *Ivi*, p. 400;

⁴²² UN HRC. *UN Human Rights Committee: Concluding Observations*, CCPR/CO/78/ISR, (Israel, 21 August 2003), available at: <https://www.refworld.org/docid/3fdc6bd57.html>;

⁴²³ Report of the Office of the United Nations High Commissioner for Human Rights on the Human rights situation in Palestine and other occupied Arab territories, A/HRC/37/38 (2018), p. 7;

⁴²⁴ UNICEF. *supra* note 1, p. 7;

This provision would result in a violation of art. 77 of Protocol I to the GCIV⁴²⁵ and it violates also art. 10(3) of the ICCPR. This article, in fact, states: “Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.”⁴²⁶ UNICEF underlines that Military Order 1651 is not protecting this right, in violation of the mentioned provisions of IHL and HR law, but also in violation of Rule 112 (2) of the UN Standard Minimum Rules for the Treatment of Prisoners⁴²⁷, that provides that “young untried prisoners shall be kept separate from adults and shall in principle be detained in separate institutions.” Another issue to underline is that the military norm that provides separation of adults and minor in the Israeli detention system use the phrase “to the extent possible”⁴²⁸. Minors are to be brought separately to and from court “to the extent possible” and minors’ hearings are to be separate from adults’ hearings “to the extent possible”. This right of Palestinian minors under IL is to be respected, according to the Israeli military provisions, “to the extent possible”. This is not acceptable, and it results in violations of Israel obligations under IL that urgently needs to be addressed.

Finally, we should consider Israel obligations to ensure the right to education for minor detainees in the Israeli military system. This issue results particularly problematic, according to Human right’s associations⁴²⁹ and to Defense for Children.⁴³⁰ This right is provided by the CRC, but it is also addressed by the GCIV. In fact, art. 94 of the GCIV encourages the “Detaining Power” to “take all practicable measure to ensure the exercise” of “intellectual, educational and recreational pursuits”. It further states that “all possible facilities shall be granted to internees to continue their studies or to take up new subjects. The education of children and young people shall be ensured; they shall be allowed to attend schools either within the place of internment or outside”. According to Defence for Children, these obligations are not fulfilled at all by the Israeli Prison Service and, when detained, Palestinian minors face numerous difficulties in pursuing their education.⁴³¹ The main problematics are listed as it follows:

“In all three prisons, Israeli authorities have restricted the types of formal classes available to just a couple subjects - namely, Arabic and Math. Recently, children detained at Ofer have begun to study Hebrew. All sciences are reportedly prohibited because of “security concerns.” Classes are offered in 45-minute periods for four to five hours a day, five days per week. Children are divided into groups based on their academic

⁴²⁵ Protocol I Additional to the Geneva Conventions, *supra* note 182, art. 77(4);

⁴²⁶ *International Covenant on Civil and Political Rights*, *supra* note 33, art. 10(3);

⁴²⁷ Standard Minimum Rules for the Treatment of Prisoners, *supra* note 46, art. 112(2);

⁴²⁸ *Ibid.*;

⁴²⁹ see Action of Christians against Torture, French – Palestine Solidarity Association, French Platform of NGOs for Palestine, French Human Rights League, Yes Theatre. “Broken Childhood: Palestinian minors in the fire line of Israeli repression” (2016) pp. 29-31;

⁴³⁰ Defense for Children International. *supra* note 84, pp. 59-60;

⁴³¹ *Ibid.*;

levels and are thus not always educated with their peer group. At Ofer prison, there is one teacher to every 10 students, based on the most recent data available. As of 2013, the ratio at Hasharon is only slightly higher. Child detainees at Megiddo reported that sometimes there were as few as five children in a class. All three juvenile sections reported that classes took place in well-ventilated or air-conditioned rooms. In Ofer prison, the classrooms had televisions, but no educational programming was available. The laundry room and a storage room were converted into classrooms in Megiddo prison. Child representatives and adult prisoner supervisors for all three prisons told DCIP that they enforce children's attendance although IPS has not made the classes mandatory. Abdul-Fatah Dawleh, the representative for Ofer's juvenile section, told DCIP that children are only allowed to miss classes for family visits, court appearances, or illness. However, a 2015 DCIP survey of children detained in Megiddo found that children attended classes an average of twice per week. Children who had completed higher levels of education prior to arrest reported that they were assigned to attend classes less frequently, or simply skipped classes. Some children told DCIP that all the classes were below their education level and were not compatible with the Palestinian curriculum."⁴³²

These are not even all the problems relative to education listed in the report. However, it is sufficient to give an idea of the reality reported by International Organizations working in the protection of Palestinian minor detainees. Israel obligations toward the right to pursue education is clearly stated by IL. This research only underlines the urgency of addressing the alleged violations. In fact, with a poor education and without access to future prospective, the minors have very little possibilities once they are out of prison and back to the reality of the Palestinian society.

Section 2: Israel's obligations under HR law

This part of the analysis will consider the main Israeli obligations under the 1989 Convention on the Rights of the Child⁴³³, with the 1984 UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment⁴³⁴, with the International Covenant on Civil and Political Rights⁴³⁵ and with the International Covenant on Economical Social and Cultural Rights. Moreover, other instruments of soft law are going to be relevant. These instruments are the UN Standard Minimum Rules for the Treatment of Prisoners⁴³⁶, also known as Mandela Rules and the UN Standard Minimum Rules for the Administration of

⁴³² Defense for Children International. *supra* note 84, pp. 59;

⁴³³ Convention on the Rights of the Child, *supra* note 11;

⁴³⁴ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* note 44;

⁴³⁵ International Covenant on Civil and Political Rights, *supra* note 33;

⁴³⁶ Standard Minimum Rules for the Treatment of Prisoners, *supra* note 46;

Juvenile Justice⁴³⁷, also known as Beijing Rules. These instruments frame the main rights of Palestinian minor detainees. The obligations of the State of Israel under HR law, regarding the protection of Palestinian minor detainees, are more numerous and detailed than the ones under IHL. This is due to the specific nature of HR treaties, that we discussed in the previous chapter. That chapter concluded that HR law is applicable to the West Bank for what concerns the Israeli actions affecting the rights of the Palestinian inhabitants. However, as we analyzed, the State of Israel opposes the extra-territorial applicability of the HR treaties. The consequences of this stance on the protection of Palestinian minor detainees are going to be illustrated in this section. The first is that Israel does not consider itself bounded by these provisions for what concern arrest and detention of Palestinian minors. Therefore, Israel does not report on the matter to the relevant UN monitoring bodies of the treaties. Consequently, we will see that the violations of these provisions are not sufficiently addressed by Israeli military authorities that tend to underestimate their obligations under HR law.

HR law generally provides that in every action that involves or impacts on children, their best interests⁴³⁸ shall be a primary consideration. Human Rights' treaties attribute a special protection to children, sometimes with specific provisions. It is the case of the ICESCR, that at art. 10 (3) states: that "special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions". Moreover, detention of children should be only used as a "measure of last resort and for the shortest appropriate period of time"⁴³⁹. All minors are entitled to a fair and public hearing by a "competent, independent, and impartial tribunal"⁴⁴⁰ and torture and ill-treatment are absolutely prohibited.⁴⁴¹ The compliance of the Israeli military juvenile detention system with these obligations under HR law has been strongly contested by UN monitoring bodies. In fact, in its first review about Israel, the Committee on the Rights of the Child, the UN body in charge of monitoring the implementation of the CRC, expressed serious concern regarding "allegations and complaints of inhuman or degrading practices and of torture and ill-treatment of Palestinian children"⁴⁴² during arrest, interrogation, and detention. More than ten years later, in 2013, the Committee found that the situation was not improved at all. As similarly stated by UNICEF in the report published the same year, the Committee found that Palestinian children arrested by Israeli forces were "systematically subject to

⁴³⁷ United Nations Standard Minimum Rules for the Administration of Juvenile Justice, *supra* note 115;

⁴³⁸ Convention on the Rights of the Child, *supra* note 11, art. 3;

⁴³⁹ Convention on the Rights of the Child, *supra* note 11, art. 37;

⁴⁴⁰ International Covenant on Civil and Political Rights, *supra* note 33, art. 14;

⁴⁴¹ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* note 44;

⁴⁴² UN Committee on the Rights of the Child. *Concluding Observations: Israel*, U.N. Doc. CRC/C/15/Add.195 (Oct. 9, 2002) para. 36;

degrading treatment, and often to acts of torture” and that Israel had “fully disregarded” all the recommendations to comply with international law.⁴⁴³

We have to recall the fact that, as a consequence of the three arguments underlined in the previous chapter, Israel consider the HR treaty as non-applicable in the West Bank. Therefore, the Conventions are applied internally, but the State of Israel refuses to respond to the monitoring committees of the implementation of such treaties in the Palestinian territories. The consequence is that no information on juvenile detention in the West Bank are furnished by the Israeli military authorities to the UN monitoring bodies of the CRC, CAT and ICCPR. In their reports, these UN bodies recalled the applicability of HR law in the territory and they insist on the Israeli obligation to respond of the implementation of the treaties for what concern the actions affecting the rights of Palestinian inhabitants.

In its first 2003 review, the Committee on the Rights of the Child stated:

“The Committee however considers that the State party’s persistent refusal to provide information and data and to respond to the Committee’s written questions on children living in the Occupied Palestinian Territory (hereafter OPT), including East Jerusalem and the Occupied Syrian Golan Heights, greatly affects the adequacy of the reporting process and the State’s accountability for the implementation of the Convention. The Committee urges the State party to comply with the advisory opinion of the International Court of Justice on the Legal Consequences of the Construction of a Wall in the OPT (I.C.J report 2004, para. 163 (3) A.) and to abide by its obligations to ensure the full application of the Convention in Israel and in the OPT, including the West Bank, the Gaza Strip as well as in the Occupied Syrian Golan heights.”⁴⁴⁴

Similarly, in 2016, the Committee against Torture, the UN monitoring body of the CAT, stated:

“Recalling its previous concluding observations (CAT/C/ISR/CO/4, para. 11) and its general comment No. 2 (2007) on the implementation of article 2 by States parties, the Committee calls on the State party to immediately reconsider its position and acknowledge that the Convention applies to all individuals who are subject to its jurisdiction. In this respect, the Committee reaffirms that the Convention applies to all territory and persons under the jurisdiction of the State party, including the Occupied Territories, in accordance with the Committee’s general comment No. 2 (2007), the views of other treaty bodies and the jurisprudence of the International Court of Justice.”⁴⁴⁵

This document is the most recent one, if we consider the reports of the UN human rights treaty monitoring bodies. The concerns that this report expressed regarding juvenile detention in the West Bank are extremely

⁴⁴³ UN Committee on the Rights of the Child. Concluding observations on the second to fourth periodic reports of Israel, U.N. Doc. CRC/C/ISR/CO/2-4 (2013) para. 73;

⁴⁴⁴ *ivi*, (2013) para. 3;

⁴⁴⁵ UN Committee against Torture. Concluding observations on the fifth periodic report of Israel, U.N. Doc. CAT/C/ISR/CO/5 (2016) para. 9;

alarming. We will underline the concerns highlighted by the Committee, as representative of some of the responsibilities of Israel under HR law that are not sufficiently addressed by Israeli authorities.

In a section named “Juvenile detainees”, the 2016 report of the Committee against torture, in fact, states:

“While taking note of the provisions of the Youth Law (Trial Punishment and Modes of Treatment) 5731-1971 relating to the arrest and detention of minors and of positive developments in the juvenile military justice system applicable in the West Bank, including the establishment of a juvenile military court in 2009, the increase of the age of majority from 16 to 18 years for the purposes of adjudication in 2011 and other measures providing for safeguards and guarantees for minors, the Committee is concerned at reports that such legal developments are not always implemented in practice, in particular with respect to Palestinian minors accused of security-related offences. In this respect, it is concerned at allegations of many instances in which Palestinian minors were exposed to torture or ill-treatment, including to obtain confessions; were given confessions to sign in Hebrew, a language they do not understand; and were interrogated in the absence of a lawyer or a family member. The Committee is also concerned that many of these children, like many other Palestinians, are deprived of liberty in facilities located in Israel, thus hindering access to visits of relatives who live in the Occupied Palestinian Territory. The Committee is further concerned that at the time of the dialogue there were 12 minors in administrative detention and 207 Palestinian minor residents of the West Bank in detention for security-related offences (arts. 2, 11, 12, 13, 14, 15, and 16).”⁴⁴⁶

The disagreement between the UN bodies and the State of Israel results in an unproductive dialogue regarding the obligations of Israel under HR law. The Committee against Torture, as well as the Committee on the Rights of the Child, continuously underlined the problematics related to juvenile detention in the West Bank. However, as reported by the above-mentioned reports, the State of Israel refused its responsibility. The concerns raised by the Committee do not represent an exhaustive list of the alleged violations of the rights of minor detainees. The last part of this section will provide a list of the Israeli obligations in light of the main problems related to the military juvenile detention system that we provided in the second chapter.

In order to state the main obligations of Israel, we will illustrate a summary of the specific guarantees relevant to juvenile justice under IHL and that result to be problematic in the Israeli military detention system. The first one concerns the notification of arrest and the reason for arrest. All children and their parents should be informed of the reason for the arrest, at the time of the arrest and in an understandable language. These rights are stated in the CRC, at art. 40 (2), in the ICCPR at art. 9 (1) and (2) and in the Beijing Rules, at Rule 10⁴⁴⁷. In this regard, UNICEF noticed that few children or parents are informed of

⁴⁴⁶ *ivi*, para. 28;

⁴⁴⁷ United Nations Standard Minimum Rules for the Administration of Juvenile Justice, *supra* note 115;

why the children is arrested, where is brought and for how long.⁴⁴⁸ UNICEF underlined Israel obligations in this regard in the 2013 report.⁴⁴⁹ However, in the 2015 UNICEF report, the status of the recommendation on the notification and reasons of arrest is defined as “Partial”⁴⁵⁰, meaning that “in totality the recommendation has not been realized and/or rights violations continue to be reported.”⁴⁵¹ Israel’s obligation to address this issue should be further affirmed.

Moreover, in this regard, it is important to recall the problem of night arrests. As we stated before, even if the practice of night arrests is not addressed in a specific provision of HRL, a general norm of the CRC can be considered relevant. This norm is the above-mentioned art. 3 of the CRC, which provides that “in all actions concerning children [...] the best interests of the child shall be a primary consideration.” Exposing a minor to the traumatic experience of being separated from the family in the middle of the night does not take in consideration the best interest of the minor. In the report of 2015, UNICEF stated that, in February 2014, the Israeli authorities implemented a pilot-test in the West Bank based on the replacement, when possible, of the practice of night arrests of children with a summons procedure⁴⁵². The effort was recognized to be extremely positive and it was encouraged. As mentioned, there is no subsequent information about the further implementation of this test, but the results do not seem to have solved the problem. In fact, in 2017 there have been 69 documented cases of night arrests in the West Bank, approximately the 50% of the total number of cases (137)⁴⁵³. In 2018 there have been 74 documented cases of night arrests, the 61% of the total number (120)⁴⁵⁴. Therefore, Israel’s obligation regarding this issue should be recalled.

Moreover, the Israeli obligations regarding the practices of interrogation of minors should be as well further underlined. The main one is represented by the fact that every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner that takes into account the needs of persons of his or her age.⁴⁵⁵ Therefore, methods of restraint or force can be used only when the child poses an imminent threat of injury to him or herself or others, and only when all other means of control have been exhausted. These rights are listed in art. 37 of the CRC and they are further addressed in the CRC General Comment No. 10, para. 89. In violations of these rights, the Israeli procedures of interrogation often involves the use of instruments and methods of restraint⁴⁵⁶. Moreover, another obligation regarding interrogation concern the fact that audiovisual recording is prescribed in case of

⁴⁴⁸ UNICEF. *supra* note 1, p. 10;

⁴⁴⁹ UNICEF. *supra* note 1, p. 14;

⁴⁵⁰ UNICEF. *supra* note 3, p. 8;

⁴⁵¹ UNICEF. *supra* note 3, p. 7;

⁴⁵² UNICEF. *supra* note 3, pp. 2, 5;

⁴⁵³ Data furnished by Defence for Children, Palestine, see appendix 1;

⁴⁵⁴ Data furnished by Defence for Children, Palestine, see appendix 1;

⁴⁵⁵ Convention on the Rights of the Child, *supra* note 11, art. 37 (c);

⁴⁵⁶ *Ibid.*;

interrogations involving minors.⁴⁵⁷ According to UNICEF, these rights are constantly violated. In fact, “the interrogation mixes intimidation, threats and physical violence, with the clear purpose of forcing the child to confess. Children are restrained during the interrogation, in some cases to the chair they are sitting on.”⁴⁵⁸ Such practices do not take into account the needs of minors.⁴⁵⁹ The methods of interrogation should be appropriate to the age of the interrogated individual. Moreover, these practices result in the violation of the right against self-incrimination, that for minors is specifically provided by art. 40 (2). In fact, as UNICEF stated:

“Children have been threatened with death, physical violence, solitary confinement and sexual assault, against themselves or a family member. Most children confess at the end of the interrogation. The interrogator prints out some forms and orders the child to sign them, though the child often lacks a proper understanding of their contents. In most cases the forms are in Hebrew, which the overwhelming majority of Palestinian children do not understand.”⁴⁶⁰

Moreover, another related problem that it is urgent to address is the practice of solitary confinement for children, that is prohibited under the above-mentioned norms of HR law. In the 2015 UNICEF report, it is stated that “the Military Prosecutor explained that, during the interrogation by the Israeli police, a child may be held in isolation for a few days, in order to prevent compromising the investigation”⁴⁶¹ The Israeli military authorities justified this practice stating that these rules are the same as under Israeli law.⁴⁶² The 2015 report, furthermore, stated that:

“The maximum period for a child to remain in is seven days. This may be prolonged, after a short interruption, for another maximum of seven days. According to the IPS, children are held in for no more than one or two days, and only in extreme circumstances up to four or five days.”⁴⁶³

This practice is not compliant with the Israeli obligations provided so far. Moreover, HR law prescribes the exclusion of all evidence obtained by torture, according to art. 15 of UNCAT, that provides: “any statement

⁴⁵⁷ The relevant norms are: Convention on the Rights of the Child, supra note 11, art 40(2)(b)(ii) and (iv); International Covenant on Civil and Political Rights, supra note 33, art 14(3)(b); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, supra note 44, art. 2; Other relevant decisions and opinions on the matters are: Convention on the Rights of the Child General Comment No. 10, para 58; HRC General Comment No. 20, para 11; HRC Concluding Observations, Israel (29 July 2010), ICCPR/C/ISR/ CO/3, para 22; UN Committee against Torture, General Comment No. 2, para 14, and Concluding Observations, Israel (14 May 2009), CAT/C/ISR/CO/4, paras 15, 16, 27 and 28.

⁴⁵⁸ UNICEF, supra note 1, p. 11;

⁴⁵⁹ Convention on the Rights of the Child, supra note 11, art. 37 (c);

⁴⁶⁰ *Ibid.*;

⁴⁶¹ UNICEF, supra note 3, p. 12;

⁴⁶² *Ibid.*;

⁴⁶³ *Ibid.*;

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.”⁴⁶⁴ The evidences collected during interrogations that involves the above-mentioned practices should therefore be excluded as evidences. In the 2015 UNICEF report, the matters related to “Confessional evidences” results to be “under discussion”⁴⁶⁵.

Another point to made is that incarceration of children should always be a measure of last resort and for the shortest possible time, as provided by art. 37(b) of the Convention on the Rights of the Child. In case of conviction of a minor, detention should, therefore, be a measure of last resort and, except in extreme circumstances. Therefore, release on bail should be encouraged. However, in the case of Palestinian minors from the West Bank, bail is often denied⁴⁶⁶. In the 2015 UNICEF report, Israeli military authorities explained the issue in this way:

“The Military Prosecutor noted that when a person is arrested, the Military Court decides on remand based on whether there is a sufficient suspicion, a specific reason for detention (security risk, flight risk, interference with ongoing investigation) and severity of the offense, as is also provided in Israeli law. In such decisions, the Judge takes into consideration the age and circumstance of the child.”

As mentioned, in practice, such consideration lead to a very little number of releases on bails. The Israeli authorities provided the data on the matter. In 2013, of the 654 cases referred to the Military Advocate General, 91 children were released on bail pending decision by the Military Prosecutor regarding an indictment (13% of the total). Of the 465 indicted children, 80 were released on bail pending trial (17% of the total). These statistics could not be considered in line with the obligations of detaining minors only as a measure of last resort, therefore Israel should consider reviewing this practice in light of its obligations under HRL.

Finally, we should recall the minors’ rights to be promptly brought before a judge and to challenge the legality of the detention⁴⁶⁷. According to HR law, the legality of continued detention should be reviewed by a judge every two weeks and every minor should enjoy the right to challenge the legality of its detention. According to Military Order 1711, issued on 28 November 2012 and in effect since April 2013, minors under 14-years-old should be brought before a judge within 24 hours of arrest and children between 14 and

⁴⁶⁴ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* note 44, art. 15;

⁴⁶⁵ UNICEF. *supra* note 3, p. 12;

⁴⁶⁶ UNICEF. *Supra* note 1, p. 12;

⁴⁶⁷ Convention on the Rights of the Child, *supra* note 11, art. 37(d) and International Covenant on Civil and Political Rights, *supra* note 33, art. 9 (3) and (4); Convention on the Rights of the Child General Comment No. 10, paras. 52 and 83; Human Rights Council General Comment No. 8, para 2.

18 years old within 48 hours.⁴⁶⁸ UNICEF highlighted the fact that military provisions recognized the vulnerability of minors in this case. However, the 2013 report underlined the fact that the treatment is still not in line with international standards, which recommend that the legality of the arrest should be reviewed by a judge within 24 hours for all persons under 18 years.⁴⁶⁹

As stated before, the obligations of Israel are numerous and detailed. As summarized in this section, the actions taken to fulfill these obligations, if existing, resulted insufficient. This has very severe consequences on the protection of Palestinian minors that appears to be left alone, unprotected by IL norms and subjected to a system that presents numerous problems. In light of this research, we should recall all the listed Israeli obligations towards Palestinian minor detainees and we should underline the lack of protection granted to this fragile category.

Section 3: The issue of accountability

Finally, this section is going to consider the issue of domestic and international accountability of the Israeli military personnel, specifically referring to the violations regarding juvenile detention. This is extremely relevant in light of the considerations made in the previous chapters. According to the “Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment”, adopted by the UN General Assembly, children should be granted with a functioning investigating mechanism against violations⁴⁷⁰. UNICEF, in fact stated that:

“Any complaint by a child, at any stage of his or her detention, regarding any form of violence and unlawful treatment, shall be promptly, diligently and independently investigated in accordance with international standards. All perpetrators shall be brought promptly to justice.”⁴⁷¹

The main institution that is responsible for domestic accountability is the Israeli High Court of Justice. As mentioned, the approach of the HCJ is often in line with the positions of the Israeli government.⁴⁷² The attitude of the HCJ towards the application of the provisions of IHL does not result in any constraint for the action of Israeli representatives in the West Bank. From the analysis made in the third chapter, it appeared that the Supreme Court of Israel, sitting as HCJ, relies on governmental political stances instead of applying

⁴⁶⁸ UNICEF. *supra* note 1, p. 9;

⁴⁶⁹ *Ibid.*;

⁴⁷⁰ Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Recommended by General Assembly resolution 55/89 (4 December 2000), principle 2;

⁴⁷¹ UNICEF. *supra* note 1, p. 18;

⁴⁷² See e. g. the refusal to address the applicability of the GCIV in HCJ. *Yesh Din et al., v. Commander of IDF Forces in the Judea and Samaria et al.*, (2010) cited in Kretzmer, David. *supra* note 181, p. 213;

the provisions of International Law, this is especially true for what concern the applicability of the GCIV. In the fourth chapters, we underlined the fact that, in the Court's judgments, HR law is never specifically referred to. Moreover, for what concerns the specific matter of detainees, and especially of minor detainees, the lack of domestic accountability is further represented by the inefficacy of the complaints mechanism in the Israeli military detention and court system.⁴⁷³ Specifically, there is no "rights-based, child-sensitive complaints mechanism"⁴⁷⁴ in the military system in force in the West Bank. The issue of accountability has been raised by UNICEF in the two reports regarding detention of Palestinian minors⁴⁷⁵, that recommended the Israeli military authorities to "take all necessary measures to establish effective and independent internal oversight mechanisms to monitor the behavior of all personnel in contact with children in Israeli military detention."⁴⁷⁶ The 2013 report specifically recommended that "the Israeli authorities should give immediate consideration to establishing an independent investigation into the reports of ill-treatment of children in the military detention system."⁴⁷⁷ This last request was made in accordance with the 2002 recommendations made by the UN Special Rapporteur on the situation of human rights on Palestinian territories occupied since 1967.⁴⁷⁸ In response to these requests, in the frame of the dialogue between Israel and UNICEF, the Military Prosecutor stated the existence of a the system of accountability based on complaints and that "existing complaints mechanisms have been insufficiently used."⁴⁷⁹ The international organization, Defence for Children Palestine, underlined the fact that the problem lays in the system itself. In fact, many Palestinian families refuse to file complaints because they are afraid of retaliation or simply because they do not believe the system is fair or impartial.⁴⁸⁰

For what concern the recommendation to establish an independent investigation regarding the ill-treatment of children in the military detention system⁴⁸¹, the Military Prosecutor "noted that an independent system of accountability and oversight exists (Military Advocate General, Ministry of Justice, and High Court of Justice), and there is no further requirement for an external oversight body."⁴⁸² The reality reported by Defence for Children, Palestine, opposes this statement. In the 2016 report, it is stated:

"Over the past five years, only three percent of criminal investigations launched by the Israeli military into soldier violence against Palestinians resulted in an indictment. [...] Between 2012 and 2015, DCIP filed 35

⁴⁷³ Defense for Children International. *supra* note 84, p. 70;

⁴⁷⁴ *Ibid.*;

⁴⁷⁵ See UNICEF. *supra* note 1; UNICEF. *supra* note 3;

⁴⁷⁶ UNICEF. *supra* note 1, p. 18; UNICEF. *supra* note 3, p. 16;

⁴⁷⁷ UNICEF. *supra* note 1, p. 18;

⁴⁷⁸ Report of the Special Rapporteur on the situation of human rights on Palestinian territories occupied since 1967 (2002);

⁴⁷⁹ UNICEF. *supra* note 3, p. 14;

⁴⁸⁰ Defense for Children International. *supra* note 84, p. 70;

⁴⁸¹ UNICEF. *supra* note 1, p. 18;

⁴⁸² UNICEF. *supra* note 3, p. 14;

complaints on behalf of Palestinian children subjected to ill-treatment and torture by Israeli forces during their arrest, interrogation, and detention. Not a single indictment has been issued against a perpetrator, and in many cases, it is unclear if an investigation has been initiated. Of the 35 complaints, 16 have been closed without indictments and the remaining 19 complaints are presumed to be pending.”⁴⁸³

The scholar Ben-Naftali also addressed the issue, stating that investigations and indictments in relation to acts perpetrated by military authorities against Palestinians are generally scarce.⁴⁸⁴ He, furthermore, stated that:

“Many investigations are hampered by a myriad of shortcomings: the time gap between reported incidents and the decision to open an investigation means that physical evidence has disappeared and that suspects and witnesses are harder to trace; the military police employs only a handful of interpreters; and many investigations are overseen by reserve commanders and are therefore frequently handed down from one officer to another.”⁴⁸⁵

Moreover:

“The judiciary plays some part in the culture of impunity: on top of the dearth of investigations and indictments, the sentences meted out by military tribunals do not reflect the severity of the crimes and rarely exceed four months’ imprisonment.”⁴⁸⁶

Therefore, it results clear that the lack of domestic accountability is an urgent matter in the military detention system, that is endangering the rights of Palestinian minor detainees. Moreover, the International mechanisms currently available to Palestinians have also failed to provide remedy to the ill-treatments of Palestinian minors, because of the lack of actual means of enforcement.⁴⁸⁷ As we noticed throughout this analysis, UN monitoring bodies can do little more than continuously underlining the violations and recalling for a concrete action to solve them. Therefore, an attempt to improve this situation is represented by Security Council Resolution 1612⁴⁸⁸, adopted in 2005, that established a UN monitoring and reporting mechanism (MRM) that is meant to collect grave violations against children during armed conflict. The purpose of this mechanism “is to provide for the systematic gathering of accurate, timely, objective and reliable

⁴⁸³ Defense for Children International. *supra* note 84, p. 70;

⁴⁸⁴ Ben-Naftali, Orna. *supra* note 308, p. 193;

⁴⁸⁵ Ben-Naftali, Orna. *supra* note 308, p. 194;

⁴⁸⁶ *Ibid.*;

⁴⁸⁷ Defense for Children International. *supra* note 84, p. 70;

⁴⁸⁸ UN Security Council, Resolution 1612, Adopted by the Security Council on 26 July 2005, U.N. Doc. S/RES/1612 (2005) available at <http://unscr.com/en/resolutions/doc/1612>;

information on grave violations committed against children in situations of armed conflict.”⁴⁸⁹ For what concern the Palestinian Territories, this mechanism provided a great number of the data that has been analyzed in the 2013 and 2015 UNICEF reports. The results achieved are the ones that we analyzed in this research and are mostly based on the willingness of the Israeli authorities to collaborate with UNICEF on the matter.

Finally, we should mention the fact that on January 1, 2015, the Government of Palestine accepted the jurisdiction of the International Criminal Court (ICC) involving crimes committed in the Palestinian Territories.⁴⁹⁰ The Preliminary Examination it is still ongoing⁴⁹¹ and it is currently evaluating issues of jurisdiction and admissibility⁴⁹² to determine if there are grounds to open war crimes investigations related to alleged crimes committed in the Palestinian Territories. The more relevant development is represented by the decision of July 13, 2018 of the Pre-Trial Chamber of the ICC, that ordered the establishment of a system of public information and outreach activities for the benefit of affected communities of the situation in Palestine⁴⁹³. The possible crimes committed by Israeli authorities that are likely to fall within the jurisdiction of the International Criminal Court are related to some of the issues that we analyzed in this research. For example: the transfer of Palestinian detainees from the West Bank to prisons that are located inside Israel, the violations of the rights regarding fair trial and, finally, the widespread and systematic ill-treatment of Palestinian prisoners. The Palestinian accession to the ICC represents an important step and it gives hope for future accountability and reparations. However, today, the violations remain un-addressed. In this regard, it is important to underline the words of the UN Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied. In a 2015 report⁴⁹⁴, the UN representative stated that the ill-treatment of Palestinian children is a serious concern, and that “impunity for these violations is likely

⁴⁸⁹ See Office of the Special Representative of the Secretary-General on Children and Armed Conflict (OSRSG-CAAC), UNICEF & UN Department of Peacekeeping Operations, Guidelines: Monitoring and Reporting Mechanism on Grave Violations against Children in Situations of Armed Conflict (2014) available at [http://www.mrmtools.org/mrm/files/MRM_Guidelines_-_5_June_2014\(1\).pdf](http://www.mrmtools.org/mrm/files/MRM_Guidelines_-_5_June_2014(1).pdf);

⁴⁹⁰ State of Palestine. Declaration Accepting the Jurisdiction of the International Criminal Court (2014), available at http://www.icc-cpi.int/iccdocs/PIDS/press/Palestine_A_12-3.pdf; and International Criminal Court. The State of Palestine accedes to the Rome Statute, (2015) available at http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1082_2.aspx;

⁴⁹¹ see <https://www.icc-cpi.int/palestine>;

⁴⁹² According to art. 52 (1) of the Rome Statute;

⁴⁹³ Decision on Information and Outreach for the Victims of the Situation, ICC-01/18-2 (13 July 2018) para. 7, available at <https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/18-2>;

⁴⁹⁴ Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied since 1967, U.N. Doc. A/HRC/28/78 (2015), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G15/008/27/PDF/G1500827.pdf>;

to perpetuate the ill-treatment of children in the future.”⁴⁹⁵ In light of these words, this analysis wants to recall that situation highlighted in this research, often underestimated and subject to political considerations, needs to be urgently addressed.

⁴⁹⁵ *ivi*, para. 63;

Chapter 6: Conclusions

This research investigated the main issues concerning the protection of Palestinian minor detainees in the complex legal context of the West Bank. In light of this analysis, the Palestinian minors result to be scarcely protected by the provisions of International Humanitarian Law and Human Rights Law. The debate on the applicability of IHL and HR law, that we analyzed, contributes to undermine the rights of this fragile category. The opposite sides of this debate do not find a common ground for confrontation and the dialogue on the matter had scarce results. The UNICEF reports underlined the fact that the situation did not improved for what concerns numerous violations, despite the dialogue between the UN's Found and the Israeli authorities. There are hopes for future improvements, that mostly relies on the willingness of Israeli authorities to accept the full applicability of the mentioned provisions and to comply with them. An important actor in this process can be the Supreme Court of Israel that, as we mentioned, started to refer to Human Rights, especially in the judgments of Justice Barak. This research recalls the urgency of the situation and the need of action in the field.

The results of these continued violations must be further highlighted, in order to frame this situation in the reality of a Palestinian minors. Being a child in the West Bank means that you can be charged for "security offences" that have been designed in an emergency contest, that was meant to be temporary. Being a child in the West Bank means that you can be charged for "stone throwing" and be detained for years. It means that you can be arrested during the night, without notification of the reason of your arrest. You can be separated from your family, unaware of your destiny. You can be interrogated restrained in your hands and legs, you can be held in solitary confinement for days. You can be victim of diffuse violence and forced to sign a confession in a language that you do not understand. When you are incarcerated, you can try to continue your studies, but with several difficulties and little results. It means that, since more than 50 years. The consequences of these violations on the life of a children are numerous. This research does not deal with the psychological effects of military detention on children, but it deals with their dignity and their rights. The constant violation of this dignity is likely to undermine the possibility of coexistence of these two nations, the Palestinian one and the Israeli one. The constant violation of this dignity is prohibited under an international legal regime that has been designed to protect human beings and to assure that the errors of the past will not be made again. Therefore, in light of the considerations made in this research, the State of Israel should mediate between the need of internal security and the protection of Human Rights granted in the Palestinian Territories.

Without doubts, every topic related to the ongoing Palestinian-Israeli conflict tends to be politicized. This study aimed to analyze the reasons behind disagreements that are based on the different narratives in the matter. Therefore, with a mainly legal approach, the research attempted to present the arguments of both sides in a balanced manner. However, it is also true that this study started from rights' violations that are

enacted by the State of Israel at the expense of Palestinian minors. In this regard, it is important to further underline that not being biased, it does not entail to ignore facts and to not acknowledge violations, especially when proven by credible researches supported by International Organizations. In this case, credible reports have emerged of ill-treatment within the Israeli military system. Reports on the matter have come from international, Palestinian and Israeli lawyers, from human rights organizations, from UN experts and bodies such as the Committee on the Rights of the Child, the Committee against Torture and the Human Rights Committee⁴⁹⁶. This reality should not be ignored.

In the complexity of the contemporary world, and especially in the complexity of the West Bank reality, that we tried to underline, IL is a very important regime that must be respected. We recall the idea that the co-application of IHL and HR law is the more effective approach for the protection of human dignity of the inhabitants of an area that is characterized by its instability and its complexity. This is particularly true if we consider the Palestinian-Israeli reality, as delineated in this analysis: the length of the occupation in the West Bank, the parallel legal systems, the jurisdiction that is both Israeli and Palestinian, and sometimes mixed. In this context, there is not a clear division between wartime and peace time, therefore a co-application of IHL and HR law would seem the most appropriate approach. Moreover, we should recall the fact that not all instruments of IHL are considered applicable in the West Bank by Israeli authorities and that makes the protection of Palestinian human dignity very fragile. Furthermore, we should highlight the importance of the length of the occupation in the West Bank. War and peace are difficult to separate in the contest of the Palestinian-Israeli conflict and that depends from the unprecedented length of the Israeli presence in the territory.

In light of all these considerations, we finally recall the importance to address this situation. Palestinian minors are entitled to a specific protection that is not granted in the Israeli military detention system. Recalling the terms used in the preamble of the Convention on the Rights of the Child, we should bear in mind that “the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding”. Moreover, we want to further recall that “the child should be fully prepared to live an individual life in society and brought up in the spirit of the ideals proclaimed in the Charter of the United Nations, and in particular in the spirit of peace, dignity, tolerance, freedom, equality and solidarity”. Every child deserves peace, dignity, tolerance, freedom, equality and solidarity, no matter where they live. Every child will grow to live an individual life in society. The future of Palestinian minors depends on the respect of their dignity. The future of the area depends on these children.

⁴⁹⁶ UNICEF. *supra* note 1;

Appendix 1: Ill-Treatment and Torture in 2017

	West Bank*	%
Forms of ill-treatment	137	
Hand tied and leg tied	130	94,9%
Blindfolded	120	87,6%
Physical violence	102	74,5%
Verbal abuse, humiliation, and intimidation	85	62,0%
Strip-searched	109	79,6%
Denial of adequate food and water	50	36,5%
Threats and inducement	44	32,1%
Denial of access to toilet	35	25,5%
Position abuse	27	19,7%
Transfer on vehicle's floor	63	46,0%
Shown or signed paper in Hebrew	75	54,7%
Solitary confinement for more than two days	26	19,0%
Confinement with adults	5	3,6%
Threats of sexual assault	0	0,0%
Electric shock	0	0,0%
Night arrest	69	50,4%
Not properly informed of rights	91	66,4%
Attempted recruitment	5	3,6%
Not informed of reason for arrest	114	83,2%
No access to counsel prior to interrogation	90	65,7%
No lawyer or family member present during interrogation	132	96,4%

Source: Defence for Children, Palestine

Figures as at 31 December 2017

*Between 1 Jan. 2017 and 31 Dec. 2017, DCIP documented the cases of 137 of arrested minors from the West Bank.

Appendix 2: Ill-Treatment and Torture in 2018

	West bank**	%
Forms of ill-treatment	120	
Hand ties and leg ties	119	99,17%
Blindfolded	113	94,17%
Physical Violence	92	76,67%
Verbal Abuse Humiliations and Intimidation	67	55,83%
Strip searched	112	93,33%
Denial of adequate food and water	53	44,17%
Threats and Inducement	51	42,50%
Denial of access the Toilet	41	34,17%
Position Abuse	23	19,17%
Transfer on Vehicle Floor	68	56,67%
Shown or signed paper in Hebrew	81	67,50%
Solitary Confinement for more than two days	22	18,33%
Confinements with Adults	8	6,67%
Threats of sexual Assault	0	0,00%
Electric Shock	0	0,00%
Night Arrest	74	61,67%
Not informed of rights	80	66,67%
Attempt to recruitment	4	3,33%
Not informed of the reason for arrest	109	90,83%
No access to counsel prior to interrogation	80	66,67%
No family member present during interrogation	115	95,83%

Source: Defence for Children, Palestine

Figures as at 31 December 2018

**Between 1 Jan. 2018 and 31 Dec. 2018, DCIP documented the cases of 120 of arrested minors from the West Bank.

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- Vienna Convention on the Law of Treaties (Vienna, 23 May 1969);

Other documents

- Defense for Children International. *No way to treat a child. Palestinian children in the Israeli military detention system*, Ramallah, (April 2016);
- ICRC. *Commentary to IV Geneva Convention*, ed. by Jean Pictet (Geneva, 1960);
- ICRC. “Middle East activities of the ICRC”, in *International Review of the Red Cross*, Vol. 10 (1970);
- Standard Minimum Rules for the Administration of Juvenile Justice, adopted by General Assembly resolution 40/33 (29 November 1985);
- Standard Minimum Rules for the Treatment of Prisoners, adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, (Geneva, 1955).

Abstract

This research focuses on the protection of Palestinian minors under International Law (IL), in the specific context of the West Bank, an area where a full application of International Humanitarian Law (IHL) and Human Rights Law (HRL) is contested.

The main aim of this analysis is to address and investigate an urgent situation. In fact, since 2007, the UNICEF's office in the Palestinian Territories has been gathering data on serious violations against minors arrested and incarcerated in the Israeli military detention system. As a result of this research, the UN Found published a 2013 report, named "Children in Israeli military detention: observations and recommendations"⁴⁹⁷. Since then, UNICEF started a dialogue with Israeli authorities on the issue of the protection of Palestinian minors and, at the same time, it regularly reported the data gathered to the United Nations Security Council Working Group on Children and Armed Conflict, via the Office of the Special Representative of the Secretary-General for Children and Armed Conflict.⁴⁹⁸ A second UNICEF report, published in 2015, listed the important progresses that have been achieved by the Israeli government, especially in terms of military legislation and standard procedures. However, UNICEF stated: "The data demonstrates the need for further actions to improve the protection of children in military detention, as reports of alleged ill-treatment of children during arrest, transfer, interrogation and detention have not significantly decreased in 2013 and 2014."⁴⁹⁹

This situation is the consequence of the unique context of the Palestinian Territories. Moreover, the reason why it is difficult to address these rights' violations is to be found in the legal status of these territories. In a grey area between International Humanitarian Law and Human Rights Law, the inhabitants of the Palestinian territories, minors included, are often exposed to rights' violations that are difficult to address. Undoubtedly, the issue of the lack of an enforcing mechanism in International Law is extremely relevant, but it has been already considered by various scholars⁵⁰⁰ and it is not exhaustive with regard to the very specific context of the Palestinian-Israeli conflict. Therefore, this analysis is not going to discuss the issue

⁴⁹⁷ UNICEF. *Children in Israeli military detention: Observations and Recommendations*, (February 2013) available at https://www.unicef.org/oPt/UNICEF_oPt_Children_in_Israeli_Military_Detention_Observations_and_Recommendations_-_6_March_2013.pdf;

⁴⁹⁸ *ivi*, p. 2;

⁴⁹⁹ UNICEF. *Children in Israeli Military Detention: Observations and Recommendations*, Bulletin No. 2, (February 2015), p. 2, available at https://www.unicef.org/oPt/Children_in_Israeli_Military_Detention_-_Observations_and_Recommendations_-_Bulletin_No._2_-_February_2015.pdf;

⁵⁰⁰ For more information on the matter see Beyerlin, Ulrich. "Sanctions," in *United Nations: Law, Policies and Practice* (Rev. ed. 1995); Blokker, Muller. *Towards More Effective Supervision by International Organizations* (1994); Doxey, Margaret P. *International Sanctions in Contemporary Perspective* (1987); Kausch, Langenfeld. "Embargo," in *Encyc. of Public International Law* (1995), p. 58-67;

further, but it is trying to understand the weight of the debate on the legal status of the Palestinian Territories on the protection of its fragile inhabitants, Palestinian minors, when they came in contact with the Israeli military detention system.

The reasons behind the choice of this topic can be summarized as it follows. Firstly, an analysis of the detention system is going to tackle what the author believes is the core of the Palestinian-Israeli conflict: the long-term military administration of the territory. A focus on military detention is going to highlight the main problems regarding the Israeli military control over the territory, especially for what concerns minors. Moreover, with an analysis of the military administration, we will investigate the problems regarding the application of the provisions of IHL, that concern the military control of an area conquered by war. Secondly, an analysis of rights' violations in the "juvenile" detention system is going to highlight the lack of protection at its extreme: when it affects a vulnerable and specially protected category, like minors. In this case, instruments of HR law are going to be relevant. Thirdly, but not less importantly, one of the main reasons behind the choice of this topic is represented by the urgency to investigate and address the complex situation that minors face in the West Bank.

Therefore, the research question can be summarized as it follows: what are the obligations of Israel, under IL, regarding the protection of minors from the West Bank? To answer this question, the methodological approach of this research is going to be mainly legal, but it is also going to consider some political and historical aspects. The analysis is based on books and papers written by eminent Israeli and international scholars in International Law.⁵⁰¹ These works have been useful to frame the reality as described by various UN documents, especially by the two reports provided by UNICEF⁵⁰² on Palestinian children in Israeli military detention. It is also important to mention that more recent data on the situation related to the detention of Palestinian minors (for the years 2017 and 2018) have been kindly furnished by an International Organization working on the field, that is also a UN partner and that participated in the collection of information for the UNICEF's reports. The name of this institution is Defence for Children International, Palestine section, and the data furnished by the Legal Unit of the organization are available in the appendix 1 and 2 of this research.

Starting from the situation as described in these documents, this analysis considers the main instruments of IHL and HR law, in order to investigate their applicability and the possible violations. For what concern IHL, the main sources are Customary international law; the 1907 Hague Convention (IV) respecting the

⁵⁰¹ The main ones are going to be Benvenisti, Eyal. *The International Law of Occupation*, (Oxford: Oxford University Press, 2012); Dinstein, Yoram. *The International Law of Belligerent Occupation*, (Cambridge: Cambridge University Press, 2009); Kretzmer, David. "The law of belligerent occupation in the Supreme Court of Israel", in *International Review of the Red Cross*, Vo. 94, N. 885, (Spring 2012); Ben-Naftali, Orna. *International Humanitarian Law and International Human Rights Law: Pas de Deux*, (Oxford, 2011); Ben-Naftali, Shany. "Living in Denial: The Application of Human Rights in the Occupied Territories", in *Israel Law Review*, n. 17, (2003);

⁵⁰² UNICEF. *supra* note 1 and 3;

Laws and Customs of War on Land and its annex: Hague Regulations concerning the Laws and Customs of War on Land⁵⁰³ (hereafter Hague Convention and Hague Regulations); 1949 Convention (IV) relative to the Protection of Civilian Persons in Time of War⁵⁰⁴ (hereafter GCIV) and the Additional Protocol Relating to the Protection of Victims of International Armed Conflicts⁵⁰⁵ (hereafter Protocol I) to the GCIV. For what concern, instead, HRL, the analysis investigates if the practices used in the Israeli military detention system are in conformity with the 1989 Convention on the Rights of the Child⁵⁰⁶ (hereafter CRC), ratified by Israel in August 1991, and the 1984 UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment⁵⁰⁷ (hereafter UNCAT), ratified by Israel also in 1991. The International Covenant on Civil and Political Rights⁵⁰⁸ (hereafter ICCPR) was also an important tool. Moreover, other instruments of soft law are relevant for the research. These instruments are the UN Standard Minimum Rules for the Treatment of Prisoners⁵⁰⁹, also known as Mandela Rules and the UN Standard Minimum Rules for the Administration of Juvenile Justice⁵¹⁰, also known as Beijing Rules. Before moving to the outline of the research, it is important to specify the terms that we used in this analysis. For minors and child, we referred to all persons below the age of 18, in line with the terminology used in the Convention on the Rights of the Child. In fact, the CRC, at art. 1, defines a “child” as a person “below the age of 18, unless the laws of a particular country set the legal age for adulthood earlier”⁵¹¹. On 27

⁵⁰³ Hague Convention (IV) respecting the Laws and Customs of War on Land and its annex: Hague Regulations concerning the Laws and Customs of War on Land (The Hague, 18 October 1907) available at <https://ihl-databases.icrc.org/ihl/INTRO/195>;

⁵⁰⁴ Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (Geneva, 12 August 1949) available at <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=AE2D398352C5B028C12563CD002D6B5C&action=openDocument>;

⁵⁰⁵ Additional Protocol Relating to the Protection of Victims of International Armed Conflicts (Geneva, 12 August 1949) available at https://www.icrc.org/en/doc/assets/files/other/icrc_002_0321.pdf;

⁵⁰⁶ Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 (20 November 1989), available at <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>;

⁵⁰⁷ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984, available at <https://www.ohchr.org/en/professionalinterest/pages/cat.aspx>;

⁵⁰⁸ International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, available at <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>;

⁵⁰⁹ Standard Minimum Rules for the Treatment of Prisoners, Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, available at https://www.unodc.org/pdf/criminal_justice/UN_Standard_Minimum_Rules_for_the_Treatment_of_Prisoners.pdf;

⁵¹⁰ Standard Minimum Rules for the Administration of Juvenile Justice, adopted by General Assembly resolution 40/33 (29 November 1985), available at <https://www.ohchr.org/Documents/ProfessionalInterest/beijingrules.pdf>;

⁵¹¹ Convention on the Rights of the Child, supra note 505;

September 2011, the Israeli military commander in the West Bank issued Military Order 1676, that raised the age of majority in the military courts from 16 to 18 years.⁵¹² Therefore, Palestinian are considered to be minor, under military law, until they turn 18. The term child can be used as a synonym.

Moreover, for Palestinian Territories, this research refers to the West Bank, Gaza Strip and East Jerusalem, in accordance with the terminology used by the International Committee of the Red Cross⁵¹³. The International Community tends to refer to these territories as “Palestinian Occupied Territories”. Even if the occupation has been recognized and strongly criticized by the UN for decades, Israel still rejects being defined as an Occupying Power. In order to present the Israeli position on the matter, we abstain, when it is possible, to define the Palestinian Territories as occupied and we leave the issue for the conclusions. The West Bank, the Gaza Strip and East Jerusalem are the territories that Israel conquered from Jordan and Egypt, after the 1967 Arab-Israeli war, also called the Six-Day war. During that war, Israel also conquered the Golan Heights from Syria and the Sinai Peninsula from Egypt. However, as we are going to highlight in this analysis, the Israeli-Palestinian conflict is characterized by its length and complexity. Each and every one of these territories has a different history, different sovereignties, different inhabitants and therefore different destinies. In order to simplify this complexity, this research focuses only on the West Bank. The reason is that the West Bank is the widest and most representative Palestinian reality, if compared with East Jerusalem. Moreover, if we compare it with the Gaza Strip, it is extremely more accessible in terms of data and information.

From a first analysis, the protection of minors is an unchallengeable obligation. However, some scholars and some Israeli authorities tried to refuse Israel’s responsibility in the matter. This work aimed to analyze the Israeli position and to challenge it, in order to reaffirm the inalienability of the rights of minors that live in any region of the world, even in the complex legal contest of the Palestinian Territories. Therefore, the analysis is going to start with an overview of the Israeli military detention system and is going to move to the main problems relating to the application of IHL and HRL in this specific context. Finally, the research is going to recall the most important obligations of Israel under IL, in light of the applicable norms.

The first chapter introduces the research, the methodology and the terms, as we have done in the previous pages of this summary. The second chapter illustrates the evolution of the Israeli detention system since 1968 until today, with special regards to minors.

The first section of this chapter deals with the main problems concerning the availability of military orders, useful to understand the evolution of the Israeli military administration. In fact, Israeli military provisions were not always officially published.⁵¹⁴ In order to overcome this problem, this analysis refers to official

⁵¹² UNICEF. *supra* note 1, p. 8;

⁵¹³ ICRC. *The occupied Palestinian territories: Dignity Denied*, (Geneva, December 2007);

⁵¹⁴ Shehadeh, Raja. *The West Bank and the Rule of Law*, ed. International Commission of Jurists, (1980), p. 103;

documents that are directly quoting the military orders. The main reference for the first section of this chapter is the 1986 UN document “The legal status of the West Bank and Gaza.”⁵¹⁵ Another, more recent, source is the report of the United Nations International meeting on Palestine, addressing the plight of Palestinian political prisoners in Israeli prisons, held in Vienna, on 7 and 8 March 2011.⁵¹⁶ Moreover, this analysis refers to military orders cited in the two UNICEF reports on “Children in Israeli military detention: observations and recommendations” of 2013⁵¹⁷ and 2015⁵¹⁸. Finally, the UN documents will be integrated with the publications of the renowned Israeli attorney and legal academic, Eyal Benvenisti.⁵¹⁹ These sources are useful to highlight the process of Israeli militarization of the judiciary that was enacted mostly through military provisions, but also through the modification of Jordanian laws, previously in force in the area. The second section, in fact, deals with the parallel justice systems in force in the West Bank today, in order to underline the complex stratification of the legal regime under exam. This regime is based on Israeli Civil Law (only for Israeli citizens), on Israeli Military Law and on the local law in force in the Territories before the occupation. Local law, in this case, refers to Jordanian Law. However, for the Israeli authorities, local law includes also the Emergency Defence Regulations of 1945. Firstly, the research focuses on the main provisions that established the Israeli control over the West Bank. Secondly, it investigates the changes in the Jordanian law. Finally, it considers the British Defense Emergency Regulations of 1945, enacted during the British mandate and reactivated by Israel after 1967.⁵²⁰ Moreover, this section considers the compliance of all these changes enacted in the West Bank with the relative norms of IHL, assuming its full applicability. The following section analyses the main military orders regarding detention and especially detention of minors. In the West Bank, around 1600 military orders were issued between 1967 and 2013⁵²¹, 20 of them regarded detention. The most relevant for the first part of the analysis is Military Order 378, which served as a criminal code in force in the West Bank until 2010. Hence, the section focuses on child detention under military laws, analyzing Military Order 132 and Military Order 1644.⁵²² The first order was about adjudication of “Juvenile Delinquents” and it set the age of majority for Palestinians at 16 and the minimal

⁵¹⁵ UN. *The legal status of the West Bank and Gaza*, (January 1982), available at

<https://unispal.un.org/DPA/DPR/unispal.nsf/0/9614F8FC82DCA5DF852575D80069E0C0>;

⁵¹⁶ UN. *International meeting on the question of Palestine, The urgency of addressing the plight of Palestinian political prisoners in Israeli prisons and detention facilities*, (March 2011), available at

<http://www.un.org/depts/dpa/qpal/docs/2011%20Vienna/final%20printed%20p1%20iyad%20misk%20e.pdf>;

⁵¹⁷ UNICEF. *supra* note 1;

⁵¹⁸ UNICEF. *supra* note 3;

⁵¹⁹ Benvenisti, Eyal. *The International Law of Occupation* (Oxford: Oxford University Press, 2012); Benvenisti, Eyal. “The Missing Argument: The Article That Changed the Course of History?”, in *Israel Law Review*, Volume 50, Issue 3, (November 2017);

⁵²⁰ Shehadeh, Raja. *The West Bank and the Rule of Law*, ed. International Commission of Jurists, (1980), p. 24;

⁵²¹ UNICEF. *supra* note 1, p. 6;

⁵²² UNICEF, *supra* note 1, p. 6;

age for criminal liability at 12. The second provision was issued on 29 July 2009 and it established a specific Military Court for Palestinian minors, that became effective on 1 October 2009.⁵²³ It was the first and only juvenile military court in the world.⁵²⁴ However, these two orders were both incorporated in Military Order 1651, that came into effect on 2 May 2010 and it is still in force today.⁵²⁵ Therefore, the analysis deals with Military Order 1651 and it underlines the main issues relating to its conformity with the CRC, the CAT and the ICCPR. Therefore, in this part of the analysis, there is a summary of the issues underlined by the UNICEF reports regarding the main violations attributed to Israel in the military legislation that concerned minors. It is important to mention that UNICEF also described some improvements in the Israeli military detention system for minors in a second report, issued on 2015. The main one concerns Military Order 1676, issued the 27 September 2011, that raised the age of majority in the military courts from 16 to 18 years, in compliance with article 1 of the Convention on the Rights of the Child. However, as stated by UNICEF and as proven also by some more data collected during this research, in practice, Palestinian children older than 16 are still sentenced according to the same provisions of adults⁵²⁶.

Finally, this chapter analyses the current composition of military courts and the process from arrest until detention of Palestinian minors from the West Bank. In the legal appendix of the book “*Courting Conflict: The Israeli Military Court System in the West Bank and Gaza*”, Lisa Hajjar describes the structure of the military courts. With the help of this source, this section underlines the main features of this system, with the aim of understanding the military structure and describing the main procedures that apply during and after arrest. The most problematic issues that the analysis considers are: the practice of night arrests and the arrest notification, the transfer and interrogation practices, the methods of restraint used on minors, the problems related to self-incrimination and the use of evidences, the place of interrogation and detention, the violation of the right to be brought before a judge and to challenge the legality of the detention, the issue of denied bails and, finally, the violations of the right to access education.

If this part of the analysis describes the context of the research, the following two chapters are going lay the basis of the debate on the applicability of the instruments of IL. In fact, all the alleged violations underlined in the previous chapter are contested by Israeli authorities, that held the inapplicability of all norms of IL in the West Bank. Therefore, the third chapter analyzes the different views regarding the applicability of IHL in the area. When acting in the Palestinian Territories, is Israel bound by all norms of IHL?

Firstly, the third chapter investigates the relations between Occupation and International Humanitarian Law, in order to underline the importance of defining the legal status of the Palestinian Territories and

⁵²³ UN. *International meeting on the question of Palestine*, supra note 515;

⁵²⁴ UNICEF. supra note 1, p. 6;

⁵²⁵ UNICEF. supra note 1, p. 6;

⁵²⁶ UNICEF. supra note 1, p. 8;

specifically, in the case of our analysis, of the West Bank. The main references for this part are “The International Law of Belligerent Occupation”, written by Y. Dinstein, and “International Law of Occupation”, a book by E. Benvenisti.

Secondly, the analysis will consider the position of Israeli authorities on the matter. Two main resources were extremely useful. The first is an article, “The Missing Reversioner: Reflections on the Status of Judea and Samaria”⁵²⁷, written by the Israeli scholar and ambassador to the UN, Yehuda Blum. With this article, Blum was the first scholar that rejected the definition of the West Bank as an occupied territory. The second source is a paper, “The Observance of International Law in the Administered Territories”⁵²⁸, written by the former Israeli Military Advocate General, Colonel Meir Shamgar. Both documents concluded that Jordan was not a “legitimate sovereign” in the West Bank and that undermined the very existence of the reversionary rights of the ousted sovereign in the area. Here is the main point of the analysis: according to Blum, the Fourth Geneva Convention (hereafter GCIV) is protecting not the right of the people in occupied territories, but the right of the ousted governor of the area, according to an interpretation of art. 2(2) of the GCIV. Consequently, Blum stated that “those rules of belligerent occupation directed to safeguarding that sovereign's reversionary rights have no application”. Therefore, the applicability of was accepted *de facto*, but not *de jure*. In fact, this stance would result in possible derogations from the obligations normally imposed to an occupying power. According to this stance, Israel should only respect a general “safeguard” of humanitarian rights of the population living in the West Bank. The fact that the “humanitarian rights of the population” are not specifically identified is leaving a relevant degree of freedom to the Israeli authorities when operating in the West Bank.

Moreover, the following section of the third chapter illustrates the jurisprudence of the Supreme Court of Israel, sitting as the High Court of Justice (HCJ). An analysis of the attitude of the High Court of Justice shows a very strong interconnection between the executive and the judiciary on the application of norms of International Law. It appears that the Supreme Court of Israel, sitting as HCJ, relies on governmental political stances instead of applying the provisions of International Law. An example is the Alpehi Menashe Case⁵²⁹. The ruling on this case referred to the ICJ’s Advisory Opinion⁵³⁰ that held the applicability of the GCIV in the Palestinian Territories and it stated that the applicability was not depended on the government’s undertaking to apply the humanitarian provisions of IHL⁵³¹. Despite the content of the ICJ Advisory

⁵²⁷ Blum, Yehuda Z. “The Missing Reversioner: Reflections on the Status of Judea and Samaria”, in *Israel Law Review*, Volume 3, Issue 2, (April 1968);

⁵²⁸ Shamgar, Meir. “The Observance of International Law in the Administered Territories”, in *Israel Yearbook on Human Rights*, (1971);

⁵²⁹ HCJ. *Zaharan Yunis Muhammad Mara'abe et al., v. The Prime Minister et al.*, HCJ 7957/04 (2005) p. 477;

⁵³⁰ ICJ. *Advisory Opinion on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, I.C.J. Reports (2004) available at <https://www.icj-cij.org/files/case-related/131/131-20040709-ADV-01-00-EN.pdf>;

⁵³¹ *Ibid.*;

Opinion, the Court refused to review its position. In the *Alpehi Menashe Case*, in fact, the HJC confirmed that “as it was accepted by the government that the humanitarian norms of the Convention were applicable, it saw no need to rule on this question.”⁵³² Therefore, the HCJ relied on the position of the Israeli Government and it never ruled on the applicability of the GCIV in the Palestinian Territories nor on the fact that its provisions can be considered part of customary law.

Finally, the last section of the chapter considers the position of International Committee of the Red Cross and the opinions of the UN and of the ICJ on the matter. The UN immediately identified the Israeli presence in the West Bank as a belligerent occupation, with resolution 242 of 22 November 1967, adopted by the Security Council.⁵³³ This section analyses all the relevant UN documents regarding the issue. The conclusion is that, according to the UN and the ICRC, the main aim of the Fourth Geneva Convention is the protection of the inhabitants of war-zones. These institutions insisted on “the unique and universal character of international humanitarian law (IHL)”, therefore “respecting and ensuring respect for its rules constitutes a legal obligation for *all* parties to conflicts, without exception.”⁵³⁴ The ICRC specifically referred to Israel on the matter⁵³⁵, recalling its responsibilities under IHL. This part of the analysis focuses on two main moments that challenged the Israeli position on the matter. The first is represented by the Conferences of the High Contracting Parties to the Fourth Geneva Convention meeting in Geneva and the second is the Advisory Opinion of the International Court of Justice on the “Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory”, rendered on 9 July 2004. The research analyses these documents and concludes that these opinions overcome the Israeli stance, therefore recognizing the Occupation of the West Bank and the full applicability of IHL.

Stated the full applicability of IHL, the fourth chapter examines the very complex issue of the application of HRL in the territory. Are Human Rights applicable in the West Bank? The State of Israel refuses to be held responsible for the implementation of the Human Rights Conventions outside the territory of the state. On the other hand, international institutions, like the ICJ, insist that Israel must be considered accountable for HRL implementation. In this part, as well, the jurisprudence of the Supreme Court of Israel is going to be extremely relevant. There are three main arguments behind the Israeli claim of irresponsibility with regard to the implementation of HR’s treaties in the West Bank.⁵³⁶ The first is the “the mutual exclusivity

⁵³² Kretzmer, David. “The law of belligerent occupation in the Supreme Court of Israel”, in *International Review of the Red Cross*, Vo. 94 (Spring 2012) p. 210;

⁵³³ UN Security Council. *Resolution 242 of 22 November 1967*, S/RES/242 (1967);

⁵³⁴ ICRC, *Fifty years of occupation: Where do we go from here?* (2 June 2017) available at <https://www.icrc.org/en/document/fifty-years-occupation-where-do-we-go-here>;

⁵³⁵ *Ibid.*;

⁵³⁶ Ben-Naftali, Shany. “Living in Denial: The Application of Human Rights in the Occupied Territories”, in *Israel Law Review*, n. 17, (2003), p. 26;

argument”, that claims that IHR law and IHL regime cannot be simultaneously applicable. The second is “the treaty interpretation argument”, according to which the jurisdictional clauses of the human rights treaties to which Israel is a party should be construed as limited to the sovereign territory of the State parties.⁵³⁷ The third is the “effective control argument” that is based on the fact that the Israeli-Palestinian Interim Agreement transferred the jurisdiction in civil spheres (including economic, social and cultural) to the Palestinian Council.⁵³⁸ Therefore, Israel arguably lacks an effective control over the Palestinian Territories and the implementation of HR law it is not its responsibility.

The first section of this chapter introduces the debate and challenges the “effective control argument”. With an historical overview of the Oslo agreements, the analysis concludes that, despite the Palestinian Authority has gained some control over Palestinians and over a small percentage of the Palestinian territories, the inhabitants of the West Bank still remain under Israeli military control and the majority of the territory is under Israeli jurisdiction. These considerations undermine the “effective control argument” that Israel invoke to support its irresponsibility regarding human rights implementation in the West Bank.

Therefore, the second section of the fourth chapter challenges the “mutual exclusivity argument”, that claims that IHR law and IHL regime cannot be simultaneously applicable. The work of the scholars Ben-Naftali and Shany are extremely relevant in this part. Moreover, Ben-Naftali deeply analyzed the idea that IHL and IHRL are complementary, rather than alternative regimes, in his work “International Humanitarian Law and Human Right Law: Pas de Deux”⁵³⁹. In doing so, he specifically referred to the Israeli-Palestinian conflict,⁵⁴⁰ as an important example. The scholar defined the idea of combining IHL and HR law as a “paradigmatic shift in the international legal discourse”, that replaced “the former convention which maintained that the two are mutually exclusive.”⁵⁴¹ One of the main points of the new stance is that war no longer concerns two or more states fighting each other, and this is the case of the Palestinian-Israeli conflict. This changing nature of war brought humanitarian law and human rights law closer. Furthermore, the research highlights the importance of the length of the occupation in the West Bank. War and peace are difficult to separate in the contest of the Palestinian-Israeli conflict and that depends from the unprecedented length of the Israeli presence in the territory. Moreover, the analysis focuses on the fact that the idea of co-application of HR law was suggested not only by scholars, but also by International Conferences and institutions. We mention the 1968 Conference of Tehran and the 1977 Protocols Additional to the Geneva Conventions. Moreover, the research considers art. 5 of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts, that states: “Nothing in the present

⁵³⁷ *Ibid.*;

⁵³⁸ *Ibid.*;

⁵³⁹ Ben-Naftali, Orna. *International Humanitarian Law and International Human Rights Law: Pas de Deux*, (Oxford, 2011);

⁵⁴⁰ *ivi*, pp. 131-200;

⁵⁴¹ *ivi*, p. 5;

Protocol shall be construed as precluding provisions in the law of a State Party or in international instruments and international humanitarian law that are more conducive to the realization of the rights of the child.”⁵⁴² Finally, the analysis considers the opinion of the ICJ on the matter. The Court expressed two Advisory Opinions⁵⁴³ that affirmed that “the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights.” Moreover, the Court expressly mentioned the issue of coexistence of IHL and HR law. Therefore, we conclude that the idea of co-application of HR law is developing on strong basis. This new paradigm undermines the “the mutual exclusivity argument” supported by Israel to exclude the applicability of HR law in the West Bank.

Finally, the last section of the chapter challenges the “treaty interpretation argument”. The main stance behind this argument is that “the jurisdictional clauses of the six human rights conventions should be narrowly construed so as to cover only persons present within the sovereign territory of State parties or within other areas governed by their laws.”⁵⁴⁴ In defending this stance, Israel recall art. 29 of the 1969 Vienna Convention on the Law of Treaties (hereafter Vienna Convention) to claim the territorial applicability of the HR Conventions. The Israeli “treaty interpretation argument” can be challenged on numerous grounds. Firstly, the analysis considers the language of the jurisdictional clauses of four Conventions that Israel ratified. Furthermore, the research focuses on the fact that the Israeli position can be undermined by a different interpretation of art. 29 of the Vienna Convention, supported by the preparatory works of the Vienna Convention.⁵⁴⁵ Moreover, another relevant instrument to oppose the Israeli narrow interpretation of HR treaties is the international jurisprudence on extra-territorial application of Human Rights treaties in Occupied Territories⁵⁴⁶. Both cases support the extraterritorial applicability of the ICCPR. The decisions were both taken on the basis of article 1 of the Optional Protocol to the ICCPR and to avoid a violation of art. 5 of the ICCPR. Finally, the research focuses on the jurisprudence of the Israeli High Court of Justice (HCJ) on the matter. “The HCJ has neither espoused nor rejected explicitly the Israeli position. While it has, on numerous occasions, though by no means as a matter of course, referred in its

⁵⁴² See Optional Protocol to the Convention on the Rights of the Child, on the involvement of children in armed conflict, adopted and opened for signature, ratification and accession by General Assembly Resolution A/RES/54/263 of 25 May 2000 entry into force 12 February 2002, the document is available at

<https://www.ohchr.org/en/professionalinterest/pages/opaccrc.aspx>;

⁵⁴³ ICJ. *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, I.C.J. Reports (1996); ICJ, *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, I.C.J. Reports (2004);

⁵⁴⁴ Ben-Naftali, Shany. *supra* note 535, p. 33;

⁵⁴⁵ UN Special Rapporteur (Humphrey Waldock) *Sixth Report on the Law of Treaties*, UN Doc. A/CN.4/186 (1966) p. 66;

⁵⁴⁶ See *Lopez Burgos v. Uruguay*, UN. Doc. A/36/40 (1981); *Casariago v. Uruguay*, UN Doc. CCPR/C/OP/1 (1984);

decisions to IHR law [...], very few decisions relating to the Occupied Territories have been rendered on the basis of this law.”⁵⁴⁷

However, the analysis mentions the fact that the judgments have different approaches⁵⁴⁸ in dealing with the application of IHR in the Palestinian Territories. To sum up, even if the decisions are taken in reference to HR law, the HR provisions are usually not mentioned, with the exception of stating its irrelevance or inapplicability.⁵⁴⁹ An interesting approach, that is important to underline for this analysis, is the one of Chief Justice Barak. This Justice’s approach, in fact, was the only one that included explicit references to HR provisions in the normative framework of the decisions.

Finally, the last chapter focuses on the issues related to the protection of minors in the context that the research highlighted. The rights of Palestinian minors from the West Bank have been paused because of the existence of two opposite sides, with opposing irreconcilable views. Therefore, the last chapter is going to recall Israel’s obligations under IHL and HR law and it, further, focuses on the issue of accountability of military personnel accused of violations, especially against minors.

The first section recalls the full applicability of the GCIV in the West Bank and analyses the main provisions regarding minors under IHL. Generally, IHL prohibits Israeli forces from targeting civilians, including minors, and it specifically obligates the State of Israel to protect minors from all acts of violence. A minor, in fact, enjoys special protection under IHL.⁵⁵⁰ Children are part of the category defined as “protected persons”⁵⁵¹ and their protection is specifically addressed at art. 50 of the GCIV. This article states some the obligations of the Occupying Powers towards children. The main ones are listed as it follows: facilitation of the proper working of all institutions devoted to the care and education of children; identification and registration of the children’s parentage; prohibition to change the personal status of children; maintenance and education of children who are orphaned or separated from their parents.⁵⁵² Further protection, especially referring to minor detainees, is provided by art. 77 of Protocol Additional to the GCIV and relating to the Protection of Victims of International Armed Conflicts (Protocol I). In light of these provisions, the analysis investigates the main violations that the Israeli military authorities should address and the main obligations in that regard. For what concern IHL, the most problematic issue is the one of the locations of interrogation and detention. In fact, Palestinian minors from the West Bank are transferred to Israel to be interrogated and often detained. This results in the violation of articles 49 and 76 of the GCIV, that prohibit holding

⁵⁴⁷ Ben-Naftali, Shany. *supra* note 535, p. 87;

⁵⁴⁸ Ben-Naftali, Shany. *supra* note 535, pp. 91-93;

⁵⁴⁹ Ben-Naftali, Shany. *supra* note 535, p. 92;

⁵⁵⁰ See Geneva Convention (IV) *supra* note 503, arts. 23, 27, 50; See also Protocol Additional to the Geneva Conventions, *supra* note 182, art. 77;

⁵⁵¹ Geneva Convention (IV) *supra* note 503, art. 27;

⁵⁵² *Ibid.*;

detainees in the territory of the Occupying power. Moreover, the research underlines three other main violations of IHL regarding Palestinian minor detainees: the first concerns administrative detention, the second relates the separation of children and adults and the third is about education. These three matters are covered by IHL, even if they also concern HR law.

Hence, the second section of the last chapter underlines Israel's obligations under HR law. This regime generally provides that in every action that involves or impacts on children, their best interests⁵⁵³ shall be a primary consideration. Moreover, detention of children should be only used as a "measure of last resort and for the shortest appropriate period of time"⁵⁵⁴. All minors are entitled to a fair and public hearing by a "competent, independent, and impartial tribunal"⁵⁵⁵ and torture and ill-treatment are absolutely prohibited.⁵⁵⁶ The analysis highlights several problems in the military juvenile detention system, that is not always compliant with these obligations. The first one concerns the notification of arrest and the reason for arrest. The issue of night arrests it is further underlined, in this part. Moreover, the Israeli obligations regarding the practices of interrogation of minors are also highlighted, especially with regards to the use of methods of restraint and the practice of solitary confinement for children. Another problem is the recurrent denial of release on bail⁵⁵⁷, that should be encouraged as a measure alternative to detention under HR law. A further issue that the research underlines is the violations of the minors' rights to be promptly brought before a judge and to challenge the legality of the detention⁵⁵⁸. As stated before, the obligations of Israel are numerous and detailed. In conclusion, the analysis states that, as summarized in this section, the actions taken to fulfill Israel's obligations under HR law, if existing, resulted insufficient.

Finally, the third section considered another relevant problem that occurs in case of a violation: the issue of accountability of military personnel. The main institution that is responsible for domestic accountability is the Israeli High Court of Justice. As mentioned, the approach of the HCJ is often in line with the positions of the Israeli government.⁵⁵⁹ Therefore, the attitude of the HCJ towards the application of the provisions of IHL does not result in any constraint for the action of Israeli representatives in the West Bank. Moreover, for what concerns the specific matter of detainees, and especially of minor detainees, the lack of domestic accountability is further represented by the inefficacy of the complaints mechanism in the Israeli military

⁵⁵³ Convention on the Rights of the Child, supra note 505, art. 3;

⁵⁵⁴ Convention on the Rights of the Child, supra note 505, art. 37;

⁵⁵⁵ International Covenant on Civil and Political Rights, supra note 507, art. 14;

⁵⁵⁶ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, supra note 44;

⁵⁵⁷ UNICEF. Supra note 1, p. 12;

⁵⁵⁸ Convention on the Rights of the Child, supra note 505, art. 37(d) and International Covenant on Civil and Political Rights, supra note 507, art. 9 (3) and (4); Convention on the Rights of the Child General Comment No. 10, paras. 52 and 83; Human Rights Council General Comment No. 8, para 2.

⁵⁵⁹ See e. g. the refusal to address the applicability of the GCIV in HCJ. *Yesh Din et al., v. Commander of IDF Forces in the Judea and Samaria et al.*, (2010) cited in Kretzmer, David. supra note 531, p. 213;

detention and court system.⁵⁶⁰ Specifically, there is no “rights-based, child-sensitive complaints mechanism”⁵⁶¹ in the military system in force in the West Bank. The issue of accountability has been raised by UNICEF in the two reports regarding detention of Palestinian minors⁵⁶². This last section analyses this issue and concludes that the lack of domestic accountability is an urgent matter in the military detention system, that is endangering the rights of Palestinian minor detainees. Moreover, it argues that the International mechanisms currently available to Palestinians have also failed to provide remedy to the ill-treatments of Palestinian minors, because of the lack of actual means of enforcement.⁵⁶³ Finally, the research welcomes the fact that on January 1, 2015, the Government of Palestine accepted the jurisdiction of the International Criminal Court (ICC) involving crimes committed in the Palestinian Territories.⁵⁶⁴ The possible crimes committed by Israeli authorities that are likely to fall within the jurisdiction of the International Criminal Court are related to some of the issues that we analyzed in this research. The Palestinian accession to the ICC represents an important step and it gives hope for future accountability and reparations. However, today, the violations remain un-addressed.

The research concludes that Palestinian minors that come in contact with the Israeli military detention system result to be un-protected. Not only, the only fact of being born in this Territory endangers their rights, not granting a protection that has been supported by the all international community, Israel included. Improvements have been made, but they result to be insufficient. Therefore, this analysis recalls Israel’s obligations towards Palestinian minor detainees. No debate on legal issues can support this lack of protection. The applicability of IHL and HR law it is extremely relevant in the complex context of the Palestinian-Israeli conflict, in light of the considerations made throughout the entire research. The conclusion is that Palestinians are entitled to the same human dignity recognized to all other human beings and that further action is urgently needed in this field.

⁵⁶⁰ Defense for Children International. *No way to treat a child. Palestinian children in the Israeli military detention system*, Ramallah, (April 2016), p. 70;

⁵⁶¹ *Ibid.*;

⁵⁶² See UNICEF. *supra* note 1 and 3;

⁵⁶³ Defense for Children International. *supra* note 559, p. 70;

⁵⁶⁴ State of Palestine. Declaration Accepting the Jurisdiction of the International Criminal Court (2014), available at http://www.icc-cpi.int/iccdocs/PIDS/press/Palestine_A_12-3.pdf; and International Criminal Court. The State of Palestine accedes to the Rome Statute, (2015) available at http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1082_2.aspx;