

Israel's Administrative Detention in the Occupied Palestinian Territories



An Assessment of the Applicable Norms of
International Law and Possibilities of Enforcement

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Disclaimer

The legal analysis and recommendations of this Report represent the legal interpretation of the authors and their consideration of the suggestions of the Advisory Committee. The legal interpretation expressed herein represents that of the authors and does not necessarily reflect the position of the members of the Advisory Committee nor of Edge Hill University.

Executive Summary

The Report engages in a critical legal analysis of the Israeli State practice of administrative detention in the Occupied Palestinian Territory (OPT). Administrative detention consists of deprivation of liberty, without charge or trial, based, in the main, on secret evidence, which can be renewed indefinitely. It entails significant limitations on the fundamental rights of detainees, at the stages of arrest, interrogation, imposition and renewal of an administrative detention order, and the treatment in, and conditions of, detention.

The Report commences with an overview of the legal character of Israel's regime of administrative detention, which is a central element in the wider military governance of the Palestinian population in the OPT. It then subjects Israel's use of administrative detention to a two-stage critical analysis. The first stage is based upon the extraterritorial application to the OPT of the norms of international humanitarian law and international human rights law. It reveals that the use of administrative detention against Palestinian civilians causes a number of grave breaches of both international humanitarian law and serious violations of international human rights law.

The second stage considers the potential liability, under the Rome Statute of the International Criminal Court (ICC), for international crimes resulting from the Israeli State practice of administrative detention. This potential liability arises from the preliminary examination launched by the Prosecutor of the ICC, after Palestine became a State Party to the Rome Statute of the ICC in January 2015. The Report examines whether Israel's use of administrative detention could amount to crimes against humanity and/or war crimes under the Rome Statute.

The Report also provides recommendations to Israel, the European Union, UN Bodies and the Prosecutor of the International Criminal Court.

Recommendations

Israel

The following recommendations reflect both the significant length of the military occupation of the OPT and the continuing requirement to demonstrate that this is a temporary, transitional phenomenon;

End the unlawful practice of administrative detention used by Israel in the OPT, through enshrining the prohibition in law;

Ensure that all existing administrative detainees are promptly released or charged with a substantive criminal offence compatible with international law;

Reform the pre-trial and trial procedures of the military court system;

On this basis, ensure that the following rights and freedoms of all individuals in the OPT are respected:

- a) All decisions to arrest civilians in the OPT must be based upon the reasonable suspicion of the individual's commission of a criminal offence;
- b) Upon arrest, the individual must be informed, in a language which s/he understands of the reason(s) for the arrest and receive a copy of the arrest warrant;
- c) Every person arrested should be given a copy of the arrest warrant and no person should be held incommunicado;
- d) Ensure that the period of questioning, and any further requests for extension, are the same as those under the Israeli criminal code;
- e) The further questioning/interrogation of the individual detainee must (i) not involve torture or other forms of ill-treatment (ii) be video and audio recorded (iii) be held in the presence of the individual's legal representative, (iv) and in the case of a child, also be in the presence of a parent or independent adult other than a legal representative;
- f) Ensure that arrested persons have access to their legal representative and family visits in the same way as any person detained, in Israel, under the Israeli criminal code;
- g) Ensure that the criminal offence(s) with which the individual is charged complies or comply with the requirements of international law and, as such, only criminalize or criminalizes serious harm;
- h) The evidence upon which the prosecution case is based must not be secret. The ISA's evidence as a whole must be disclosed to the defendant and her/his legal representative prior to the trial;

- i) Palestinian lawyers should receive access to the entirety of the ISA's evidence and be enabled to challenge its admissibility and probative value;
- j) Palestinian lawyers should have the possibility to submit their own evidence and bring their defence witness(es) to the hearing;
- k) A conviction will result in a non-renewable, determinate sentence, and the defendant must have the right of appeal;

Ensure that forms of detention of Palestinians are subject to effective monitoring by an independent body;

Adopt legislative measures establishing a non-derogable prohibition of torture and other forms of cruel, inhuman or degrading treatment or punishment;

Adopt legislative measures and institutional practices which, in contrast to the present position, ensure prompt investigation and effective remedies for any person raising a claim of torture or other forms of cruel, inhuman or degrading treatment or punishment;

Grant access to Israel and the Occupied Palestinian Territory for international human rights bodies and non-governmental organizations tasked to investigate alleged violations of fundamental rights of Palestinian detainees;

Take all urgent and appropriate measures for the prompt ratification of the following international treaties:

- a) Fourth Hague Convention of 1907 and the annexed Hague Regulations;
- b) Additional Protocol I to the Geneva Conventions;
- c) Optional Protocol to the International Covenant on Civil and Political Rights;
- d) Optional Protocol to the UN Convention Against Torture, Inhuman and Degrading Treatment and Punishment;
- e) Optional Protocol to the UN Convention on the Elimination of All Forms of Discrimination Against Women;
- f) Rome Statute of the International Criminal Court;

Strengthen the independence and impartiality of the military court system and the judiciary more broadly in relation to Palestinian cases;

Grant the International Committee of the Red Cross and the United Nations human rights monitors full, unimpeded access to all those detained;

Establish without further delay, credible, effective, transparent and independent accountability mechanisms to investigate alleged crimes against humanity and war crimes;

Cooperate with the preliminary examination of the International Criminal Court and with any subsequent investigation that may be opened;

Ensure the exercise of the right of all victims to an effective remedy, including full reparations, without further delay.

UN Human Rights Council

Establish an independent mechanism to monitor the human rights situation of Palestinian detainees;

Request the United Nations Secretary-General to bring serious violations of international human rights and humanitarian law, and alleged crimes against humanity and war crimes, referred in this Report, to the attention of the United Nations Security Council under Article 99 of the Charter of the United Nations.

UN General Assembly

Request the Security Council to report to it on measures taken with regard to ensuring accountability for the alleged commission of crimes against humanity and war crimes in relation to the facts in this Report;

Establish a trust fund to pay adequate compensation to Palestinians who have suffered loss and damage as a result of unlawful detention;

Promote an urgent discussion on the legality of the use of administrative detention within the context of a prolonged military occupation.

UN Security Council

Require the Government of Israel to take all appropriate steps, to launch appropriate investigations that are independent and in conformity with international standards, into alleged crimes against humanity and war crimes;

Establish an independent committee of experts in international humanitarian law, international human rights law and international criminal law to report on any domestic legal or other proceedings undertaken by the Government of Israel in relation to potential crimes against humanity and war crimes.

European Union

Adopt a concerted and substantive policy position that condemns the specific practice of administrative detention by Israel and call for its abolition;

Undertake a specific study of Israel's practice of administrative detention, and make specific recommendations to Israel to ensure that its State institutions and personnel comply fully with the procedural and substantive guarantees of international humanitarian law and international human rights law for administrative detainees;

Consider, in relation to this specific study, establishing and sending a fact-finding mission to investigate the use of administrative detention and the treatment and conditions of detention of Palestinian prisoners in Israeli detention centres;

Ensure that in the context of the areas of EU Israeli cooperation, especially legal and data sharing, the EU is not facilitating Israel's use of administrative detention, given the severity of its effects on the fundamental rights of Palestinians.

Prosecutor of the International Criminal Court

Considering Palestine's declaration of acceptance of the ICC's jurisdiction, its accession to the Rome Statute and the self-referral of its own situation to the ICC, commence, without further delay, under Article 53 of the Statute, an investigation of the following allegations of crimes against humanity arising from the Israeli state practice of administrative detention:

- a) Torture or Other Inhuman Acts of a Similar Character Intentionally Causing Great Suffering, or Serious Injury to Body or to Mental or Physical Health;
- b) Deportation or Forcible Transfer of Population;
- c) Imprisonment;
- d) Persecution;
- e) Apartheid;

And/or of the following alleged war crimes arising from the Israeli state practice of administrative detention:

- a) Torture, or Inhuman Treatment;
- b) Wilfully Causing Great Suffering, or Serious Injury to Body or Health;
- c) Unlawful Confinement;
- d) Wilfully Depriving a Prisoner of War or Other Protected Person of the Right to a Fair and Regular Trial;
- e) Unlawful Deportation or Transfer.

PART I

Introduction

1 Factual Context

Administrative detention is the deprivation of liberty, for an indeterminate period, without criminal charge or trial. In place of a conventional process of prosecution for a criminal offence, in which the determination of guilt is the sole basis for deprivation of liberty, it is a practice initiated by the executive branch of the state in relation to which judicial proceedings are always subordinate. It entails significant interference with protections afforded to the individual by the norms of international law, at the stages of arrest, interrogation, judicial proceedings relating to the imposition, extension and review of an administrative detention order, and the length and conditions of detention. The deprivation of liberty is accompanied by a number of elements which raise questions over the legitimacy, under international law, of a widespread and systematic recourse to that practice.

In the particular situation of the Israeli military governance of the West Bank (not including East Jerusalem¹) of the Occupied Palestinian Territory, the Israeli State practice of administrative detention² is characterized by the broad grounds for arrest; the lack of information provided, at each stage of the initial detention process and subsequent judicial review and appeal, to the detainee or her/his legal representative regarding the reasons for detention; the use of severe techniques of interrogation; the use of secret evidence as the basis for the judicial review and appeal; the resulting limitations upon the effective legal representation of the detainee and the absence of an effective review process before an impartial court or administrative body (including the extremely low percentage rate of judicial cancellations of detention orders); the absence of either a maximum cumulative period of administrative detention or the number of times an administrative detention order can be renewed; the unlawful transfer of the majority of detainees, from the OPT, to the detention estate in Israel. The detainee's treatment in, and conditions of detention, also indicate further potential sources of concern, under international law, with regard to this form of deprivation of liberty.

The use of administrative detention is a central element in Israel's policy in the Occupied Palestinian Territory. Over the course of the belligerent occupation of the West Bank, including East Jerusalem, and the Gaza Strip, Israel has availed itself of administrative detention to deprive thousands of Palestinians, including minors, of their liberty for varying, but generally prolonged, periods of time. Israel makes a continuous, widespread and systematic use of administrative detention against Palestinians.

On 5 November 1989, Israel held 1,794 Palestinians in administrative detention. B'Tselem has reported that Israel held more than 1000 Palestinians in administrative detention in 2003 and that since March 2002, "not a single month has gone by without Israel holding at least 1000 Palestinians in administrative detention".³ From June 2002 until June 2003, Israel held a monthly average of 1063 administrative detainees, with the peak of 1140 administrative detainees in April 2003. In July 2016, there were approximately 750 administrative detainees in Israeli custody, including 3 Palestinian Legislative Council members, 2 females, and 8

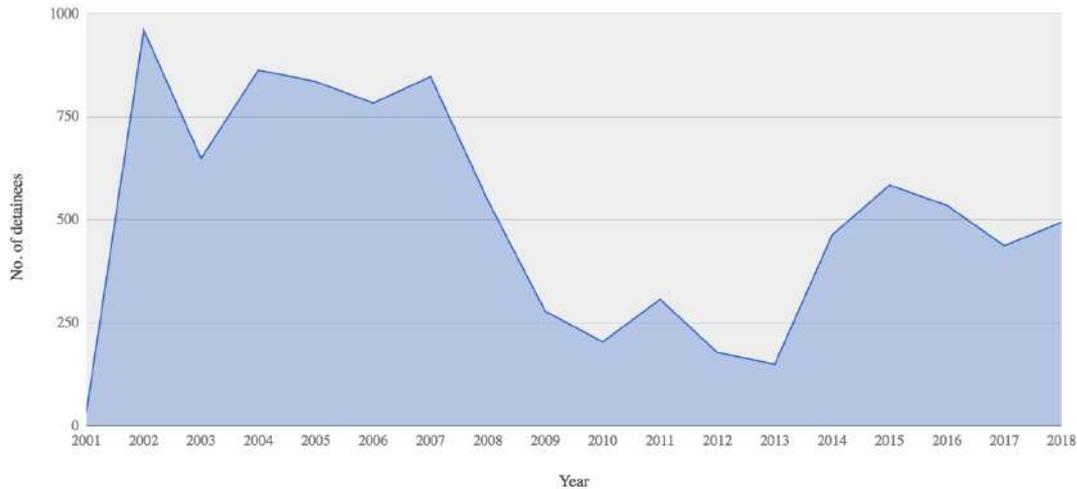
¹ East Jerusalem, from a territorial perspective, is, and remains, part of the West Bank (OPT), under Israeli military occupation, but, from a legal perspective, it is distinguished by the primary application of Israeli civilian law rather than the regime of military orders. In East Jerusalem, administrative detention arises from the

² The Israeli State practice of administrative detention is currently governed by the *Order Regarding Security Directives [Consolidated Version], (Judea and Samaria) (No. 1651)*, 2009 (hereinafter Military Order 1651).

³ For the statistics provided in this Section of the Report, see B'Tselem, available at https://www.btselem.org/administrative_detention

children. As the end of 2018, 494 Palestinians, including two minors aged between 16 and 18 years old, were being held under administrative detention in Israel Prison Service facilities. The following table by B'Tselem shows the number of Palestinian administrative detainees on specific dates from 2001 to 2018, one date given per month.

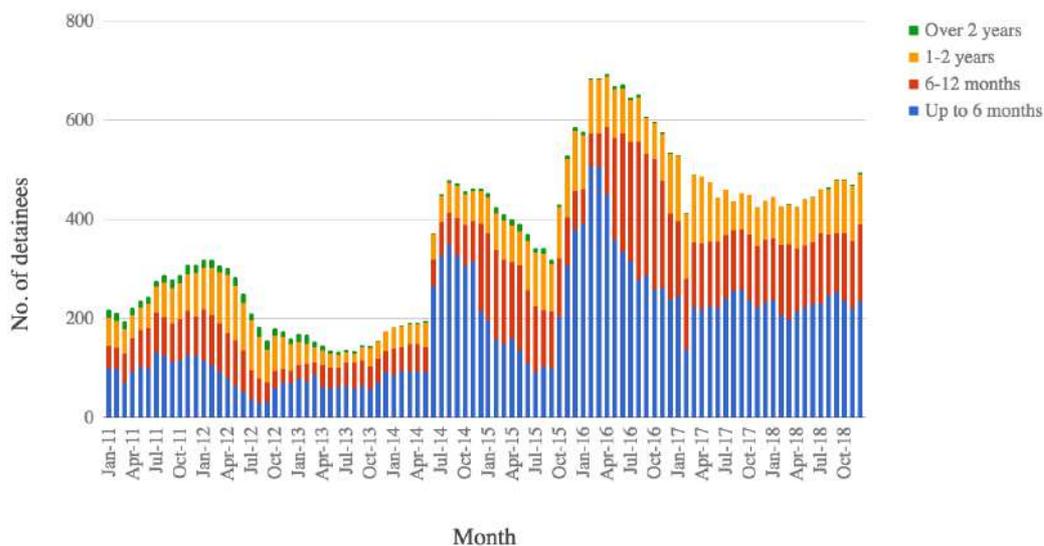
Administrative detainees (2001-2018)



Administrative detention is frequently extended. B'Tselem reports that, at the end of May 2017, among 475 Palestinian administrative detainees, 121 had been held for more than one year, which entails that their detention had been extended at least twice. The same NGO calculates that, from the beginning of 2015 to the end of July 2017, among 3,909 administrative detention orders, 2,441 (62.4%) were extensions of existing orders.

The following table by B'Tselem shows the duration of the detention from January on specific dates from 2011 until October 2018, one date given per month

Administrative detainees by duration in custody



The following tables show the number of administrative detainees per month during the past four years

2018

Month	Date of Statistics		
	Total	Minors aged 16 to 18	
Dec.	494	2	31 Dec.
Nov.	469	3	30 Nov.
Oct.	481	4	31 Oct.
Sept.	481	4	30 Sept.
Aug.	465	3	31 Aug.
July	462	4	31 July
June	446	3	30 June
May	440	3	31 May
April	424	3	30 April
March	431	3	31 March
Feb.	427	4	28 Feb.
Jan	445	3	31 Jan.

2017

Month	Date of Statistics		
	Total	Minors aged 16 to 18	
Dec.	437	2	31 Dec.
Nov.	425	2	30 Nov.
Oct.	449	2	31 Oct.
Sept.	453	2	30 Sept.
Aug.	436	1	31 Aug.
July	459	1	31 July
June	444	2	30 June
May	475	2	31 May
April	486	2	30 April
March	492	1	31 March
Feb.	514	0	28 Feb.

Jan	531	0	31 Jan.
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2016

Month	Date of Statistics		
	Total	Minors aged 16 to 18	
Dec.	535	1	31 Dec.
Nov.	576	4	30 Nov.
Oct.	598	5	31 Oct.
Sept.	608	7	30 Sept.
Aug.	644	10	31 Aug.
July	642	8	31 July
June	685	7	30 June
May	678	10	31 May
April	692	13	30 April
March	688	11	31 March
Feb.	627	7	29 Feb.
Jan	568	2	31 Jan.

2015

Month	Date of Statistics		
	Total	Minors aged 16 to 18	
Dec.	584	6	31 Dec.
Nov.	527	5	30 Nov.
Oct.	429	4	31 Oct.
Sept.	315	0	30 Sept.
Aug.	341	0	31 Aug.
July	342	0	31 July
June	370	0	30 June
May	391	0	31 May
April	396	0	30 April
March	412	0	31 March

Feb.	424	0	28 Feb.
Jan	455	0	31 Jan.

2 Domestic Legal Basis

The Law in Israel

Article 78 of the Fourth Geneva Convention – which allows the internment of protected persons (civilians) “for imperative reasons of security” – has so far been invoked by Israel to justify its use of administrative detention. However, Israeli authorities have never clarified the criteria utilized to define the concept of “State security”. In Israel, administrative detention is authorized under the *Emergency Powers Law (Detentions) (1979)* (“Emergency Law”), and it becomes applicable with the declaration, by the Knesset, of a state of emergency. It is to be noted that such a state of emergency has been in existence since the founding of the State of Israel in 1948. Under the Emergency Law, the Minister of Defence authorizes detention for up to six months, and is allowed to renew the order every six months, for an indefinite period. The detainee must be brought before a judge within 48 hours of arrest and, if subject to detention, this must be regularly reviewed every three months by the president of the District Court.

The Law in the West Bank

In the West Bank (not including East Jerusalem), Military Order 1651 contains the current consolidated authorization for administrative detention.⁴ Administrative detention takes the form of that of administrative detention under the Temporary Order (Chapter 1, Article B, Articles 285-294).⁵ This authorizes the military commanders in the area to issue an order to detain an individual for up to six months if they have “reasonable grounds to believe that a certain person must be held in detention for reasons to do with regional security or public security”.⁶ Detention can be extended by the Commanders for additional periods of up to six months if “on the eve of the expiration of the detention order”, “reasons pertaining to regional security or public security still require the detention of the person”.⁷ Military Order 1651 contains no definition of the maximum cumulative period of administrative detention (nor the number of times an administrative detention order can be renewed) and the terms, “regional security” and “public security”, are not provided with any further explanatory detail.

⁴ Administrative detention was originally authorized, since 1971, under Military order 378, Article 87. This State practice of administrative detention was further consolidated, under Military Order 1226, and further amended by Military Order 1591. This was, in turn, replaced, in 2009, by Military Order 1651, which entered into force on 2nd May 2010.

⁵ The Temporary Order of Chapter 1, Article B is, at present, operative, due to the necessity “to maintain public order and regional security” (Article 284), in place of the administrative detention contained in Chapter 1, Article A (Articles 273-283). Administrative detention, under Article B, enables, upon arrest, a period of detention for questioning, of up to 8 days, prior to the individual’s presentation before a judge. In contrast, the currently inoperative administrative detention, under Article A, has a reduced period, upon arrest, of detention for questioning of ninety-six hours (Article 273(C)), prior to presentation before a judge (Article 275(A)). There are two routes, in Military Order 1651, to the imposition of administrative detention which will be discussed further in the Section 3 below.

⁶ Military Order 1651, Article 285(A).

⁷ Ibid., Article 285(B).

The definition of these terms is primarily determined by the particular interpretation of the military commanders and, although subject to judicial review and appeal within the military court system of the OPT, in practice, the military commander has a very substantial discretionary power enabling indefinite arbitrary detention.

The Law in the Gaza Strip

In Gaza, despite the withdrawal of Israeli military troops, in 2005, Israel continues to exercise effective military and administrative control in this area.⁸ Therefore, the withdrawal of Israeli troops does not mean that Israel is no longer an Occupying Power in the Gaza Strip.⁹ In March 2002, the Knesset enacted the *Incarceration of Unlawful Combatants Law (2002)* (“Unlawful Combatants Law”), which provides for the indefinite administrative detention of foreign nationals (i.e., those who, after the withdrawal of Israel, are present in Gaza, whether as original inhabitants of Gaza or as other nationalities)¹⁰, through the creation of a third category of person – the “unlawful combatant”. This broad category is introduced, for Israel, in addition to the existing categories of combatant and civilian of international humanitarian law. The “unlawful combatant”, is defined as

“a person who has participated, directly or indirectly, in hostilities against the State of Israel, or was a member of a force conducting hostilities against the State of Israel, and in respect of whom the conditions granting prisoner of war status under international humanitarian law, as specified in article 4 of the Third Geneva Convention of 12 August 1949 relative to the Treatment of Prisoners of War, do not apply”.¹¹

Under Article 3, the authority to detain is conferred upon a senior Israeli military official (the Chief of Staff of the Israeli Defence Force), and the grounds for detention, under Article 3(a), are a “reasonable basis to presume that a person held by the state authorities is an unlawful combatant and that his release would harm state security”.¹²

Under Article 5(a), a person suspected of being an “unlawful combatant” can be held for up to 14 days without judicial review, by the District Court, of the initial detention order. Under Article 5(e), secret evidence and in-camera evidence is admissible in the absence of the detainee and her/his legal representative at this level of review. If the detention order is confirmed, there is further right of appeal, within 30 days, to the Supreme Court. If the appeal is not upheld, the detention order is confirmed, and the detention continues, subject, under

⁸ For example, Israel exercises control over air space, sea space and international borders. Although indirectly, it also continues to exercise control over Palestinian movement at the Rafah crossing.

⁹ See, for example, the Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied Since 1967, in 2006, “Israel’s withdrawal from Gaza does not, however, mean that the occupation of the territory has come to an end. Israel still retains effective control over the territory through its control of airspace, territorial sea and external land boundaries” (*Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied Since 1967*, UN doc. E/CN.4/2006/29 (Jan. 17, 2006); see also Ian Scobbie, “An Intimate Disengagement: Israel’s Withdrawal from Gaza, the Law of Occupation and of Self-Determination”, in E. Cotran and M. Lau, (eds.), *Yearbook of Islamic and Middle Eastern Law*, Volume 11 (2004-2005), (Leiden: Brill), pp. 3-31. See, however, the contrasting position of the Israeli Supreme Court, in 2008, HCJ 9132/07, *Al-Bassiouni, et al v. Prime Minister and A and B v Israel*, Appeal Decision, Crim A 6659/06, 1757/07, 8228/07, 3261/08; ILDC 1069 (IL 2008).

¹⁰ The Law was the response to a Israeli Supreme Court decision, *Anonymous (Lebanese citizens) v Minister of Defence FCrA 7048/97, judgment of 12 April 2000, ILDC 12 (IL 2000)*, prohibiting the strategic use of administrative detention for the purposes of prisoner exchange.

¹¹ Article 2 *Incarceration of Unlawful Combatants Law 2002*.

¹² Article 3(a) *Incarceration of Unlawful Combatants Law*.

Article 5(c), to periodic review only twice a year. The central determination of renewed periods of detention is a risk-based analysis contained in Article 7. This imposes upon any decision to release a detainee the presumption of their risk to state security based upon the initial membership of, or direct/indirect participation in hostilities undertaken by, a force which has not ceased its hostile activities against Israel. It is this presumption which has to be rebutted in order for the decision to release the detainee to be taken.

The Unlawful Combatants Law was the subject of review by the Israeli Supreme Court, in 2008, in *A and B v Israel*.¹³ The judicial review is based upon the conformity of the Law with both the underlying principles of the Israeli constitution and the obligations of Israel under international law.¹⁴ The Supreme Court considers the 2002 Law compatible with obligations under international humanitarian law, as the category of “unlawful combatant” merely creates a “sub-category of civilians under international humanitarian law”.¹⁵ It is the decision of these civilians to directly engage in acts of hostility which threaten state security which is foundation for this distinctive sub-category, and for the concomitant reduction in the rights and protections afforded to them under international humanitarian law.¹⁶ Thus, the legal framework of detention, under the 2002 Law, was held compatible “with articles 27, 41-43 and 78 of the Fourth Geneva Convention”.¹⁷

Despite the Supreme Court’s position, the Law was further amended, in 2008, in order to “adapt its provisions to future combat operations [Operation “Cast Lead”] entailing the detention of suspected unlawful combatants on a massive scale”.¹⁸ However, these adapted provisions have yet to be fully exercised.¹⁹

In the Fifth Periodic Report of Israel to the UN Committee on Torture, in 2015, Israel states that

“[a]s for the application of the Law, in the twelve years since the enactment of the

¹³ *A and B v Israel*, Appeal Decision, CrimA 6659/06, 1757/07, 8228/07, 3261/08; ILDC 1069 (IL 2008) available at http://www.asser.nl/upload/documents/DomCLIC/Docs/NLP/Israel/Anonymous_Supremecourt_Judgment_11-6-2008.pdf

¹⁴ Yuval Shany, “The Israeli Unlawful Combatants Law: Old Wine in a New Bottle?”, *The Hebrew University of Jerusalem Faculty of Law Research Paper No. 03* (2012), p. 9. Here, the focus is solely upon the Court’s consideration of obligations under international law.

¹⁵ *Ibid.*, p.10. Referring to *A and B v Israel*, Op. cit., §14.

¹⁶ *Ibid.*, pp.10-11. Referring to *A and B v Israel*, Op. cit., §13

¹⁷ *Ibid.*, p.11. Referring to *A and B v Israel*, Op. cit., §16. The finding of compatibility is, of course, predicated upon the presumption that Israeli is no longer an Occupying Power in Gaza, and that, therefore, individuals in Gaza, as foreigners, fall outside the remit of the legal framework of obligations and protections to be accorded to ‘protected persons’ under the Fourth Geneva Convention. See, also, the analysis in Henning Lahmann, “The Israeli Approach to Detain Terrorist Suspects and International Humanitarian Law: The Decision *Anonymous v. State of Israel*”, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 69, 2 (2009), 347-364; and in Knut Dörmann, “Unlawful Combatants”, in Andrew Clapham and Paola Gaeta (eds.), *The Oxford Handbook of International Law in Armed Conflict*, (Oxford: Oxford University Press, 2014), 604-623.

¹⁸ *Ibid.*, p.16. The central modifications and adaptations are outlined on pp. 16-18. For the further Israeli judicial precisions with regard to the operation of the 2002 Law, see the case-commentaries on pp. 19-22.

¹⁹ For Lahmann, based upon an obiter dictum statement in *A and B v Israel*, §11, it appears that the Supreme Court considers the form of administrative detention, under the Unlawful Combatants Law, to be confined to individuals arrested from Gaza as the West Bank “is still under the effective control of the State of Israel, or in other words, under belligerent occupation within the meaning of GC IV.32” (Lahmann, Op. cit., 352). Hence, that the Israeli State practice of administrative detention is now distinguished by two forms of administrative detention which are mutually exclusive to the OPT and Gaza.

Incarceration of Unlawful Combatants Law, a total of 50 persons have been detained according to the Law. Twelve persons were detained during the Second Lebanon War in 2006, 30 were detained during operation “Cast Lead” (late 2008-early 2009) and eight on other occasions. As of October 1, 2014, there is one person (an adult male) who is detained according to this Law, he was brought for a judicial review of his detention in August and the Be’er-Sheva District Court affirmed his detention. An additional review is scheduled for February 2015, unless he will be released prior to that date”.²⁰

Thus, the Report, on the assumption that the final detainee has been released and, whilst acknowledging the continued possibility for the renewed use of this form of administrative detention, proceeds to concentrate the focus of its legal analysis and evaluation upon the law and practice of the form of administrative detention utilized in the OPT.

3 Administrative Detention in the West Bank in Practice

The Israeli State practice of administrative detention²¹ in the West Bank of the OPT is an integral part of the wider military governance of the West Bank. It is authorized by the provisions contained in the military legislation – Military Order 1651 – and it provides the military authority with two procedures through which an individual can be subject to administrative detention.

The first procedure initially arises from the exercise of the power of arrest without warrant, conferred upon a soldier, under Article 31 of Military Order 1651. The ground for the arrest, in contrast to those of “reasons of regional security or public security”, contained in Article 285(A) of the Temporary Order of Administrative Detention (Article B), is that of “suspicion of the commission of an offence”.²² Thus, the arrest is based upon mere *suspicion* of the commission of a *criminal* offence without any further requirement of justification or grounds for this suspicion. The arrest then provides for a period of detention and questioning of up to 96 days before the issuing of an arrest order (warrant) or release.

During this first and subsequent periods of detention and questioning, there is no obligation to inform the individual or her/his legal representative of the reasons for the arrest nor to immediately present the individual to a judge. In addition, although the military originally undertake the arrest, the individual is normally temporarily transferred into the custody of the police or ISA for interrogation.

At the conclusion of this first period of up to ninety-six hours, the transition to administrative detention is provided by Article 39 which, on presentation of the individual before a judge, allows a further period of questioning of up to seventy-two hours on the basis that the military prosecutor wishes to refer the individual detainee's case to the military commander to consider the imposition of administrative detention.

It should also be emphasized that, due to manner in which the individual's arrest and detention for questioning can subsequently be transformed into the procedure of administrative detention, the total length of detention for questioning, prior to the imposition

²⁰ Fifth Periodic Report of Israeli to the UN Committee on Torture, 2015 CAT/C/ISR/5, §75.

²¹ The following outline of the Israeli State practice of administrative detention in the OPT draws, in part, upon the relevant sections of the joint B'TSelem and Hamoked Report, *Without Trial Administrative Detention of Palestinians by Israel and the Internment of Unlawful Combatants Law*, October 2009, available at: https://www.btselem.org/download/200910_without_trial_eng.pdf

²² Military Order 1651, Article 31.

of administrative detention, of the individual can be longer than that resulting from the second procedure.²³

If the military commander subsequently decides to impose administrative detention, then the procedure is that of administrative detention, under Temporary Order (Article B), Article 287 (described in more detail in the second procedure below). This entails a further period of detention and questioning for the purpose of administrative detention of up to eight days prior to presentation of the individual before a judge.

The second procedure arises from the provisions of the Administrative Detention - Temporary Order (Article B).²⁴ The individual is arrested, based upon a warrant (detention order)²⁵, under Article 286, by either a soldier or a policeman. The warrant is based upon the military commander's order resulting from his consideration that the individual should be detained for "reasons of regional security or public security" under Article 285(A). The arrest results, under Article 287, in an initial period of detention and questioning of up to 8 days prior to presentation of the individual before a judge.

During this period of up to eight days of detention and questioning, there is no obligation to inform the individual or her/his legal representative of the reasons for the arrest nor to immediately present the individual to a judge. In addition, although the military originally undertake the arrest, the individual is normally temporarily transferred into the custody of the police or ISA for period of up to eight days of detention and interrogation.

At the conclusion of this period of detention and questioning, the individual is presented before the judge, under Article 287. The judge is conferred with the authority to confirm, modify or cancel the military commander's detention order. However, the judicial review is based upon rules of procedure, under Article 290, which confer a judicial discretion to deviate from accepted rules of evidence. This authorizes the judge

“to receive evidence even in absence of the detainee or his representative, or without disclosing it to them if, after examining the evidence or hearing the pleas, even in absence of the detainee and his representative, the judge is convinced that disclosing the evidence to the detainee or his representative may harm regional security or public security”²⁶

As a result, the almost exclusive judicial practice is to exercise this judicial discretion, and to base the review upon the purely judicial examination of secret evidence supplied by the military prosecutor. In the rare instances in which the military judge requires further information from the ISA, he can request a representative to attend, but this further information is also subject to these modified rules of evidence. Equally rarely, if the judge finds that the information in the security file is public information, the information will be released to the detainee and her or his lawyer. However, submission to the military prosecutor and defence lawyers of information resulting from interrogation is often delayed for months.

²³ This results from the fact that, after the first 96 hours (Article 31 (C)), the police may ask for an extension of a number of further days for questioning and, only after these days have past (which can sometimes be a period of weeks), apply for the extra 72 hour period of questioning (Article 39), prior to the transfer to the next, final period of up to 8 days of detention and questioning under administrative detention (Temporary Order (Article B)) before presentation before a judge (Article 287).

²⁴ Military Order 1651, Articles 284-294.

²⁵ The warrant/detention order is issued by the military commander under Article 285(A).

²⁶ Military Order 1651, Article 290 (C).

The grounds for administrative detention, the specific “reasons of regional or public security”, therefore, remain unknown to the detainee and/or legal representative at the outset, and commonly, for the duration of the proceedings. The members of the police or ISA who undertook the initial interrogation do not attend the proceedings, and it is the military prosecutor who is usually the only source of information about the evidence submitted in administrative detention cases. If the defence seek to question the military prosecutor to elicit further information, he/she has the right not to answer questions and will normally respond that the information is ‘privileged evidence’, which cannot be disclosed. In the rare event that the prosecutor responds, it is normally considered to have the status of unsworn evidence.

The defence lawyer is, thus, not in the position to know what is contained in the security file; is not able to contest the veracity of the classified information presented to the court; and is not able to confront and cross-examine witnesses. While defence lawyers are entitled to petition military judges for more information regarding the vague allegations against their client, it is very difficult for military courts to release this type of information, and this might occur only after the person has already been held in administrative detention for a number of months. In relation to the detainee, it is very unusual, in relation to these unspecified “reasons of regional or public security”, for defence lawyers to call witnesses for the defence, and, in practice, the only evidence that is available relates to the good behaviour of the detainee and his/her family life.

In addition, the hearing is held in camera and is, therefore, not open to the public.²⁷ The entirety of the military court proceedings, whether that of the initial detention or each of the review/renewal proceedings, has, until very recently, been conducted in Hebrew, a language that the majority of detainees cannot understand. However, as a result of the Israeli Supreme Court decision in *Khaled el-Arej vs. the Head of the Central Command*²⁸, in 2013, an amendment has been made to the Security Provisions Order of the military legislation applied to the OPT. This requires mandatory translation into Arabic of the indictment, and the presumption of the availability of simultaneous translation into Arabic of the legal proceedings for specific defendants. However, the further argument of the Petitioners for the “obligation to translate court decisions by the military courts, in order to use them as a precedent to assist in the defence of other defendants”²⁹, was rejected as beyond the scope of the original petition and unsupported by sufficient argumentation.

The capacity of Palestinian lawyers to represent detainees in Israeli military and civil courts is dependent upon their residency, with Palestinian lawyers whose residency is either in the West Bank or in Gaza having restricted rights of representation compared with Palestinians with Jerusalem residency.

The judicial review, by the military court, very rarely results in a situation in which the detention order is not simply approved without change; and, although Article 288 provides

²⁷ Ibid., Article 291(A).

²⁸ *Khaled el-Arej vs. the Head of the Central Command, the commander of the IDF forces in the region* HCJ 2775/11, [2013], an amendment has been to the Security Provisions Order of the military legislation of applied to the OPT. This requires mandatory translation into Arabic of the indictment, and the presumption of the availability of simultaneous translation into Arabic of the legal proceedings for specific defendants. However, the further argument of the Petitioners for the “obligation to translate court decisions by the military courts, in order to use them as a precedent to assist in the defence of other defendants” (§6) is rejected as beyond the scope of the original petition and unsupported by sufficient argumentation.

²⁹ Ibid., §6.

the detainee with a right of appeal to the Military Court of Appeal, appellate proceedings, in the overwhelming number of cases, confirm the initial decision at the stage of judicial review.

If the Military Court of Appeal confirms the initial decision of the military court to impose the detention order, there is the final, and exceptional, right of appeal to the Supreme Court, which will operate, in this instance as a final Court of Appeal.³⁰ This oversight of the Supreme Court, sitting as the High Court of Justice, has arisen, since 1967, on the basis of the exercise of constitutional jurisdiction over the military court system. The present basis for this authority arises from Section 15 of the Israeli Basic Law. This confers the authority upon the Supreme Court to “deal with matters in which it sees need to grant a remedy for the sake of justice and which are not within the jurisdiction of another court”.³¹

The instances of the exercise of this exceptional jurisdiction are, however, marked by an absence of any significant or sustained judicial regulation of the decision-making practices of the military court system with regard to the Israeli State practice of administrative detention.³²

At the end of the detention period, under Article 285(B), the military commander is authorized to renew the detention order for another period of up to six months, and no limit is imposed upon the process of renewal thus enabling it to be initiated indefinitely. For each instance of renewal of the detention order, the detainee is offered a new judicial review and further appeal.

The individual subject to an administrative detention order imposed in the OPT experiences a situation in which, apart from the knowledge of the length of the existing detention order and the initiation of judicial review proceedings in relation to any further extension, he or she has no further certainty as to the duration of the detention or the possibility of release.

4 Dispersal and Categorization

The imposition of detention under the regime of administrative detention in the OPT involves the individual’s detention in detention facilities under the control of the Israeli Prison Service (IPS). Apart from Ofer Prison located in the OPT, the other facilities are in Israel. Hence, both detention for the purpose of interrogation and the imposition of an administrative detention order involve the regular transfer, by the Israeli, of Palestinian detainees from the OPT to three types of facilities within Israeli territory: a detention centre; an interrogation centre; or a prison. While detention centres are situated on military bases or settlements in the

³⁰ The right of appeal derives from “the Courts Law (Consolidated Version) 5744-1984 (“Courts Law”) and is considered to be one of the fundamental principles of the Israeli legal system (Section 17 of the Basic Law: The Judiciary; Sections 41(a) and 52(a) of the Courts Law). As a rule, the right to appeal exists regarding any criminal and civil procedure, in every instance, including military instances” (CAT, *Fifth Periodic Report of Israel*, 2015, §332).

³¹ Section 15, *Israeli Basic Law*. The character of this authority, under Section 15, to hear petitions relating to the activities of the Israeli military (IDF) in the West Bank, is provided with comprehensive expression in the case of *Ja’amait Ascan v IDF Commander in Judea and Samaria* 37(4) PD [1983], and is based upon the Court’s definition of the IDF as a body fulfilling a public function under law. Once the IDF is held to fulfil this function, its actions are subject to constitutional review irrespective of whether the actions are undertaken in Israel or in the OPT.

³² This is demonstrated by the comprehensive study and analysis undertaken in Shiri Krebs, “Lifting the Veil of Secrecy: Judicial Review of Administrative Detentions in the Israeli Supreme Court”, in *Vanderbilt Journal of Transnational Law*, Vol.45, No.3 (2012), pp. 639-703.

West Bank, interrogation centres and prisons are located in Israel.

The forced transfer of detainees to Israel, and the restriction upon the issuance of permits in the OPT, makes visits from family members even more difficult. In addition, after forced transfer to Israel, it is also common for detainees to be moved between detention facilities, within Israel, increasing the difficulties in establishing the location of the particular detainee in order to apply for a permit.

In 2003, Israel admitted the existence of at least one secret interrogation centre (known as Facility 1391), which is managed by the Israeli Security Agency (ISA). As its exact location is unknown, the primary assumption is that it is situated within an Israeli military base outside the OPT. The public revelations of its existence were accompanied by allegations of the use of techniques of interrogation and conditions of detention, in addition to the removal of the capacity for access and legal representation, constituting torture or other ill-treatment.

Once the existence of the facility was revealed, it was the subject of a number of petitions, to the Israeli Supreme Court, by Hamoked (Centre for the Defence of the Individual), on behalf of former detainees at the Facility. In the first case, *HaMoked: Center for the Defence of the Individual v. State of Israel et al.*³³, in 2003, HCJ 9733/03, Hamoked, on behalf of ten former detainees, challenged the secrecy of the location and operation of the Facility on the basis of provisions of international humanitarian law and Israeli law. The Supreme Court, in relation to the secrecy of the location of the Facility, held that this was unconstitutional, and made an order nisi. In regard to the allegations of torture and other ill-treatment, in relation to both techniques of interrogation and conditions of detention, the Supreme Court, held that the Petitioners had not exhausted the domestic procedure and required them to submit their allegations to the relevant authorities for consideration.

In the co-joined cases of *HaMoked: Center for the Defence of the Individual et al. v. The Attorney General et al.*³⁴, in 2005, the Supreme Court rejected the Petitioners' challenge to the refusal of the Respondents (The Attorney General and the Judge Advocate General) to open an investigation into the allegations of torture and ill-treatment by two former detainees arising from the submission of their allegations. The initial examination of the allegations and the decision not to proceed with an investigation were held to be reasonable.

In the final judgment, in 2011, a further co-joined case, *HaMoked: Center for the Defence of the Individual v. State of Israel et al.*, due, in part, to the changes made by Israel to impose restrictions upon the use of the Facility and the interrogation techniques utilized at the Facility, the review is restricted to "the lawfulness of withholding the physical location of the detention facility and the possibility of limiting visits by Knesset members in the detention facility".³⁵ In regard to the question of physical location,

"[t]he dispute between the parties revolves around the scope of the duty imposed by these statutory provisions on the respondents in the circumstances of the matter before us. The petitioner [HaMoked] seeks to interpret the statutory provisions literally and linguistically

³³ *HaMoked: Center for the Defence of the Individual v. State of Israel et al.* HCJ 9733/03.

³⁴ *HaMoked: Center for the Defence of the Individual et al. v. The Attorney General et al.* HCJ 11447/04 and HCJ 1081/05.

³⁵ *HaMoked: Center for the Defence of the Individual v. State of Israel et al.* HCJ 8102/03, HCJ 9733/03, §3.

such that the declaration of a detention facility and notification of a person's arrest require reference to an exact physical location".³⁶

The Supreme Court rejected the arguments of the petitioner, and considered that detention in the Facility does not require that the detainee and his/her representatives to be informed of the exact physical location, but

“[n]evertheless, we see fit to note that should the state seek to hold detainees in the facility for a duration exceeding that which was determined in the restrictive arrangement, it shall be obligated to relay the physical location of the detention facility also and merely citing the code name for the detention facility and providing a contact for inquiries will not suffice”.³⁷

Thus, the Facility continues to exist, albeit with the restrictions upon the techniques of interrogation and conditions of detention, within the system of administrative detention.³⁸

Apart from detention facilities of the character of Facility 1391, upon arrest and detention, detainees are divided into three categories and this categorization reflects a differentiation with regard to the legal and procedural status of each category: (i) Israeli Jewish criminal prisoners; (ii) Palestinian criminal prisoners with Israeli citizenship; and (iii) Palestinian political prisoners from the Occupied Palestinian Territory (including West Bank, Gaza and East Jerusalem) and Palestinian political prisoners who hold Israeli citizenship.

The differentiation with regard to legal status and procedural requirements is exemplified by the following instances. There is a marked difference in the application of administrative orders in Israel and in the OPT. In Israel, the *Israeli Emergency Powers Law* (Detention) (1979) provides that a detainee must be brought before a judge within 48 hours and the detention order must be reviewed every three months. In contrast, in the OPT, a detainee must be brought before a judge within 8 days, and the length of the administrative detention orders is for maximum of a six-month period, and can be indefinitely renewed. Palestinian political detainees in Israel (unlike Jewish prisoners from Israel) are not entitled to the use of a telephone, home visits, early release, and cannot receive family visits without being separated by barriers from family members.³⁹ Finally, Israel applies international human rights law to

³⁶ Ibid., §22.

³⁷ Ibid., §27. (Emphasis in original).

³⁸ It is assumed, by the Report, that the Facility, although not closed, is not operative. In 2009, at the time of the Concluding Observations by the UN Committee Against Torture (CAT) on the Fourth Periodic Report of Israel (CAT/C/ISR/CO/4), which was submitted by Hamoked to the Supreme Court, prior to its decision, in 2011, in *Hamoked: Center for the Defence of the Individual v. State of Israel et al.* HCJ 8102/03, HCJ 9733/03, the CAT states that it has received “information from the State party [Israel] that ISA secret detention and interrogation facility known as “Facility 1391” has not been used since 2006 to detain or interrogate security suspects” (CAT, Concluding Observations on the Fourth Periodic Report of Israel, 2009 CAT/C/ISR/CO/4, §26). This position is restated in the *Fifth Periodic Report of Israel*, 2015, CAT/C/ISR/5, §278; and the Facility is not mentioned, by the CAT, in the *Concluding Observations to the Fifth Periodic Report of Israel* CAT/C/ISR/CO/5, in 2016.

³⁹ As a result of the decision by the Nazareth District Court, Pr.P.C. 49300-07-10 *Amir Machul v. Israel Prisons Service* (31.8.10), the challenge to the Israeli Prisons Service Directive Number 04.34.00, “that meetings between security detainees/prisoners and their lawyers should be with a glass partition, unless the Prison’s Director decides in exceptional circumstances to remove the partition”, has been upheld as a violation of the constitutional right to due process contained in the Israeli Basic Law. (CAT, *Fifth Periodic Report of Israel*, 2015 CAT/C/ISR/5, §45.).

settlers illegally residing in the OPT, but does not afford such rights and obligations to Palestinians.⁴⁰

⁴⁰See, International Court of Justice, *Advisory Opinion, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 9 July 2004, §112. The domestic legal basis for this distinct status of Israeli settlers is held, by the Israeli Supreme Court, to arise from the continued application, irrespective of their position under the *Fourth Geneva Convention* and the *Hague Regulations*, of the human rights contained in the Israeli Basic Law to all Israeli citizens in the OPT, which is a territory considered to be under Israeli control through belligerent occupation (see, *Zaharan Yunis Muhammad Mara'abe and others v The Prime Minister of Israel*, 2005 H.C.J. 7957/04, §21 citing and affirming the Supreme Court's position in *Regional Council, Coast of Gaza v. Knesset of Israel*, 2005 H.C.J. 1661/05 §80; and *Hess v. Commander of the IDF Forces in the West Bank*, 2004 HCJ 10356/02, HCJ 10497/02, §8ff.). Although the Israeli Supreme Court has considered the differences in the lengths of detention, in 2014, in *The Ministry of Palestinian Prisoners and others v The Minister of Defense and others* HCJ Case 3368/10; HCJ Case 4057/10, the judgment only centres upon an examination of the comparative lengths of detention in Israel and the OPT, and not upon the comparative length between Palestinians and Israeli settlers within the OPT. The case is discussed in detail below in relation to the *Convention on the Elimination of All Forms of Racial Discrimination* in the Section on international human rights law.

PART II

International Humanitarian Law

1 Applicability

This Report focuses on the regulations of international humanitarian law protecting civilians, namely, the individuals who do not, or who have ceased to, participate in the hostilities. It will, therefore, concentrate exclusively, with regard to international humanitarian law, upon those provisions applicable to administrative detention of civilians during an armed conflict.

The main sources of international humanitarian law which are *prima facie* applicable in respect of administrative detention of civilians in the OPT are the *Hague Regulations*,⁴¹ the *Fourth Geneva Convention*⁴² and the *Additional Protocols to the Geneva Conventions*⁴³ as well as provisions that have universal application as rules of customary international law. No derogation from international humanitarian law is permitted on military or security grounds, since it is considered to represent a body of international law whose provisions express a careful balance between humanitarian principles and military necessity.

Israel is not a party to the *Hague Regulations* of 1907 nor to *Additional Protocol I to the Geneva Conventions* which would otherwise be immediately applicable to Israel's belligerent occupation in the OPT and, in particular, to the Israeli State practice of administrative detention. Thus, in the absence of Israel's ratification of both these treaties, the applicability of these provisions of international humanitarian law can only be established, and accepted by Israel, on the basis that they have attained the status of customary international law.

As a result of Israel's position, the Report is guided by a strict interpretation and determination of the customary status of the provisions of the *Hague Regulations* and *Additional Protocol I* as rules of customary humanitarian law. It refrains from attributing the status of customary international law to normative standards derived from policy recommendations or to rules whose applicability is dubious or reasonably disputed by Israel. The conferral of the status of customary international law is thereby confined to the provisions of international humanitarian law that are considered to have clearly acquired the status of customary international law.⁴⁴ If these provisions have attained this status, they are held to be incontrovertibly applicable to Israeli State practice.

⁴¹ *Regulations Annexed to the Convention respecting the Laws and Customs of War on Land*, signed at The Hague on 18 October 1907.

⁴² *Convention (IV) relative to the Protection of Civilian Persons in Time of War*, signed in Geneva on 12 August 1949.

⁴³ *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts* (hereinafter "Additional Protocol I") and *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts* (hereinafter "Additional Protocol II"), both signed in Geneva on 8 June 1977.

⁴⁴ In order to identify norms which can be considered to be customary international humanitarian law, this Report relies on the general principles outlined in the ILC Draft Conclusions on the Identification of Customary International Law (International Law Commission, *Identification of customary international law. Text of the draft conclusions provisionally adopted by the Drafting Committee*, A/CN.4/L.872, 30 May 2016 (hereinafter "ICL Draft Conclusions") supplemented by the rules of customary humanitarian law identified by the ICRC in its comprehensive study of 2005 (Jean-Marie Henckaerts, Louise Doswald-Beck et al., *International Committee of the Red Cross, Customary International Humanitarian Law, Volume I: Rules*, (Cambridge: Cambridge University Press, 2005). For the ILC Drafting Committee, a rule of customary international law exists where two conditions are satisfied. First, there has to be a general practice, namely, a sufficiently widespread, representative and consistent practice, irrespective of its duration (*ICL Draft Conclusions*, Draft conclusion 8). Second, such a general practice must be accepted as law (*opinio juris*), that is, "undertaken with a sense of legal right or obligation" (Draft conclusion 9). In assessing evidence for establishing these two constituent elements, "regard must be had to the overall context, the nature of the rule, and the particular circumstances in which the evidence in question is to be found" (Draft conclusion 3, para. 1).

2 The Hague Regulations of 1907

The Hague Regulations are annexed to the Fourth Hague Convention of 1907, and contain the general normative foundations of the law of occupation. The guiding orientation of the juridical framework of the Hague Regulations is to demarcate a set of parameters for the actions for the occupying power which ensure respect for local laws, customs and natural resources.⁴⁵ Article 42 of the Hague Regulations provides a widely accepted definition of occupation, which can be considered to reflect international humanitarian law which has assumed the status of customary international law.⁴⁶ For Article 42,

“Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised”.⁴⁷

The notion of effective control determines the capacity to identify occupation and is of central importance in establishing whether a territory is under occupation and, thus, for the applicability of the attendant legal framework of the Hague Regulations. The existence of effective control is a question of fact which is determined without reference to the perception of the parties to the armed conflict of the prevailing situation. The effective control test, as a question of fact, operates without regard to Israel’s conception of the OPT as a ‘disputed territory’ within which it is not an occupying state. The test requires the satisfaction of three cumulative conditions, namely, the “unconsented-to presence of foreign forces, the foreign forces’ ability to exercise authority over the territory concerned in lieu of the local sovereign, and the related inability of the latter to exert its authority over the territory”.⁴⁸

A central principle underlying the Hague Regulations is that the occupying power must exercise its military control without unnecessarily infringing the individual and collective rights of the local population. In particular, Article 43 provides that the occupant “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”. In relation to this provision, the International Court of Justice held that,

“[t]his obligation comprised the duty to secure respect for the applicable rules of international human rights law and international humanitarian law, to protect the inhabitants of the

⁴⁵ See especially *Hague Regulations*, Articles 43-46, 55-56.

⁴⁶ As Tristan Ferraro emphasizes, “The notion of occupation has been expanded by Article 2 common to the 1949 Geneva Conventions specifically in order to include occupation that encountered no armed resistance. However, nothing in the *travaux préparatoires* indicates that the drafters of these instruments intended to change the widely accepted definition of occupation contained in Article 42 of the Hague Regulations. Since Common Article 2 explicitly recognizes the application of these instruments to all cases of occupation but fails to define the notion of occupation, one can logically conclude that the applicability of the Conventions’ relevant norms – in particular those of Part III, Section III of the Fourth Geneva Convention – is predicated on the definition of occupation laid down in Article 42 of the Hague Regulations. This is also suggested by Article 154 of the Fourth Geneva Convention governing the relationships between this instrument and the Hague Conventions of 1907”. (Tristan Ferraro, “Determining the beginning and end of occupation under international humanitarian law”, *International Review of the Red Cross*, Vol.94, No.885 (2012), pp. 133-163 (136).

⁴⁷ Article 42, Hague Rules, annexed to the Hague Convention 1907.

⁴⁸ Tristan Ferraro, “Determining the beginning and end of occupation under international humanitarian law”, *Op. cit.*, p. 142. In the same vein, ICJ, *Armed Activities on the Territory of the Congo (DRC v. Uganda)*, Judgment, 19 December 2005 (hereinafter ‘ICJ Congo v. Uganda’), §173.

occupied territory against acts of violence, and not to tolerate such violence by any third party”.⁴⁹

The obligation upon the occupying power, under Article 43, is further extended by Article 46 which imposes an explicit requirement to guarantee and maintain respect for a number of fundamental values, including the lives of persons, family rights, religious convictions and practice, and private property. The Hague Regulations forbid pillage, the imposition of general penalties, and the destruction of protected buildings and institutions.⁵⁰

Israel is not a party to the Hague Regulations, but the Israeli Supreme Court has accepted, in a number of decisions, that these rules have attained the status of customary international law.⁵¹ In addition, Israel, in common with all participants in the International Court of Justice (ICJ) Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*,⁵² confirmed its acceptance of the status of the Hague Regulations as that of customary international law.⁵³

The further question relates to the applicability of the Hague Regulations, as customary international law, to the belligerent occupation, by Israel, of the OPT. The Report follows the ICJ *Wall Advisory Opinion* in determining this question through the application of the definition of occupation, under Article 42 of the Hague Regulations, to Israel’s belligerent occupation of the OPT.⁵⁴ For the ICJ, the belligerent occupation of the OPT, by Israel, satisfies the definition of occupation under Article 42 of the Hague Regulations,

“The Court would observe that, under customary international law as reflected... in Article 42 of the Regulations Respecting the Laws and Customs of War on Land annexed to the Fourth Hague Convention of 18 October 1907 (hereinafter "the Hague Regulations of 1907"), territory is considered occupied when it is actually placed under the authority of the hostile army, and the occupation extends only to the territory where such authority has been established and can be exercised. The territories situated between the Green Line...and the former eastern boundary of Palestine under the Mandate were occupied by Israel in 1967

⁴⁹ ICJ *Congo v. Uganda*, Op. cit., §178.

⁵⁰ *Hague Regulations*, Articles 47, 50, 56. As it will be demonstrated in Part III of the Report, concerning International Human Rights Law, these obligations are complemented by the concurrent, extraterritorial application of International Human Rights Law in the occupied territory and the obligations of the occupying state to respect the rights of the population under its effective control set out in these international instruments. The discussion, in Part III, will again focus solely upon these concurrent aspects of international human rights law in relation to administrative detention.

⁵¹ The Israeli Supreme Court sitting as the High Court of Justice (hereinafter “HCJ”), 7015/02, 7019/02, *Ajuri v IDF Commander in Judea and Samaria*, 3 September 2002, 56(6) PD 352, §13; HCJ 769/02 *The Public Committee Against Torture in Israel v The Government of Israel* (Targeted Killings case), §§19-20; HCJ 606/78, *Ayyub v Minister of Defence*, 33(2) PD, 1978, p. 120.

⁵² ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports, 2004, p.136 (hereinafter ‘ICJ Wall Advisory Opinion’).

⁵³ *Ibid.*, §89. The ICJ also offers a complimentary argument, in §89, for the status of the Hague Rules as customary international law based upon the judgment of the International Military Tribunal of Nuremberg in which the “rules laid down in the [Hague] Convention were recognized by all civilized nations, and were regarded as being declaratory of the laws and customs of war” (Judgment of the International Military Tribunal of Nuremberg, 30th September and 1st October 1946, p.65) and its later confirmation, by the ICJ, in its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, §75.

⁵⁴ Further support for this interpretative position is provided by the later decision of the International Criminal Tribunal for the Former Yugoslavia, which in *Naletić and Martinović* (IT-98-34) Trial Judgment, 2003, § 215, acknowledged the absence of a definition of ‘occupation’ in the Geneva Conventions, and referred to Article 42 of the Hague Regulations as providing, under customary international law, the authoritative definition of ‘occupation’ under the Geneva Conventions.

during the armed conflict between Israel and Jordan. Under customary international law, these were therefore occupied territories in which Israel had the status of occupying Power. Subsequent events in these territories... have done nothing to alter this situation. All these territories (including East Jerusalem) remain occupied territories and Israel has continued to have the status of occupying Power”.⁵⁵

The underlying requirement of this definition of occupation of effective control is derived from the satisfaction of the three cumulative conditions of “unconsented-to presence of foreign forces, the foreign forces’ ability to exercise authority over the territory concerned in lieu of the local sovereign, and the related inability of the latter to exert its authority over the territory”.⁵⁶

The ICJ’s evaluation of the Israeli position with regard to both the status of the OPT prior to, and in, 1967, is one in which Israel acquired the status of an occupying power, when its armed forces took control of the West Bank and the Gaza Strip during the war of 1967. At this point, the law of belligerent occupation, comprising the Hague Regulations become applicable, due to their customary status, to the OPT.⁵⁷ In addition, as emphasized by the ICJ, the subsequent modification in Israel’s original powers and responsibilities over the OPT resulting from, for example, the PLO Israel Interim Agreements (known as the Oslo Accords 1993/1995) and Israel’s attempts to annex parts of the occupied territory, are without effect upon Israel’s position as occupying power as a matter of IHL: all territories occupied by Israel in 1967 remain occupied territories within the meaning of the law of belligerent occupation.

3 The Fourth Geneva Convention

The primary purpose of the Fourth Geneva Convention is to strengthen the protection afforded, under the Hague Regulations, to civilians, especially in situations of belligerent occupation of territory in which they reside, from the direct effects of armed conflict or from arbitrary treatment carried out by the other party (occupying power) to the conflict.

On the entry of Israel into the OPT, and during the initial period of Israeli belligerent occupation of the OPT, in 1967, the Fourth Geneva Convention was explicitly recognized, by Israel, as part of the laws applicable to the territory, under Article 35 of the *Security Provisions Order (West Bank)*, 1967. However, the subsequent *Security Provisions Order (West Bank)*, (*Amendment No. 9*), (*Order No. 144*), 22 October 1967, removed the previous Order’s recognition of the applicability of the Fourth Geneva Convention to the OPT. This reflected the unwillingness of Israel to accept both its status as an Occupying Power and the obligations of the Fourth Geneva Convention.⁵⁸ However, Israel subsequently stated that,

⁵⁵ *Ibid.*, §78.

⁵⁶ Tristan Ferraro, “Determining the beginning and end of occupation under international humanitarian law”, *Op. cit.*, p. 142; and ICJ *Congo v. Uganda*, *Op. cit.*, §173.

⁵⁷ The applicability of the provisions of the Fourth Geneva Convention will be discussed in the following Section. The position of the ICJ, is further supported by the analysis in Orna Ben-Naftali, Aeyal Gross, Keren Michaeli “Illegal Occupation: Framing the Occupied Palestinian Territory”, *Berkeley Journal of International Law*, Vol.23, No.2 (2005), pp. 551-614, 567-570.

⁵⁸ See, for an outline of the justification for the inapplicability of the definition, under the Fourth Geneva Convention, as an Occupying Power, David Kretzmer, “The law of belligerent occupation in the Supreme Court of Israel”, *International Review of the Red Cross*, Vol. 94, No.885 (2012), pp. 207-236 (209-10); and David Kretzmer, *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories*, (New York:

despite its rejection of the applicability of the Fourth Geneva Convention, its actions within the OPT would continue to comply with the humanitarian provisions of the Fourth Geneva Convention which formed part of the principles of customary international humanitarian law.⁵⁹ The continued reluctance of Israel to assume the juridical designation of an Occupying Power renders the foundation and extent of the applicability of the Fourth Geneva Convention to the OPT unclear.

The Israeli domestic court system, and, in particular, the Israeli Supreme Court, has, therefore, become the primary focus for the determination of Israel's responsibilities which combine those under IHL with those of derived from the basic procedural and substantive protections of Israeli administrative law.⁶⁰ The Israeli Supreme Court, sitting as the Israeli High Court, in relation to petitions from the OPT, reflects the dualist position in refraining from ruling, as a matter of direct legal obligation, on the question of the applicability of the Fourth Geneva Convention to the OPT. It has, however, adopted a consistently narrow and restrictive interpretative position in which only certain provisions of the Fourth Geneva Convention are applicable.

The position is exemplified in *The Public Committee Against Torture in Israel v. The Government of Israel* (Targeted Killings case) and in *Mara'abe v. The Prime Minister of Israel*⁶¹, which centre upon the definition of the legal authority of the Israeli military commander in the OPT and the further provisions of international and domestic law to which this authority is subject.

The authority of the military commander, as the representative of the State of Israel in the

State University New York Press, 2002), pp. 33-34; and the extended discussion in Orna Ben-Naftali, 'Pathological occupation: normalizing the exceptional case of the Occupied Palestinian Territory and other legal pathologies', in Orna Ben-Naftali (ed.), *International Humanitarian Law and International Human Rights Law*, (Oxford: Oxford University Press, Oxford, 2011), pp. 129–200. Many of the same arguments reappear in the later Levy Report in 2012. Its argument relies on the assumption that the West Bank and the Gaza Strip do not qualify as occupied territories within the meaning of the law of belligerent occupation, which comprises several provisions of the Fourth Geneva Convention. Israel avers that the West Bank and the Gaza Strip were not under the sovereign control of a High Contracting Party to the Geneva Conventions when it took control of them during the 1967 war, since Egypt and Jordan were acting as administrators, not sovereigns under the terms of the British Mandate.

⁵⁹ The comprehensive statement of this position, as emphasized by Kretzmer, *Op. cit.*, (2012), fn.10 p. 210, is by the then Israel Attorney General, Meir Shamgar, "The Observance of International Law in the Administered Territories", *Israel Yearbook on Human Rights*, Vol. 1, (1971), pp. 262–277.

⁶⁰ For Tristan Ferraro, the reliance upon domestic courts for the determination and enforcement of State responsibility under IHL is itself the reflection of the more general phenomenon of the ineffectiveness of the other mechanisms of regulation and enforcement contained in the Geneva Conventions, and the continued predominance of the preceding approach of the Hague Convention and Regulations that the "responsibility to ensure that the rules were observed and offenders brought to justice lies with the states" (Tristan Ferraro, "Enforcement of occupation law in domestic courts: issues and opportunities", *Israel Law Review* 41,1-2 (2008), pp.331-357, 334).

⁶¹ *The Public Committee Against Torture in Israel v. The Government of Israel* HCJ 769/02, [2005]; *Mara'abe v. The Prime Minister of Israel* HCJ 7957/04, [2005]. For further analysis of *The Public Committee Against Torture in Israel v. The Government of Israel* case, see Daniel Bodansky, Orna Ben-Naftali, and Keren Michaeli, "The Public Committee Against Torture in Israel v. The Government of Israel. Case No. HCJ 769/02", *American Journal of International Law*, Vol. 101, No.2 (2007), pp. 459-465; Antonio Cassese, "On Some Merits of the Israeli Judgment on Targeted Killings", *Journal of International Criminal Justice*, Vol.5, No.2 (2007), pp. 339-45; W.J. Fenrick, "The Targeted Killings Judgment and the Scope of Direct Participation in Hostilities", *Journal of International Criminal Justice* (2007), Vol.5, No.2 (2007), pp. 332-8; R.S. Schondorf, "The Targeted Killings Judgment", *Journal of International Criminal Justice* Vol.5, No.2 (2007), pp. 301-9.

OPT, derives from “belligerent occupation”.⁶² This entails that the OPT has “not been “annexed” to Israel” and that “Israeli law does not apply in these areas”.⁶³ Hence, “the legal regime which applies in these areas is determined by public international law regarding belligerent occupation”.⁶⁴ For the Israeli Supreme Court, this specific area of public international law is composed of two elements: the Hague Regulations 1907 and the Fourth Geneva Convention.⁶⁵

Thus, the Hague Regulations, to which Israeli is not a State Party, are held to have the status of customary international law in their entirety⁶⁶ and to be a part of Israeli domestic law.⁶⁷ The Fourth Geneva Convention is an international legal instrument which Israeli has ratified, but not incorporated into domestic legislation. The status of the Fourth Geneva Convention, as an unincorporated international legal instrument, leads the Supreme Court to adopt a strictly dualist perspective to the interpretation of the applicability of its provisions to the belligerent occupation of the OPT.⁶⁸ This interpretation, based upon the dualist perspective, holds that it is only those provisions of the Fourth Geneva Convention which have attained the status of customary international law – “the humanitarian aspects”⁶⁹ – which are applicable to the belligerent occupation of the OPT.⁷⁰

In addition, there is a distinct, but, for the Supreme Court, equally important further source of law which regulates the belligerent occupation of the OPT:

“the basic principles of Israeli administrative law, which is law regarding the use of a public official's governing power. These principles include, inter alia, rules of substantive and procedural fairness, the duty to act reasonably, and rules of proportionality”.⁷¹

Hence, the legal framework which is applicable to the belligerent occupation of the OPT is a combination of public international law and Israeli domestic administrative law.⁷²

The Report considers, in contrast to the position of the Israeli Supreme Court, that there is a legal foundation for a more direct and integral connection between the two elements of public international law – the Hague Rules and the Fourth Geneva Convention – applicable to the OPT. The character of this connection is such that, irrespective of Israel’s non-ratification of

⁶² *Mara’abe v. The Prime Minister of Israel*, Op. cit., §14.

⁶³ *Ibid.*

⁶⁴ *Ibid.* Citing H CJ 1661/05 *The Gaza Coast Regional Council v. The Knesset et al.* H CJ 1661/05 [2005], §3.

⁶⁵ The Supreme Court’s consideration of the applicability of international human rights law will be examined in the later section on International Human Rights Law.

⁶⁶ *Mara’abe v. The Prime Minister of Israel*, Op. cit., §14.

⁶⁷ *The Public Committee Against Torture in Israel v. The Government of Israel*, Op. cit., §§19-20.

⁶⁸ As emphasized in *The Public Committee Against Torture in Israel v. The Government of Israel*, §20, this is a reflection of “the position of the Government of Israel [which] is that, in principle, the laws of belligerent occupation in The Fourth Geneva Convention do not apply regarding the *area*. However, Israel hono[u]rs the humanitarian provisions of that convention” (*ibid.*). Citing *Kawasme v. The Minister of Defense* H CJ 698/80 [1980]. For the Supreme Court, in *The Public Committee Against Torture in Israel v. The Government of Israel*, “the “geometric location” of our issue is in customary international law dealing with armed conflict. It is from that law that additional law which may be relevant will be derived according to our domestic law. International treaty law which has no customary force is not part of our internal law” (*Ibid.*, §19).

⁶⁹ *Mara’abe v. The Prime Minister of Israel*, Op. cit., §14.

⁷⁰ *Ibid.*; *The Public Committee Against Torture in Israel v. The Government of Israel*, §20.

⁷¹ *Mara’abe v. The Prime Minister of Israel*, Op. cit., §14.

⁷² *Ibid.*, citing *Jami’at Ascan v The Commander of IDF Forces in Judea and Samaria* H CJ 393/82 [1983].

either the Hague Rules or the Fourth Geneva Convention, the entirety of the Fourth Geneva Convention is applicable, as customary international law, to the OPT.

The legal basis for this position is contained in the Advisory Opinion of the International Court of Justice (ICJ) on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.⁷³ The ICJ, in its comprehensive response to the “doubts expressed by Israeli as to the applicability in the Occupied Palestinian Territory of certain rules of international humanitarian law and international human rights instruments”⁷⁴, emphasizes the inherent interconnection between the Hague Rules and the Fourth Geneva Convention.

The ICJ commences from the relationship between the Hague Rules and the Fourth Geneva Convention which is determined by reference to Article 154 of the Fourth Geneva Convention. Under Article 154,

“that [the Fourth] Convention is supplementary to Sections II and III of the Hague Conventions. Section III of those Regulations, which concerns “Military authority over the territory of the hostile State”, is particularly pertinent in this case”.⁷⁵

From this position, the ICJ, then evaluates “Israel’s denial of the applicability *de jure* of the Convention to the Occupied Palestinian Territory”.⁷⁶ The denial is founded upon two elements. The first concerns the history of territorial possession and sovereignty by States over the OPT and the second relates to the interpretation of Article 2 Common to all the Geneva Conventions.

In relation to the history of territorial possession and sovereignty, the Israeli position is that, whilst the 1967 armed conflict involved the Israeli occupation of the OPT, prior to this occupation the territory was not under the sovereignty of any State party of that conflict. Hence, this historical origin of the Israeli occupation entails “that [the Fourth Geneva] Convention is not applicable *de jure*”⁷⁷ to the OPT. For the ICJ, in contrast,

“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”.⁷⁸

Hence, from the commencement of hostilities in 1967, between two or more State Parties of the Geneva Conventions, the Geneva Conventions (including the Fourth Geneva Convention) were applicable to the hostilities. The character of this armed conflict led to a situation in which “Israeli forces occupied all the territories which had constituted Palestine under British

⁷³ *ICJ Wall Advisory Opinion*, Op. cit., ICJ Reports, 2004, p. 136

⁷⁴ *ICJ Wall Advisory Opinion*, Op. cit., §86. The ICJ’s consideration of the applicability of international human rights instruments to the OPT will be discussed in the later section of the Report on International Human Rights Law.

⁷⁵ *Ibid.*, §89.

⁷⁶ *Ibid.*, §90.

⁷⁷ *Ibid.*, §93.

⁷⁸ *Ibid.*, §101.

Mandate (including those known as the West Bank, lying to the east of the Green Line)”.⁷⁹ The occupation, as a situation proceeding directly from the armed hostilities, is then a situation of belligerent occupation in which the Fourth Geneva Convention is *de jure* applicable.

Article 2 determines the common applicability of the Geneva Conventions. Under Article 2,

“[(1)] 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.

[2] 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”.⁸⁰

For Israel, Article 2(2) restricts the scope of the application of Article 2(1). The restriction produces a situation in which Article 2 only applies “in the case of occupation of territories falling under the sovereignty of a High Contracting Party involved in an armed conflict”⁸¹, and, therefore, the Fourth Geneva Convention has no application to the OPT.

The ICJ rejects the Israeli interpretation of the structure of Article 2, namely, the restrictive purpose of the second paragraph in relation to the first paragraph of Article 2. In contrast, the ICJ emphasizes that from its inception, as reflected in the intentions of the drafters contained in the Conventions’ *travaux préparatoires*, the Conventions were intended to be applicable irrespective of the recognition of a state of conflict by the parties and in all cases of occupation irrespective of a state of war.⁸² Thus, Article 2(2) was not intended as a limitation upon the scope of Article 2(1) but, rather, to ensure the inclusion of situations of occupation “without combat”.⁸³ The ICJ then indicates a substantial body of support for this interpretation of the relationship between the paragraphs of Article 2.⁸⁴

Thus, with the rejection of Israel’s characterization of the status of the OPT prior to, and in, 1967; and of the paragraphs of Article 2 Common to the Geneva Conventions, Israel’s presence in the OPT provides the grounds for the satisfaction of the three cumulative conditions under Article 42 of the Hague Rules.⁸⁵ Israel, therefore, remains an occupying

⁷⁹ *Ibid.*, §73.

⁸⁰ Article 2 Common to All the Geneva Conventions.

⁸¹ *ICJ Wall Advisory Opinion*, *Op. cit.*, §93.

⁸² *Ibid.*, §95.

⁸³ *Ibid.*

⁸⁴ The ICJ cites (§§96-99), Conference of the State Parties to the Fourth Geneva Convention on 15th July 1999, and reiterated at the later meeting in 2001; the declaration of the *de jure* applicability of the Fourth Geneva Convention to the OPT, by the International Committee of the Red Cross, on 5th December 2001; the resolutions of the UN General Assembly 10th December 2001 56/60 and 9th December 2003 58/97; the UN Security Council Resolutions of 15th September 1969 271(1969); 22nd March 1979 446 (1979); 20th December 1990 resolution 681 (1990); 18th December 1992 799 (1992) and 18th March 1994 904 (1994).

⁸⁵ Israel acquired the status of an occupying power, when its armed forces took control of the West Bank and the Gaza Strip during the war of 1967. At this point, the law of belligerent occupation, comprising the Hague Regulations and the Fourth Geneva Convention, become applicable to the OPT. The position of the ICJ, is further supported by the analysis in Ben-Naftali, Gross, Michaeli (2005), *Op. cit.*, pp. 551-614, 567-570. In addition, as emphasized by the ICJ, the subsequent modification in Israel’s original powers and responsibilities over the OPT is without effect upon Israel’s position, under IHL, as occupying power: all territories occupied by

power in the OPT, under Article 42 of the Hague Rules, and, this, in turn, entails the continued existence of the relationship specified, under Article 154 of the Fourth Geneva Convention, between the Hague Rules and the Fourth Geneva Convention. Hence, there is the *de jure* applicability of the entirety of the Fourth Geneva Convention, as customary international law, to the OPT.

The length of the belligerent occupation of the OPT raises the question of the duration of the *de jure* applicability of the entirety of the Fourth Geneva Convention. Under Article 6(2) and (3) of the Fourth Geneva Convention, a distinction is introduced between provisions which apply for the duration of military operations leading to occupation and those that remain applicable throughout the whole period of occupation.⁸⁶

On a strict construction of Article 6(3), it could be argued that whilst the power of internment (administrative detention) of civilians, under Article 27, remains applicable during the entire period of the belligerent occupation, Articles 41-43 and 78 of the Fourth Geneva Convention, which provide the procedural protections for the internment of civilians, cease to be applicable “one year after the general close of military operations”, as they are excluded from those that remain applicable during the entire period of belligerent occupation.

Although the ICJ, in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, confirmed the applicability, under Article 6(3), of the one-year rule⁸⁷, the Report considers that this position ignores the applicability of Article 3(b) of Additional Protocol I to the Geneva Conventions. Therefore, this aspect of decision can be rejected without any effect upon the preceding aspects of the decision upon which the Report relies.⁸⁸

In relation to Israel’s belligerent occupation of the OPT and the designation, by the Israeli Supreme Court, in *The Public Committee Against Torture in Israel v. The Government of Israel*, of the hostilities in the OPT as an international armed conflict, Article 3(b) of the Additional Protocol I to the Geneva Conventions has the potential to be applicable.⁸⁹

Article 3(b) of Additional Protocol I to the Geneva Conventions states that,

Israel in 1967 remain occupied territories within the meaning of the law of belligerent occupation (See, *ICJ Wall Advisory Opinion*, Op. cit., §78, §96).

⁸⁶ Article 6(2) and (3) of the Fourth Geneva Convention state:

“(2). In the territory of Parties to the conflict, the application of the present Convention shall cease on the general close of military operations.

(3). In the case of occupied territory, the application of the present Convention shall cease one year after the general close of military operations; however, the Occupying Power shall be bound, for the duration of the occupation, to the extent that such Power exercises the functions of government in such territory, by the provisions of the following Articles of the present Convention: 1 to 12, 27, 29 to 34, 47, 49, 51, 52, 53, 59, 61 to 77, 143”.

⁸⁷ *ICJ Wall Advisory Opinion*, Op. cit., §125.

⁸⁸ The Report follows the positions adopted by Orna Ben-Naftali, ““A la recherche du temps perdu”: rethinking Article 6 of the Fourth Geneva Convention in the light of the legal consequences of the Construction of a Wall in the Occupied Palestinian Territory Advisory Opinion”, *Israel Law Review*, Vol. 38, Nos.1-2 (2005), pp. 214–220; Ardi Imseis, “Critical reflections on the international humanitarian law aspects of the ICJ Wall advisory opinion”, *American Journal of International Law*, Vol. 99, No. 1, (2005); pp. 105–109; and Vaivos Koutroulis, *Le début et la fin de l’application du droit de l’occupation*, (Pedone, Paris, 2010), pp. 163–179.

⁸⁹ The Report considers the applicability of the other relevant Articles of Additional Protocol I in the following Subsection.

“the application of the Conventions and of this Protocol shall *cease*, in the territory of Parties to the conflict, on the general close of military operations and, *in the case of occupied territories, on the termination of the occupation*, except, in either circumstance, for those persons whose final release, repatriation or re-establishment takes place thereafter. These persons shall continue to benefit from the relevant provisions of the Conventions and of this Protocol until their final release, repatriation or re-establishment”.⁹⁰

The effect of Article 3(b) is to render the accompanying procedural guarantees (under Articles 41-43 and 78) of the Fourth Geneva Convention applicable to the occupying power’s use of administrative detention (under Article 27) irrespective of the duration of the occupation and, in particular, whether it exceeds a period of one year.

Israel has not ratified either of the Additional Protocols to the Geneva Conventions, and, therefore, in order for Article 3(b) to be recognized as source of international law applicable in the OPT, it must have attained the status of customary international law. The Israeli Supreme Court, in *The Public Committee Against Torture in Israel v. The Government of Israel*⁹¹, has accepted that those provisions of Additional Protocol I which have attained the status of customary international law are applicable to the OPT. In particular, Article 3(b) has attained the status of customary international law based upon the cumulative effect of the following:

“First of all, this support is confirmed by the *travaux préparatoires* of Article 3(b), which reveal the will of the negotiators to abolish Article 6, paragraph 3 of the Fourth Geneva Convention. It is also significant that Article 3 was adopted by consensus successively before the relevant Working Group and the First Committee as well as at the Plenary session.⁴⁶ This consensus includes States non-parties to Additional Protocol I that participated in the 1974–1977 Diplomatic Conference, namely India, Indonesia, Iran, Israel, Pakistan, Somalia, Sri Lanka, Thailand, Turkey, and the US. The fact that these states have not ratified the Protocol because they disagreed with other contentious provisions within the document does not mean that their adherence to the rule laid down in Article 3(b) can be put to question. All the more so since this adherence has been confirmed by later practice. Finally, a series of UN General Assembly Resolutions adopted after the ICJ Wall Advisory Opinion, while recalling the advisory opinion in its preamble, demand, in the relevant operative paragraph, that Israel ‘comply fully with the provisions of the Fourth Geneva Convention’. Nineteen out of the twenty-four states that have not yet ratified Additional Protocol I voted in favour of these resolutions”.⁹²

Thus, Article 3(b) of Additional Protocol I has the status of customary international law in relation to the belligerent occupation, by Israel, of the OPT. Therefore, Article 3(b), and *not* Article 6(3) of the Fourth Geneva Convention, determines the applicability of the provisions of the Fourth Geneva Convention during Israel’s belligerent occupation. Hence, the procedural guarantees, under Article 41-43 and 78, of the Fourth Geneva Convention, continue to apply to power of internment (administrative detention), under Article 27, for the entirety of the duration of the period of Israel’s belligerent occupation.

⁹⁰ Article 3(b) of Additional Protocol I (Emphasis added).

⁹¹ *The Public Committee Against Torture in Israel v. The Government of Israel*, Op. cit., §20.

⁹² Vaivos Koutroulis, “The application of international humanitarian law and international human rights law in situations of prolonged occupation: only a matter of time?”, *International Review of the Red Cross*, Vol.94, No.885, (2012), pp. 165-205, 174-175), and the further supporting footnote references cited therein.

The effect of the applicability of Article 3(b) of Additional Protocol I extends beyond the question of the duration of the totality of the protections contained within the framework of IHL. For the underlying intention to afford the protections of IHL to individuals for the duration, however prolonged, of belligerent occupation also reinforces the question, as discussed below, of the application of the fundamental rights and duties of international human rights law (IHRL) to the occupying power.

4 Additional Protocol I

Israel is not a party to the Additional Protocol I to the Geneva Conventions of 1949. In contrast to the Geneva Conventions of 1949, Additional Protocol I has not obtained universal ratification, nor are the entirety of its provisions to be considered the reflection of customary international law.⁹³ For the purposes of the Report, the focus is upon the status of Article 1(4) and Article 75 of Additional Protocol I to the OPT.⁹⁴ Article 1(4) of the Additional Protocol extends, through its application to Article 2 Common to All the Geneva Conventions, the provisions of all the Geneva Conventions (including the Fourth Geneva Convention)

“to armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations”.⁹⁵

In the absence of Israel’s ratification of this international legal instrument, Article 1(4) is not, for Israel, a provision of a treaty awaiting domestic incorporation. Israel has also indicated itself to be, and acted as, a persistent objector to this provision, and refuses to accept that it has attained the status of customary international law. Thus, the potential for Additional Protocol I to transform the definition of the situation in the OPT into an international armed conflict, and to provide the applicability of the entirety of its provisions and the provisions of the Geneva Conventions (including the Fourth Convention) to the OPT is explicitly denied by Israel.

⁹³ Although Israel actively participated in the preparatory discussions to the drafting of the two Additional Protocols in the early 1970s, “Israel was the only state that voted against the approval of the final version of the protocols in the concluding meeting of the diplomatic conference in Geneva and even voted, in the course of the conference, against the adoption of some of their central provisions” (Ruth Lapidot, Yuval Shany, Ido Rosenzweig, “Israel and the Two Protocols Additional to the Geneva Conventions”, *Policy Paper 92*, (2011) (Jerusalem: The Israel Democracy Institute), p. iv). The basis of Israel’s opposition derives from three elements: “the application of the Geneva Conventions and the First Additional Protocol to wars of national liberation [Article 1(4) *Additional Protocol I*]; greater flexibility in the rules entitling guerrilla fighters to receive status of prisoners of war [Articles 43-44 *Additional Protocol I*]; and the means by which national liberation organizations can join the protocol[s], in such a manner that, in Israel’s opinion, derogates from the duty of obeying the laws of war and encourages guerrilla organizations to use terror as a combat tactic”.

⁹⁴ In regard to the wider question of the relationship between the Hague Rules, the Geneva Conventions and the Additional Protocols, the Report adheres to the position of the International Court of Justice, in its Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, on the fundamental unity of these three elements as a body of IHL: “These two branches of the law applicable in armed conflict [Hague Rules and Geneva Conventions] have become so closely interrelated that they are considered to have gradually formed one single complex system, known today as international humanitarian law. The provisions of the Additional Protocols of 1977 give expression and attest to the unity and complexity of that law” (*Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports 1996, §75).

⁹⁵ Article 1(4), *Additional Protocol I*.

However, while Israel remains a non-Party to Additional Protocol I, the Israeli Supreme Court decision, in *The Public Committee against Torture in Israel v The Government of Israel*⁹⁶, in 2005, indicates that the Israeli position is no longer represented by the total denial of applicability of Additional Protocol I. The decision modifies the Israeli position through the Supreme Court's interpretation of the status of Additional Protocol I as customary international law and the status of the conflict within the OPT.

The Supreme Court, in regard to the question of the sources of law applicable to Israel in the OPT, and guided by the underlying dualist approach to the legal interpretation of the relationship between international law and domestic law, held that

“[i]n addition, the laws of armed conflict are entrenched in 1977 Additional Protocol I to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, hereinafter The First Protocol). Israel is not party to that protocol, and it was not enacted in domestic Israeli legislation. Of course, the customary provisions of The First Protocol are part of Israeli law”.⁹⁷

Thus, the case has transformed the position of Additional Protocol I into a recognized source of international law which is part of Israel domestic law insofar as its provisions are held to have the status of customary international law.

The Supreme Court's consideration of the character of the conflict in the OPT, under IHL, leads it to an emphatic statement that:

“As stated, for years the starting point of the Supreme Court – and also of the State's counsel before the Supreme Court – is that the armed conflict is of an international character. In this judgment we continue to rule on the basis of that view. It should be noted that even those who are of the opinion that the armed conflict between Israel and the terrorist organizations is not of international character, think that international humanitarian or international human rights law applies to it”.⁹⁸

This, in turn, leads to the weakening, if not effectively to rendering redundant the preceding opposition to Article 1(4) of Additional Protocol I. For, with the acknowledgement of the conflict has the status of an international armed conflict, the Supreme Court removed the importance of a determination of “whether the present conflict falls under article 1(4) of the First Additional Protocol ... and greatly restricted, if it did not completely obviate, the practical implications of the Israeli objection to this article”.⁹⁹

The decision in *The Public Committee against Torture in Israel v The Government of Israel*, also enables other Articles of Additional Protocol I to be part of Israeli law applicable in the OPT if they have the status of customary international law. Thus, the Report turns to consider

⁹⁶ *The Public Committee against Torture in Israel v The Government of Israel*, 2005 HCJ 769/02. The Report also accepts the designation, by the Israel Supreme Court, of the OPT as a situation in which the law of international armed conflict applies (Ibid., §18). The Report, therefore, only refers to the provisions of the Geneva Conventions and Additional Protocol I relating to international armed conflict.

⁹⁷ Ibid., §20.

⁹⁸ Ibid., §21.

⁹⁹ Lapidot, Shany, Rosenzweig (2011), Op. cit., p. vi.

the applicability to administrative detention of the fundamental guarantees and safeguards of Article 75, Additional Protocol I.

In regard to the Israeli State practice of administrative detention, Article 75 would require Israel to incorporate further fundamental guarantees and minimum safeguards.¹⁰⁰ In particular, the fundamental guarantees and minimum standards of Article 75(3) (the right to be informed of reason for the charge/detention and the right to as minimal a delay as possible in release “as soon as the circumstances justifying the arrest, detention or internment have ceased to exist”); and, of Article 75(2), the absolute prohibition “at any time and in any place whatsoever” upon the acts of “violence to the life, health, or physical or mental well-being of persons” (Article 75(2)(a)) and “outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault” (Article 75(b)).

The rights contained in Article 75(3) are of direct relevance to the arrest, detention proceedings and periodic review of the Israeli State practice of administrative detention. The absolute prohibitions in Article 75(2) are of potential direct relevance to the practices of interrogation and to the wider conditions and treatment during the periods of administrative detention.

Despite the absence of universal ratification, and, in particular of Israel’s non-ratification, Article 75 of Additional Protocol I has crystallised into customary international law and is applicable to Israel irrespective of its non-ratification. The position is supported by the explicit attribution of this status of customary international from various sources,¹⁰¹ including the landmark judgment of the Supreme Court of the United States, which declared that Article 75 is “indisputably” part of customary international law.¹⁰²

¹⁰⁰ In particular, as emphasized by the International Committee for the Red Cross Commentary on Additional Protocol I of 1987, Article 75 “represents an important step forward in humanitarian law by laying down several minimum rules of protection for the benefit of all those who find themselves in time of armed conflict in the power of a Party to the conflict, whereas in such circumstances provisions of human rights law are subject to possible derogations”, p. 865, §3006, Available at: <https://ihldatabases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=E46340B132AC1B86C12563CD004367BF>.

¹⁰¹ See e.g. Eritrea Ethiopia Claims Commission, Civilians Claims, *Ethiopia’s Claim 5 (Ethiopia/Eritrea)*, Partial Award, 17 December 2004, 135 ILR 427, § 29; Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, Doc OR OEA/Ser.L/V/II.116 Doc. 5 rev. 1 corr., 22 October 2002, §76; Antonio Cassese, “The Geneva Protocols of 1977 on the Humanitarian Law of Armed Conflict and Customary International Law”, *UCLA Pacific Basin Law Journal*, Vol. 3, No. 1-2, (1984), pp. 57-117 (p.98); Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, 2nd Edition (Cambridge: Cambridge University Press, 2010), p.33; Christopher J. Greenwood, “Customary Law Status of the 1977 Geneva Protocols” in F. Kalshoven, J.M. Astrid Delissen, Gerard J. Tanja (eds.), *Humanitarian law of armed conflict: challenges ahead: essays in honour of Frits Kalshoven*, (Dordrecht: M. Nijhoff, 1991), pp. 93-114 (p.103), Michael J Matheson, “Session One: The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions”, reprinted in *2 Am. U. J. Int’l L. & Pol’y* 419 (1987), pp. 41-431, 427 (expressing the acceptance, as customary international law, by the United States of the fundamental guarantees embodied in Article 75. Although, the position of the USA was modified, for a period – the initial ‘war on terror’ – it is assumed, after the Supreme Court decision in *Hamdan v Rumsfeld*, and the Executive Order of the US President, “Periodic Review of Individuals Detained at Guantanamo Bay Naval Station Pursuant to the Authorization for Use of Military Force”, issued on March 7th 2011, to have returned to essentially the same position presented by Matheson).

¹⁰² United States Supreme Court, *Salim Ahmed Hamdan v. Donald H. Rumsfeld et al.*, 548 U.S. 557 (2006), No. 05-184, 29 June 2006, p. 71 (slip opinion).

5 Administrative Detention in the Occupied Palestinian Territory

Administrative detention is a State practice which is permitted under IHL. Article 27(4) of the Fourth Geneva Convention enables a party to the conflict to resort to administrative detention of civilians belonging to the opposing party. However, although the Fourth Geneva Convention does not impose an absolute prohibition on this State practice, it enumerates a set of procedural principles, under Articles 41-43 and 78, which constrain the character of each stage of this State practice (the initiation of administrative detention, the procedural form through which administrative detention is reviewed and the conditions of detention). The specific procedural safeguards are differentiated by the place of detention/internment, with Articles 41-3 relevant to situations of civilian internment in the territory of a party to the conflict, and Article 78 relevant to situations of civilian internment in an occupied territory. Despite these distinct situations of applicability, it is assumed that the intention of the drafters of the Fourth Geneva Convention was not to establish any significant divergence in the type and standard of procedural protection between these Articles of the Fourth Geneva Convention.

The procedural safeguards are combined, under Articles 27, 31-33, and the Articles under Section IV of Part III of the Fourth Geneva Convention, with the absolute prohibition upon certain forms of treatment and conditions of detention. Thus, the State Party is obliged to ensure and guarantee that each individual detainee will experience forms of treatment and conditions of detention compatible with these provisions of the Fourth Geneva Convention.

Additional Protocol I supplements and enhances both aspects of the Fourth Geneva Convention in relation to the State practice of administrative detention. Article 75(3) strengthens the existing procedural protections of the Fourth Geneva Convention, at the initial stages of administrative detention and at the stage immediately prior to release. It confers upon individuals the right to be informed, by the State Party, of the reason for charge/detention and the right to as minimal a delay as possible in release “as soon as the circumstances justifying the arrest, detention or internment have ceased to exist”. Under Article 75(2), it strengthens the existing protections of the Fourth Geneva Convention in relation to the conditions and treatment whilst in detention. It imposes an absolute prohibition “at any time and in any place whatsoever” upon forms and conditions of treatment of the individual by the State Party.

The failure of a State to comply with one or more of these requirements indicates a potential non-compliance with the Fourth Geneva Convention and Additional Protocol I. In relation to the Fourth Geneva Convention, the non-compliance, if established, represents a situation in which the civilian has been held in a situation of “unlawful confinement” and/or has been subjected to “inhumane treatment”. Under Article 147 of the Fourth Geneva Convention, “unlawful confinement” and “inhumane treatment” are breaches of the Fourth Geneva Convention which are further categorized as a grave breach.¹⁰³ The non-compliance, by a

¹⁰³ Fourth Geneva Convention, Article 147: “Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages

State, with the requirements of Article 75 of Additional Protocol I, will be considered, under Article 85 of Additional Protocol I, to represent a grave breach of that Protocol.

The Report proceeds, on the basis of these applicable provisions of IHL in the OPT, to provide a detailed legal analysis of the compliance of the Israeli State practice of administrative detention with these provisions of IHL. The analysis focuses upon the determination of the degree of compliance of each stage of the Israeli State practice of administrative detention. It begins by addressing the permissible grounds for internment; it then examines the procedural rights afforded to internees; and concludes with the consideration of the forms of treatment and conditions of detention, the grounds for warranting release and the transfer of civilian detainees from the OPT to Israel.

6 Control Measures and Respect for Fundamental Rights

Article 27(4) of the Fourth Geneva Convention permits the occupying power to “take such measures of control and security in regard to protected persons as may be necessary as a result of the war”.¹⁰⁴ The measures have the status of a derogation from the fundamental “principle of respect for the human person and the inviolable character of the basic rights of [the] individual”¹⁰⁵, and are considered to involve different degrees of interference with the right to liberty of person under Article 27.¹⁰⁶ The recourse to internment/administrative detention is a measure which represents the severest degree of interference with the right to liberty of the civilian population, and, as such, is regarded as an exceptional measure of control.

The severity of administrative detention is the continued potential for serious interference with the principle of respect and inviolable basic rights to extend beyond the right to liberty to the physical and mental integrity of the individual detainee.¹⁰⁷ The particular balance to be established between humanitarian principles and military necessity requires that administrative detention be regulated, for the entire period from arrest to release, by respect for the human person and basic rights of the individual. Thus, regulation by humanitarian principles involves the imposition of both procedural and substantive protection upon the exercise of the exceptional security measure of administrative detention.

and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly”.

¹⁰⁴ Article 27(4) of the Fourth Geneva Convention.

¹⁰⁵ Jean S. Pictet (ed.), *Commentary: IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, ICRC, 1958 (hereinafter “ICRC Commentary of 1958”), p. 200.

¹⁰⁶ For the ICRC Commentary of 1958, under Article 27(4), “[t]he various security measures which States might take are not specified; the Article merely lays down a general provision. There are a great many measures, ranging from comparatively mild restrictions such as the duty of registering with and reporting periodically to the police authorities, the carrying of identity cards or special papers, or a ban on the carrying of arms, to harsher provisions such as a prohibition on any change in place of residence without permission, prohibition of access to certain areas, restrictions of movement, or even assigned residence and internment” (ICRC Commentary of 1958, p. 207). The further specification of the permissible range of security measures, in regard to an occupying power, is contained in Article 78(1) of the Fourth Geneva Convention.

¹⁰⁷ *Ibid.*

7 Grounds for Administrative Detention

The Fourth Geneva Convention confines the general ground for derogation from its provisions regarding civilians as protected persons to reasons of “security”. Under Article 5(1) and (2), a further precision is accorded to this general ground based upon whether the derogation is imposed within the territory of the State or within an occupied territory. Under Article 5(1), within the territory of the State, the reasons of security are more precisely defined as those of “the security of the State”.¹⁰⁸ In contrast, under Article 5(2), reasons of security within an occupied territory are defined more narrowly, as those of “absolute military security”.¹⁰⁹ The distinction reflects the different realities of a territory governed by a State in the wider interests of its security and an occupied territory under military control in which it is the narrower interest of military security which furnishes the reasons of security.¹¹⁰

The Fourth Geneva Convention recognizes the State practice of internment/administrative as an exceptional security measure within the parameters of the derogation under Article 27(4). The imposition of administrative detention is guided by the distinction, under Article 5, between two separate contexts: imposition upon non-repatriated civilians within the State (as an adverse party to the conflict)¹¹¹, or, upon civilians within an occupied territory¹¹² (where the State is the occupying power). For the purposes of the Report, the focus is upon the form of internment/administrative detention imposed by Israeli, as an occupying power, upon the civilians of an occupied territory, the OPT. Thus, the analysis of this section will centre upon Article 78 of the Fourth Geneva Convention.

Under Article 78(1), the occupying power is authorized, for “imperative reasons of security”, to impose measures upon the civilian population and, “at most, subject them to assigned residence or internment”. The imposition of administrative detention is, therefore, the result of two exceptional situations. The recourse to any limitation of the right to freedom of movement of the civilian population in the occupied territory is confined to the *risk* that the *individual* poses to the military security of the occupying power. The obligation to establish the particular risk posed by an individual to the military security of the occupying power flows from the prohibition, under international customary law, upon collective punishments¹¹³ and the principle of non-discrimination.¹¹⁴ It also reflects, as indicated by the

¹⁰⁸ Article 5(1) of the Fourth Geneva Convention.

¹⁰⁹ Article 5(2) of the Fourth Geneva Convention.

¹¹⁰ Zelalem Mogessie Teferra, “National security and the right to liberty in armed conflict: The legality and limits of security detention in international humanitarian law”, *International Review of the Red Cross*, Vol. 98 No.3 (2016), pp. 961-993, 963, fn 5; 966, fn18.

¹¹¹ For these situations of non-repatriated civilians, the ground for detention by the (detaining) State is governed by Article 42(1) of the Fourth Geneva Convention.

¹¹² For these situations of civilians within an occupied territory, the ground for detention by the occupying power is governed by Article 78(1) of the Fourth Geneva Convention.

¹¹³ Jean-Marie Henckaerts, Louise Doswald-Beck, *Customary International Humanitarian Law. Volume I: Rules* (Cambridge: Cambridge University Press, 2005), (hereinafter “ICRC Study on Customary International Humanitarian Law 2005”), Rule 103 (the prohibition of collective punishments extends to “sanctions and harassment of any sort”, including administrative sanctions).

¹¹⁴ ICRC Study on Customary International Humanitarian Law 2005, Op. cit., Rule 88. It is also complimented, as discussed in Part III below, by the relevant protections provided by International Human Rights Law.

ICRC Commentary of 1958, the enhanced protection afforded to civilians in an occupied territory, under Article 78(1), in comparison with the recourse to measures of security, under Articles 41 and 42, in relation to civilians within a territory of a Party to the conflict.¹¹⁵

The requirement of a risk posed by the individual to the military security of the occupying power distinguishes administrative detention from “any infringement of the penal provisions enacted by the Occupying Power”¹¹⁶, and “[t]he persons subjected to these measures are not, in theory, involved in the struggle. The precautions taken with regard to them cannot, therefore, be in the nature of a punishment”.¹¹⁷ This, in turn, entails that the establishment of an individual’s risk does not confer an automatic entitlement to impose administrative detention but, rather, the preliminary stage for the further consideration of the type of measure that will be imposed to limit the individual’s freedom of movement. Hence, the qualifying term, “at most”, in Article 78(1), appended to the measures of assigned residence and administrative detention, denotes the exceptional, rather than conventional character of recourse to both measures.

The Israeli Supreme Court, acknowledging that Article 78 of the Fourth Geneva Convention is part of customary international law and, therefore, part of Israeli law applicable to the OPT, has offered a number of precisions with regard to compliance with this provision. The Supreme Court commences from the position of the military commander in the OPT involving a balancing test, under Article 78, between military security of the OPT and the protected status of the civilians within the OPT.¹¹⁸ The Supreme Court imposes further regulation of this balance as the ground for the decision to arrest and impose an administrative detention order through the degree of specific risk to military security presented by an individual. The decision to arrest and detain based upon the aim of general deterrence of other individuals or for the wider strategic purposes of utilizing the detainees for prisoner exchanges are determined, by the Supreme Court, to be excluded by the requirements of Article 78.¹¹⁹ The exceptional character of the interference of administrative detention with the protected status of civilians in the OPT, indicated by the second limitation, is also acknowledged through the requirement that the military commander demonstrate that

¹¹⁵ For the ICRC Commentary of 1958, “[i]n occupied territories the internment of protected persons should be even more exceptional than it is inside the territory of the Parties to the conflict; for in the former case the question of nationality does not arise. That is why Article 78 speaks of imperative reasons of security; there can be no question of taking collective measures: each case must be decided separately” (ICRC Commentary of 1958, Op. cit., p. 365.)

¹¹⁶ ICRC Commentary of 1958, Op. cit., p. 368. The Report concurs with Pejic (Jelena Pejic, “Procedural principles and safeguards for internment/administrative detention in armed conflict and other situations of violence”, *International Review of the Red Cross*, Vol. 87, No. 858 (2005), pp. 375-391 (p. 381 fn. 21)), in considering that the potential of Article 68 of the Fourth Geneva Convention (permitting administrative detention by the occupying power for minor criminal offences) to undermine a strict distinction between the regimes of administrative and criminal detention, is removed by the ICRC Commentary of 1958, which states “[i]nternment is a preventive administrative measure and cannot be considered a penal sanction. It is nevertheless mentioned here under the same head as simple imprisonment, because the authors of the Convention wished to make it possible for military courts of the Occupying Power to give persons guilty of minor offences the benefit of conditions of internment provided in Article 79 et seq. The provision was a humane one and was intended to draw a distinction between such offenders and common criminals” (ICRC Commentary of 1958 Op. cit., pp. 343-344).

¹¹⁷ Ibid.

¹¹⁸ See, for example, the Israel Supreme Court decisions of HCJ 2056/04 *Marab et al. v. IDF Commander; Beit Sourik Village Council v. The Government of Israel*; HCJ 7015/02 *Ajuri et al. v. The Commander of IDF Forces in the West Bank et al.*; HCJ 7019/02 *Ajuri et al. v. The Commander of IDF Forces in Judaea and Samaria et al.*

¹¹⁹ HCJ 7015/02 *Ajuri et al. v. The Commander of IDF Forces in the West Bank et al.*; HCJ 7019/02 *Ajuri et al. v. The Commander of IDF Forces in Judaea and Samaria et al.*; *A and B v State of Israel*, CrimA 3261/08.

the risk to military security posed by a specific individual person is unable to be prevented by the imposition of less restrictive security measures.¹²⁰

However, the significant and enduring effect of these precisions, by the Israeli Supreme Court, upon the grounds of the underlying rationale and pattern of the military commander's decision-making within the OPT remains unclear. The lack of amendment of the Military Orders in the OPT governing administrative detention in order to define the grounds for the exercise of administrative detention more precisely would suggest the limited and isolated effect of the jurisdiction of the Supreme Court on the initial stage of administrative detention in the OPT.

8 Procedural Rights

In order for the administrative detention of an individual to comply with the Fourth Geneva Convention, the occupying power is required to establish and follow a regular procedure of initial appeal and subsequent review of the grounds for continued administrative detention. The absence of a regular, periodic procedure indicates the potential for the administrative detention to be designated, under Article 147, as the grave breach of unlawful confinement.

The requirements of a regular procedure are contained in Article 78(2) which states that

“[d]ecisions regarding such assigned residence or internment shall be made according to a regular procedure to be prescribed by the Occupying Power in accordance with the provisions of the present Convention. This procedure shall include the right of appeal for the parties concerned. Appeals shall be decided with the least possible delay. In the event of the decision being upheld, it shall be subject to periodical review, if possible every six months, by a competent body set up by the said Power”.¹²¹

The obligation imposed upon the occupying power is co-terminus with the exercise of administrative detention under Article 78(1). In this manner, Article 78(2), through the implementation of a regular procedure, establishes the underlying balance of IHL between the occupying power's considerations of security and the maintenance of protection for civilians within the occupied territory under the Fourth Geneva Convention.¹²² The further

¹²⁰ HCJ 11026/05 *Anonymous v. IDF Commander in the West Bank* §§6-8; HCJ 7015/02 HCJ, *Ajuri* §§25-26. It should also be noted that the Israeli Supreme Court considers the same requirements to apply without qualification to both the regime of administrative detention in the OPT (Military Detention Order) and in Gaza (Unlawful Combatants Law).

¹²¹ Article 78(2) of the Fourth Geneva Convention.

¹²² The balance is also the reflection of the foundational provision of Article 27 which, for the ICRC Commentary of 1958 “proclaims the principle of respect for the human person and the inviolable character of the basic rights of individual men and women” (ICRC Commentary 1958, Op. cit., 199). The ICRC Commentary explicitly recognizes, within these basic rights, the right to personal liberty. However, “[t]he right to personal liberty, and in particular, the right to move about freely, can naturally be made subject in war time to certain restrictions made necessary by circumstances. So far as the local population is concerned, the freedom of movement of civilians of enemy nationality may certainly be restricted, or even temporarily suppressed, if circumstances so require. That right is *not*, therefore, included among the other *absolute rights* laid down in the Convention, *but that in no wise means that it is suspended in a general manner*. Quite the contrary: the regulations concerning occupation and those concerning civilian aliens in the territory of a Party to the conflict are based on *the idea of the personal freedom of civilians remaining in general unimpaired*. The right in question is therefore a *relative one* which the Party to the conflict or the occupying power may restrict or even suspend *within the limits laid down by the Convention*” (Ibid., pp. 201-202., emphasis added). The heightened procedural protection to be afforded in occupied territories is explicit in the Commentary's consideration of

determination of the requirements of a “regular procedure”, under Article 78(2), is, for the ICRC Commentary of 1958, through the replication of the specific procedures detailed in Article 43.¹²³ Therefore, the initial arrest and detention must be accompanied by the right of appeal and, if the detention order is upheld, the review, every six months, of the initial grounds for continued detention.

The occupying power retains the same discretion, in conformity with Article 43, as to whether the body which undertakes the appeal and review is judicial (court) or administrative (board), but, for the ICRC Commentary of 1958, despite this, it “means that the decision will never be left to one individual. It will be a joint decision, and this offers protected persons [civilians] a better guarantee of fair treatment”.¹²⁴

The Fourth Geneva Convention and the ICRC Commentary contains no prohibition upon the establishment of a military court system as the response of the occupying power to the procedural requirements of Article 78(2). Under Articles 64 and 66 of the Fourth Geneva Convention, the occupying power, as an aspect of the exceptional amendment of the existing legal framework of the occupied territory, in response to considerations of order and security, is permitted to establish “properly constituted, non-political military courts, on condition that said courts sit in the occupied country. Courts of appeal shall preferably sit in the occupied country”.¹²⁵ The jurisdiction of the military courts, within an occupied territory, is held by the ICRC Commentary of 1958 to extend beyond the members of the military personnel of the occupying power to include civilians within the occupied territory.¹²⁶ Thus, for the purposes of IHL, the Israeli military court system is not, from the outset, incompatible with the procedural protections for the right to liberty relative to the severity of the interference of the security measure of administrative detention.¹²⁷ However, the concern of the ICRC

Article 78(1), in which it states, “[i]n occupied territories the internment of protected persons should be *even more exceptional* than it is inside the territory of the Parties to the conflict; for in the former case the question of nationality does not arise. That is why Article 78 speaks of imperative reasons of security; there can be no question of taking collective measures: each case must be decided separately” (Ibid., p. 368. Emphasis added).

¹²³ ICRC Commentary of 1958, Op. cit., p. 368. In this manner, the Commentary insists upon the equality of procedural protections for the two distinct contexts of a civilian in the territory of a Party to the conflict at the commencement of hostilities (to which the procedural protections of Article 43 apply to any decision by that Party to impose administrative detention upon a civilian within its territory) and of a civilian in a territory occupied by a Party to the conflict (to which the procedural protections under Article 78(2), replicating those of Article 43, apply to any decision by the occupying power to impose administrative detention upon civilian within the occupied territory).

¹²⁴ Ibid., p. 369 (Emphasis added).

¹²⁵ Article 66 of the Fourth Geneva Convention. Here, the Report follows the analysis the Yesh Din Report of 2007, *Backyard Proceedings: The Implementation of Due Process Rights in the Military Courts in the Occupied Territories* (pp. 32-35). For the Yesh Din Report, Articles 64 and 66 of the Fourth Geneva Convention prohibit the existence and operation of the Israeli military court system outside the OPT; and to this position, this Report adds that the prohibition under these Articles provides additional support for the application of the absolute prohibition upon deportation of the civilian population, under Article 49 of the Fourth Geneva Convention, from the OPT (Article 49 will be discussed below). In addition, Regulation 6(b) of the Emergency Regulations (Offences Committed in Israeli-Held Areas – Jurisdiction and Legal Assistance), 1967, which continues to render the detainee subject to the provisions of the legal framework in the OPT does not overcome the prohibition, under Articles 64 and 66, upon the operation of the Israeli military court system outside the OPT.

¹²⁶ ICRC Commentary of 1958, Op. cit., pp. 335-336. In addition, the Israeli military court system specifically acknowledged the foundation of its jurisdiction over civilians in Article 66 of the Fourth Geneva Convention in Samaria Court Case 5732/01, 5708/01, *Military Prosecutor v. Odeh*, decision dated September 11, 2002 (Yesh Din, Op. cit., p. 35).

¹²⁷ This is in contrast with the stronger hesitations expressed in the UN Human Rights Committee *General Comment No. 13: Article 14 (Administration of Justice), Equality before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law* 13th April 1984, §4; and *General comment no. 32*,

Commentary with the “better guarantee of fair treatment” and a “properly constituted, non-political” military court would suggest that the operation of the appellate procedure (initial appeal and periodic review) – the actual process of considering an individual appeal or review – remains subject to continued scrutiny under Article 78(2).¹²⁸

Hence, the Fourth Geneva Convention intends that both the initial appeal and the review process are required to be independent and impartial in their consideration of either the imposition or renewal of the administrative detention order.¹²⁹ This, in turn, entails that an integral element of both procedures, as part of the adversarial judicial process, is the detainee’s right to attend and be heard in the proceedings and to receive legal assistance and representation.¹³⁰ The Military Court system includes the capacity for the detainee to attend and to be heard and for legal assistance and representation for detainees as part its procedures and, therefore, in this formal respect it is in conformity with the requirements of Article 78(2).

The continuing scrutiny of the process of initial appeal and of review is enhanced by Article 75(3) of Additional Protocol I. The requirement of a “regular procedure”, under Article 78(2) of the Fourth Geneva Convention, is supplemented by the further precision, under Article 75(3), that the detainee be “informed promptly, in a language he [she] understands, of the reasons why these measures have been taken”. The ICRC Commentary of 1987 indicates that, in relation to administrative detention, the term “reasons” are to be understood as “reasons for which a State might wish to take security measures such as internment or assigned residence”¹³¹; and that for the term “promptly”, “it is difficult to determine a precise time limit, but ten days would seem the maximum period”.¹³²

The requirement of Article 75(3), although an obligation upon the occupying power at the time of arrest, is to be understood as affecting the entirety of the subsequent procedures of

Article 14, Right to equality before courts and tribunals and to fair trial, CCPR/C/GC/32 23rd August 2007, §22. From the perspective of the international human rights law of the International Covenant on Civil and Political Rights (ICCPR), the establishment of a system of military courts is an exceptional measure situated at the very boundary between compliant and non-compliant forms of procedural protection. This will be discussed further in the section on international human rights law.

¹²⁸ As Pejic emphasizes, “[w]hile the Convention does not specifically speak of these actions as challenges to the lawfulness of detention, that is what they essential are. The purpose of the “reconsideration” or “appeal” is to enable the competent body to determine whether the person was deprived of liberty for valid reasons and to order his or her release if that was not the case”. (Pejic, *Op. cit.*, p. 388).

¹²⁹ The following explication of the more specific elements of the procedural protection envisaged by the Fourth Geneva Convention derives from the fact, as Pejic notes, that the Fourth Geneva Convention and Additional Protocol I “do not sufficiently elaborate on the procedural rights of internees, nor do they specify the details of the legal framework that a detaining authority must implement” (Jelena Pejic, *Op. cit.*, p. 377).

¹³⁰ The Report follows Pejic (*Op. cit.*, p. 389) and Hans-Peter Gasser and Knut Dormann, “Protection of the Civilian Population”, in Dieter Fleck (ed.), *The Handbook of International Humanitarian Law* 3rd Edition (Oxford: Oxford University Press, 2013), p. 317, in considering that Article 78(2), as a “regular procedure”, requires that a detainee “attend the proceedings in person” and has the “right to be heard”. Article 78(2) of the Fourth Geneva Convention is silent on the question of legal assistance and representation. However, following Pejic (*Op. cit.*, p. 388), the requirement of conformity between the degree of procedural protection under Article 78(2) and Article 43, enables the same character of a minimum level of protection, from the ICRC Commentary of 1958 on Article 43, to be accorded to the procedural protections of both Articles. From the minimum status ascribed to both Articles, combined with the encouragement to State Parties, in the Commentary on Article 43, to “afford better safeguards” beyond this minimum, legal assistance and representation can be considered a “basic procedural safeguard”.

¹³¹ ICRC Commentary on Additional Protocol I, §3070, p. 876.

¹³² *Ibid.*, §3072, p. 876.

initial appeal and review. Delay in, or absence of, knowledge of the charge has a direct effect upon the individual detainee's capacity to engage in a genuine challenge, through either of these subsequent procedures, to the grounds of administrative detention order. The delay or absence also has a direct effect upon the ability of the detainee's legal representative to provide legal assistance and representation at each of the stages of administrative detention.

In addition, Article 75(3) should extend to the decision taken at both the initial appeal and the review process since it relates to the confirmation or rejection of the reason for the imposition of the administrative detention order. The appellate body and the review body are, therefore, required to inform the detainee of the reasons for their decision to confirm or reject the grounds of the administrative detention order.¹³³

The enhanced concept of a "regular procedure" conferred by Article 75(3) of Additional Protocol I reveals a number of elements of the Israeli practice of administrative detention as incompatible with the requirements of Article 75(3) and Article 78(2) of the Fourth Geneva Convention. The instances of incompatibility relate to all stages of the Israeli practice of administrative detention.

Under the two procedures of arrest and detention of the individual, pursuant to Military Order 1651¹³⁴, the individual is only informed, throughout the whole period or periods of detention for questioning, in the most general and vague terms of the reason for the detention. If the detention is initiated under Article 31, then the individual is arrested with a warrant, and there is an initial period of up to 96 hours of questioning, before a decision is made to charge, release or transform the procedure into one of administrative detention. Once the decision is made to consider administrative detention, then, under Article 39, the individual is presented before a military judge to request a further period of up to 72 hours questioning. During this period, a decision is made either to release the individual or to impose an administrative detention order. If the military commander decides to impose an administrative detention order, under Article 285(A), then the individual is detained for questioning for a further period of up to eight days. At the conclusion of this period, the individual is presented before a judge, under Article 287, for judicial review of the administrative detention order. The judicial confirmation of both the initial period of administrative detention and any order, under Article 285(B), to extend the period of administrative detention, are subject to a further judicial review after three months.

The arrest and detention which is initiated under 285(A), enables the individual to be arrested, based upon a warrant, and detained for questioning for a period of up to eight days. At the conclusion of this period, the individual is presented before a judge, under Article 287, for judicial review of the administrative detention order. The judicial confirmation of both the initial period of administrative detention and any order, under Article 285(B), to extend the period of administrative detention, are subject to a further judicial review after three months.

Under both procedures, the initial and subsequent judicial review of the administrative detention order, are, as a result of Article 290 (A), proceedings in which "it is permissible to deviate from the rules of evidence if the judge is convinced that this will be expedient in establishing the truth and conducting a just trial".¹³⁵ The deviation is supplemented by Article 290(C) which confers a discretion upon the military judge

¹³³ Here, the Report follows the argument of Pejic (Op. cit., p. 384).

¹³⁴ Under Articles 31 and 285(A) of Military Order 1651.

¹³⁵ Military Order 1651, Article 290 (A).

“to receive evidence even in absence of the detainee or his representative, or without disclosing it to them if, after examining the evidence or hearing the pleas, even in absence of the detainee and his representative, the judge is convinced that disclosing the evidence to the detainee or his representative may harm regional security or public security”.¹³⁶

Thus, each of the stages of the review of the procedure are not ones accompanied by the more detailed specification of the charge nor of the evidence, which remains almost always secret, upon which the charge is based. As a result, both the detainee and the legal representative are deprived of the effective capacity to challenge the detention at any of the stages of the review process.

Article 288 of Military Order 1651 provides the opportunity for the detainee and the legal representative to appeal against the decision to impose or to subsequently confirm the administrative detention order. However, the appeal, if granted, will remain subject to the same modified rules of evidence as were operative at each stage of the review process.

The judicial role, in the review and appeal process of the military court system and, in the exceptional situation of a review of a decision by the military court system, by Israeli Supreme Court, effectively replaces the adversarial function of the detainee/legal representative in the evaluation of the justification for the administrative detention order on the basis of secret evidence.¹³⁷ The requirements of a “regular procedure” are fundamentally at variance with one which is almost entirely dependent upon secret evidence. It removes the capacity for the detainee/legal representative to either know the reasons for the administrative detention order or to challenge the evidence upon which those reasons are based.

Despite the explicit acknowledgement by the Supreme Court¹³⁸ of the importance of a regular procedure in regard to the specific character of administrative detention, these descriptions of the purpose and approach to the review are belied by the pattern revealed in the judicial review “[i]n the first decade of the twenty-first century”, by the Israeli Supreme Court “of over 322 administrative detention cases”.¹³⁹ In relation to this body of case law,

“not even a single case resulted in a judicial decision to release the detainee, and only 14 percent received an elaborated and reasoned judgment. Ninety-five percent of the Court

¹³⁶ Ibid., Article 290 (C).

¹³⁷ Here, the Report follows the analysis of Krebs (Op. cit.) of 322 of the Israeli Supreme Court cases, from the creation of the Israeli Supreme Court online electronic case database in 2000 to 2012, complimented by qualitative interviews with Supreme Court Judges, Prosecutors, Defence Lawyers and Palestinian detainees. The Report, therefore, in common with Krebs, diverges from the analyses of Daphne Barak-Erez and Matthew C. Waxman, “Secret Evidence and the Due Process of Terrorist Detentions”, *Columbia Journal of Transnational Law*, Vol.43, No.3 (2009), pp. 4-64; Stephen J. Schulhofer, “Checks and Balances in Wartime: American, British and Israeli Experiences”, *Michigan Law Review*, Vol. 102, No.8 (2004), pp. 1906-1958; and Itzhak Zamir, “Human Rights and National Security”, *Israel Law Review*, Vol.23, No.1 (1989), pp. 375-406 which all consider this framework of appeal and review to be entirely compatible with the more procedurally demanding standards of international human rights law (and, thus, by implication, entirely compatible with the requirements of a “regular procedure until IHL).

¹³⁸ Here, following Krebs, in citing the Supreme Court decisions in HCJ 3239/02 *Marab v. IDF Commander in the W. Bank*; HCJ 11006/04 *Khadri v. IDF Commander in Judea & Samaria*; HCJ 9441/07 *Agbar v. IDF Commander in Judea & Samaria*.

¹³⁹ Krebs, Op. cit., p. 672.

judgments were based on secret evidence that was presented by the state during *ex parte* hearings”¹⁴⁰.

It is particularly instructive that in *Marab v. IDF Commander in the W. Bank*, the “only successful petition submitted by detainees against specific military detention” in the OPT, between 2000 and 2012, “the declaration of nullification was suspended for a six-month period for reorganization purposes. The Court did not release any of the individual detainees who submitted the petitions.”¹⁴¹ Hence, that the complimentary jurisdiction of the Supreme Court over the operation of the military court system in the OPT does not realize the level of procedural protection envisaged under IHL.

9 The Immediacy of Release upon Cessation of Administrative Detention

The insistence of IHL upon a “regular procedure” as part of the State practice of internment/administrative detention is combined with an equally strong insistence, under Articles 132(1) and 133(1) of the Fourth Geneva Convention, upon internment/administrative detention as an exceptional measure of security. Articles 132(1) and 133(1) of the Fourth Geneva Convention dictate that release must immediately follow when the reasons for internment are no longer present and, in any event, as soon as possible after the close of hostilities. The requirements imposed by Articles 132(1) and 133(1) are reinforced by Article 75(3) of Additional Protocol I which reiterates that the authorisation, under IHL, to detain civilians on grounds of security ceases as soon as the specific grounds justifying detention the individual’s detention are no longer present.

The emphasis upon the exceptional character of administrative detention is acknowledged by the Israeli Supreme Court which has recognised that “the prolonged detention warrants more frequent reviews”¹⁴²; and that the longer the period of detention lasts, the more compelling the reasons adduced by the government to show that detention remains justified.¹⁴³ However, as revealed by the analysis of Krebs, despite this acknowledgement, none of the 322 cases relating to the Supreme Court’s judicial review of administrative detention has resulted in “a judicial decision to release the detainee”.¹⁴⁴ Thus, the current approach to the release of detainees lacks compliance with Articles 132(1) and 133(1) of the Fourth Geneva Convention and Article 75(3) of Additional Protocol I.

10 Obligation of Humane Treatment

Article 27 of the Fourth Geneva Convention recognizes a broad range of fundamental rights to which civilians are entitled, under IHL, that must be respected “in all circumstances” by States. Under Article 27(1), the entitlement is to

“respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and

¹⁴⁰ Ibid.

¹⁴¹ Ibid., p. 673.

¹⁴² See, HCJ 1389/07 *Commander of IDF Forces in the Judea and Samaria Area v. Military Court of Appeals*, 28 February 2007, § 6.

¹⁴³ See, HCJ 11026/05 *Anonymous v. IDF Commander in the West Bank* (2005), judgment of December 22, 2005, §7, quoting with approval HCJ 11006/04, *Qadri v. Commander of IDF Forces in Judea and Samaria* (unreported), §6.

¹⁴⁴ Krebs, Op. cit., p. 672.

shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity”¹⁴⁵.

A further emphasis is placed, under Article 27(2), upon ensuring that women are protected, by the State or occupying power, from forms of inhumane treatment such as “rape, enforced prostitution, or any form of indecent assault”¹⁴⁶. The entitlement to respect and humane treatment includes, under Article 27(3), the prohibition upon “any adverse distinction based, in particular, on race, religion or political opinion”¹⁴⁷.

The ICRC Commentary of 1958 specifies that Article 27 is to be viewed as a foundational provision of the Fourth Geneva Convention which orients the purpose and interpretation of the whole Convention¹⁴⁸; and “the statement of these principles in an international convention gives them the character of legal obligations and marks an essential stage in the history of international law – in particular international humanitarian law”¹⁴⁹. Article 27 is the “principle of respect for the human person and the inviolable character of the basic rights of [the] individual”¹⁵⁰, and extends protection to “all the rights of the individual, that is, the rights and qualities which are inseparable from the human being by the very fact of his existence and his mental and physical powers”¹⁵¹. Hence, the notions of “respect for the person” and “humane treatment” must be assigned their “widest sense,” covering “all aspects of man’s life”¹⁵².

The importance of Article 27 is reinforced by Article 32 which states

“The High Contracting Parties specifically agree that each of them is prohibited from taking any measure of such a character as to cause the physical suffering or extermination of protected persons in their hands. This prohibition applies not only to murder, torture, corporal punishment, mutilation and medical or scientific experiments not necessitated by the medical treatment of a protected person, but also to any other measures of brutality whether applied by civilian or military agents.”¹⁵³

Article 32 reiterates the status of Article 27¹⁵⁴ as a foundational provision and, with the phrase “any other measures of brutality”, to indicate that inhumane treatment is not confined to the forms which are specifically prohibited. Rather, it is to indicate the general character of the provision and the accompanying intention “to cover cases which, while they are not among the specifically prohibited acts, nevertheless cause suffering to protected persons”¹⁵⁵.

The applicability of Additional Protocol I to the OPT entails that the prohibition upon inhumane treatment, under Articles 27 and 32, of the Fourth Geneva Convention receives

¹⁴⁵ Article 27(1) of the Fourth Geneva Convention.

¹⁴⁶ Article 27(2) of the Fourth Geneva Convention.

¹⁴⁷ Article 27(3) of the Fourth Geneva Convention.

¹⁴⁸ “It is the basis of the Convention, proclaiming as it does the principles on which the whole of “Geneva Law” is founded” (ICRC Commentary of 1958, Op. cit., pp. 199-201).

¹⁴⁹ Ibid., p. 200.

¹⁵⁰ Ibid.

¹⁵¹ Ibid., p. 201.

¹⁵² Ibid., pp. 201, 204.

¹⁵³ Article 32 of the Fourth Geneva Convention.

¹⁵⁴ For the ICRC Commentary of 1958, “need to strengthen this principle and to prohibit expressly all acts contrary to it” (Op. cit, p. 221).

¹⁵⁵ Ibid., p. 224.

further reinforcement from the absolute prohibitions contained in Article 75(2) of Additional Protocol I. Under Article 75(2), Additional Protocol I imposes an absolute prohibition “at any time and in any place whatsoever” upon the acts of “violence to the life, health, or physical or mental well-being of persons” (Article 75(2)(a)) and “outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault” (Article 75(b)).

The fundamental entitlements and obligations in Articles 27 and 32 enable the Fourth Geneva Convention to further regulate the occupying power’s recourse to administrative detention under Article 78(1). Thus, the procedural protection, under Article 78(2), is complimented by the prohibition contained in Articles 27 and 32 of the Fourth Geneva Convention and in Article 75(2) of Additional Protocol I upon the inhumane treatment of detainees at successive stages of arrest, interrogation and detention of administrative detention.

The complimentary character of these provisions in relation to the procedural protections of Article 78(2) expresses the severe effect upon the right to personal liberty of administrative detention as a measure of restriction by the occupying power. The severity is contained both in the initial type of deprivation of liberty, but also in the continued potential for this form of deprivation of liberty to result in inhumane treatment.¹⁵⁶

The structure of protection created by Articles 27 and 32 of the Fourth Geneva Convention and Article 75(2) of Additional Protocol I, which have attained the status of customary international law, require that Israel, as occupying power, in the exercise of internment/administrative detention, refrain in each of its stages, from all instances of inhumane treatment and actively ensure the prevention of, and protection from, all such instances. To the extent that instances of inhumane treatment are perpetrated, in any of the stages of administrative detention, Israeli will be in the breach of Articles 27 and 32 of the Fourth Geneva Convention and Article 75(2) of Additional Protocol I.

11 Conditions of Detention

The prohibition upon inhumane treatment, under the Fourth Geneva Convention, extends to the conditions of detention in the facilities in which detainees are held. For the ICRC Commentary of 1958 views the security measure of administrative detention as representing “a particularly great danger of offences against the human person”.¹⁵⁷ The inherence of this danger requires the preceding definition of the exceptional character of this security measure and the “regular procedure” of appeal and review; *and* a detailed specification, under Articles 79 to 135, of the “standards of treatment designed to ensure that the human person is respected under the circumstances where it appears to be in greatest danger”.¹⁵⁸ The Fourth Geneva Convention combines the elaboration of these detailed standards with the framework of external monitoring and assistance, under Article 142, undertaken by the ICRC.¹⁵⁹ Delegates of the ICRC may at any time visit the internees and inspect their place of detention; delegates may have individual conversations with internees without witnesses. This far-reaching authorisation may only be limited for reasons of imperative military necessity, and

¹⁵⁶ Ibid., p. 207.

¹⁵⁷ Ibid.

¹⁵⁸ Ibid.

¹⁵⁹ Article 142 of the Fourth Geneva Convention states that “[t]he special position of the International Committee of the Red Cross in this field shall be recognized and respected at all times”.

only as an exceptional and temporary measure.¹⁶⁰ The purpose of the visits and interviews by the ICRC is to monitor the conditions of detention and to establish the extent to which they remain fully compliant with the humane treatment of the detainees as required under IHL.¹⁶¹

Articles 79 to 135, under Section IV of Part III of the Fourth Geneva Convention, provide a detailed framework of regulation, by IHL, of the organisation of places of internment and of the treatment of internees. The intention guiding these rules is to acknowledge the distinct civilian status of the internees/detainees whilst maintaining a general parity in the level of protection and conditions of treatment with the regulations governing the detention of prisoners of war.

The central provisions of the Fourth Geneva Convention, in relation to administrative detention, relate to the conditions within the detention facility and to the maintenance of the contact of the detainee with the exterior. The insistence by the Fourth Geneva Convention on the non-punitive character of administrative detention requires that detainees be accommodated separately from persons deprived of their liberty as a result of a criminal conviction.¹⁶² The separate accommodation must conform with the obligation of humane treatment which requires an adequate standard of accommodation, food and medical care to be provided at the detaining power's expense.¹⁶³ Humane treatment also prohibits victimisation, punishment drill or reduction of food rations.¹⁶⁴ It also requires that the modification of the detainee's conditions and treatment is only permitted on the grounds of security.¹⁶⁵

In addition to the conditions and treatment within the detention facility, the Fourth Geneva Convention is insistent upon the obligation of the occupying power to enable the detainee to maintain contact with the exterior.¹⁶⁶ In particular, under Article 116, every detainee has a right to "receive visitors, especially near relatives at regular intervals and as frequently as possible", and, therefore, the right to receive regular visits from his or her legal representative.

The prohibitions and obligations regarding the maintenance of humane treatment of the detainees is reinforced by the requirement, under Article 99 of the Fourth Geneva Convention, that the internment facility shall be placed under the authority of a responsible military officer or a public official chosen from the civil administration of the detaining power. The military officer or civilian official is responsible for the application of the Fourth Geneva Convention within the detention facility, and, therefore for ensuring that the personnel in control of internees are "instructed in the provisions of the present Convention and of the administrative measures adopted to ensure its application".¹⁶⁷ The Fourth Geneva Convention also recognizes the entitlement of detainees, under Article 101, to submit to the detaining power petitions relating to the conditions of detention. Submissions may also be made to protecting powers, directly or through the Internee Committee.

¹⁶⁰ Article 143 of the Fourth Geneva Convention.

¹⁶¹ ICRC Commentary of 1958, Op. cit., p. 569.

¹⁶² Article 84 of the Fourth Geneva Convention.

¹⁶³ Articles 81, 85, 89, 91-92 of the Fourth Geneva Convention.

¹⁶⁴ See e.g. Articles 27, 100 and 117 of the Fourth Geneva Convention.

¹⁶⁵ ICRC Commentary of 1958, Op. cit., p. 432.

¹⁶⁶ Articles 105 to 116 of the Fourth Geneva Convention.

¹⁶⁷ Article 99 of the Fourth Geneva Convention.

The framework of protections provided by Articles 79 to 135 of the Fourth Geneva Convention, which have attained the status of customary international law, require that Israeli, as occupying power, in the exercise of internment/administrative detention, refrain within its detention facilities, from all instances of inhumane treatment and actively ensure the prevention of, and protection from, all such instances. To the extent that instances of inhumane treatment are perpetrated within the detention facilities, Israeli will be in the breach of the relevant prohibitions and obligations contained in Articles 79 to 135 the Fourth Geneva Convention.

12 Prohibition against Unlawful Deportation and Forcible Transfer

In addition to the procedural protections imposed directly upon the process of administrative detention and the absolute prohibition upon forms of treatment and conditions of detention, a further concern of the Fourth Geneva Convention relates to the State Party, as occupying power, moving civilians within (forcible transfer) or outside (deportation) the occupied territory. The connection between unlawful deportation and administrative detention results from the location of the majority of the Israeli detention facilities in Israel.

Article 49 of the Fourth Geneva Convention contains the absolute prohibition against forcible transfer or deportation of protected persons – civilians – from an occupied territory.¹⁶⁸ Under Article 49,

“(1) Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive.

(2) Nevertheless, the Occupying Power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons so demand. Such evacuations may not involve the displacement of protected persons outside the bounds of the occupied territory except when for material reasons it is impossible to avoid such displacement. Persons thus evacuated shall be transferred back to their homes as soon as hostilities in the area in question have ceased”.¹⁶⁹

The only exception to the absolute prohibition against forcible transfer and deportation is, under Article 49(2), evacuation, a temporary measure permissible only if strict conditions are met. The exceptional character of evacuation is reinforced by the occupying power’s

¹⁶⁸ ICRC Commentary of 1958, Op. cit., p. 279. The absolute prohibition, under Article 49 of the Fourth Geneva Convention, is repeated in Article 85(4)(a) in Additional Protocol I, and designed as a grave breach and, therefore, as a war crime. The ICRC Commentary on Additional Protocol I of 1987 emphasizes that the repetition of the absolute prohibition is a simple reaffirmation of the absolute prohibition, under Article 49 of the Fourth Geneva Convention (ICRC Commentary 1987, p. 1000). The imposition of an absolute prohibition, under Article 49, irrespective of whether the movement is a forcible transfer or deportation, is confirmed by the ICTY in *Prosecutor v. Krstić* (Case no. IT-98-33-T), §§521-522. The position of *Prosecutor v. Krstić*, is affirmed in the later cases of *Prosecutor v. Krnojelac* (Case no. IT-97-25), §474 and *Prosecutor v. Simić*, (Case no. IT-95-9/2), §122. *Prosecutor v. Krstić* also confirms, in the same paragraphs, the absolute prohibition on forcible transfer and deportation contained in international criminal law, under Article 7(1)(d) of the Statute of the International Criminal Court (which, under Articles 8(2)(a)(vii) and 8(2)(b)(viii)), is defined as a war crime which the International Criminal Court is competent to prosecute). The definition and application Article 7(1)(d) will be discussed in further detail in the later section of the Report devoted to international criminal law.

¹⁶⁹ Article 49 of the Fourth Geneva Convention.

obligation to allow evacuees to return to their homes as soon as the security situation so permits, and the continued responsibility for the subsequent process of repatriation. The breach of Article 49 constitutes a grave breach for the purposes of Article 147 of the Fourth Geneva Convention thereby designating it as a war crime.

The general prohibition upon forcible transfer or deportation, under Article 49, is supplemented by Articles 76 and 78 of the Fourth Geneva Convention. Under Article 76, a further precision is added to the general prohibition, in regard to protected persons “accused of offences”, who “shall be detained in the Occupied Territory and if convicted they shall serve their sentence therein”.¹⁷⁰ Article 78, which permits internment/assigned residence of civilians, by the occupying power, is held, by the ICRC Commentary, to require that “the protected persons concerned will benefit by the provisions of Article 49 and cannot be deported; they can therefore only be interned, or placed in assigned residence, within the frontiers of the occupied country itself”.¹⁷¹ Thus, the intention of the Fourth Geneva Convention is that civilians whether accused of offences or subject to assigned residence/administrative detention remain protected by the absolute prohibition under Article 49.

The decision by the military commander to transfer an individual out of the OPT has been subject to challenge in the Israeli Supreme Court on the basis that it violates the absolute prohibition under Article 49 of the Fourth Geneva Convention.¹⁷² The Supreme Court has developed a position, in which, in conformity with the dualist interpretation of the relationship between international and domestic law, Israel’s non-ratification of the Fourth Geneva Convention entails that Article 49 is only applicable, as part of Israeli domestic law, if it is considered to be part of customary international law. The Supreme Court adopts a two-fold approach in which it argues, firstly, that Article 49 has not attained this status, and, therefore, is not to be considered to be part of Israeli domestic law. Alternatively, if Article 49 has attained the status of customary international law, as part of Israeli domestic law, it remains a provision without application to individual transfers, as it considers that the drafters’ intention in relation to Article 49 was exclusively confined to prohibit the mass transfer of populations, by occupying powers, from occupied territory.¹⁷³ Thus, individual transfer is, on the basis of either of these alternatives a permissible action, on the part of the military commander¹⁷⁴, which is outside the purview of the absolute prohibition, under Article 49(1).

In contrast to Article 49, the Supreme Court holds that Articles 76 and 78 are provisions of the Fourth Geneva Convention which have unquestionably attained the status of customary international law. However, despite their presence as part of Israeli domestic law applicable to the OPT, the Supreme Court rejects their *common* capacity to prohibit deportation. The further precision, introduced by Article 76, is held, by the Supreme Court¹⁷⁵, to be inapplicable to individual civilians subject to internment/administrative detention. For the

¹⁷⁰ Article 76 of the Fourth Geneva Convention.

¹⁷¹ ICRC Commentary of 1958, Op. cit., p. 368.

¹⁷² See, HCJ 97/79 *Awad v. Commander of Judea and Samaria Region*; HCJ 298/80; *Qawasme v. Minister of Defence*; HCJ 785/87 *Afu v. Commander of the IDF Forces in the West Bank* [1988]; and HCJ 253/88 *Sejadia v. Minister of Defence*.

¹⁷³ See, HCJ 785/87 *Afu v. Commander of the IDF Forces in the West Bank*, §32(h).

¹⁷⁴ The decision of the military commander, and the accompanying provisions of Israeli military law in the OPT, in relation to a particular individual is, of course, for the Supreme Court, still governed by the principles of Israeli administrative law contained in the relevant provisions of the Israeli Basic Law.

¹⁷⁵ See HCJ 253/88 *Sejadia v. Minister of Defence*.

phrase “accused of offences”, is held to relate exclusively to the area of criminal offences, and not to extend to include individuals subject to internment/administrative detention. As a result, the Supreme Court considers that Article 76, in its limitation of the prohibition of deportation to criminal offences, has the effect of designating Article 78 as one which confers the capacity to engage in the transfer of the individual out of the occupied territory. For the Supreme Court, this distinction indicates the greater seriousness of an individual civilian’s potential liability for a criminal offence in comparison with that of potential liability for internment/administrative detention. Thus, that the Fourth Geneva Convention introduces and maintains an unequal degree of protection between Articles 76 and 78 with regard to the capacity for the occupying power to deport the individual out of the occupied territory.

The Report rejects this interpretation, by the Israeli Supreme Court, of the character of Article 49 and of the unequal level of protection conferred by Articles 76 and 78 against the occupying power’s capacity to the deport an individual from the occupied territory. Instead, it proceeds from the interpretative position of the ICJ in the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* with regard to the status of the Fourth Geneva Convention in the OPT. From this position, the entirety of the Fourth Geneva Convention has *de jure* applicability in the OPT as customary international law.¹⁷⁶ Hence, Article 49, as a provision of the Fourth Geneva Convention, with the status of customary law, is a part of Israeli law applicable to the military commander in the OPT.

The applicability of Article 49 to the OPT leads, in turn, to the character of this prohibition, namely, whether it is exclusively confined to the prohibition of the phenomena of mass transfers within and mass deportations out of the occupied territory. In contrast to the approach of the majority in the decisions of the Israeli Supreme Court, the parameters of the prohibition, under Article 49, whilst formulated in response to historical patterns of inhumane treatment, are not delimited by these specific forms of historic inhumane treatment. Hence, following the ICRC Commentary of 1958 on Article 78(1)¹⁷⁷, the specific resolutions of the UN Security Council¹⁷⁸, this aspect of the minority opinions of Justice Bach in *Afu* and *Sajedia*¹⁷⁹, and the predominant approach of the academic commentary¹⁸⁰, the absolute

¹⁷⁶ ICJ *Advisory Wall Opinion*, Op. cit., §101.

¹⁷⁷ For the ICRC Commentary of 1958, Op. cit., p. 368: “[i]t will suffice to mention here that as we are dealing with occupied territory, the protected persons concerned will benefit by the provisions of Article 49 and cannot be deported; they can therefore only be interned, or placed in assigned residence, within the frontiers of the occupied country itself”.

¹⁷⁸ In addition to the UN Security Council Statements of 26th May and 11th November 1976 stating the full applicability of the Fourth Geneva Convention to the OPT (UN Security Council Resolution and UN Security Council Resolution, there are the more specific Security Council Resolutions, during the 1980s, specifically condemning Israeli deportations from the OPT on the basis of the applicability of the Fourth Geneva Convention. See, UN Security Council Resolution 607, January 5th 1988; UN Security Council Resolution 608, January 14th 1988; UN Security Council Resolution 636, July 6th 1989; UN Security Council Resolution 641, August 30th 1989; UN Security Council Resolution 694, May 26th 1991 and Resolution 726, January 6th 1994. The UN Security Council has also explicitly condemned *individual* deportations, in UN Security Council Resolution 468, 8th May 1980 and UN Security Council Resolution 469, 20th May 1980.

¹⁷⁹ See the dissenting opinions of Justice Bach in H.C.J. 785/87 *Afu v. Commander of the IDF Forces in the West Bank* and H.C.J. 253/88 *Sajedia v. Minister of Defense*.

¹⁸⁰ Behnam Dayanim, ‘The Israeli Supreme Court and the Deportations of Palestinians: The Interaction of Law and Legitimacy’, *Stanford Journal of International Law*, Vol. 30, No. 3 (1994), pp. 143–150; Yoram Dinstein, ‘The Israel Supreme Court and the Law of Belligerent Occupation: Deportations’, *Israeli Yearbook of Human Rights*, Vol. 23 (1993), pp. 1-26; AM Fahrenkopf, ‘A Legal Analysis of Israel’s Deportation of Palestinians from the Occupied Territories’, *Boston University International Law Journal*, Vol.8, No.1 (1990), pp. 125–55; R Lapidot, ‘The Expulsion of Civilians from Areas Which Came under Israeli Control in 1967: Some Legal Issues’, *European Journal of International Law*, Vol.2, No.1 (1991), pp. 97–109.

prohibition, under Article 49, is not confined to the phenomena of mass transfers and mass deportations.

The applicability of Article 49 to all forms of deportation from the OPT leads to the further question of whether the absolute prohibition, under Article 49, encompasses the transfer of an individual from the OPT to Israel in relation to the imposition of administrative detention, under Article 78. The distinction between criminal offences, under Article 76, and administrative detention, under Article 78, is not intended by the drafters of the Fourth Geneva Convention to create a divergence in the applicability of the protection afforded by Article 49. The equality of protection from deportation afforded to both Articles is affirmed by the ICRC Commentary of 1958: civilians can “only be interned, or placed in assigned residence, within the frontiers of the occupied country itself”.¹⁸¹

Thus, the Israeli State practice, as occupying power, of deportation of any individual detainee, upon whom an administrative detention order is imposed under Article 78(1) of the Fourth Geneva Convention, from the OPT to detention facilities in Israel represents a breach of the absolute prohibition, under Article 49 of the Fourth Geneva Convention, upon deportation.¹⁸²

In each instance in which a grave breach of the Fourth Geneva Convention and Additional Protocol I is alleged to have been perpetrated by the Israeli State practice of administrative detention, a war crime has been potentially committed. Under the Geneva Conventions and Protocols, international humanitarian law imposes the primary positive obligation upon State Parties to define grave breaches of the Geneva Conventions and Protocols as both a crime within their domestic penal law (“war crimes”) and as an offence in the military codes of discipline for the armed forces of the State Party. The obligation requires the enactment, within these spheres of civil and military law, of the constituent elements of the relevant crimes and the accompanying forms of punishment. From this flows the further duty to prosecute or extradite the persons responsible for the grave breaches (*aut dedere aut judicare* principle). Hence, the designation of these breaches of the Fourth Geneva Convention and Additional Protocol I, as grave breaches to which the status of a war crime is attributed, may lead to both individual criminal responsibility and State liability under international law.¹⁸³ Thus, Israel has an obligation, under international humanitarian law, to actively respond to allegations of grave breaches of the Geneva Conventions and Protocols through the investigation and prosecution of individuals accused of these grave breaches within the Israeli domestic legal system.

¹⁸¹ ICRC Commentary of 1958, Op. cit., fn.178.

¹⁸² The fact that the arrest and periods of detention upon transfer, under Regulation 6(b) of the Emergency Regulations (Offences Committed in Israeli-Held Areas – Jurisdiction and Legal Assistance), 1967, continue to render the detainee subject to the provisions of the legal framework in the OPT does not, for the Report, affect the operation of the absolute prohibition on deportation under Article 49. In addition, under Article 85(4)(a) Additional Protocol I to the Geneva Conventions, “the transfer by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory, in violation of Article 49 of the Fourth Convention”, represents a grave breach for the purposes of Additional Protocol I.

¹⁸³ The further, universal jurisdiction conferred by the Geneva Conventions upon the prosecution of war crimes, enables prosecution by other State Parties and international criminal courts. The particular situation with regard to war crimes, under the Rome Statute of the ICC, potentially arising from the Israeli State practice of administrative detention is discussed in Part V of the Report.

The previously self-contained structure of international humanitarian law is, in common with all other norms of international law, and in conjunction with the general international law of state responsibility, codified in the International Law Commission's *Draft Articles on Responsibility of States for intentionally wrongful acts*.¹⁸⁴ The perpetration of internationally wrongful acts, includes grave breaches of international humanitarian law and, therefore, enables the interpretation of the concept of state responsibility to be based upon the Draft Articles. The relevant aspects of state responsibility resulting from the Draft Articles are, under Article 4, the broad designation of an act of a State under international law which encompasses,

“conduct of any State organ (...) whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State”.¹⁸⁵

Article 4 imposes State responsibility upon Israel for grave breaches of international humanitarian law which arise throughout the entirety of the Israeli State practice of administrative detention. The responsibility will, therefore, relate to each element of the practice of administrative detention irrespective of which State institution has been conferred with authority over it.¹⁸⁶

¹⁸⁴ United Nations, International Law Commission, *Report on the Work of its Fifty-third Session* (23 April-1 June and 2 July-10 August 2001), General Assembly, Official Records, Fifty-fifth Session, Supplement No.10 (A/56/10), pp. 29-365 available at: <http://www.un.org/law/ilc/reports/201/2001report.htm> (hereinafter ILC Draft Articles SR)

¹⁸⁵ *Ibid.*, Article 4.

¹⁸⁶ The Israeli Supreme Court decision in H CJ 2605/05 *The Academic Centre for Law and Business v. Minister of Finance* [2009], which held Israeli government legislation seeking to establish Israel's first private prison constitutionally invalid, entails that the Report has no need to refer to Draft Article 5, which continues to impose State responsibility in the event of the exercise of elements of governmental authority by private enterprises.

PART III
INTERNATIONAL HUMAN RIGHTS LAW

1 Applicability

The applicability of IHRL to the conduct of Israel in the OPT proves to be another source of continued and profound disagreement between Israel and the UN Treaty Bodies and the vast majority of the international community. Not only has the government of Israel disputed that IHRL applies in situations of armed conflict or belligerent occupation, it has also rejected the extraterritorial scope of that body of law.¹⁸⁷ The Israeli position is comprised of the adoption of a dualist position with regard to the State's relationship to international law and of a particular characterization of the relationship between IHL and IHRL.

The dualist position acknowledges that international law (customary and international legal instruments) and domestic law are both legitimate sources of law. The relationship between the two sources of law is one in which the dualist position accords primacy to the domestic legal order. Hence, in order for international law to become binding upon domestic State institutions it will either, as customary international law, have to be compatible with primary domestic legislation or, as a ratified international legal instrument, have to have attained the status of customary international law or to have been explicitly incorporated into domestic legislation.

The State's dualist position is reflected in the primacy accorded to primary domestic law in the process of legal interpretation, by domestic courts, of the relationship between international law and domestic law. Thus, domestic courts will only consider the State to be bound by customary international law if the relevant provision of customary international law is compatible with the relevant provision of primary domestic legislation. For the provisions of ratified international legal instruments, beyond those which are considered to be compatible provisions of customary international law, primacy will only be accorded by the further process of domestic incorporation.

The specific parameters of this dualist position, as a process of legal interpretation, remain without explicit constitutional or legislative expression in either the Israeli Basic Law or the conventional statutes enacted by the Knesset.¹⁸⁸ Although the dualist position entails that Israeli domestic courts commence the process of legal interpretation from "the presumption of compatibility with Israel's international obligations" and, "in the case of a clear clash between primary legislation and a norm of customary or conventional international law, the legislation prevails"¹⁸⁹, it has been the Israeli legal system, in particular, the Israeli Supreme Court, which has provided the parameters for this interpretative process.¹⁹⁰

Israel has ratified, but not incorporated, the Fourth Geneva Convention and a number of international legal instruments of IHRL relevant to the State practice of administrative

¹⁸⁷ *ICJ Wall Advisory Opinion*, Op. cit., §§102, p. 110; Summary of the Legal Position of the Government of Israel, Annex I to the Report of the Secretary General Prepared Pursuant to GA Res., ES-10713, UN Doc. A/ES-10/248, 24 November 2003.

¹⁸⁸ David Kretzmer, 'Israel', in David Sloss (ed.), *The Role of Domestic Courts in Treaty Enforcement: A Comparative Study*, (Cambridge: Cambridge University Press, 2009), pp. 273–325, 276.

¹⁸⁹ David Kretzmer. "The law of belligerent occupation in the Supreme Court of Israel", *International Review of the Red Cross*, Vol. 94, No.885 (2012), p. 212.

¹⁹⁰ Kretzmer, 'Israel', Op. cit., p. 276. As Kretzmer emphasizes, "it is mainly in relation to the O[P]T that international law has gained prominence in the [Supreme] Court's jurisprudence" (Ibid., p. 286).

detention.¹⁹¹ Thus, both IHL and IHRL are unincorporated into Israeli domestic law, and their effective presence within Israeli domestic law rests upon the recognition of their provisions as customary international law. The further delineation of the relationship between IHL and IHRL rests upon the underlying assumption that IHL and IHRL are distinct normative frameworks without an essential connection due to their mutually exclusive applicability to war/conflict (IHL) and peace (IHRL). The mutually exclusive application is reflected in the extra-territorial application of IHL and the purely internal application of IHRL which is confined to ensuring the State Party maintain and guarantee the relevant rights and obligations of individuals within the territory the State Party. Hence, for Israel, it is solely “[international] humanitarian law [which] is the protection granted in a conflict situation such as the one in the West Bank and Gaza Strip”.¹⁹²

Thus, in order for the Report to proceed to the normative evaluation of the Israeli State practice of administrative detention in the OPT, on the basis of the provisions of IHRL, it is necessary to determine the plausibility of the Israeli position. This, in turn, requires that the Report undertake a two-stage process of legal analysis and interpretation. The first stage involves the demonstration, in contrast to the Israeli position, of the relationship of mutual support and interconnection between IHL and IHRL. From this relationship it is then necessary, as the further evaluation of the Israeli position, to demonstrate, in the second stage, that the extra-territorial applicability of these international legal instruments of International Human Rights Law is an integral aspect of the applicability of IHL to the situation of Israel’s belligerent occupation in the OPT.¹⁹³

¹⁹¹ Israel has ratified, but not incorporated, the following international legal instruments of IHRL relevant to the State practice of administrative detention, the International Covenant on Civil and Political Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the United Nations Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, the United Nations Convention on the Rights of the Child, the United Nations Optional Protocol on the Rights of the Child in Armed Conflict, and the United Nations Convention on the Elimination of All Forms of Discrimination Against Women.

¹⁹² *Summary of the Legal Position of the Government of Israel*, Op. cit., §4.

¹⁹³ It is also possible to regard this two-stage demonstration as one which imposes a *positive* obligation, under IHL, upon Israel, to modify the existing legal system of the OPT to incorporate the relevant protections of IHRL. This potential positive obligation, under IHL, arises from the combination of Article 43 of the Hague Regulations and Article 64 of the Fourth Geneva Convention define the legal parameters of the occupying power’s authority to modify the pre-existing legal framework of the occupied territory. Article 43 of the Hague Convention states, “The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all measures in his power to restore and ensure, as far as possible, public order and civil life, while respecting, unless absolutely prevented, the laws in force in the country”. Article 64 of the Fourth Geneva Convention states, “The penal laws of the occupied territory shall remain in force, with the exception that they can 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. The Occupying Power may, however, 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 and administration, and likewise of the establishments and lines of communication used by them”. The underlying emphasis of both Articles is upon the maintenance of the pre-existing legal order with modification by the occupying power *limited* to the specific and *temporary* circumstances of military occupation. Thus, the relationship of mutual support and interconnection between IHL and IHRL, the extraterritorial applicability of IHRL and the length of the military occupation, would suggest that the incorporation of the framework of the rights and duties of IHRL into the legal framework of the OPT has attained the status of a positive duty upon Israel.

2 The Relationship between International Human Rights and International Humanitarian Law

In relation to the Israeli position, the Report commences from the decision of the International Court of Justice in the ICJ Wall Advisory Opinion¹⁹⁴ regarding the full applicability of the fundamental rights and freedoms contained in the international legal instruments of IHRL, qualified only by the presence of strictly circumscribed provisions of derogation in a state of emergency, in situations of armed conflict.¹⁹⁵ The Report considers the ICJ's Advisory Opinion to affirm the preceding indications, by the international community, of the uninterrupted applicability of IHRL to armed conflict.¹⁹⁶ It also considers that the ICRC Study on Customary International Humanitarian Law reaffirms the position of the ICJ's Advisory Opinion in establishing, on the basis of "extensive State practice", the obligation upon State Parties to ensure the continued application of IHRL for the duration of an armed conflict.¹⁹⁷

The Report then proceeds to examine the Israeli rejection of the ICJ Wall Advisory Opinion and the continued maintenance, by the executive part of the Israeli State, of the inapplicability of IHRL to the OPT.¹⁹⁸ The initial written response of the Israeli Attorney General to the ICJ Wall Advisory Opinion, in *Alian v Prime Minister*¹⁹⁹, whilst acknowledging the applicability of IHL in the form of the Hague Convention 1907 and the Fourth Geneva Convention 1949 to the OPT, rejects the applicability of IHRL.²⁰⁰ The written response considers that the legal framework within which the military commander in the OPT is to operate is exemplified by the decision in *Beit Sourik Village Council v Government of Israel*.²⁰¹ The legal framework involves the evaluation of the military commander's decision-making on the basis of a general balancing test between the requirements of security in the OPT and the humanitarian requirement to recognize and guarantee the interests of the Palestinian population in the OPT. The determination of whether a particular decision by the military commander reflects the correct balance requires further evaluation of the necessity and proportionality of the decision.

The subsequent Israeli Supreme Court decision, in *Mara'abe v. Prime Minister of Israel*,²⁰² affirms the applicability in Israeli domestic law of the Hague Convention of 1907 and the

¹⁹⁴ Whilst an ICJ Advisory Opinion has the status of a non-binding opinion on the relevant question of international law, as the Israeli Supreme Court notes, in HCJ 7957/04 *Mara'abe v. The Prime Minister of Israel*, Op. cit., §56, "the opinion of the International Court of Justice is an interpretation of international law, performed by the highest judicial body in international law. The ICJ's interpretation of international law should be given is full appropriate weight".

¹⁹⁵ *ICJ Wall Advisory Opinion*, Op. cit., §106.

¹⁹⁶ For example, UN General Assembly Resolution, *Basic Principles of the Protection of Civilian Population in Armed Conflict*, Resolution 2675 (XXV), 25 UN GAOR, UN Doc. A/8178, Supp. (No.28), which emphasizes the full applicability of international humanitarian law and human rights law in situations of armed conflict.

¹⁹⁷ *ICRC Study on Customary International Humanitarian Law* 2005, Op. cit., p. 303.

¹⁹⁸ Here, the Report draws upon the analysis in Yuval Shany, "Head Against The Wall? Israel's Rejection Of The Advisory Opinion On The Legal Consequence Of The Construction Of A Wall In The Occupied Palestinian Territories", *Yearbook of International Humanitarian Law*, Volume 7 (2004), pp. 352-372.

¹⁹⁹ HCJ 4825/04 *Alian v Prime Minister*, Written Response, 23 February 2005, §552. For the purposes of the subject matter of the Report – administrative detention – it is unnecessary to discuss the detailed criticisms and objections to the factual analysis of the ICJ regarding the character and construction of the wall.

²⁰⁰ *Ibid.*, §§508-528.

²⁰¹ HCJ 2056/04 *Beit Sourik Village Council v Government of Israel* [2004].

²⁰² H.C.J. 7957/04 *Mara'abe v. Prime Minister of Israel*, Op. cit.

Fourth Geneva Convention 1949 insofar as their provisions have attained the status of customary international law. It then develops a position beyond that of *Beit Sourik* through its reformulation of the balancing test as one which

“...in exercising his authority pursuant to the law of belligerent occupation, the military commander must “ensure the public order and safety.” In this framework, he must consider, on the one hand, considerations of state security, security of the army, and the personal security of all who are present in the area. On the other hand, he must consider the human rights of the local Arab population”.²⁰³

Thus, the Israeli Supreme Court explicitly acknowledges the continued relationship between IHL and IHRL within the OPT. However, the acknowledgement is without either a formal determination of the extra-territorial applicability of the international legal instruments of IHRL to the OPT or a recognition of an obligation, under IHL, to incorporate the relevant provisions of the international legal instruments of IHRL within the existing legal framework of the OPT.²⁰⁴

From this development of the jurisprudence of the Israeli Supreme Court, the Report then turns to the question of the specific form of relationship between IHL and IHRL. The initial typology is furnished by the ICJ Wall Advisory Opinion which identifies three types of relationship between IHL and IHRL in situations of armed conflict:

“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”.²⁰⁵

The focus of the subsequent analysis shifts to the determination of the place of the State practice of administrative detention within the typology delineated by the ICJ. This, in turn, will specify the character of the general relationship between IHL and IHRL in regard to the legal regulation of administrative detention.

The Israeli Supreme Court in *Mara'abe v. Prime Minister of Israel* considers that the relationship is one in which the rights involve both IHL and IHRL, and that IHL and IHRL have a complementary relationship.²⁰⁶ Whilst the Supreme Court indicates that “[t]he human rights of the local residents include the whole gamut of human rights”²⁰⁷, the particular right

²⁰³ Ibid., §28.

²⁰⁴ These aspects of the judgment will be discussed in the relevant subsections below.

²⁰⁵ *ICJ Wall Advisory Opinion*, Op. cit., §106. See, however, the special issue of the *American Journal of International Law* devoted to a discussion of the ICJ Wall Advisory Opinion *American Journal of International Law* Vol. 90, No.1 (2005)) in which a number of contributors reject the position of the ICJ or criticize the form of legal reasoning, but not the conclusion that the Fourth Geneva Convention has de jure applicability in the OPT nor the conclusion of the extraterritorial application of IHRL (in this instance, ICCPR and the CRC).

²⁰⁶ *Mara'abe v. Prime Minister of Israel*, Op. cit., §26.

²⁰⁷ Ibid., §§ 24-29, citing the judgment of Justice A. Procaccia in HCJ 10356/02/ HCJ 10497/02 *Hess v. Commander of the IDF Forces in the West Bank* [2004]: “In the framework of his responsibility for the well-being of the residents of the area, the commander must also work diligently to provide proper defense to the constitutional human rights of the local residents, subject to the limitations posed by the conditions and factual circumstances on the ground . . . included in these protected constitutional rights are freedom of movement, religion, and worship, and property rights. The commander of the area must use his authority to preserve the

which is the primary focus of the judgment is that of right of access to agricultural land by the Palestinian inhabitants of the villages located upon projected site of the Israeli separation wall/barrier.²⁰⁸ Thus, a direct analogy cannot be made with the State practice of administrative detention, because, even when conceived as the right to freedom of movement, it is only one aspect of the broader right to liberty and security of person affected. Hence, as a more circumscribed right, the right to freedom of movement does not encompass the totality of the elements of administrative detention as a State practice: arrest, interrogation, conditions of detention, appeal, and review.

The Israeli Supreme Court decision in *Mara'abe v. Prime Minister of Israel*, defines the general interrelationship between IHL and IHRL as one of complementarity. It has thereby effectively presupposed and applied the interpretative principle of international law of *lex specialis derogat legi generali* to determine the character of the interrelationship between IHL and IHRL.²⁰⁹ Thus, this presupposition removes the necessity to discuss the question of the applicability of this principle, and proceeds to the more specific question of the determination of the interrelationship with regard to administrative detention.

In relation to this more specific question, the Report confers a central position to the fundamental guarantees of Article 75(1) of Additional Protocol I to the Geneva Conventions. Hence, it reiterates its earlier analysis of the Israeli Supreme Court decision in *The Public Committee Against Torture in Israel v. The Government of Israel*²¹⁰, in which the Israeli Supreme Court's designation of the conflict in the OPT, as an international armed conflict, enables the applicability, in Israeli domestic law, of the provisions of Protocol I which have the status of customary international law. Article 75(1) has attained the status of customary international law.

The central importance of Article 75(1) of Additional Protocol I derives from the explicit formulation of the interrelationship between IHL, of which it is a component, and IHRL.²¹¹

public safety and order in the area, while protecting human rights" (*Hess v. Commander of the IDF Forces in the West Bank*, §14. Emphasis added).

²⁰⁸ The Supreme Court in *Beit Sourik* and *Mara'abe* acknowledge that the right of access is itself connected to a far broader question of the entire way of life of the village residents.

²⁰⁹ The principle of *lex specialis derogat legi generali* is utilized in order to resolve a potential situation of normative conflict in which two norms, from distinct legal frameworks, are considered to be equally applicable to a particular situation. The principle provides an interpretative presumption in which the norm derived from the legal framework which is held to have a more specific pertinence is considered to be superior and, therefore, to prevail over the norm derived from the legal framework having a more general pertinence. In regard to the situation of the norms of IHL and IHRL, the general presumption is that the two normative frameworks are essentially complementary, with the principle of *lex specialis* confined to the resolution of exceptional, isolated situations of conflict between a norm of IHL and a norm of IHRL (See, for example, Jann K. Kleffner, "Human Rights and International Humanitarian Law. General Issues", in Terry Gill and Dieter Fleck (eds), *The Handbook of the International Law of Military Operations*, 2nd Edition (Oxford: Oxford University Press, 2015), pp. 35-62; Anja Lindroos, "Addressing Norm Conflicts in a Fragmented System: The Doctrine of *Lex Specialis*", *Nordic Journal of International Law*, Vol. 74, No.1 (2005), pp. 27-66; Marko Milanović, "Norm Conflicts, International Humanitarian Law, and Human Rights Law", in Orna Ben-Naftali (ed.), *International Humanitarian Law and International Human Rights Law*, (Oxford: Oxford University Press, 2011), pp. 95-127; Alexander Orakhelashvili, "The Interaction between Human Rights and Humanitarian Law: Fragmentation, Conflict, Parallelism, or Convergence?", *The European Journal of International Law*, Vol.19, No.1 (2008), pp. 161-182). The Report assumes that this is also the underlying, but never specifically articulated presumption of, the Israeli Supreme Court with regard to the function of the principle of *lex specialis* in the interrelationship between IHL and IHRL.

²¹⁰ HCJ 769/02 *The Public Committee Against Torture in Israel v. The Government of Israel*.

²¹¹ Here, the Report follows the analysis of Pejic, Op. cit. p. 378.

The fundamental guarantees of Article 75 are intended to ensure that individuals “shall be treated humanely in all circumstances and shall enjoy, as a *minimum*, the protection provided by this Article”.²¹² The status of a minimum accorded to this provision of IHL entails that IHRL is held to have an integral, complementary relationship in which its purpose is to supplement and enhance the minimum level of protection afforded under this provision of IHL. The character of the interrelationship between IHL and IHRL established by Article 75(1) is further emphasized by Article 75(8) which states that

“No provision of this Article may be construed as limiting or infringing any other more favourable provision granting greater protection, under any applicable rules of international law, to persons covered by paragraph 1”.²¹³

The delineation of the interrelationship in Article 75 is itself a particular expression of the more general definition contained in Article 72 of Additional Protocol I:

“The provisions of this Section are additional to the rules concerning humanitarian protection of civilians and civilian objects in the power of a Party to the conflict contained in the Fourth Convention, particularly Parts I and III thereof, as well as to other applicable rules of international law relating to the protection of fundamental human rights during international armed conflict”²¹⁴

Thus, IHRL, contained in the relevant international legal instruments stated at the outset of this section, has an essential and integral function of enhancing the legal regulation, by IHL, of the Israeli State practice of administrative detention. The preceding position of the Report of the *de jure* applicability of IHL to the OPT, composed of the combination of those provisions of the Fourth Geneva Convention and Additional Protocol I which have attained the status of customary international law, is supplemented by the legitimate recourse to the relevant provisions of IHRL.

The complementary interrelationship between IHL and IHRL is also supported from within the legal framework of IHRL. In the absence of a definition of torture, in the Geneva Conventions, the definition of torture, under the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, is held to provide the basis for the determination of the definition under the Geneva Conventions.²¹⁵ The Convention on the Rights of the Child, under Article 38, states the direct, complementary interrelationship between international human rights law and the international human rights law contained in the provisions of the CRC.²¹⁶ The same relationship between IHL and IHRL will, therefore,

²¹² Article 75(1) Additional Protocol I (emphasis added).

²¹³ Article 75(8) Additional Protocol I.

²¹⁴ Article 72 Additional Protocol I (the phrase “this Section” refers to the Section “Treatment of persons in the power of a party to the conflict” of Additional Protocol I).

²¹⁵ See, for example, the decision of the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia in *Prosecutor v. Miroslav Kvočka, Mlado Radic, Zoran Zigic and Dragoljub Prcać*, Case No. IT-98-30/1-A, Judgment, 28 February 2005.

²¹⁶ Article 38 states:

- (1) States Parties undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child.
- (2) States Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities.
- (3) States Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, States Parties shall endeavour to give priority to those who are oldest.

exist in regard to the international human rights provisions of the Optional Protocol on the Rights of the Child in Armed Conflict. The UN Human Rights Committee, in *General Comment No. 29*, *General Comment No. 31* and *General Comment No.35*, has consistently held that international human rights law, contained in the provisions of the ICCPR, remains fully applicable, subject to the strictly legally circumscribed grounds of derogation, in situations of armed conflict and that the character of the interrelationship between IHL and IHRL is that of an essential complementarity.²¹⁷ The UN Committee on the Elimination of All Forms of Racial Discrimination in the Concluding Observations on Israel, in 2007, has held that international human rights law, contained in the provisions of CERD, remains fully applicable and that CERD is essentially complementary to IHL.²¹⁸ The UN Committee on the Elimination of Discrimination against Women, in *General recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations* has held that the international human rights, as women's rights, contained in the Convention for the Elimination of All Forms of Discrimination Against Women, exist in a complementary relationship with IHL.²¹⁹

From this position, the Report then engages in a discussion of the question of the extraterritorial applicability of the provisions of the relevant international legal instruments of IHRL to the OPT in order to establish a legal foundation, beyond the parameters of Israeli administrative law, for the legal regulation of the Israeli State practice of administrative detention.

(4) In accordance with their obligations under international humanitarian law to protect the civilian population in armed conflicts, States Parties shall take all feasible measures to ensure protection and care of children who are affected by an armed conflict.

²¹⁷ UN Human Rights Committee (HRC), *General Comment No. 29 on States of Emergencies*, adopted on 24 July 2001, reproduced in Annual Report for 2001, A/56/40, Annex VI, §3: "During armed conflict, whether international or non-international, rules of international humanitarian law become applicable and help, in addition to the provisions in article 4 and article 5, paragraph 1, of the Covenant [International Covenant on Civil and Political Rights], to prevent the abuse of a State's emergency powers"; HRC, *General Comment No.31 The nature of the general legal obligation imposed on States Parties to the Covenant*, 26 May 2004, CCPR/C/21/Rev.1/Add.13, §11: "As implied in General Comment 29, the Covenant applies also in situations of armed conflict to which the rules of international humanitarian law are applicable. While, in respect of certain Covenant rights, more specific rules of international humanitarian law may be specially relevant for the purposes of the interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive"; HRC, *General Comment No.35, Article 9 (Liberty and security of person)*, 16 December 2014, CCPR/C/GC/35, §64: "With regard to article 4 of the Covenant [International Covenant on Civil and Political Rights], the Committee first observes that, like the rest of the Covenant, article 9 applies also in situations of armed conflict to which the rules of international humanitarian law are applicable [citing General comments No. 31, §11, and No. 29, §3]. While rules of international humanitarian law may be relevant for the purposes of the interpretation of article 9, both spheres of law are complementary, not mutually exclusive".

²¹⁸ UN Committee on the Elimination of All Forms of Racial Discrimination, *Concluding Observations*, Israel, U.N. Doc. CERD/C/ISRICO/13 (June 14, 2007), §13: "In the present context of violence, the Committee recognizes the difficulties of the State party in fully implementing the Convention. Guided by the principles of the Convention, the State party should ensure, however, that security measures taken in response to legitimate security concerns are guided by proportionality, and do not discriminate in purpose or in effect against Arab Israeli citizens, or Palestinians in the Occupied Palestinian Territories, and that they are implemented with full respect for human rights as well as relevant principles of international humanitarian law".

²¹⁹ UN Committee on the Elimination of Discrimination against Women *General Recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations* CEDAW/C/GC/30, 1 November 2013, §19: "In all crisis situations, whether non-international or international armed conflict, public emergencies, foreign occupation or other situations of concern such as political strife, women's rights are guaranteed by an international law regime that consists of complementary protections under the Convention and international humanitarian, refugee and criminal law".

3 Extraterritorial Application of International Human Rights Law

The absence of the formal determination, in *Mara'abe v. Prime Minister of Israel*, of the *de jure* extra-territorial applicability of IHRL to the OPT results from the position of the Israeli judiciary in relation to the executive and legislative elements of the Israeli state under the dualist system. It is only the executive and the legislature which formally determine the extent and type of relationship of Israeli domestic law to international legal instruments through signature and ratification (executive) and incorporation (legislature). The role of judiciary is confined to one of interpretation of the relationship between international and domestic law.

However, the decision in *Mara'abe v. Prime Minister of Israel* creates a contradiction within the Israeli State between the judiciary and the executive and the legislature. This arises from the contrast between the decision of the Israel Supreme Court and the continued refusal of the executive and legislature to consider that the obligation, under the ratified international legal instruments of IHRL, to provide the relevant UN Committees with a Country Report detailing the implementation and adherence to the human rights of the particular legal instrument extends extra-territorially to the OPT.

The refusal is founded upon the repeated denial by Israel of the extra-territorial applicability of IHRL to the OPT based upon the attribution of two fundamentally distinct legal purposes and territorial domains of application. The entirely domestic purpose and non-belligerent orientation of IHRL is, for Israeli, the corollary of its territorial limitation to the population within the borders of Israeli territory. Thus, it is only those provisions of IHL which have achieved the status of customary international law, which are considered to have any effective presence in, and extraterritorial application to, the belligerent occupation of the OPT.

In order to establish the formal, *de jure* extraterritorial applicability of the relevant international legal instruments of IHRL to the OPT and, in particular, to the Israeli State practice of administrative detention, the Report commences from the ICJ Wall Advisory Opinion. The ICJ's interpretation of the extraterritorial applicability of the international legal instruments of IHRL ratified by a State Party focuses upon an analysis of the presence, within the particular international legal instrument, of the necessary phraseology to denote the extraterritorial application of its provisions. For the ICJ, extraterritoriality is established by the presence of a phraseology denoting control, rather than territorial application, in which control is understood to extend the applicability beyond the territory of the State Party to encompass those areas "under the State party's jurisdiction".²²⁰

On the basis of this approach to the determination of extraterritorial applicability, the ICJ, focusing upon the two international legal instruments of IHRL – the ICCPR and the CRC – held to be of potential relevance to the construction of the wall, holds that the term "jurisdiction" is a definitive indication of this extraterritorial applicability. Hence, presence of the term "jurisdiction", in Article 2(1) of ICCPR and in Article 2 of CRC²²¹, constitutes the

²²⁰ Eyal Benvenisti, "The Applicability of Human Rights Conventions to Israel and the Occupied Territories", *Israel Law Review*, Vol.26, No.1 (1992), pp. 24-35, p. 33.

²²¹ Article 2(1) ICCPR: "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national

extraterritorial applicability of these two international legal instruments of IHRL to the OPT.²²² The extraterritorial applicability of UNCAT and CERD, although not discussed by the ICJ, would, by the presence of the term “jurisdiction”, under Article 2(1) UNCAT and Article 6 CERD, fulfil the ICJ’s test for extraterritorial applicability.²²³ The UN Committee Against Torture has confirmed the ICJ’s approach “that the Convention applies to all territory and persons under the jurisdiction of the State party, including the Occupied Territories”.²²⁴ The UN Committee on the Elimination of All Forms of Racial Discrimination has also endorsed the ICJ’s approach, reiterating in its Concluding Observations on the fourteenth to sixteenth periodic reports of Israel of 2012, its preceding position in its Concluding Observations of 2007, that Israel’s denial of the extraterritorial applicability of the CERD “is not in accordance with the letter and spirit of the Convention, and international law, as also affirmed by the International Court of Justice and by other international bodies”.²²⁵

The absence of any explicit indication of extraterritorial applicability in the Articles of Convention on the Elimination of All Discrimination Against Women (CEDAW) entails that there is no direct capacity for extension of the ICJ’s test to determine the extraterritorial application of its provisions. However, the UN Committee on the Elimination of All Discrimination Against Women in General Comment No.28 has held that CEDAW is to be considered an international legal instrument of IHRL which has extraterritorial applicability, and the position of the General Comment has been applied in the Committee’s decision in *Y.W. v Denmark* in 2015.²²⁶ In addition, the Committee on the Elimination of All Discrimination Against Women in its Concluding Observations on Israel’s periodic reports has consistently affirmed the extraterritorial applicability of CEDAW.²²⁷

or social origin, property, birth or other status”; and Article 2 CRC: “State parties shall respect and ensure the rights set forth in this Convention to each child within their jurisdiction”.

²²² See *ICJ Wall Advisory Opinion*, Op. cit., §§107 ff.

²²³ Article 2(1) UNCAT: “Each State Party shall take effective legislative, administrative and judicial or other measures to prevent acts of torture in any territory under its jurisdiction”; Article 6 CERD: “All State Parties shall assure to everyone within their jurisdiction effective protection and remedies”.

²²⁴ UN Committee Against Torture, *Concluding observations on the fifth periodic report of Israel*, 3 June 2016, CAT/C/ISR/CO/5, §9.

²²⁵ *Concluding observations of the Committee on the Elimination of Racial Discrimination: Israel*, 2012 CERD/C/ISR/CO/14-16, §10, referring to, and reaffirming its previous position, in *Concluding observations of the Committee on the Elimination of Racial Discrimination: Israel*, 2007 CERD/C/ISR/CO/13, §32.

²²⁶ Committee on the Elimination of Discrimination against Women, *General recommendation No. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, 2010 CEDAW/C/GC/28, §12: “12. Although subject to international law, States primarily exercise territorial jurisdiction. The obligations of States parties apply, however, without discrimination both to citizens and non-citizens, including refugees, asylum-seekers, migrant workers and stateless persons, within their territory or effective control, even if not situated within the territory. States parties are responsible for all their actions affecting human rights, regardless of whether the affected persons are in their territory”; Committee on the Elimination of Discrimination against Women, *Communication No. 51/2013*, CEDAW/C/60/D/51/2013, §8.4: “The Committee recalls that in paragraph 12 of its General Recommendation No.28 on the core obligations of State parties under Article 2 of the Convention it emphasized that the obligations of State parties applied without discrimination both to citizens and to non-citizens, including refugees, asylum seekers, migrant workers and stateless persons, within their territory or effective control, even if not situated within the territory. The Committee indicated that State parties were responsible for all their actions affecting human rights, regardless of whether the affected persons were within their territories”.

²²⁷ Committee on the Elimination of Discrimination against Women, *Concluding observations on the sixth periodic report of Israel*, 2017 CEDAW/C/ISR/CO/6, §14: “The Committee regrets that the State party maintains its position that the Convention is not applicable beyond its own territory, such that it provided no information on the implementation of the Convention in the Occupied Palestinian Territory over which the State party exercises jurisdiction or effective control. It reiterates that the State party’s position is contrary to the position of the Committee and other treaty bodies, including the Human Rights Committee, the Committee on

Therefore, in contrast to the position of the executive and legislature of the Israeli State, each of the international legal instruments of IHRL of relevance to administrative detention has extraterritorial applicability. In addition, the Report diverges from the position of the Israeli Supreme Court in conceiving the status of this extraterritorial applicability to be *de jure*, rather than *de facto*. From this position with regard to the extraterritorial applicability of IHRL, an obligation is imposed upon the military commander in the OPT to amend the existing legal framework of the OPT to incorporate these international legal instruments of IHRL.²²⁸

The resolution of the question of the extraterritorial applicability of the international legal instruments of IHRL to the OPT and the Israeli State practice of administrative detention enables the Report to engage in a detailed legal analysis of the relationship between IHRL and each of the stages of administrative detention.

4 The International Covenant on Civil and Political Rights

Israel signed the ICCPR in 1966 and ratified/acceded to this international legal instrument of IHRL in 1991. Israel has neither signed nor ratified the Optional Protocol to the ICCPR of 1976 which was drafted to enable individuals, having exhausted all domestic remedies, to submit a communication to the Human Rights Committee claiming to be victims of violations, by the State Party, of any of the rights set forth in the ICCPR. Thus, the relationship between the Human Rights Committee and Israel remains that established by the ICCPR, under Article 40, in which Israel, as State Party to the Convention, is obliged to submit to the Committee “reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made in the enjoyment of those rights result”.²²⁹ This obligation upon Israel to provide these periodic reports is the mechanism of oversight, under international law, in regard to the human rights and fundamental freedoms contained in the ICCPR. Thus, in regard to individuals within the OPT, to which the ICCPR has extraterritorial applicability, the Human Rights Committee has no authority to hear individual communications, and the Israel Supreme Court remains the basis for individual challenges to Israeli State practices within the OPT.

Derogation

In contrast to the other international legal instruments of human rights, the ICCPR is distinguished, under Article 4, by the explicit capacity, through an official declaration by the State Party, to derogate from its provisions.²³⁰ The capacity for derogation arises, under

Economic, Social and Cultural Rights, the Committee against Torture and the Committee on the Elimination of Racial Discrimination, and the International Court of Justice”.

²²⁸ Here, the Report follows the position of Eyal Benvenisti, *Op. cit.*, p. 35: “It is therefore suggested that occupants who are parties to human rights conventions that apply “within their jurisdiction” are bound by these conventions also in their activities in the occupied areas. Thus, with the relevant ratification of ... human rights conventions, Israel has committed itself to implement them in the territories it occupies”.

²²⁹ ICCPR Article 40(1).

²³⁰ ICCPR Article 4(3): “Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation”.

Article 4(1), from a situation in which the State Party considers itself confronted by a state of emergency.²³¹

The strictly circumscribed definition of a state of emergency, under Article 4(1), is further limited, under Article 4(2), by the designation of the following rights as non-derogable provisions of the ICCPR: Article 6 (right to life), Article 7 (prohibition of torture and cruel, inhuman or degrading treatment or punishment), Article 8 (prohibition on slavery and servitude), Article 11 (prohibition on imprisonment for breach of a contractual obligation), Article 15 (prohibition upon retroactive criminal offences/punishment), Article 16 (right to legal personality) and Article 18 (right to freedom of thought, conscience and religion).

Israel has remained in an officially declared state of public emergency, from May 19th 1948 until the present. Upon Israel's ratification of the ICCPR, under Article 40 of the ICCPR, Israel made the following declaration of the existence of a state of emergency in regard to the provisions of the ICCPR:

“Since its establishment, the State of Israel has been the victim of continuous threats and attacks on its very existence as well as on the life and property of its citizens. These have taken the form of threats of war, of actual armed attacks, and campaigns of terrorism resulting in the murder of, and injury to human beings. In view of the above, the State of Emergency which was proclaimed in May 1948 has remained in force ever since. This situation constitutes a public emergency within the meaning of article 4(1) of the Covenant. The Government of Israel has therefore found it necessary, in accordance with the said article 4, to take measures to the extent strictly required by the exigencies of the situation, for the defence of the State and for the protection of life and property, including the exercise of powers of arrest and detention. Insofar as any of these measures are inconsistent with article 9 of the Covenant, Israel thereby derogates from its obligations under that provision”.²³²

The character of this derogation is of direct relevance to the Israeli State practice of administrative detention as Article 9 of the ICCPR contains the right to liberty and security of person and, as its corollary, the prohibition of arbitrary arrest and detention. It also opens the further question of the effect of this derogation from Article 9 upon the right to fair trial under Article 14.

The Human Rights Committee in its consideration of Israel's periodic reports, under Article 40 of the ICCPR, has never held that Israel's declaration is fundamentally at variance with the definition of a state of public emergency under Article 4(1). Thus, the Human Rights Committee has not held that the Israel's derogation is unfounded but, rather, has repeatedly

²³¹ Article 4(1) states: “In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent *strictly required by the exigencies of the situation*, provided that such measures are *not inconsistent with their other obligations under international law* and do *not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin*”. (Emphasis added).

²³² Human Rights Committee (HRC), *Initial State Party Report*, Israel CCPR/C/81/Add.13 2 June 1998, §106. There has been discussion, within Israeli state institutions, since 1999, of the necessity for the continued declaration of a state of public emergency (see, for example, Human Rights Committee, *Replies of the Government of Israel to the List of Issues (CCPR/C/ISR/Q/3/)* to be taken up in connection with the consideration of the third periodic report of Israel (CCPR/C/ISR/3), 12 July 2010, CCPR/C/ISR/Q/3/Add.1, Question 9, p. 28). In addition, in 1999, there was an unsuccessful challenge, in the Israel Supreme Court, to the continued declaration of a state of public emergency in Israel, H.C.J. 3091/99, *The Association of Civil Rights in Israel v. The Knesset*. At present, however, the state of public emergency continues to be in force.

reiterated that the exceptional character of a state of public emergency entails that a State Party should, for the entirety of its duration, undertake a regular review and reconsideration of the continued necessity for its existence.²³³ Therefore, the focus of further legal analysis centres upon the effect upon Article 9 and Article 14 ICCPR of the Israeli derogation based upon the declaration of a state of public emergency.²³⁴

The Report is, thereby, concerned with two main questions in relation to the right to liberty and security of person under Article 9. First, it is concerned to determine the degree to which the derogation modifies this right. Second, it is concerned to establish the extent to which any modification of this right affects the capacity of Article 9, in its interrelationship with IHL, to operate as an essential supplement to Article 78(1) of the Fourth Geneva Convention and Article 75 of Additional Protocol I to the Geneva Conventions.

The legal principles of necessity and proportionality which underlie the determination of the legitimacy of the initial Israeli derogation continue to regulate the manner in which Israel undertakes any concrete modification of Article 9. The Human Rights Committee is insistent, in General Comment No. 29 on derogation, that

“the mere fact that a permissible derogation from a specific provision may, of itself, be justified by the exigencies of the situation does not obviate the requirement that specific measures taken pursuant to the derogation must also be shown to be required by the exigencies of the situation. In practice, this will ensure that no provision of the Covenant, however validly derogated from will be entirely inapplicable to the behaviour of a State party”.²³⁵

The more specific application, by the Human Rights Committee, of this approach to Article 9 is elaborated in General Comment No.35 on Article 9.

In relation to derogation from Article 9, General Comment No. 35 reaffirms that

“While reservations to certain clauses of article 9 may be acceptable, it would be incompatible with the object and purpose of the Covenant for a State party to reserve the right to engage in arbitrary arrest and detention of persons”.²³⁶

Therefore, the effect of derogation is not to confer upon the State Party the capacity, even within the tightly circumscribed definition of a state of public emergency, to release itself

²³³ See, HRC, UN Human Rights Committee: *Concluding Observations: Israel*, 18 August 1998, CCPR/C/79/Add.93, §11; HRC, *Concluding observations on the second periodic report of Israel*, 21 August 2003, CCPR/CO/78/ISR, §12; HRC, *Concluding observations on the third periodic report of Israel*, 3 September 2010, CCPR/C/ISR/CO/3, §7. Whilst the consideration of the continued existence of the state of emergency is evaluated more critically and a stronger emphasis is placed upon Israel’s review of the necessity of a declaration of a state of emergency, the HRC still holds that the state of emergency remains with the requirements of Article 4(1). See, HRC, *Concluding observations on the fourth periodic report of Israel*, 21 November 2014, CCPR/C/ISR/CO/4, §10.

²³⁴ HRC, *General Comment No.32: Article 14: Right to Equality before Courts and Tribunals and Right to a Fair Trial*, 23 August 2007 CCPR/C/GC/35 and *General Comment No.35: Article 9 (liberty and security of person)*, 15 December 2014, CCPR/C/GC/35, rather than HRC *General Comment No.29: Article 4: Derogations during a State of Emergency*, 31 August 2001, CCPR/C/21/Rev.1/Add.11.

²³⁵ HRC, *General Comment No.29*, Op. cit., §4.

²³⁶ HRC, *General Comment No.35*, Op. cit., §68, citing *General comment No. 24: Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant*, 4 November 1994, CCPR/C/21/Rev.1/Add.6, §8.

from the entirety of its derogable obligations under Article 9. This, in turn, requires that the State Party, irrespective of derogation, continue to maintain and guarantee the essential elements of this right and its corresponding obligations under Article 9.

The General Comment No. 35 identifies the essential elements of Article 9 as the framework of procedural guarantees which protect the “liberty of person”.²³⁷ The status accorded to these procedural guarantees is that of aspects of Article 9 which “may never be made subject to measures of derogation that would circumvent the protection of non-derogable rights”.²³⁸ Hence, in relation to the particular form of deprivation of liberty represented by the practice of administrative detention, it then becomes a question of determining these irreducible procedural guarantees under Article 9 which have this fundamental function in relation to the non-derogable rights under Article 4(2).

The General Comment No. 35 defines administrative detention as a form of detention which “presents severe risks of arbitrary deprivation of liberty”; and “would normally amount to arbitrary detention as other effective measures addressing the threat, including the criminal justice system, would be available”.²³⁹ The presumption that this form of detention is arbitrary can only be rebutted

“under the most exceptional circumstances, a present, direct and imperative threat is invoked to justify the detention of persons considered to present such a threat, the burden of proof lies on States parties to show that the individual poses such a threat and that it cannot be addressed by alternative measures, and that burden increases with the length of the detention”.²⁴⁰

The State’s rebuttal of this presumption does not in itself render the administrative detention non-arbitrary as, for the duration of the period of detention, the State is obliged to demonstrate that the “detention does not last longer than absolutely necessary, that the overall length of possible detention is limited”.²⁴¹ In addition, the State is required to “fully respect the guarantees provided for by article 9 in all cases”:

“Prompt and regular review by a court or other tribunal possessing the same attributes of independence and impartiality as the judiciary is a necessary guarantee for those conditions, as is access to independent legal advice, preferably selected by the detainee, and disclosure to the detainee of, at least, the essence of the evidence on which the decision is taken”.²⁴²

Thus, in relation to administrative detention, the procedural guarantees, under Article 9(2) and Article 9(4)²⁴³, remain unaffected by the particular character of this form of detention; and represent the fundamental procedural guarantees which are equally unaffected by any derogation under Article 4.

²³⁷ HRC, *General Comment No.35*, Op. cit., §67.

²³⁸ Ibid.

²³⁹ Ibid., §15.

²⁴⁰ Ibid.

²⁴¹ Ibid.

²⁴² Ibid.

²⁴³ Article 9(2): “Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.”; Article 9(4): “Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful”.

In regard to the relationship between Article 9 of the ICCPR and IHL – the imposition of the State practice of administrative detention within the context of the OPT – the General Comment No. 35 recognizes that “security detention authorized and regulated by and complying with international humanitarian law in principle is not arbitrary”.²⁴⁴ The “complementary”²⁴⁵ interrelationship between Article 9 ICCPR and IHL is one in which the “[d]uring international armed conflict, substantive procedural rules of international humanitarian law remain applicable and limit the ability to derogate, thereby helping to mitigate the risk of arbitrary detention”.²⁴⁶ The General Comment No. 35 confirms the status of IHL as the minimum, non-derogable threshold of procedural protection to which the procedural guarantees of the ICCPR, under Article 9(2) and Article 9(4), are an essential complement.

Therefore, the Israeli public declaration of derogation from the ICCPR leaves Article 9(2) and Article 9(4) unaffected and of full application to the Israeli State practice of administrative detention in the OPT.

The right to fair trial, under Article 14, is also a derogable provision of the ICCPR. However, whilst it is not specifically indicated to be the subject of derogation in Israel’s public declaration of derogation, under Article 4 of the ICCPR, the connection between the procedural guarantees of Article 9(2) and Article 9(4) and Article 14 require consideration of the status of Article 14 in respect of the Israeli derogation.

The Human Rights Committee, in General Comment No.32 Article 14: Right to equality before courts and tribunals and to a fair trial, states that the character or effect of a State Party’s derogation from Article 14 can only commence²⁴⁷ from “reservations to particular clauses of article 14”.²⁴⁸ In contrast, “a general reservation to the right to a fair trial would be incompatible with the object and purpose of the Covenant”.²⁴⁹ Any reservations to particular clauses will be subject to the satisfaction of the conditions of a state of public emergency under Article 4 and cannot “circumvent the protection of non-derogable rights” under Article 4(2).²⁵⁰ In addition, the Human Rights Committee indicates that there is a non-derogable core of Article 14 which arises because “[t]he right to equality before the courts and tribunals and to a fair trial is a key element of human rights protection and serves as a procedural means to safeguard the rule of law”.²⁵¹

Therefore, Article 14 remains operative in the regulation, by international human rights law, of the Israeli State practice of administrative detention.

The enhanced protection of the ICCPR

The extraterritorial applicability of the ICCPR to the OPT coupled with the limits imposed upon the Israel derogation, under Article 4, entail that the complementary relationship between IHL and the provisions of IHRL contained in the ICCPR enhances the framework of

²⁴⁴ Ibid., §64.

²⁴⁵ Ibid., §66 citing General comment No. 29, Op. cit., §3

²⁴⁶ Ibid.

²⁴⁷ Here, the subsequent qualifying phrase “may be acceptable” (§5) indicates that the State Party cannot assume that even these reservations will automatically, and without further consideration by the Human Rights Committee, be considered to be compatible with the conditions for derogation under Article 4.

²⁴⁸ HRC, *General Comment No.32*, 23 August 2007, CCPR/C/GC/32, §5.

²⁴⁹ Ibid.

²⁵⁰ Ibid., §6.

²⁵¹ Ibid., §2.

procedural protection applied to the Israeli State practice of administrative detention. The enhancement arises from the normative hierarchy of arrest and detention which the ICCPR establishes based upon the degree of risk of arbitrariness. Within this normative hierarchy, arrest and detention in connection with a criminal charge and proceedings is considered to be the State practice which has the lesser degree of risk of arbitrariness in comparison with that of arrest and detention in connection with administrative detention.

In this manner, the ICCPR requires the imposition of administrative detention always to be open to its termination by the formal charging of the individual with a concrete criminal offence, the introduction of the procedural rights and obligations of a criminal trial undertaken by a judicial body and, upon conviction, a sentence specifying a determinate period of detention. The emphasis upon the normative primacy of criminal proceedings is accompanied by an equal emphasis upon ensuring the procedural guarantees of the ICCPR for those individuals upon whom administrative detention is imposed.

The ICCPR also establishes an integral connection between Article 9 (the right to liberty and security of person) and other provisions of the ICCPR. The breach of Article 9, including the fundamental procedural guarantees of Article 9(2) and Article 9(4), has the capacity to constitute a breach of other provisions of the ICCPR, in particular, Article 7 (the prohibition of torture and cruel, inhuman or degrading treatment or punishment), Article 10 (the right of all persons deprived of their liberty to be treated with humanity), Article 14 (the right to fair trial) and Article 16 (the right to legal personality).

Arrest and ground(s) of detention

The right to liberty, under Article 9(1) of the ICCPR, is not an absolute right. Israel, as a party to the ICCPR, is not prohibited from engaging in practices of deprivation of liberty, including administrative detention. However, in order for those practices to remain compatible with the requirements of Article 9 (1), Israel must demonstrate that these practices continue to respect the two distinct, but non-separable conditions of legality and lack of arbitrariness of arrest and detention. Legality refers not simply to the requirement that the practice originates in an explicit legislative provision of the State, but to the requirement that the legislative provision must define, in a clear and accessible manner, the substantive grounds for, and the procedural mechanisms under which, deprivation of liberty is permitted. Grounds for detention based on ill-defined, general notions of “terrorism”²⁵², “extremist activity”²⁵³ or “unlawful association”²⁵⁴ are considered to be incompatible with the requirement of legality under Article 9(1) of the ICCPR.

The more specific evaluation of the conformity of the Israeli State practice of administrative detention with Article 9(1) is contained in Israel’s periodic reports, under Article 40 of the ICCPR, and the opinions of the Human Rights Council Working Group on Arbitrary Detention in regard to individual applications.²⁵⁵ The Human Rights Committee has

²⁵² HRC, *Concluding observations on the fourth periodic report of Mauritius*, 27 April 2005, CCPR/CO/83/MUS, §12.

²⁵³ HRC, *Concluding observations on the sixth periodic report of the Russian Federation*, 24 November 2009, CCPR/C/RUS/CO/6, §24.

²⁵⁴ HRC, *Concluding observations on the initial report of Honduras*, 13 December 2006, CCPR/C/HND/CO/1, §13.

²⁵⁵ The Human Rights Council Working Group on Arbitrary Detention was established by resolution 1991/42 of the Commission on Human Rights, which extended and clarified the Working Group’s mandate in its resolution

consistently held, in its concluding observations on the periodic reports of Israel, that the Israeli State practice of administrative detention should cease and that all arrests and detentions in the OPT should take the sole form of criminal proceedings.²⁵⁶ In parallel with this recommendation, the Human Rights Committee has evaluated the degree of conformity with Article 9(1) of the continued recourse, by Israel, to the practice of administrative detention. This has entailed the evaluation, under Article 9(1), of the ground upon which the initial arrest is made, the designation of grounds for arrest which lack conformity with requirements of Article 9(1) and the capacity for a breach of Article 9(1) to result in the breach of other provisions of the ICCPR.

The ground for arrest of a risk or threat to security within the OPT, in order to remain compatible with Article 9(1), must be founded upon the specific and continuing risk or threat posed by the particular individual subject to arrest. In the absence of this foundation for the individual's arrest, the arrest will breach Article 9(1) and, from its inception, this instance of the Israeli State practice of administrative detention will be both unlawful and arbitrary.²⁵⁷ The requirements of Article 9(1) remain operative for the entire duration of the individual's subjection to the Israeli State practice of administrative detention, and, therefore, continue to apply to any subsequent decision to impose an administrative detention order and the further periods of review and renewal of the original detention order. Article 9(1) becomes not merely the basis upon which the initial decision to arrest should be exercised, but also the basis for each of the subsequent stages, within the military court system, of appeal and review of any administrative detention order which is imposed.

The position of the Human Rights Committee is affirmed by the Working Group on Arbitrary Detention their Opinions on individuals subject to administrative detention, by Israel, in the OPT.²⁵⁸ In each of the instances of administrative detention which it examines, the Working Group concludes that the individuals have all been arrested without a sufficient foundation under Article 9(1).²⁵⁹ The cumulative effect of these Opinions, which relate to both adults and

1997/50. On the basis of General Assembly resolution 60/251 and Human Rights Council decision 1/102, the Council assumed the mandate of the Commission. The mandate of the Working Group was most recently extended for a three-year period in Council resolution 33/30 of 30 September 2016. In contrast to the position of the Human Rights Committee, dependent upon the State Party's ratification of the Optional Protocol to the ICCPR, the task of the Working Group was "not only of informing the Commission by means of a comprehensive report, but also of investigating cases of deprivation of liberty imposed arbitrarily". (Human Rights Council, *Methods of work of the Working Group on Arbitrary Detention*, 13 July 2017 A/HRC/36/38, §1).

²⁵⁶ HRC, *UN Human Rights Committee: Concluding Observations: Israel*, 18 August 1998, CCPR/C/79/Add.93, §21; HRC, *Concluding observations on the second periodic report of Israel*, 21 August 2003, CCPR/CO/78/ISR, §14; HRC, *Concluding observations on the fourth periodic report of Israel*, 21 November 2014, CCPR/C/ISR/CO/4, §10.

²⁵⁷ HRC, *UN Human Rights Committee: Concluding Observations: Israel*, 18 August 1998, Op. cit., §21

²⁵⁸ Human Rights Council Working Group on Arbitrary Detention, *Opinion No. 86/2017* concerning Salem Badi Dardasawi (Israel), 18 December 2017, A/HRC/WGAD/2017/86; *Opinion No. 44/2017* concerning Ali Abdul Rahman Mahmoud Jaradat (Israel) 2 October 2017, A/HRC/WGAD/2017/44; *Opinion No. 3/2017* concerning a minor whose name is known by the Working Group (Israel), 16 June 2017, A/HRC/WGAD/2017/3; *Opinion No. 24/2016* concerning a minor (whose name is known by the Working Group) (Israel), 20 October 2016, A/HRC/WGAD/2016/24; *Opinion No. 13/2016* concerning a minor (whose name is known by the Working Group) (Israel), 24 June 2016, A/HRC/WGAD/2016/13.

²⁵⁹ The structure of an Opinion of the Working Group is based upon submissions by the individual and the State Party prior to the evaluation by the Working Group. In each of these Opinions, despite communication by the Working Group with Israel, Israel has never proceeded to make a formal submission replying to the submission of the individual subject to administrative detention. In accordance with its working methods, the Working Group has considered that the absence of a response by Israel indicates that it does not contest the factual

minors, deprived of their liberty through administrative detention “not in contemplation of prosecution on a criminal charge”, is that the most recent Opinion of Working Group “takes note of the pattern that has emerged through the number of cases with similar facts that have been brought before it in the past”.²⁶⁰ Hence, that the breaches of Article 9 that the Opinions have previously identified indicate, rather than isolated instances of non-compliance, a State practice of detention in which the “severe risks” indicated by the HRC General Comment have become effectively transformed into a State practice of deprivation of liberty which repeatedly and systematically breaches Article 9. On this basis, the most recent Opinion of the UN Human Rights Council Working Group on Arbitrary Detention at its 80th Session will be used as exemplifying the systematic non-compliance of this Israeli State practice of administrative detention”

In relation to the two fundamental requirements of legality and lack of arbitrariness, the Opinion considers that the Israeli State practice of administrative detention is in breach of both requirements. With regard to the requirement of legality, the arrest and detention originates in Israeli Military Order No. 165, (2009), Article 31 (detention for interrogation), it led to the individual’s immediate administrative detention without charge or trial.²⁶¹ However, beyond the formal legality of the existence of this Military Order, the requirement of legality necessitates that Israel demonstrates “what present, direct and imperative threat [an individual] posed at the time of his arrest and how this threat has persisted during his detention for what is [in this situation] now nearly two years”.²⁶² The failure to satisfy this “imperative requirement” represents the absence of legality of the individual’s administrative detention and the breach of Article 9 of the Covenant”.²⁶³

The absence of legality of detention will then indicate the arbitrariness of the detention. For, once it is evident that Israel’s imposition of administrative detention relates to a “threat [which] does not exist and the arrest and subsequent detention [...] therefore lacks legal basis, [it] is contrary to article 9 of the Covenant and consequently [it] is arbitrary”.²⁶⁴ The finding of arbitrariness establishes that the Israeli State practice of administrative detention is categorized as within the first of the UN Working Group’s four categories of arbitrary detention administrative detention: “[w]hen it is clearly impossible to invoke any legal basis justifying the deprivation of liberty”.²⁶⁵

Right to be informed about the reasons for arrest and detention

The connection between Article 9(1) – the legality and arbitrariness of arrest and detention – and the right to be informed, upon arrest, of the reasons for the arrest, under Article 9(2), arises where the State fails to inform the individual of the reasons for the arrest. The fundamental purpose of the procedural protection, under Article 9(2), is to oblige the State to divulge the reason and, therefore, the factual and legal basis upon which the individual has been arrested and detained. The failure represents not only the violation of Article 9(1) in

submissions of the individual. Hence, for the Working Group, Israel does not contest that the foundation for each arrest was without sufficient foundation under Article 9(1).

²⁶⁰ *Opinion No. 86/2017*, Op. cit., §43.

²⁶¹ *Ibid.*, §30.

²⁶² *Ibid.*, §32.

²⁶³ *Ibid.*

²⁶⁴ *Ibid.*

²⁶⁵ *Ibid.*, §3(a).

relation to the State practice of administrative detention, but also the violation, under Article 9(1), of the relationship between administrative detention and criminal proceedings. For the failure to inform the individual of the reasons for the arrest and detention is indicative of the failure to “ensure that individuals subject to administrative detention orders were either promptly charged with a criminal offence or released”.²⁶⁶

The right to be informed of the reasons for arrest and detention is, in addition to its relationship with Article 9(1), a procedural guarantee which reflects the individual’s status as genuine legal subject with distinct legal personality within the State practice of administrative detention. The obligation of the State to inform the individual of the reasons for arrest and detention is the corollary of the right of the individual, as a legal subject, to participate, as an adversarial party, in the determination of the validity of the State’s case for arrest and detention.

The Israeli State practice of administrative detention is a violation of Article 9(2), as a fundamental procedural guarantee, in each situation in which the individual is either not promptly informed of the reasons for the arrest and/or not promptly informed of the charges which form the basis for the imposition of an administrative detention order. The absence of this information is held to affect both the legal personality of the individual arrested or detained and, as a further supplement to the minimum level of protection afforded under Article 78(1) of the Fourth Geneva Convention and Article 75 of Additional Protocol I to the Geneva Conventions, the character of legal representation available to the individual.

The essential connection to effective legal representation contained in Article 9(2) is emphasized in the Human Rights Committee General Comment No. 35 in which “access to independent legal advice, preferably selected by the detainee, and disclosure to the detainee of, at least, the essence of the evidence on which the decision is taken” is one of the “necessary guarantee[s]” ensuring that the arrest and detention are compatible with Article 9.²⁶⁷ The approach of the General Comment is reaffirmed by the Opinions of the Working Group on Arbitrary Detention in their evaluation of individuals subject to arrest and administrative detention in the OPT. In *Opinion No.86/2017*, the Working Group holds that where administrative detention involves a situation in which the individual “is still to formally learn what charges against him have legitimized his detention for a period of close to two years”; and “no explanation of the reasons for his detention nor access to any evidence that served as the basis for the issuance of the detention order have been provided to his lawyer”²⁶⁸; this represents a denial of the right, under Article 9(2), “not only [to] be promptly informed of the reasons for his or her arrest, but also promptly informed of any charges against him or her”.²⁶⁹

For the Working Group, the administrative detention of the individual in *Opinion No.86/2017* exemplifies the *systemic*, rather than the isolated and individual character of these breaches of Article 9 by the Israel State practice of administrative detention. The systemic character results from the confirmation, in this Opinion, of a common pattern of arrest and detention underlying the Israel State practice of administrative detention. The Working Group considers that

²⁶⁶ UN Working Group on Arbitrary Detention, *Opinion No.86/2017*, §41, citing and affirming the Working Group’s previous *Opinion No.44/2017*.

²⁶⁷ HRC, General Comment No.35, Op. cit., §15.

²⁶⁸ *Opinion No.86/2017*, Op. cit., §36.

²⁶⁹ *Ibid.*, §37.

“[i]n the absence of any explanation from the [Israeli] Government, the Working Group takes note of the pattern that has emerged through the number of cases with similar facts that have been brought before it in the past [citing the previous Opinions]”.²⁷⁰

The pattern is also held to corroborate “the general manner in which such administrative detention orders were used against Palestinians in particular, as highlighted by the Human Rights Committee” in the Concluding Observations on the fourth periodic report of Israel.²⁷¹

The right to challenge the legality of arrest or detention (habeas corpus) and related procedural guarantees

Article 9(4) of the ICCPR furnishes the individual with the further procedural guarantee, in the event of the imposition of an administrative detention order, of the right to challenge the lawfulness of detention. Under Article 9(4),

“[a]nyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful”.²⁷²

The strict requirement of a judicial body represents the supplement, under Article 75 of Additional Protocol I to the Geneva Conventions, contributed by the ICCPR to the minimum requirement of a “regular procedure” of Article 78(2) of the Fourth Geneva Convention which accords the Occupying Power the choice of whether to institute the “regular procedure” in the form of either a court or board. The adoption of a military court system in the OPT is not specifically prohibited by Article 9(4), but continued compliance with its procedural protection for the detainee requires conformity between the procedure of the Israeli military court system and the notion of a judicial body and judicial proceedings of Article 9(4).

The Human Rights Committee in General Comment No. 35 reemphasizes that Article 9(4) obliges State to utilize a judicial body to review the legality of detainees’ arrest and detention. The requirement for a judicial body is demonstrated by its “higher degree of objectivity and independence”; whereby the judicial body must either be independent of both the executive authority that ordered the detention and the parties to the case or enjoy judicial independence in proceedings that are judicial in nature. The Human Rights Committee considers that it is permissible to establish specialised tribunals that deal with challenges to detention, provided that their nature, powers and related proceedings are judicial.²⁷³

²⁷⁰ Ibid., §43.

²⁷¹ Ibid., citing HRC, *Concluding observations on the fourth periodic report of Israel*, 21 November 2014, CCPR/C/ISR/CO/4, §10.

²⁷² ICCPR Article 9(4).

²⁷³ HRC, *General Comment No.35*, Op. cit., §45 citing 1090/2002, *Rameka v. New Zealand*, § 7.4 (discussing the ability of a Parole Board to act in judicial fashion as a court); 291/1988, *Torres v. Finland*, §7.2 (finding review by the Minister of the Interior insufficient); 265/1987, *Vuolanne v. Finland*, § 9.6 (finding review by a superior military officer insufficient); HRC *General Comment No. 32*, §§18–22.

The position of the HRC is reiterated by the UN Working Group on Arbitrary Detention in its Opinions relating to the specific Israeli State practice of administrative detention. In the most recent Opinion, the Working Group states:

“The right to challenge the lawfulness of detention before a court is a self-standing human right, which is essential to preserve legality in a democratic society. That right, which is, in fact, a peremptory norm of international law, applies to all forms of deprivation of liberty, and to all situations of deprivation of liberty, including not only detention for purposes of criminal proceedings, but also situations of detention under administrative and other fields of law, including military detention, administrative detention, detention under counter-terrorism measures, involuntary confinement in medical or psychiatric facilities, migration detention, detention for extradition, arbitrary arrests, house arrest, solitary confinement, detention for vagrancy or drug addiction, and detention of children for educational purposes. It also applies irrespective of the place of detention or the legal terminology used in the legislation. Any form of deprivation of liberty on any ground must be subject to effective oversight and control by the judiciary”.²⁷⁴

The particular situation of administrative detention under conditions of military occupation, and the more general character of the relationship between IHL and IHRL, is specified in paragraphs 64-68 of General Comment No. 35. The Human Rights Committee determines that there is mutually supportive relationship between IHL and IHRL in regard to the applicability of Article 9(4) to a situation of military occupation and the relevant provisions of IHL. Hence, the HRC considers that the right to legal advice and representation, under Article 9(4), remains a requirement for a State practice of administrative detention in situations of military occupation.

In order for the exercise of the right, under Article 9(4), to be effective, both the individual detainee and the judicial procedure have to constitute a genuine legal challenge to the State’s decision to impose an administrative detention order. This, in turn, recognises the intimate connection between Article 9(2) and Article 9(4) which arises from the necessity for detainees, in order to effectively challenge the lawfulness of detention, to be informed of the nature of the specific factual allegations against them as well as to have access to relevant evidence.²⁷⁵ The relationship between Article 9(2) and Article 9(4) reinforces the individual detainee’s right to have legal advice and representation as an integral aspect of Article 9(4). The General Comment No. 35 affirms that, in relation administrative detention “not in contemplation of a criminal charge”, the State, to ensure full respect for Article 9, guarantees in all cases “access to independent legal advice, preferably selected by the detainee”.²⁷⁶

The position of the Human Rights Committee is confirmed by the UN Working Group on Arbitrary Detention in its Opinions relating to the specific Israeli State practice of administrative detention. The most recent Opinion, in which the Working Group considers Israeli administrative detention as manifesting a systematic risk of non-compliance with Article 9, regards the presence of legal representation for individuals subject to arrest and administrative detention as an integral element of the capacity to challenge the legality of detention under Article 9(4). The effectiveness of this capacity is, however, held to be

²⁷⁴ UN Working Group on Arbitrary Detention *Opinion 86/2017*, Op. cit., §38.

²⁷⁵ HRC, *General Comment No.35*, Op. cit., §15.

²⁷⁶ Ibid.

dependent upon the detainee's "access to any documents supporting the detention".²⁷⁷ In the absence of this access, there is a clear violation of article 9 (4) of the Covenant.²⁷⁸

The detainee's knowledge of the charges and evidence which form the basis for the imposition of the administrative detention order, as provided for by Article 9(2) and Article 9(4), enhance the minimum level of procedural protection under IHL through the requirement imposed upon the type of evidence utilized against the individual detainee. The right to challenge, which encompasses the right of effective legal representation, is nullified by the predominant recourse, by Israel, to secret evidence as the basis for the imposition of the administrative detention order.

The character of the judicial proceedings of the military court system through which the initial administrative detention order is confirmed, and subsequently subject to periodic review, is also regulated by the requirements of Article 9(4). For the Human Rights Committee, in General Comment No. 35, Article 9(4) requires "prompt and regular review by a court or other tribunal possessing the same attributes of independence and impartiality as the judiciary" in order to provide the "necessary guarantee", by the State Party, "that detention does not last longer than absolutely necessary, that the overall length of possible detention is limited and that they fully respect the guarantees provided for by article 9 in all cases".²⁷⁹

The independence of the judicial body is the corollary of a genuine power of review which, on determining that detention is unlawful and arbitrary, must encompass ordering release through a decision having binding force in relation to all other State institutions. The provision requires that the decision be taken without delay by a judicial body empowered to order release in any case of detention established to be unlawful and arbitrary. In addition, the power of release must be accompanied, under Article 9(5), by a power to compensate the individual who has been unlawfully and arbitrarily detained.²⁸⁰

In relation to the predominant, systematic features of the Israeli state practice of administrative detention, the UN Working Group considers that these systematic features represent an absence of effective review under Article 9(4). In particular, where detainees have been the subject of multiple arrests and periods of administrative detention, which result in "neither a prompt nor a regular review of [detainees'] continued detention".²⁸¹ This is compounded by a lack of knowledge of "the reasons for ... detention, which makes it impossible... to challenge the legality of... continued detention".²⁸²

The right to fair trial – Article 14

The systematic breaches of the procedural guarantees of Article 9(2) and Article 9(4) by the Israeli State practice of administrative detention raise the question of the potential relationship between these breaches of Article 9 and the conformity with the right to fair trial

²⁷⁷ UN Working Group on Arbitrary Detention *Opinion No. 86/2017*, Op. cit., §39; affirming the position of the earlier *Opinion No.44/17*, Op. cit., §34.

²⁷⁸ Ibid.

²⁷⁹ HRC, *General Comment No.35*, Op. cit., §15.

²⁸⁰ Ibid., §§49-52.

²⁸¹ UN Working Group on Arbitrary Detention *Opinion No. 86/2017*, Op. cit., §36.

²⁸² Ibid., §42.

under Article 14 of the ICCPR. The Human Rights Committee, in General Comment No.32 Article 14: Right to equality before courts and tribunals and to a fair trial, considers that

“[t]he right to equality before the courts and tribunals and to a fair trial is a key element of human rights protection and serves as a procedural means to safeguard the rule of law. Article 14 of the Covenant aims at ensuring the proper administration of justice, and to this end guarantees a series of specific rights”.²⁸³

The public declaration of a state of public emergency by Israel, in a similar manner to the derogable status of Article 9, cannot, despite the derogable status of Article 14, remove all rights and obligations imposed by Article 14. A minimum, non-derogable core of procedural protection, remains unaffected by any State Party’s derogation, under Article 4 of the ICCPR.²⁸⁴

For the Human Rights Committee, the rights and obligations, under Article 14(1), are distinguished in accordance with the type of charge which is the basis upon which proceedings are undertaken by the court or tribunal. In relation to the State practice of administrative detention, the first sentence of Article 14(1) provides the relevant statement of “a general guarantee of equality before courts and tribunals that applies regardless of the nature of proceedings before such bodies”.²⁸⁵ The general guarantee is further differentiated into the particular guarantees of “equal access and equality of arms, and ensures that the parties to the proceedings in question are treated without any discrimination”.²⁸⁶ The guarantee of equality of arms is more precisely defined as the requirement that “the same procedural rights are to be provided to all the parties unless distinctions are based on law and can be justified on objective and reasonable grounds, not entailing actual disadvantage or other unfairness to the defendant”.²⁸⁷

Hence, the violation of Article 9(2) and Article 9(4), through the failure to inform the suspect upon arrest or upon the imposition of the initial administrative detention order of the reason(s) for the arrest and detention, can also be considered to violate the general guarantee of equality and equality of arms under Article 14(1).

The normative content of equality, under Article 14, extends beyond the proceedings to encompass the character of the court or tribunal. For the Human Rights Committee, in situations in which the State Party has designated that “exceptional criminal procedures or specially constituted courts or tribunals apply in the determination of certain categories of cases, object and reasonable grounds must be provided to justify the distinction”.²⁸⁸

This aspect of the normative regulation of Article 14 is then expanded in the Human Rights Committee’s explicit discussion of the limits imposed upon a State Party’s creation and use of military courts or tribunals. It is, therefore, the character of the court or tribunal itself which is also an essential aspect of the regulatory framework of Article 14. Article 14 can be

²⁸³ HRC, *General Comment No.32*, Op. cit., §2.

²⁸⁴ *Ibid.*, §§5-6. See, also, Evelyne Schmid, “The Right to a Fair Trial in Times of Terrorism: A Method to Identify the Non-Derogable Aspects of Article 14 of the International Covenant on Civil and Political Rights”, in *Göttingen Journal of International Law*, Vol. 1, No.1 (2009), pp. 29-44.

²⁸⁵ *Ibid.*, §3.

²⁸⁶ *Ibid.*, §8.

²⁸⁷ *Ibid.*, §13, citing HRC *Communication No. 1347/2005, Dudko v. Australia*, § 7.4.

²⁸⁸ *Ibid.*, §14.

considered to impose a further normative hierarchy in addition to that imposed by Article 9. The normative primacy accorded, under Article 9, to criminal proceedings in comparison to those of administrative detention is supplemented by Article 14 which establishes an institutional hierarchy which accords normative primacy to civilian courts in comparison to military courts or tribunals.

The normative primacy accorded to civilian courts is not the absolute prohibition upon the State Party's creation and recourse to military courts or tribunals. Rather, it is the requirement that the presence of system of military courts or tribunals, as an alternative or addition to the civilian court system, conform to a set of stringent normative criteria. These normative criteria impose a two-stage test upon the State Party's decision to hold the proceedings against an individual within the system of military courts or tribunals.

For the Human Rights Committee, military court or tribunal proceedings have the continuing potential to "raise serious problems as far as the equitable, impartial and independent administration of justice is concerned".²⁸⁹ Therefore, in order for the proceedings to remain in conformity with Article 14,

"[t]rials of civilians by military or special courts should be exceptional, i.e. limited to cases where the State party can show that resorting to such trials is *necessary and justified by objective and serious reasons*, and where with regard to the specific class of individuals and offences at issue the *regular civilian courts are unable to undertake the trials*".²⁹⁰

Article 14, by defining the degree of conformity of military courts and tribunals through this two-stage test, proceeds beyond Article 9 to require the State Party to consider the legitimacy of the continued existence of, and recourse to, a system of military courts and tribunals.

Article 14 enables legal regulation, under international human rights law, of the Israeli State practice of administrative detention in the OPT to consider not merely the absence of the initiation of criminal proceedings, under Article 9, but also the absence of proceedings in a civilian court. Article 14 also translates the systematic breaches of the non-derogable procedural guarantees of Article 9(2) and Article 9(4) into the absence of "equitable, impartial and independent administration of justice" under Article 14. The translation is the reflection of the wider regulatory purpose of Article 14 in which these systematic breaches have become synonymous with the deficient form of proceedings in the military court system in the OPT.

The right to legal personality – Article 16

The absence of conformity of the Israeli State practice of administrative detention with the procedural protections contained in Article 9(2) and Article 9(4), and the concomitant absence of conformity with Article 14, leads to the breach of the substantive, non-derogable right to legal personality under Article 16 of the ICCPR. The right is the recognition of the individual's status as an autonomous legal personality within the legal system of the OPT and imposes upon the State the duty to accord the individual the necessary procedural and substantive rights and protections in order to guarantee this status.

²⁸⁹ Ibid., §22. See, also, Evelyne Schmid, "A few comments on a comment: the UN Human Rights Committee's General Comment No. 32 on Article 14 of the ICCPR and the question of civilians tried by military courts", *The International Journal of Human Rights*, Vol. 14, No. 7, (2010), pp. 1058–1071.

²⁹⁰ Ibid.

Article 16 complements the framework of IHL by supplementing the fundamental guarantees, under Article 27 of the Fourth Geneva Convention and Article 75 of Additional Protocol I, and the concept of a 'regular procedure', under Article 78(1), through the right to an autonomous legal personality and legal equality.

The Human Rights Committee in its Concluding Comments on the first periodic Report of Israel in 1998 indicates the manner in which the Israeli State practice of administrative detention violates the substantive right to legal personality under Article 16. The Human Rights Committee states, that

“[t]he Committee remains concerned that despite the reduction in the number of persons held in administrative detention on security grounds, persons may still be held for long and apparently indefinite periods of time in custody without trial. It is also concerned that Palestinians detained by Israeli military order in the occupied territories do not have the same rights to judicial review as persons detained in Israel under ordinary law... The Committee considers the present application of administrative detention to be incompatible with articles 7 and 16 of the Covenant, neither of which allows for derogation in times of public emergency. The Committee takes due note that Israel has derogated from article 9 of the Covenant. The Committee stresses, however, that a State party may not depart from the requirement of effective judicial review of detention. The Committee recommends that the application of detention be brought within the strict requirements of the Covenant and that effective judicial review be made mandatory”.²⁹¹

Thus, Article 16 is the right, as a legal personality, to full and active participation in each of the military court proceedings concerning the individual's administrative detention. It is also, as an integral part of Article 16, the right to equal legal treatment. Hence, the lack of compliance of the Israeli State practice of administrative detention, under Article 9(2) and Article 9(4), is the breach of both these elements of Article 16.

Interrogation – The intersection between the right to security of person and the prohibition of torture and other cruel, inhuman or degrading treatment or punishment.

The interrogation of an individual after arrest, prior to the imposition of an administrative detention order is common, and the evidence which results can take the form of a confession to an offence or its preparation. It can also provide evidence which forms the basis for further investigation of other individuals. If the interrogation produces a confession or other evidence of the potential commission of concrete criminal offences, normally, the individual will be charged and prosecuted for a criminal offence. At this stage, the possibility of an administrative detention order will be replaced with criminal proceedings in which subsequent detention will be pre-trial detention. If the evidence resulting from the interrogation provides no evidence against the individual suspect sufficient for a criminal charge, then the possibility of the imposition of an administrative detention order remains based upon the assessment of the individual's risk to security in the OPT.

The interrogation of individuals arrested in the OPT is usually undertaken by members of the ISA (formerly the General Security Service (GSS)/Shin Bet) and, since the commencement

²⁹¹ HRC, *Initial State Party Report, Israel* CCPR/C/81/Add.13 2 June 1998, §21. The prohibition of torture and other cruel, inhuman and degrading treatment or punishment, under Article 7, will be discussed in the subsequent subsections.

of the occupation, in 1967, there have been frequent allegations of the systematic use of techniques of interrogation which constitute torture or other forms of inhuman treatment. These allegations concern the systematic use of handcuffing, hooding, shaking, sleep deprivation and stress positions in the interrogation of detainees.²⁹²

The practice of interrogation, within a situation of belligerent occupation, is not specifically regulated by IHL, under either the Fourth Geneva Convention or Additional Protocol I to the Geneva Conventions. However, the fundamental guarantees under Article 27 of the Fourth Geneva Convention and Article 75(2)(a), (b) of Additional Protocol I to the Geneva Conventions prohibit torture – physical and mental – and other forms of inhuman or degrading treatment. Article 7 of the ICCPR, which is a non-derogable provision of the ICCPR and, therefore, unaffected by the public declaration of a state of public emergency by Israel, under Article 4, provides the complementary absolute prohibition upon torture and other cruel, inhuman or degrading treatment or punishment.²⁹³ Thus, to the extent that an interrogation utilizes techniques which constitute torture and other cruel, inhuman or degrading treatment or punishment, the practice interrogation represents a breach of Article 7.²⁹⁴

In relation to the more detailed definition and distinction between the notions of torture and other cruel, inhuman or degrading treatment or punishment, The Human Rights Committee in General Comment No.20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment), states that

²⁹² See, for the most recent documented allegations the B'Tselem/Hamoked joint reports: *Backed By The System: Abuse And Torture At The Shikma Interrogation Facility* [2015], available at https://www.btselem.org/sites/default/files/sites/default/files2/201512_backed_by_the_system_eng.pdf; *Kept in the Dark: Treatment of Palestinian Detainees in the Petach- Tikva Interrogation Facility of the Israel Security Agency* [2010], available at https://www.btselem.org/sites/default/files/sites/default/files2/publication/201010_kept_in_the_dark_eng.pdf; *Absolute Prohibition: The Torture and Ill-Treatment of Palestinian Detainees* [2007], available at https://www.btselem.org/sites/default/files/sites/default/files2/publication/200705_utterly_forbidden_eng.pdf; the Annual reports by Addameer, *Violations against Palestinian Prisoners & Detainees In Israeli Prisons & Detention Centers*, available at <http://www.addameer.org/publications/annual-violations-reports>, and the Addameer report, *Torture of Palestinian Political Prisoners in Israeli Prisons* [2003], available at http://www.addameer.org/sites/default/files/publications/torture-eng_0.pdf; and the reports of the Public Committee Against Torture in Israel, *Family Matters, Part Two: The Ongoing use of Family Members in GSS Interrogations Against Torture in Israel* [2012], available at <http://stoptorture.org.il/family-matters-part-two-the-ongoing-use-of-family-members-in-gss-interrogations-june-2012/?lang=en>; *When the Exception Becomes the Rule: Incommunicado Detention of Palestinian Security Detainees* [2010], available at <http://stoptorture.org.il/when-the-exception-becomes-the-rule-incommunicado-detention-of-palestinian-security-detainees-october-2010/?lang=en>; *Shackling as a Form of Torture and Abuse* [2009], available at <http://stoptorture.org.il/shackling-as-a-form-of-torture-and-abuse-june-2009/?lang=en>. In addition, the petitioners, in the cases of HCJ 9018/17 *Firas Tbeish v Attorney General* [2018]; HCJ 5722/12 *Abu Ghosh v. Attorney General* [2017], HCJ 94/5100 *The Public Committee Against Torture in Israel v. The Government of Israel* [1999], all allege the use of a number of these techniques during their interrogations.

²⁹³ This is reiterated in HRC, *General Comment No.20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)*, 10 March 1992, §3: “The text of article 7 allows of no limitation. The Committee also reaffirms that, even in situations of public emergency such as those referred to in article 4 of the Covenant, no derogation from the provision of article 7 is allowed and its provisions must remain in force. The Committee likewise observes that no justification or extenuating circumstances may be invoked to excuse a violation of article 7 for any reasons, including those based on an order from a superior officer or public authority”.

²⁹⁴ The complimentary legal framework of the UN Convention Against Torture will be discussed separately below.

“The Covenant does not contain any definition of the concepts covered by article 7, nor does the Committee consider it necessary to draw up a list of prohibited acts or to establish sharp distinctions between the different kinds of punishment or treatment; the distinctions depend on the nature, purpose and severity of the treatment applied”.²⁹⁵

However, the General Comment extends the prohibition to include “not only to acts that cause physical pain but also to acts that cause mental suffering to the victim”²⁹⁶; and “that prolonged solitary confinement of the detained or imprisoned person may amount to acts prohibited by article 7”.²⁹⁷

Article 7 imposes the dual obligation upon the State to refrain from the imposition of torture and other inhuman treatment upon individuals and to actively implement a legal and institutional framework of protection from torture and other inhuman treatment.²⁹⁸ The active implementation is a comprehensive obligation encompassing the introduction of the prohibition in the State’s domestic law and the regular,

“systematic review [of] interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment is an effective means of preventing cases of torture and ill-treatment. To guarantee the effective protection of detained persons, provisions should be made for detainees to be held in places officially recognized as places of detention and for their names and places of detention, as well as for the names of persons responsible for their detention, to be kept in registers readily available and accessible to those concerned, including relatives and friends. To the same effect, the time and place of all interrogations should be recorded, together with the names of all those present and this information should also be available for purposes of judicial or administrative proceedings. Provisions should also be made against incommunicado detention. In that connection, States parties should ensure that any places of detention be free from any equipment liable to be used for inflicting torture or ill-treatment. The protection of the detainee also requires that prompt and regular access be given to doctors and lawyers and, under appropriate supervision when the investigation so requires, to family members”.²⁹⁹

Therefore, the comprehensive character of the prohibition applies without qualification to the Israeli State practices of interrogation undertaken in relation to individuals arrested in the OPT.

On this basis, and following the Human Rights Committee, in its consideration of the periodic reports of Israel, the Report adopts the normative position of Article 7 of the ICCPR³⁰⁰ in relation to the Landau Commission Report³⁰¹ and the subsequent Israeli Supreme Court decisions³⁰² relating to the legal regulation of practices of interrogation under

²⁹⁵ HRC, General Comment No.20, Op. cit., §4.

²⁹⁶ Ibid., §5.

²⁹⁷ Ibid., §6.

²⁹⁸ Ibid., §§2, 8, 10.

²⁹⁹ Ibid., §11.

³⁰⁰ This will be complemented and supplemented by the subsequent discussion of the relevant provisions of the UN Convention Against Torture and Israel’s periodic reports to the UN Committee Against Torture.

³⁰¹ *Report of the Commission of Inquiry Regarding the Interrogation Practices of the GSS with Respect to Hostile Terrorist Activities* headed by Justice (ret.) M. Landau, 1987.

³⁰² HCJ 9018/17 *Firas Tbeish v Attorney General* [2018]; HCJ 5722/12 *Abu Ghosh v. Attorney General* [2017] and HCJ 94/5100 *The Public Committee Against Torture in Israel v. The Government of Israel* [1999].

domestic administrative law informed by the principles of the Israeli Basic Law: Human Dignity and Liberty.

From the normative position of Article 7 of the ICCPR, the Landau Commission Report contains no acknowledgment of Israel's signature of the ICCPR (ratification in 1999) nor of the prohibition of torture as a norm of customary international law. The Israeli Supreme Court, in *The Public Committee Against Torture in Israel v. The Government of Israel*, despite the subsequent ratification of the ICCPR, contains no acknowledgment or discussion of the applicability of the non-derogable rights and obligations under Article 7 nor of the prohibition under customary international law. The most recent Supreme Court decision in *Abu Ghosh v. Attorney General* is distinguished by the recognition and discussion of the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (ratified 1991)³⁰³, but remains silent with regard to Article 7 of the ICCPR.

Thus, until 2017, the Israeli Supreme Court has, through silence, rather than explicit statements of inapplicability, ignored the question of the legal regulation of interrogation, by provisions of international human rights law, of members of the Israeli Security Services (formerly GSS/Shin Bet). The silence is the reflection of the manner in which the initial approach of the Landau Commission has constructed the question of the legal regulation of interrogation by members of the GSS as one entirely within the purview of Israeli domestic law.³⁰⁴ Hence, the legal discussion, until *Abu Ghosh v. Attorney General*, has centred exclusively upon the relationship between Israeli domestic criminal law and administrative law as the origin of the authority for interrogation and for its regulation. The interpretation of the parameters of the legal regulation of interrogation have been combined with the Israeli Supreme Court's distinction between legal and legislative regulation of interrogation. This, in turn, has reinforced the predominantly domestic orientation and the dependence of regulation upon a theory of the separation of powers between the judicial and legislative elements of the Israeli State.

In contrast, once the rights and obligations of Article 7 are acknowledged to apply to interrogation practices by the Israeli Security Services (formerly GSS/Shin Bet), then the character of the legal regulation is significantly altered. For, in place of the discussion of the source of domestic legal authority to interrogate, the legality of the adoption and use of particular techniques of interrogation and the legitimacy of a defence of necessity, Article 7 of the ICCPR reorientates the analysis to centre upon the individual subject to interrogation.

The reorientation is also the expression of the connection between Article 9 and Article 7 of the ICCPR in which the further regulation of arrest and detention derives from the right, under Article 9(4), to initiate legal proceedings to challenge the lawfulness of arrest and detention before a judicial body of the State. The right, although procedural in formulation, overlaps with substantive considerations to prevent the "severe risk" of unlawfulness and arbitrariness inherent in administrative detention from resulting in violations of the right to

³⁰³ The more detailed discussion of this case will be undertaken in the later section on the UN Convention Against Torture.

³⁰⁴ For a critique of the underlying presuppositions of the Landau Commission, see Mordechai Kremnitzer, "The Landau Report – Was the Security Service Subordinated to Law, or the Law to the Needs of the Security Service", *Israel Law Review*, Vol. 23, Nos. 2-3 (1989), pp. 216-279. For an analysis of the Israeli Supreme Court's decisions prior to *The Public Committee Against Torture in Israel v. The Government of Israel*, see Eyal Benvenisti, "The Role of National Courts in Preventing Torture of Suspected Terrorists", *European Journal of International Law*, Vol.8, No.4 (1997), pp. 596-612.

security and liberty of person, under Article 9(1) with the potential for simultaneous violation of Article 7, for non-life threatening injuries to bodily and mental integrity or, for life-threatening injuries, both the right to security and liberty of person, under Article 9(1) and the right to life, under Article 6.³⁰⁵

The application of Article 7 to interrogation practices by the ISA imposes a strict separation between those techniques of interrogation which constitute torture and other inhuman treatment and those which do not inflict torture or other inhuman treatment. The strict separation is accompanied by the absolute prohibition upon the techniques of interrogation defined as torture and other inhuman treatment. Thus, as the Human Rights Committee in its Concluding Observations on the first periodic report of Israel in relation to the implementation of the ICCPR, states, in 1998, prior to the Israeli Supreme Court decision in *The Public Committee Against Torture in Israel v. The Government of Israel*,

“The Committee is deeply concerned that under the guidelines for the conduct of interrogation of suspected terrorists, authority may be given to the security service to use “moderate physical pressure” to obtain information considered crucial to the “protection of life”. The Committee notes that the part of the report of the Landau Commission that lists and describes authorized methods of applying pressure remains classified. The Committee notes also the admission by the State party delegation that the methods of handcuffing, hooding, shaking and sleep deprivation have been and continue to be used as interrogation techniques, either alone or in combination. The Committee is of the view that the guidelines can give rise to abuse and that the use of these methods constitutes a violation of article 7 of the Covenant in any circumstances. The Committee stresses that article 7 of the Covenant is a non-derogable prohibition of torture and all forms of cruel, inhuman or degrading treatment or punishment. The Committee urges the State party to cease using the methods referred to above. If legislation is to be enacted for the purpose of authorizing interrogation techniques, such a law should explicitly prohibit all forms of treatment prohibited by article 7”³⁰⁶

The Human Rights Committee, in the Concluding Observations on the second periodic report of Israel, in 2003, considers that the effect of the Supreme Court decision in *The Public Committee Against Torture in Israel v. The Government of Israel* fails to recognise the character and requirements of the absolute prohibition under Article 7.³⁰⁷ For the Human Rights Committee remains

³⁰⁵ HRC, *General Comment No.35*, §§55, 56, citing 449/1991, *Mojica v. Dominican Republic*, §5.4; 1753/2008, *Guezout et al. v. Algeria*, §§ 8.4; 1782/2008, *Aboufaied v. Libya*, §§ 7.4 and 7.6; 440/1990, *El-Megreisi v. Libyan Arab Jamahiriya*, §5.4.

³⁰⁶ HRC, *Concluding Comments on the first periodic report of Israel*, 18 August 1998, CCPR/C/79/Add.93, §19.

³⁰⁷ See, also, Matthew G. St. Amand, “Public Committee against Torture in Israel v. The State of Israel et al: Landmark Human Rights Decision by the Israeli High Court of Justice or Status Quo Maintained”, *North Carolina Journal Of International Law And Commercial Regulation*, Vol.25, No.3 (2000), pp. 655-684; Barak Cohen, “Democracy And The Mis-Rule Of Law: The Israeli Legal System's Failure To Prevent Torture In The Occupied Territories”, *Indiana International and Comparative Law Review*, Vol.12, No.1 (2001), pp. 75-105; Jason S. Greenberg, “Torture Of Terrorists In Israel: The United Nations And The Supreme Court Of Israel Pave The Way For Human Rights To Trump Communitarianism”, *ILSA Journal of International & Comparative Law*, Vol.7 (2000-2001), pp. 539-552; Catherine M. Grosso, “International Law in the Domestic Arena: The Case of Torture in Israel”, *Iowa Law Review* (2000-2001), pp. 305-337; Ardi Imseis, “Moderate Torture on Trial: Critical Reflections on the Israeli Supreme Court Judgement concerning the Legality of General Security Service Interrogation Methods”, *Berkeley Journal of International Law*, Vol.19, No.2 (2001), pp. 328-349; Mordechai Kremnitzer and Re'em Segev, “The Legality of Interrogational Torture: A Question of Proper Authorization or a Substantive Moral Issue?”, *Israel Law Review*, Vol.34, No.4 (2000), pp. 509-559.

“concerned that interrogation techniques incompatible with article 7 of the Covenant are still reported frequently to be resorted to and the “necessity defence” argument, which is not recognized under the Covenant, is often invoked and retained as a justification for ISA actions in the course of investigations. The State party should review its recourse to the “necessity defence” argument and provide detailed information to the Committee in its next periodic report, including detailed statistics covering the period since the examination of the initial report. It should ensure that alleged instances of ill-treatment and torture are vigorously investigated by genuinely independent mechanisms, and that those responsible for such actions are prosecuted. The State party should provide statistics from 2000 to the present day on how many complaints have been made to the Attorney-General, how many have been turned down as unsubstantiated, how many have been turned down because the defence of necessity has been applied and how many have been upheld, and with what consequences for the perpetrators”.³⁰⁸

The concerns of the Human Rights Committee in regard to the continued incompatibility between the Supreme Court decision, in *The Public Committee Against Torture in Israel v. The Government of Israel*, and Article 7 of the ICCPR are reiterated in the Concluding Observations on the third and fourth periodic reports of Israel, in 2010 and 2014. In the Concluding Observations on third periodic report, the Human Rights Committee, while noting “the Supreme Court decision on the exclusion of unlawfully obtained evidence”, indicates the lack of implementation of the positive obligation, under Article 7 (and Article 1 of the UN Convention Against Torture), to incorporate “the crime of torture...into the State Party’s legislation”.³⁰⁹ The failure to adhere to this positive obligation is accompanied, for the Human Rights Committee, by

“consistent allegations of the use of torture and cruel, inhuman or degrading treatment, in particular against Palestinian detainees suspected of security-related offences. It is also concerned at allegations of complicity or acquiescence of medical personnel with the interrogators. The Committee further expresses its concern at information that all complaints of torture are either denied factually or justified under the “defence of necessity” as “ticking time bomb” cases. The Committee observes that the prohibition of torture, cruel, inhuman or degrading treatment in article 7 is absolute and according to article 4, paragraph 2 no derogations thereof are allowed, even in times of public emergency (arts. 4 and 7)”.³¹⁰

The Human Rights Committee, in the Concluding Observations on the fourth, and most recent, periodic report of Israel, reaffirms the absence of conformity with both the positive (legislative enactment of a crime of torture and the “audio or visual documentation of interrogations in cases of persons detained for security offences”) and negative obligations (the continued recognition of a defence of necessity which “implicitly allows the use of so-called “moderate physical pressure” in cases of “necessity”) of Article 7.³¹¹ The absence of conformity flows from Israel’s failure to acknowledge that “the prohibition of torture, cruel, inhuman or degrading treatment in article 7 is absolute, and according to article 4, paragraph

³⁰⁸ HRC, *Concluding Comments on the second periodic report of Israel*, 21 August 2003, CCPR/CO/78/ISR, §18.

³⁰⁹ HRC, *Concluding Comments on the third periodic report of Israel*, 29 July 2010, CCPR/C/ISR/CO/3, §11

³¹⁰ *Ibid.*

³¹¹ HRC, *Concluding observations on the fourth periodic report of Israel*, 21 November 2014, CCPR/C/ISR/CO/4, §14.

2, no derogations therefrom are permitted, even in time of public emergency (arts. 4 and 7)”.³¹²

The Supreme Court decision in *Abu Ghosh v. Attorney General* effectively confirms and supplements the preceding decision in *The Public Committee Against Torture in Israel v. The Government of Israel*. The confirmation relates to the continued recognition of the existence and applicability of a defence of necessity with regard to the adoption and use of techniques of interrogation held to inflict torture or other forms of inhuman treatment. The necessity defence is supplemented by the acknowledgement of both the legality and legitimacy of the internal guidelines of the ISA, based upon the Attorney General’s Directive regarding ISA Interrogations and the Necessity Defence, to authorize, prior to their use, the employment of ‘exceptional’ techniques of interrogation. The position of the individual who alleges that he or she has been subjected to torture or other forms of inhuman treatment is rendered more difficult through the burden and standard of proof which is imposed.

The position of the Supreme Court is further reinforced by the recent decision in *Firas Tbeish et al. v Attorney General et al.*³¹³ The predominant focus for the question of the legal regulation allegations of torture and other forms of ill-treatment, arising from interrogation by the ISA, concerns Israeli domestic law – administrative and criminal – with a minimal recognition and discussion of the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (ratified 1991), and the continued silence with regard to Article 7 of the ICCPR. The Supreme Court confirms the internal guidelines of the Israeli Security Services, on the basis of the Attorney General’s Directive, and, thus, the presence and function of the necessity defence.³¹⁴ This, in turn, reiterates the operation of this defence as a justification for the use of these techniques at the stage of the formal investigation of allegations of torture or other forms of ill-treatment. Hence, that it operates *prior* to any criminal proceedings, to justify the decision by an investigation *not* to proceed with criminal proceedings. The operation of the necessity defence at the stage of an investigation is combined with the effective maintenance of a reversed burden and standard of proof, from the ISA to the detainee, with regard to allegations of torture and other forms of ill-treatment.

Thus, although the minimal discussion of obligations under international human rights law, in both *Abu Ghosh v. Attorney General* and *Firas Tbeish v Attorney General*, is entirely devoted to the UN Convention Against Torture, the retention of the essential approach in *The Public Committee Against Torture in Israel v. The Government of Israel*, indicates the continued maintenance of a legislative and judicial framework, together with internal guidelines of the ISA, which violate the absolute prohibition on torture and other inhuman treatment under Article 7.³¹⁵

³¹² Ibid.

³¹³ HCJ 9018/17 *Firas Tbeish et al. v Attorney General et al.* [2018].

³¹⁴ See, for a discussion of the effect of necessity defence, Itamar Mann and Omer Shatz, “The Necessity Procedure: Laws of Torture in Israel and Beyond, 1987-2009”, *Unbound Harvard Journal of the Legal Left*, Vol. 6, (2010), pp. 59-110.

³¹⁵ The cases of *Abu Ghosh* and *Firas Tbeish* will also be critically examined, in the next section, in relation to their compatibility with Israel’s obligations under the *United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*.

The conditions of detention – Article 7 and Article 10

The imposition of an administrative detention order, and in each instance of that an application for its extension is upheld, the individual will be held in a detention facility. The treatment and conditions within the detention facility are regulated by Article 7 and Article 10 of the ICCPR. Article 7 imposes an absolute, non-derogable prohibition upon treatment and conditions in detention which represent torture or other cruel, inhuman and degrading treatment or punishment. Article 10 complements Article 7 with the individual right and corresponding obligation of the State Party, under Article 10(1), that “[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person”.³¹⁶

The complementary relationship between Article 7 and Article 10 is indicated by the Human Rights Committee in General Comment No.21: Article 10 (Humane Treatment of Persons Deprived of Their Liberty), whereby,

“not only may persons deprived of their liberty not be subjected to treatment that is contrary to article 7, including medical or scientific experimentation, but neither may they be subjected to any hardship or constraint other than that resulting from the deprivation of liberty; respect for the dignity of such persons must be guaranteed under the same conditions as for that of free persons. Persons deprived of their liberty enjoy all the rights set forth in the Covenant, subject to the restrictions that are unavoidable in a closed environment”.³¹⁷

The requirement of humane treatment imposed upon the State Party as a “positive obligation” derives from the status of the individual as a person “deprived of liberty” which, in turn, renders them “particularly vulnerable”.³¹⁸ The positive obligation is “a fundamental and universally applicable rule” which permits of no qualification or modification based upon either “the material resources available in the State party” or “distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”.³¹⁹

The combined normative resources of Article 7 and Article 10 of the ICCPR enable the evaluation of the institutional treatment and conditions of detention of individual detainees. Therefore, the character and pattern of treatment and conditions of detention are required to avoid all forms of torture and other inhuman treatment and ensure the humane treatment of detainees. The avoidance of forms of treatment and conditions of treatment which breach Article 7 and Article 10, within the Israeli network of detention facilities, is coupled with a positive obligation upon Israel to guarantee and protect detainees from the risk of harm from potential breaches of Article 7 and Article 10.

The prohibitions and protections flowing from Article 7 and Article 10 also maintain a connection with the protection, under Article 9(1), “of persons in any form of detention against arbitrary detention and infringement of personal security”.³²⁰ Hence, for the Human Rights Committee, in General Comment No. 35, the common framework of safeguards which a State Party is obliged to ensure are indicated by a set of “non-exhaustive” examples:

³¹⁶ ICCPR Article 10(1).

³¹⁷ HRC, *General Comment No.21: Article 10 (Humane Treatment of Persons Deprived of Their Liberty)*, 10 April 1992, §3.

³¹⁸ *Ibid.*

³¹⁹ *Ibid.*, §4.

³²⁰ HRC, *General Comment No.35*, Op. cit., §58.

“Detainees should be held only in facilities officially acknowledged as places of detention. A centralized official register should be kept of the names and places of detention, and times of arrival and departure, as well as of the names of persons responsible for their detention, and made readily available and accessible to those concerned, including relatives. Prompt and regular access should be given to independent medical personnel and lawyers and, under appropriate supervision when the legitimate purpose of the detention so requires, to family members. Detainees should be promptly informed of their rights, in a language they understand; providing information leaflets in the appropriate language, including in Braille, may often assist the detainee in retaining the information”.³²¹

The protections and safeguards resulting from the combination of Article 7, Article 9(1) and Article 10 provide a sophisticated and comprehensive foundation for the regulation of the network of Israeli detention facilities.

The Human Rights Committee, in its Concluding Observations on the periodic reports of Israel, has repeatedly designated treatment and conditions of detention of detainees as a specific area of concern in regard to the rights and obligations under ICCPR. The focus has been upon both the negative and positive obligations arising from this combined framework. In relation to the negative obligations, the Human Rights Committee has emphasized the requirement to refrain from the systematic institutionalization of forms of ill-treatment and inhuman conditions of detention and, within these forms of treatment, the use of segregation as the effective imposition of extended periods of solitary confinement.³²² The focus upon the positive obligations has concentrated upon the requirement of Israel to actively monitor the operation of the network detention centres and to investigate and prosecute instances of ill-treatment and/or inhumane conditions of detention by members of the ISA.³²³

The Concluding Observations reveal an institutional context of detention in which detainees continue to suffer documented instances of torture or other ill-treatment together with inhumane conditions of detention.³²⁴ This situation is accompanied by the continued absence

³²¹ Ibid.

³²² See, HRC, *Concluding Observations on the first periodic report of Israel*, 18 August 1998, CCPR/C/79/Add.93, §20; HRC, *Concluding Observations on the second periodic report of Israel*, 21 August 2003 CCPR/CO/78/ISR, §12; and HRC, *Concluding Observations on the fourth periodic report of Israel*, 21 November 2014 CCPR/C/ISR/CO/4, §15.

³²³ HRC, *Concluding Observations on the fourth periodic report of Israel*, Op. cit., §15.

³²⁴ See, the reports of Addameer, *Aggressions by Special Units of the Israeli Prison Service against Prisoners and Detainees during Transfers and Raids*, 2014, available at http://www.addameer.org/sites/default/files/publications/special_units_of_the_ips.pdf; Addameer, Physicians for Human Rights-Israel, *The Sounds of Silence: Isolation and Solitary Confinement of Palestinians in Israeli Detention*, July 2008, available at <http://www.addameer.org/sites/default/files/publications/isolation-eng.pdf>; Adalah, Physicians for Human Rights-Israel and Al Mezan, *Solitary Confinement of Prisoners and Detainees in Israeli Prisons June 2011*, available at https://www.adalah.org/uploads/oldfiles/upfiles/2011/Solitary_confinement_position_paper_English.pdf; The Public Committee Against Torture in Israel, *When the Exception Becomes the Rule: Incommunicado Detention of Palestinian Security Detainees – October 2010*, available at <http://stoptorture.org.il/when-the-exception-becomes-the-rule-incommunicado-detention-of-palestinian-security-detainees-october-2010/?lang=en>; Physicians for Human Rights-Israel, *The Politics of Punishment Solitary confinement of prisoners & detainees in Israeli prisons Status Report*, available at <http://cdn3.phr.org.il/wp-content/uploads/2015/03/Politics-of-Punishment-report-phri-prisoners-palestinians-2016.pdf>; Physicians for Human Rights-Israel, *Position Paper July 2012: Inhumane Conditions of Imprisonment of Palestinian Security-Classified Prisoners in Israeli Prisons*, available at http://cdn3.phr.org.il/wp-content/uploads/2017/02/PHRI_Report_Inhumane-Conditions-of-Imprisonment-of-Palestinian-Security-Classified-Prisoners-in-Israeli-Prisons_2012.pdf.

of any preliminary investigation of allegations of ill-treatment and/or inhumane conditions of detention resulting in the decision to institute formal legal proceedings against members of the ISA.³²⁵

5 The Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment

Israel signed, in 1986, and ratified, in 1991, the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT).³²⁶ Israel has neither signed nor ratified the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. In addition, Israel has made two declarations of reservation from the provisions of UNCAT. Under Article 28, Israel has declared that it does not recognize the competence of the UN Committee Against Torture (CAT), under Article 20; and, under Article 30(2), Israel has declared that it is not bound by Article 30(1) of UNCAT.

The effect of the declaration of reservation from UNCAT, under Article 28, is to remove the competence of the CAT, under Article 20, to receive and consider individual communications alleging violations of UNCAT. The reservation from UNCAT, under Article 30, concerns the removal, in a situation of a dispute between Israel and another State Party to UNCAT “concerning the interpretation or application of the Convention”³²⁷, of either State Party’s capacity to request arbitration by the International Court of Justice. The effect of the non-ratification of the Optional Protocol to the Convention is to render inoperative the purpose of the Protocol to “establish a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment”.³²⁸ Thus, there is no capacity for individuals within the OPT to communicate allegations of violations of UNCAT to the CAT, and the sole mechanism available to CAT to regulate the implementation by Israel of the provisions of the UNCAT is the obligation, under Article 19, to submit periodic reports to CAT.

The appointment of the Special Rapporteur on Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment, by Resolution 1985/33³²⁹, of the UN Commission on Human Rights, provides the possibility for the additional and further investigation of instances of torture, and other cruel, inhuman or degrading treatment or punishment. The mandate of the Special Rapporteur, as reaffirmed under Resolution 34/19, involves the receipt of individual communications, the conduct of individual investigations, the general gathering of information and formulation of observations and recommendations, country visits and cooperation with the CAT and the presentation of regular reports.³³⁰

³²⁵ Ibid.

³²⁶ For an overview of the drafting and development of the UNCAT, see Matthew Lippman, “The Development and Drafting of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment”, in *Boston College International and Comparative Law Review*, Vol. No. (1994), pp. 275-335.

³²⁷ Article 30(1) UNCAT.

³²⁸ Article 1 Optional Protocol to UNCAT.

³²⁹ The mandate of the Special Rapporteur for Torture has been continued extended with the most recent extension, by Resolution 34/19, for a period of three years from March 2017.

³³⁰ See, Human Rights Council, Resolution 34/19, 7 April 2017, §1(a)-(g). The Reports of the Special Rapporteur will be drawn upon by the Report in addition to the periodic reports by Israel, under UNCAT.

In relation to Article 7 and Article 10 of the ICCPR, UNCAT is considered to provide a complimentary and enhanced framework of human rights protection in relation to the infliction of torture and other cruel, inhuman and degrading treatment or punishment. The non-derogable character of Article 7 (prohibition of torture and other cruel, inhuman and degrading treatment or punishment) is reaffirmed, in regard to torture, by Article 2(2) of UNCAT which specifies that

“[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture”.³³¹

In regard to prohibition of other cruel, inhuman and degrading treatment or punishment, Article 16 (2) of UNCAT states that,

“[t]he provisions of this Convention are without prejudice to the provisions of any other international instrument or national law which prohibits cruel, inhuman or degrading treatment or punishment or which relates to extradition or expulsion”.³³²

Thus, the absolute prohibition of other cruel, inhuman and degrading treatment or punishment, under Article 7 of the ICCPR, and the right to humane treatment and respect of inherent human dignity, under Article 10, are preserved by UNCAT.

The supplementary reinforcement of Article 7 of the ICCPR by UNCAT relates to the definition of torture and positive obligations imposed upon a State Party to UNCAT. Article 1 of UNCAT provides a comparatively more detailed definition of torture as the corollary of the reaffirmation of its absolute prohibition:

“any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions”.³³³

The Addendum to the Report of the Special Rapporteur of 5th February 2010, emphasizes that the definition of torture, under Article 1, and the distinction between torture and other cruel, inhuman degrading treatment or punishment, under Article 16, are not to be based upon the type or severity of the pain or suffering inflicted upon the victim.³³⁴ For the Special

³³¹ Article 2(2) UNCAT.

³³² Article 16(2) UNCAT.

³³³ Article 1 UNCAT.

³³⁴ UN Human Rights Council, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak: Addendum*, 5 February 2010 A/HRC/13/39/Add.5, §187. Thereby, reiterating the earlier insistence, in the subsection of the Report devoted to torture, under Article 1 of UNCAT, that “the definition of torture does not require any bodily injuries, let alone any lasting impairment. The particular evil of torture is the deliberate infliction of severe pain or suffering on a powerless person, and not the infliction of injuries. Injuries can be an aggravating factor, but it is impermissible to reduce torture to such a concept” (Ibid., §74).

Rapporteur, it is the infliction severe pain or suffering is the *common* requirement for “cruel and inhuman treatment and punishment, including torture”; and the distinction is, rather, to be made in relation to the infliction of “degrading treatment or punishment”, under Article 16, “where the particular humiliation of the victim is sufficient, even if the pain or suffering is not severe”.³³⁵

These precisions of the Special Rapporteur are the compliment to the insistence that the central distinction between torture and other cruel, inhuman degrading treatment or punishment is based upon “the purpose of the conduct, the intention of the perpetrator and the powerlessness of the victim”.³³⁶ Thus,

“[t]orture constitutes such a horrible attack on the dignity of a human being because the perpetrator of torture deliberately inflicts severe pain or suffering on a powerless victim for a specific purpose, such as extracting a confession or information. Cruel and inhuman treatment, on the other hand, means the infliction of severe pain or suffering without purpose or intention and outside a situation where a person is under the de facto control of another. It follows that one may distinguish between justifiable and non-justifiable treatment causing severe suffering. Examples where the causing of severe suffering may be justifiable are the lawful use of force by the police in the exercise of law enforcement policies (e.g. arrest of a criminal suspect, dissolution of a violent demonstration) and by the military in an armed conflict. In such situations, the principle of proportionality has to be strictly observed. If the use of force is not necessary and, in the particular circumstances of the case, disproportional to the purpose achieved, it amounts to cruel or inhuman treatment. In a situation where a person is under the de facto control of another and thus powerless, the test of proportionality is no longer applicable. Other situations which may amount to CIDT are particularly severe conditions of detention, domestic violence, female genital mutilation and trafficking in human beings”.³³⁷

The application of the Special Rapporteur’s considerations on these elements of UNCAT entails that the Israeli State practices of interrogation entail a situation in which the individual is “under the de facto control of another”. Israeli practices of interrogation may, in the event of the deliberate infliction of severe pain or suffering on a powerless victim, be classified as torture. In regard to administrative detention, in situations of particularly severe conditions of administrative detention, these may be classified as cruel, inhuman or degrading treatment or punishment.

The fundamental purpose of UNCAT is also contained in the provisions which impose positive obligation upon a State Party to actively protect individuals from the infliction of torture or cruel, inhuman and degrading treatment or punishment. The State Party has not only to refrain from, but has also to intervene to prevent the infliction of these forms of suffering. The positive obligation is defined in Articles 4 (enactment of specific domestic criminal offence prohibiting torture), 10 (training of all relevant state personnel in prohibition of torture/formulation of prohibition in rules and duties of all relevant state personnel), 11 (prevention of torture through systemic review of practices of interrogation and arrest, custody and detention), 12 (investigation of allegations of torture or cruel, inhuman or degrading treatment or punishment), 13 (right of individual complaint and examination of

³³⁵ Ibid.

³³⁶ Ibid., §188.

³³⁷ Ibid.

allegations of torture) and 15 (prohibition of admissibility of confession evidence obtained by torture) of UNCAT.

Article 4 obliges a State Party to enact domestic legislation which imposes an absolute prohibition upon torture.³³⁸ The obligation requires the State Party to criminalize torture by the introduction of a specific substantive domestic criminal offence punishable by "appropriate penalties which take into account their grave nature".³³⁹ This is accompanied, under Article 16, by the obligation on the State Party to prevent cruel, inhuman or degrading treatment or punishment, and "the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment".³⁴⁰

The requirement to enact a specific domestic criminal offence prohibiting torture is accompanied by the positive obligation, under Article 10 and Article 11, to ensure that the prohibition is embedded in the institutional practices and oversight of a State Party's detention estate. Under Article 10(1), the entirety of the State personnel who will have contact with those arrested, interrogated and detained, are to be suitably trained to respect the prohibition of both torture and other cruel, inhuman or degrading treatment or punishment. Under Article 10(2), the training is itself the reinforcement of the rules and duties, formulated by a State Party, associated with each of the respective roles of these personnel. The training and legal definition of the roles of the personnel in the detention estate are regulated, under Article 11, by the State Party's continuing obligation to undertake systematic and regular reviews of the practices of interrogation and detention to ensure continued compliance with the prohibitions under Article 1 and Article 16.

³³⁸ The wider question of the applicability of the provisions of UNCAT to the increasing phenomena of private provision of equipment for Israel's detention estate or the privatization of Israeli prisons is not considered in the Report. This is because of the withdrawal of G4S, in 2015, from the supply of equipment to the Israeli detention estate, and the earlier Israeli Supreme Court decision in HCJ 2605/05 *The Human Rights Division, The Academic Center for Law and Business v. Minister of Finance* (November 19, 2009) holding legislation authorizing the establishment of private prison constitutionally invalid, and that the Israeli detention estate is to remain entirely state owned and operated. For, an analysis of the Israeli Supreme Court decision, see Barak Medina, "Constitutional limits to privatization: The Israeli Supreme Court decision to invalidate prison privatization", *International Journal of Constitutional Law*, Vol. 8 No. 4, (2010), pp. 690–713; Daphne Barak-Erez, "The Private Prison Controversy and the Privatization Continuum", *Law & Ethics of Human Rights*, Vol.5, No.1 (2011), pp. 139–157; Richard Harding, "State monopoly of 'permitted violation of human rights': The decision of the Supreme Court of Israel prohibiting the private operation and management of prisons", *Punishment & Society*, Vol.14, No.2 (2012), pp. 131-146; and Hila Shamir "The Public/Private Distinction Now: The Challenges of Privatization and of the Regulatory State", *Theoretical Inquiries in Law*, Vol. 15 No.1 (2014), pp. 1-25.

³³⁹ Article 4 UNCAT. For the Special Rapporteur, in contrast to the position of H. J. Burgers and H. Danelius, *United Nations Convention Against Torture: A Handbook on the Convention Against Torture and Other, Cruel, Inhuman, or Degrading Treatment or Punishment*, (Dordrecht: Martinus Nijhoff, Dordrecht 1988), p. 129, holds that "in practice, it is difficult if not impossible, to cover all the different aspects included in the definition of torture under article 1 CAT without explicitly incorporating this definition in the domestic criminal code. A clear definition of the crime of torture in accordance with article 1 CAT is needed to establish universal jurisdiction. The criminalization of torture in one provision is required to provide for legal certainty. It allows law enforcement officials to understand and apply clear rules and facilitates complaints for victims of torture. The CAT Committee has increasingly urged States to include an explicit definition of torture in their national criminal legislation. In order to avoid any problems of interpretation and implementation, the full verbatim incorporation of article 1 CAT is advisable. Of course, this does not apply to the 'lawful sanctions' clause in the last sentence of article 1(1) CAT" (*Report of the Special Rapporteur*, Op cit., §143).

³⁴⁰ Article 16(1) UNCAT.

The State Party's regulation of the organization and behaviour of its detention estate in accordance with the prohibitions, under Article 1 and Article 16, is enhanced by the further level of oversight resulting from the positive obligations under Article 12 and 13. The effect of these obligations is to require the creation of a distinct institutional procedure, under Article 12, to actively investigate all allegations of torture or cruel, inhuman and degrading treatment or punishment position within the institutions of the State Party. The Addendum to the Report of the Special Rapporteur of 5th February 2010, insists that the State Party has no discretion in regard to the initiation of an investigation. The obligation is to be understood as arising "irrespective of the filing of a complaint" and, on the basis, of "reasonable grounds, an investigation must be instigated regardless of the origin of suspicion".³⁴¹ The insistence upon the rapidity of the decision to investigate relates to protection of the alleged victim in order that both "no further abuse can be inflicted" and that the existing evidence of the infliction of harm is recorded in order not to "undermine the evidentiary basis".³⁴² Hence,

"[a]s soon as there is a suspicion, an investigation shall be initiated immediately or without any delay, within the next hours or days. It therefore has to be ensured that all public officials, in particular prison doctors, prison officials and magistrates who have reasons to suspect an act of torture or ill-treatment, report this *ex officio* to the relevant authorities for proper investigation in accordance with article 12".³⁴³

The investigatory obligation of the State Party is reinforced by the obligation, under Article 13³⁴⁴, to recognize and facilitate the right of individuals to communicate allegations of violations of Article 1 and Article 16, and, upon submission of an allegation, to proceed to a genuine examination of the individual complaint.

The Addendum to the Report of the Special Rapporteur of 5th February 2010, underlines that, in accordance with the jurisprudence of the UN Committee Against Torture, the "threshold for a complaint must be as low as possible, particularly in the context of detention".³⁴⁵ Therefore, "a formal submission or express statement of the complainant is not required, and that bringing an allegation in a non-bureaucratic manner, either verbally or in writing, to the attention of a State official suffices".³⁴⁶ The low threshold of complaint is the counterpart of "the discretion of detainees where and to whom they wish to complain" and the addressee of the complaint "can be any ordinary staff member of a penitentiary facility, but also doctors,

³⁴¹ *Report of the Special Rapporteur*, Op cit., §136.

³⁴² *Ibid.*, §137.

³⁴³ *Ibid.*

³⁴⁴ The Report of the Special Rapporteur, stresses that the obligation under Article 12 will always be the primary manner in which the infliction of harm, by torture or other cruel, inhuman and degrading treatment or punishment, is identified and prosecuted. For "victims are in most cases not in the position to file a complaint without putting themselves into further danger and risk suffering reprisals. In order to counterbalance the vulnerability of the victim and the de facto inaccessibility of complaints mechanisms, particularly in the context of detention, article 12 CAT shifts the responsibility to initiate an investigation from the victim to the State authority most directly involved" (*Ibid.*, §135). Thus, the existence of a procedure for individual complaint, under Article 13, cannot remove or diminish the obligation upon the State Party under Article 12.

³⁴⁵ *Report of the Special Rapporteur*, Op cit., §110. Citing, CAT Committee, *Parot v. Spain*, Comm. No 6/1990, §10.4; *Blanco Abad v. Spain*, Comm. No. 59/1996, §8.6; Comm. No. 59/1996; *Imed Abdelli v. Tunisia*, Decision of the Committee against Torture of 20 November 2003, Comm. No. 188/2001, §10.6; *Bouabdallah Ltaief v. Tunisia*, Decision of the Committee against Torture of 20 November 2003, Comm. No. 189/2001, §10.6; *Jovica Dimitrov v. Serbia and Montenegro*, Decision of the Committee against Torture of 23 May 2005, Comm. No. 171/2000, §7.2.

³⁴⁶ *Report of the Special Rapporteur*, Op cit., §110.

social workers, prison chaplains, prosecutors, or, if existent, members of a monitoring body”³⁴⁷.

On receipt of the allegation,

“it must be promptly followed up by an impartial examination by a competent body which is independent from the alleged perpetrator, equipped with full investigative powers in order to secure evidence and establish the facts, and ultimately be in the position to forward the matter to those authorities that can initiate criminal proceedings. As a minimum, the complainant shall be heard by the authority conducting the examination and meet with a doctor for a forensic examination”³⁴⁸.

The purpose of the positive obligations imposed on a State Party, by Articles 4, 10, 11, 12 and 13, is to direct the State Party to establish an effective regulatory framework over the operation of the detention estate. The regulatory framework is guided by the prohibition in Articles 1 and 16, and the positive obligations seek to embed the prohibition in the institutional policies and the behaviour of the personnel within the detention estate.

The prohibition, under Articles 1 and 16, is extended, by Article 15³⁴⁹, to encompass the rules of admissibility of evidence in judicial proceedings in which statements or confessions are obtained by torture or other cruel, inhuman or degrading treatment or punishment. The prohibition becomes an exclusionary rule which renders all evidence obtained in violation of the prohibition inadmissible. In this manner, the domestic legal system of a State Party is required to intervene to prevent other institutions of the State Party from benefiting from the use of evidence acquired in violation of Article 1 and/or Article 16. The intervention and exclusion are also the maintenance of the independence and integrity of a State Party’s domestic legal system through the prevention of complicity in pre-trial interrogations and evidence gathering involving the violation of Article 1 and/or Article 16.

In relation to the Israeli State practice of administrative detention, Article 15 relates to situations in which the interrogation, prior to administrative detention, involving the infliction of torture or other cruel, inhuman or degrading treatment or punishment, leads the individual to reveal information which is utilized to proceed to against other individuals in criminal proceedings or to arrest and administratively detain other individuals.

The more detailed evaluation of Israel’s implementation of the provisions of UNCAT is furnished by the UN Committee on Torture in its Concluding Comments on the periodic reports by Israel under Article 19 of UNCAT. For the purposes of the Report, the focus will be upon those elements relevant to the relationship between UNCAT and the Israeli State practice of administrative detention.

³⁴⁷ Ibid.

³⁴⁸ Ibid., §111.

³⁴⁹ This is also a manner in which UNCAT compliments Article 7 of the ICCPR which is also held, within its more general formulation, to contain the same prohibition upon the admissibility of evidence obtained as a result of torture or other cruel, inhuman or degrading treatment. See, HRC, *General Comment No. 20*, HRI/GEN/1/Rev.1 (1994): “It is important for the discouragement of violations under article 7 that the law must prohibit the use of admissibility in judicial proceedings of statements or confessions obtained through torture or other prohibited treatment” (Ibid., §12).

6 The situation of Israel and the Occupied Territory

In addition to the Israeli position that UNCAT has no extraterritorial applicability to the OPT, which the Report has dealt with above, Israel continues to argue that the character of the security situation and the obligation to protect its citizens from violence in the OPT, obliges it to respond in an exceptional manner. The UN Committee on Torture (CAT) has consistently held that the particular situation and conditions in the OPT and the continued declaration of a state of emergency in Israel, are irrelevant to the determination of the applicability of the provisions of UNCAT. For, to suggest that these conditions have relevance to a State Party's obligations under UNCAT is to commence from a fundamental misunderstanding of the absolute, non-derogable prohibition upon torture and inhuman and degrading treatment under UNCAT.³⁵⁰

The enactment of a substantive criminal offence of torture

Israel has not, as indicated in each of the existing periodic reports under UNCAT, enacted a specific, substantive criminal offence prohibiting torture, in conformity with the definition of torture, under Article 1, and as required under Article 4. Although, in the fifth, and most recent periodic report, Israel indicates that there are discussions in regard to the creation and enactment of a such an offence, no legislative process has yet begun.³⁵¹ The lack of specific legislation is the consequence of an enduring conception of the adequacy of the existing framework of criminal offences, under Israeli domestic law, to respond to the occurrence of the infliction of harm or suffering which has the character of torture.

The CAT continues to emphasize that the absence of a specific, statutory offence entails that none of the existing substantive criminal offences, within the Israel domestic legal system, criminalize harm or suffering in a manner which denotes the harm or suffering as torture. The only response of the Israeli framework of substantive criminal offences can be of prosecution for an offence which is held to be the equivalent of torture, but that offence can never explicitly designate the harm or suffering as torture. This, in turn, raises the question, upon conviction, of the adequacy of the accompanying sentencing regime, as it is unclear in what manner this would be capable of indicating punishment for torture, under Article 4(2), rather than for the more general substantive criminal offence for which the individual has been convicted.

Interrogation

The monitoring and criticism of the Israeli position with regard to the regulation of the use of torture or other cruel, inhuman and degrading treatment or punishment in the interrogation of suspects has been a central concern of the CAT. The position of the CAT confirms and reinforces the position of the Human Rights Committee in relation to the continuing inadequacy of the Israeli legal framework in its response to the recourse to practices of

³⁵⁰ See, for example, UN Committee Against Torture, *Concluding Observations* (fourth periodic report of Israel) CAT/C/ISR/CO/4 23 June 2009, §10; *Concluding Observations* (third periodic report of Israel) Supplement No. 44 (A/57/44) §51. This position is also the expression of the parity of protection between the non-derogable, absolute prohibition upon torture and other cruel, inhuman and degrading punishment, under Article 7 of the ICCPR, and UNCAT.

³⁵¹ *Concluding Observations* (fifth periodic report of Israel), CAT/C/ISR/CO/5, 3 June 2016, §12.

torture or other cruel, inhuman and degrading treatment or punishment in the interrogation of suspects.³⁵²

The CAT has critically evaluated the development of the legal framework, from the Landau Commission³⁵³ to *The Public Committee Against Torture in Israel v The State of Israel*³⁵⁴, and has indicated the persistent failure of the legal framework to recognize and implement the negative and positive obligations of UNCAT. The critical evaluation has been accompanied, in the Concluding Observations, with the indication of the continued instances of torture and other forms cruel, inhuman and degrading treatment or punishment during the interrogation of suspects.

The Report proceeds to analyze the most recent Israeli Supreme Court decision, *Abu Ghosh v. Attorney General*³⁵⁵, in 2017, in order to determine the effect of this decision upon the conformity between the Israeli domestic law and the provisions of UNCAT.³⁵⁶ Although, each of the instances of interrogation from which the case arises, relate to investigations of potential criminal offences, for the Report, the importance of the decision concerns the wider question of the compatibility of the general Israeli legal framework which regulates all instances of interrogation with the provisions of UNCAT.

The decision derives from the challenge, by a number of Palestinian individuals who, in separate instances, had been interrogated, and who alleged that their interrogations involved the infliction of torture or other cruel, inhuman and degrading treatment or punishment and to the decision, by the Israeli Attorney General, not to authorize a formal, criminal investigation into their allegations. Thus, the decision centres upon both the negative and positive obligations under UNCAT.

In relation to the Attorney General's decision, the Israeli Supreme Court, considers the basis upon which it can hold that the decision was incorrect. The discussion is exclusively confined to Israeli domestic law and is based upon the definition of the legal grounds upon which the exercise of the Attorney General's discretion is open to review.³⁵⁷ The grounds for review are confined to the reasonableness of the decision and, for it to be overturned, it has to be demonstrated to be manifestly unreasonable. The unreasonableness of the decision is further differentiated in accordance with whether it relates to the evidential basis for the decision or whether it relates to the public interest. In a situation in which the exercise of the Attorney General's discretion is based upon the lack of evidence to support the allegations, the Supreme Court holds that "the scope of the intervention in his decision, which is narrow in

³⁵² See, UN Committee Against Torture, *Concluding Observations* (fourth periodic report of Israel) CAT/C/ISR/CO/4 23 June 2009 §§20-21; *Concluding Observations* (third periodic report of Israel) Supplement No. 44 (A/57/44) §52(g), (h);

³⁵³ For the critical evaluation of the Landau Commission, see the critical evaluation of the *Concluding Observations* on the (second periodic report of Israel), Op. cit., §238 (a).

³⁵⁴ For the critical evaluation of the Israeli Supreme Court decision in *The Public Committee Against Torture in Israel v. The State of Israel*, see the *Concluding Observations* (third periodic report of Israel), Op. cit., §52(a)(i)-(iii).

³⁵⁵ HCJ 5722/12 *Abu Ghosh v. Attorney General*, Judgment of 12.12.17. For critical analysis of *Abu Gosh v. Attorney General*, see Elena Chachko, "'Pressure Techniques' and Oversight of Shin Bet Interrogations: *Abu Gosh v. Attorney General*", available at <https://www.lawfareblog.com/pressure-techniques-and-oversight-shin-bet-interrogations-abu-gosh-v-attorney-general>; Yuval Shany, "Back to the 'Ticking Bomb' Doctrine", available at <https://www.lawfareblog.com/back-ticking-bomb-doctrine>

³⁵⁶ The decision, in 2017, awaits the scrutiny of the CAT, in the present situation of the preparation of the next periodic report of Israel.

³⁵⁷ *Abu Ghosh v. Attorney General*, Op. cit., §§20-23.

any case, is even further reduced”.³⁵⁸ Therefore, since the Attorney General’s decision not to open a formal, criminal investigation does not arise from the exercise of a discretion which “exceeds the range of reasonableness”, there is no basis upon for the Supreme Court to overturn the decision.

The exclusive focus, by the Israeli Supreme Court, upon the legal regulation of the exercise of the Attorney General’s discretion by principles of Israeli administrative law ignores the existence and character of the positive obligations under UNCAT. The exercise of discretionary decision-making, by the Attorney General, should accord primacy to the existence and character of the positive obligations under UNCAT when considering allegations/complaints of torture or other cruel, inhuman and degrading treatment or punishment. This, in turn, requires that the criteria of Israeli administrative law, in situation which these allegations/complaints arise, are replaced with those which give effect to the positive obligations under UNCAT. In particular, the notions of reasonableness and evidence, under Israeli administrative law, in their application to the instigation of criminal prosecutions, are at variance with the distinct institutional procedure envisaged under Articles 12 and 13 of UNCAT as discussed above.

In regard to the determination of the interrogations as ones in which the ISA interrogators inflicted torture upon the individual complainants/petitioners, the Supreme Court adopts an essentially restrictive position to application of the definition under Article 1 to the techniques of interrogation. The central element of this restrictive approach is to confine the application of Article 1 to “the specific circumstances of that case”³⁵⁹, and, thus, to subsume it within the parameters of the exercise of the general discretion of the Attorney General. In this manner, the jurisprudence of international human rights law relating to the determination of the definition of torture³⁶⁰, under Article 1, is held to be inapplicable or too abstract, rather than an essential compliment, under international law, to the identification of practices of interrogation as torture.

With this rejection of the jurisprudence of international human rights law, the submission by international experts to the Supreme Court is also rejected, which holds that this jurisprudence should determine the exercise of the Attorney General’s discretion and, insofar as it is at variance, indicates a lack of “good faith” or failure to accord “the ordinary meaning that give terms of the Convention in their context and in light of the subject matter and purpose” under Article 31 (3) of the Vienna Convention on the Law of Treaties 1969.³⁶¹

The restrictive definition is the corollary of a demanding standard of proof placed upon individual petitioners to establish the infliction of torture. It effectively introduces a standard of proof which will become progressively more demanding in accordance with the degree of time between the date of any medical/psychological examination and evidence and the date

³⁵⁸ Ibid., §22.

³⁵⁹ Ibid., §35.

³⁶⁰ The following HRC jurisprudence is cited, and held inapplicable, *Acosta* (CCPR / C / 34 / D / 162/1983 (1988)); (*Sodic v. Uruguay*, Comm. No. 63/1979 (R.14 / 63), Hum. Rts. Comm. (28 October 1981)); (*Selmouni v France*, Reports 1999-V, ECtHR judgment of 28 July 1999); *Malawi African Association and Others v. Mauritania*, Communications 54/91, 61/91, 98/93, 164-196 / 97 and 210/98, 13 the annual activity) report: 1999-2000; (2000) AHRLR 149 (ACHPR 2000). Also cited, and held inapplicable, *Report of visit of the special rapporteur on torture to turkey*, UN Doc. E / CN.4 / 1999/61 / Add.1, 27 January 1999 and *Guantánamo Bay, Situation of Detainees*, UN Doc. E / CN.4 / 2006/120, 15 February 2006.

³⁶¹ *Abu Ghosh v. Attorney General*, Op. cit., §36.

of the interrogation during which the alleged torture was inflicted.³⁶² In the absence of contemporaneous medical evidence, the evidence must establish a strict, causal connection between the techniques of interrogation utilized in the individual's interrogation and the alleged infliction of harm or suffering constitutive of torture. These evidential requirements are at variance with the interpretation of the positive obligations under UNCAT by the Special Rapporteur already discussed by the Report. For, it is arguable that this standard of proof effectively represents a reversal of the burden of proof imposed by these positive obligations under UNCAT: the underlying presumption is that the State Party bears the burden of disproving an allegation of torture.

The subsequent discussion, by the Israeli Supreme Court, of the necessity defence reaffirms the position of the preceding decision in *The Public Committee Against Torture in Israel v The State of Israel*. The continued recognition and application of this general, case-law defence indicates the lack of acknowledgement and recognition of the absolute prohibition upon torture as the absolute primacy of this provision of international human rights law over any potentially conflicting provision of a State Party's domestic law. The maintenance of the potential applicability of the defence of necessity to interrogators who utilize techniques of interrogation which inflict torture is consistently identified by the CAT as incompatible with the absolute prohibition upon torture and that Israel should introduce legislation to exclude the availability of the defence in "cases involving torture".³⁶³

The most recent decision of the Supreme Court, in *Firas Tbeish v Attorney General*, which concerns allegations of torture, during interrogation, by an administrative detainee, reaffirms the position of *Abu Ghosh*. In addition, through its refusal to rescind the Attorney General's Directive, it enables the continued operation of the necessity defence, at the stage of the investigation of allegations of torture or other forms of ill-treatment. The Supreme Court fails to recognize the further positive obligations, upon Israeli, under Article 10 (training of all relevant state personnel in prohibition of torture/formulation of prohibition in rules and duties of all relevant state personnel), Article 11 (prevention of torture through systemic review of practices of interrogation and arrest, custody and detention), Article 12 (investigation of allegations of torture or cruel, inhuman or degrading treatment or punishment) and Article 13 (right of individual complaint and examination of allegations of torture).

For the CAT, Article 2(2) of UNCAT

"provides that the prohibition of torture is absolute and non-derogable and that no exceptional circumstances whatsoever may be invoked by a State party to justify acts of torture. In this respect, the Committee is concerned that the necessity defence, which is contained in section 34 (11) of the Penal Law as a defence afforded to any defendant in criminal cases, has not been explicitly excluded for cases involving torture. Thus it could still be invoked *post factum* as a possible justification for torture in the context of interrogations carried out in situations involving impending threats to human lives and as a result lead to a lack of proper accountability (art. 2)".³⁶⁴

Hence, the Supreme Court decisions in *Abu Ghosh v. Attorney General* and *Firas Tbeish v Attorney General*, perpetuate the lack of adherence to the provisions of UNCAT. This can only be resolved, for the CAT, as emphasized in the most recent fifth periodic report of 2016,

³⁶² Ibid., §25.

³⁶³ *Concluding Observations* (fifth periodic report of Israel), Op. cit., §14.

³⁶⁴ Ibid.

by the combination of the “incorporation into domestic law [of] the principle of the absolute prohibition of torture in conformity with article 2 (2) of the Convention and, recalling its previous recommendations (A/57/44, para. 53 (i) and CAT/C/ISR/CO/4, para. 14)”, and the complete removal of “necessity as a possible justification for torture”.³⁶⁵ The absence of these legislative changes, is accompanied by the continued lack of compliance with the further positive obligations under Article 10, Article 11, Article 12 and Article 13 of UNCAT.

Exclusion of Unlawfully Obtained Evidence (UNCAT Article 15)

The Israeli law of evidence, until the case of *Yissacharov v Chief Military Prosecutor et al.*³⁶⁶, in 2006, contained no legislative provision nor general case-law doctrine that evidence which had been obtained illegally should be excluded from admission in judicial proceedings as part of the prosecution case. The decision in *Yissacharov v Attorney-General et al.* recognizes, for the first time in Israeli law, a general case-law doctrine which empowers a judge to exclude evidence if, to admit it, would substantially violate the accused’s right to a fair trial.

Whilst the CAT acknowledges, and “notes with appreciation”, the decision in *Yissacharov v Chief Military Prosecutor et al.*³⁶⁷, it also indicates that this judicial discretion confronts a pre-trial context in which the Israeli Criminal Procedure Law and the Prisons Ordinance enables the right to pre-trial legal advice to be “delayed, subject to written requests, if it puts the investigation at risk, prevents disclosure of evidence, or obstructs the arrest of additional suspects, and security-related offenses or terrorism charges permit further delays”.³⁶⁸ Thus, the degree of judicial regulation of practices of interrogation and evidence gathering prior to judicial proceedings is determined by an uncertain relationship with the discretion accorded to Israeli State personnel when undertaking these practices.

This particular concern of the CAT is a reflection of a wider uncertainty with regard to the extent to which this judicial discretion will be exercised beyond the factual circumstances of *Yissacharov v Chief Military Prosecutor et al.* In particular, the individual concerned was an Israeli army soldier and the basis upon which the individual’s confession was sought to be excluded was the *deliberate* denial of access to legal advice, namely, a decision to deny access which exceeded the parameters of the discretion provided by the Israeli Criminal Procedure Law and the Prisons Ordinance.

Hence, it remains unclear in what manner the general case-law doctrine, adopted in *Yissacharov v Chief Military Prosecutor et al.*, extends to the judicial role of military judges in the military court system in the determination and review of administrative detention orders upon Palestinians in the OPT. For, this doctrine, and the accompanying judicial discretion to exclude evidence, immediately confronts the absence of the individual’s knowledge of the reasons for arrest/detention and the admissibility of secret evidence as the basis for the imposition and renewal of administrative detention orders.

In addition to the uncertainties of the application of this general case-law doctrine to the Israeli State practice of administrative detention, there is the further question of the absence, at present, of judicial discussion of the compatibility between this general case-law doctrine and the absolute prohibition under Article 15 of UNCAT of the admissibility of evidence

³⁶⁵ Ibid., §15.

³⁶⁶ *Yissacharov v Chief Military Prosecutor et al.* Crim A 5121/98, [2006].

³⁶⁷ *Concluding Observations* (fourth periodic report of Israel), Op. cit., §5.

³⁶⁸ Ibid., §15.

resulting from the infliction of torture or other cruel, inhuman or degrading treatment. For, at the very least, the formulation of the doctrine, as a judicial discretion entirely determined within the parameters of Israeli domestic law³⁶⁹, would have to acknowledge and conform with the prohibition under Article 15 of UNCAT.

These concerns and uncertainties are supported by the CAT in its Concluding Observations on the fifth periodic report of Israel, in 2016. The CAT states that it is

“concerned at allegations of instances in which coerced evidence was used in courts, including in military courts to sentence children, despite the jurisprudence of the Supreme Court regarding the inadmissibility of evidence obtained illegitimately”.³⁷⁰

Conditions and Treatment in Administrative Detention

The CAT considers that the Israeli State practice of administrative detention breaches Article 16 of UNCAT. The capacity for administrative detention to inflict cruel, inhuman or degrading punishment or treatment, arises from its imposition upon individual detainees for “inordinately lengthy periods”.³⁷¹ The excessive length of periods of administrative detention

“deprives detainees of basic safeguards, including the right to challenge the evidence that is the basis for the detention. Warrants are not required and the detainee may be de facto in incommunicado detention for an extended period, subject to renewal”.³⁷²

Hence, irrespective of any further instances of treatment or conditions of detention which inflict suffering classifiable as torture or cruel, inhuman or degrading treatment or punishment, the excessive length of periods of administrative detention is sufficient in itself to constitute a breach of Article 16 of UNCAT.

Solitary Confinement

Detainees who are subject to administrative detention orders may, during the process of interrogation, and in course of one or more of their periods of post-interrogation detention, be subjected to solitary confinement. The imposition of solitary confinement is authorized, under Israeli domestic law, as part of the legal framework regulating the detention estate. Its purported purpose is as an exceptional, disciplinary measure imposed upon detainees or to separate individual detainees from one another for broader reasons of security.

For the CAT, the concern in relation to the solitary confinement, beyond the problem of the

³⁶⁹ The relationship between the Israeli Basic Law and the Israeli law of evidence.

³⁷⁰ *Concluding Observations* (fifth periodic report of Israel), CAT/C/ISR/CO/5, 3 June 2016, §34. The CAT acknowledges that the Israeli delegation has indicated the discussion and drafting of a specific statutory provision prohibiting the admissibility of a confession resulting from torture. However, the legislation has yet to be formally introduced for passage through Knesset, and it is unclear whether, if the provision is merely confined to confessions, it would satisfy the prohibition, under Article 15, which specifies that the prohibition applies to “any statement”. In addition, the CAT notes that “the development of the doctrine of inadmissibility of evidence is still an ongoing process within the Israeli legal system, as stated by the Supreme Court (C.A. 2939/09 *Filza v. The State of Israel* (15.10.09))” (Ibid., §348).

³⁷¹ *Concluding Observations* (fourth periodic report of Israel), Op. cit., §17.

³⁷² Ibid. The position of the CAT, in the regard to the fourth periodic report, is reiterated by the *Concluding Observations* (fifth periodic report), Op. cit., §22. The *Concluding Observations* (fourth periodic report of Israel) reiterates, in turn, in more detail, the concerns expressed in the *Concluding Observations* (third periodic report of Israel), Op. cit., §52(e).

determination of the definition of its ‘exceptional’ character and duration³⁷³, is of its the use as a conventional, rather than ‘exceptional’ practice, which is also commonly associated with the purpose of actively eliciting statements from the detainee. The potential for this use of solitary confinement to violate the provisions of UNCAT, arises from situations in which

“persons can also be held in separation, allegedly in conditions of isolation that are similar to those prevailing in solitary confinement, during significantly longer periods for interrogation purposes or for other reasons such as State or prison security. In this respect, the Committee notes with concern the reports that persons who suffer from mental health problems can also be held in separation if they are deemed to pose a threat to themselves or other inmates. The Committee is further gravely concerned that solitary confinement and separation can also be applied to minors and, in this respect, it expresses concern at allegations that many children have been held in separation for interrogation purposes. The Committee regrets the lack of statistical data from the State party on the use of separation during interrogation (arts. 2, 11, 15 and 16)”.³⁷⁴

Thus, to the extent that these practices identified by the CAT, in regard to the use of the practice of solitary confinement, are imposed upon individuals who are arrested, interrogated and then detained on the basis of administrative detention orders, a further breach of the provisions of UNCAT occurs.

7 The International Convention on the Elimination of All Forms of Racial Discrimination³⁷⁵

Israel signed, in 1966, and then ratified, in 1979, the *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD).³⁷⁶ The rights and obligations of ICERD are, under Article 8, accompanied by the establishment of the *UN Committee on the Elimination of All Forms of Racial Discrimination* (CED). Israel has not exercised the optional declaration, under Article 14 CERD, to enable the competence of the Committee to receive and consider individual complaints of racial discrimination. Thus, the monitoring function of the CED is limited to the early-warning mechanism³⁷⁷; inter-state complaints; and the more general procedure, established, under Article 9, by the obligation of each State Party to provide a regular periodic in relation to the rights and obligations under ICERD.

³⁷³ The *Concluding Observations* (fifth periodic report), recommends that Israel “(a) [e]nsure that solitary confinement and equivalent measures are used only in exceptional cases as a measure of last resort, for as short a time as possible and subject to independent review, in line with international standards; (b) Put an immediate end and prohibit the use of solitary confinement and equivalent measures for juveniles and persons with intellectual or psychosocial disabilities; (c) Compile, provide to the Committee and regularly publish comprehensive disaggregated data on the use of solitary confinement and equivalent measures” (Ibid., §25).

³⁷⁴ *Concluding Observations* (fifth periodic report), Op. cit., §24. The concerns reiterate those expressed in the *Concluding Observations* (fourth periodic report of Israel), Op. cit., §18.

³⁷⁵ The Report was completed before the conclusion of the inter-state complaint procedure (Articles 11-13 ICERD), originally filed by Palestine on 23rd April 2018 against Israel, for breaches of its obligations under the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) (www.ohchr.org/EN/HRBodies/CERD/Pages/InterstateCommunications.aspx). Thus, the Report is unable to include any of its findings in the following analysis.

³⁷⁶ The special position of the principle of non-discrimination on the grounds of race, colour, sex, language, religion, or social origin is attested to by the fact that it is listed among the non-derogable rights by Article 4(1) of the ICCPR, Article 27(1) of the ACHR and Article 4(1) of the Arab Charter on Human Rights.

³⁷⁷ The mechanism has only been used in relation to Israel with regard to the question of family reunification in situations of marriage between an Israeli citizen and an individual residing either the West Bank or the Gaza Strip, see CERD/C/65/Dec.2 and CERD/C/63/Dec.2.

In relation to the Country Reports, the CED rejects Israel's position of the non-applicability of the CERD to the OPT and, as its necessary corollary, the absence, in each Country Report, of detailed information concerning racial discrimination and its prevention in the OPT.³⁷⁸ In conformity with the general position of other UN Committees with regard to the applicability of legal instruments of international human rights, legal instruments of international humanitarian law and international law, the CED regards the rights and obligations of ICERD as fully applicable to the OPT. The monitoring of rights and obligations, under ICERD in the OPT, however, operates without the possibility for individual complaints from the OPT, and remains predominantly based upon the response of the CED to Israel's Country Reports.

The ICERD, in Article 1(1), provides a general definition of racial discrimination as

“any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life”.³⁷⁹

The potential for racial discrimination, under Article 1(1), is considered to continue to reside in a State's domestic legal provisions regarding “nationality, citizenship or naturalization” insofar as, under Article 1(3), these domestic provisions “discriminate against any particular nationality”.

The general definitions and parameters of State policy, under Article 1, are enhanced by the positive obligation upon States, under Article 2(1), to develop and implement an anti-racial discrimination policy within all state institutions. The policy is to be implemented, under Article 2(2), in demonstrable “concrete steps” which guarantee “the full and equal enjoyment of human rights and fundamental freedoms”.

In relation to the Israeli State practice of administrative detention, the two most recent *Concluding Observations* of the CED in relation to Israel's Country Reports³⁸⁰, have held that the potential for racial discrimination arises, beyond the general obligation, under Article 2, from Article 3 (racial segregation and apartheid); Article 5(a) (the right to equal treatment before tribunals and all other organs administering justice) and Article 6 (right to effective protection and remedies). The applicability of these Articles flows from the position of CED in the *General Recommendation 31 on the Prevention of Racial Discrimination in the Administration and Functioning of the Criminal Justice System*.³⁸¹

³⁷⁸ See, for the most recent reaffirmation of this position, *Concluding observations of the Committee on the Elimination of Racial Discrimination on the fourteenth to sixteenth periodic reports of Israel* 2012 CERD/C/ISR/CO/14-16, §10; and *Concluding observations of the Committee on the Elimination of Racial Discrimination on the tenth to thirteenth periodic reports of Israel* reports of Israel CERD/C/ISR/CO/13 2007, §32.

³⁷⁹ Article 1(1) CERD.

³⁸⁰ *Concluding observations of the Committee on the Elimination of Racial Discrimination on the fourteenth to sixteenth periodic reports of Israel* 2012 CERD/C/ISR/CO/14-16; and *Concluding observations of the Committee on the Elimination of Racial Discrimination on the tenth to thirteenth periodic reports of Israel* reports of Israel CERD/C/ISR/CO/13 2007.

³⁸¹ UN Committee on the Elimination of Racial Discrimination, *General Recommendation 31 on the Prevention of Racial Discrimination in the Administration and Functioning of the Criminal Justice System*, 2005. From A/60/18, pp. 98-108. Adopted at the UN Committee's 1724th meeting.

The Preamble to the *General Recommendation* emphasizes the continued possibility for racial discrimination in every State Party's criminal justice system and, if present, "in the administration and functioning of the system of justice, it constitutes a particularly serious violation of the rule of law, the principle of equality before the law, the principle of fair trial and the right to an independent and impartial tribunal, through its direct effect on persons belonging to groups which it is the very role of justice to protect".³⁸² The *General Recommendation* then proceeds to identify the specific instances in which racial discrimination can arise within the criminal justice system and the measures, procedures and policies which a State Party is obliged to adopt in order to ensure that its criminal justice system complies with the CERD.

On this basis, the CED identifies instances of non-compliance with Article 5(a) in the "maintenance of administrative detention for both Palestinian children and adults based on evidence that is kept secret for security reasons".³⁸³ There is also non-compliance, under Article 5(a), in the decision itself to arrest Palestinian children and impose administrative detention upon them through the military court system which is, simultaneously, an "undermining of their [Palestinian children's] judicial guarantees", and, therefore, non-compliance with the right of Palestinian children, under Article 6, to effective protection from racial discrimination.³⁸⁴ In addition, the introduction and maintenance of a system of administrative detention for Palestinians represents non-compliance with Article 3 due to the "existence of two sets of laws, for Palestinians on the one hand and Jewish settlers on the other hand who reside in the same territory, namely the West Bank...and are not subject to the same justice system (criminal as well as civil matters)".³⁸⁵ The non-compliance with Articles, 5(a), 6 and 3 are also non-compliance with the positive obligation of Israel, under Article 2(1) and (2), to actively intervene, as Occupying Power, to prevent the presence of racial discrimination in the criminal justice system in the OPT. For the CED, active intervention, due to the racially discriminatory character of administrative detention, is represented by the decision of Israel, "to end its current practice of administrative detention".³⁸⁶

The Israeli Supreme Court, in *The Ministry of Palestinian Prisoners and others v The Minister of Defense and others*³⁸⁷, has effectively considered the question of discrimination in the OPT in relation to the difference in the length of time before which a suspect must be brought before a judge. The co-joined cases involve a challenge to this difference in relation to that existing between the OPT and Israel and, within the OPT, between Palestinian suspects and Israeli citizens who are settlers in the OPT.³⁸⁸ The judgment arises from a sequence of modifications, undertaken by the relevant Israeli state institutions, to the initial

³⁸² UN Committee on the Elimination of Racial Discrimination, *General Recommendation 31 on the Prevention of Racial Discrimination in the Administration and Functioning of the Criminal Justice System*, 2005. Preamble From A/60/18, p.99. Adopted at the UN Committee's 1724th meeting.

³⁸³ *Concluding observations of the Committee on the Elimination of Racial Discrimination on the fourteenth to sixteenth periodic reports of Israel* 2012 CERD/C/ISR/CO/14-16, §27.

³⁸⁴ Ibid.

³⁸⁵ Ibid.

³⁸⁶ Ibid.

³⁸⁷ *The Ministry of Palestinian Prisoners and others v. The Minister of Defense and others* [2014], HCJ Case 3368/10; HCJ Case 4057/10. An English translation of the case is available at <http://versa.cardozo.yu.edu/sites/default/files/upload/opinions/Ministry%20of%20Palestinian%20Prisoners%20v.%20Minister%20of%20Defense.pdf>

³⁸⁸ The judgment focuses almost exclusively upon the difference existing between Israel and the OPT.

procedures of arrest and administrative detention in the OPT which were the basis for the original application by the complainants (petitioners).

Although the position of the complainants (petitioners) is, in part, based upon emphasizing the non-compliance of these differing lengths of detention with international law, the decision of the Israeli Supreme Court is based entirely upon the interpretation of constitutional rights contained in provisions of the Israeli Basic Law and previous case-law of the Supreme Court.³⁸⁹ Thus, in place of an acknowledgement of the specific character and pertinence of Israel's obligations in relation to human rights and freedoms contained in the legal instruments of international human rights law, the decision is confined to the interpretation of "Section 5 of the [Israeli] Basic Law: Human Dignity and Liberty, where it is prescribed that: "There shall be no deprivation or restriction of the liberty of a person by imprisonment, detention, or any other way""³⁹⁰ This, in turn, transforms the question of the evaluation of the conformity of these differences to Section 5 into a single balancing test through which the degree of compliance of the overall legal framework of arrest and detention in the OPT is established.

For the Supreme Court, the right to liberty under Section 5 co-exists with the "public interest to expose criminals and prevent crime, and certainly to try and thwart security offenses".³⁹¹ Hence,

"it is necessary to strike a balance in the constant tension that exists in the Israeli reality, between security and protecting the rights of someone suspected of committing an offense. This tension emerges also in the matter before us – the periods of detention of Palestinians who are residents of the Region".³⁹²

The Supreme Court considers the balancing test within the distinct security context of the OPT³⁹³ and the effect of the amendments/modifications of the initial legal framework of administrative detention during the course of the proceedings.³⁹⁴

The amended legal framework is considered to demonstrate "significant changes"³⁹⁵, and that, for the Supreme Court, "[t]here is no doubt that the State came a long way and significantly and even dramatically shortened the periods of detention applicable to the Palestinian residents of the Region".³⁹⁶ As a result,

"the current detention periods which were prescribed for *adults*, who are suspected of

³⁸⁹ *The Ministry of Palestinian Prisoners and others v. The Minister of Defense and others*, §52 ff. The previous case-law which is cited: HCJ 2605/05 *The Law and Business Academic Center v. The Minister of Finance* [2009]; LCrimA 837/12 *The State of Israel v. Gusakov* [2012]; CHR 8823/07 *Anonymous v. The State of Israel* [2010]; ADA10/94 *Anonymous v. The Minister of Defense*, IsrSC 53(1) [2002]; HCJ 3239/02 *Marav v. Commander of IDF Forces in Judea and Samaria*, IsrSC 54(2) [2003]; HCJ 10720/06 *Farid v. The Military Court of Appeals* [2007].

³⁹⁰ *Ibid.*, §52.

³⁹¹ *Ibid.*

³⁹² *Ibid.*

³⁹³ The Supreme Court effectively adopts the position of the Respondents (Israeli state institutions), rather than the Petitioners, with regard to the essential connection between the distinctive character of the practices of arrest, interrogation and administrative detention and the security situation in the OPT (See, §54).

³⁹⁴ The Supreme Court presents the initial framework and the final, modified legal framework in §56 and §57 respectively.

³⁹⁵ *Ibid.*, §58.

³⁹⁶ *Ibid.*, §61.

committing *security offenses*, in the time period *before the filing of an indictment* – are reasonable and proportionate, and therefore there is no cause for our involvement in this context at the current time”.³⁹⁷

There remain, however, within the amended framework, three periods of detention with which the Supreme Court is “not comfortable”³⁹⁸: “the periods of detention of minors, the periods of detention of adults in offenses that are not security offenses; and the period of detention until the end of proceedings (of minors and adults, in all classifications of offenses)”.³⁹⁹ For each of these periods of detention, the Supreme Court is unconvinced by the underlying justification provided by Israeli state institutions. However, the Supreme Court, rather than “issuing an order *nisi* with respect to the three mentioned matters”, leaves “the Petitions pending” and directs the Israeli state institutions to reconsider them, and to provide a further update notice in relation to them.⁴⁰⁰

Whilst it appears the Supreme Court engages in a judicial review of the respective frameworks of detention in operation in Israel and the OPT, the effective marginalization of the international human rights and obligations of the CERD, entails that the scope and character of that judicial review remains unaffected by the fundamentally different and necessarily more demanding orientation of the CERD. The Supreme Court, by utilizing the notion of security as the main criterion upon which to compare the two regimes of detention, effectively excludes the consideration of the notion of discrimination under the CERD.

8 The Convention on the Elimination of All Forms of Discrimination against Women

Israel signed, in 1980, and then ratified, in 1991, the CEDAW. The rights and obligations of CEDAW are, under Article 17(1), accompanied by the establishment of the *UN Committee on the Elimination of Discrimination against Women* (CmEDAW), and Israel is obliged, under Article 18, to provide the Committee with regular Country Reports detailing the progress in the implementation of the provisions of CEDAW. Israel has neither signed nor ratified the later *Optional Protocol to CEDAW* to enable the CmEDAW to either receive and consider individual complaints of discrimination against women or to initiate an inquiry procedure. Thus, the monitoring function of the CmEDAW is limited to the existing general obligation upon Israel, established under Article 18, to provide a regular Country Report in relation to the rights and obligations under CEDAW.

Israel has sought to further limit the monitoring function of the Country Report, through the continued lack of inclusion of information with regard to the OPT, based upon the claim that CEDAW is without extraterritorial application to the OPT. The Israeli position, explicated in its Reply to the CmEDAW Concluding Observation No. 23 in relation to Israel’s *fourth and fifth Country Report*⁴⁰¹, is founded upon the continued affirmation that the “current state of

³⁹⁷ Ibid., §62 (Emphasis in the original). The phrase “current time” indicates the continued openness to judicial review, by the Supreme Court, on the basis of the regular, periodic review, by Israeli state institutions of the length of this particular period of detention; and the continued potential for challenge by the Petitioners to the decision resulting from this review.

³⁹⁸ Ibid., §63.

³⁹⁹ Ibid.

⁴⁰⁰ Ibid.

⁴⁰¹ CmEDAW, *Concluding observations on the fourth and fifth periodic reports of Israel, adopted by the Committee at its forty-eighth session (17 January-4 February 2011) Addendum: Information provided by Israel on the follow-up to the concluding observations of the Committee*, 2013 CEDAW/C/ISR/CO/5/Add.1

international law and state-practice worldwide” entails that the “two systems-of-law [international humanitarian law and international human rights law], which are codified in separate instruments, nevertheless remain distinct and apply in different circumstances”.⁴⁰² In addition, the absence of an explicit Israeli declaration of the extraterritorial application of CEDAW, indicates that “it does not apply, nor was it intended to apply, to areas outside its national territory”.⁴⁰³ This position is reaffirmed in the most recent, *sixth Country Report*.⁴⁰⁴

The position of the CmEDAW, which is also that of this Report, is that, the foundation of the Israeli denial of extraterritorial applicability of CEDAW “is contrary to the position of the Committee and other treaty bodies, including the Human Rights Committee, the Committee on Economic, Social and Cultural Rights, the Committee against Torture and the Committee on the Elimination of Racial Discrimination, and the International Court of Justice”.⁴⁰⁵ Thus, that CEDAW is of immediate and direct extraterritorial application, as an international legal instrument of international human rights law, to the OPT, and to which Israeli, as the Occupying Power, is obliged to “give full effect”.⁴⁰⁶ On this basis, the Israeli State practice of administrative detention in the OPT is held to be open to evaluation for its degree of compliance with the relevant provisions of CEDAW.⁴⁰⁷ Article 1 of CEDAW defines discrimination against women as

“any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.”⁴⁰⁸

The definition is accompanied, under Article 2, by the State Party’s condemnation of the discrimination against women “in all its forms” and the concomitant obligation to “a general obligation, under Article 2, “to pursue by all appropriate means and without delay a policy of eliminating discrimination against women”. The general obligation is then expressed as the duty to undertake the more specific obligations under Article 2(a)-(g). In particular, Article 2(c) requires the State Party “to establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination”; and Article 2(d) requires the State Party to “refrain from engaging in any act or practice of discrimination

⁴⁰² Ibid., p. 2.

⁴⁰³ Ibid.

⁴⁰⁴ CmEDAW, *Sixth periodic report of Israel 2017*, CEDAW/C/ISR/6, §8.

⁴⁰⁵ CmEDAW, *Concluding observations on the sixth periodic report of Israel*, 2017 CEDAW/C/ISR/CO/6, §14.

⁴⁰⁶ Ibid., §15.

⁴⁰⁷ In relation to the State practice of administrative detention, the provisions of CEDAW, significantly enhance the State’s specific obligations to women, as Occupying Power, under Article 27 of the Fourth Geneva Convention which provides that “Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault”; and, under the fundamental guarantees of Article 75 (1) of Additional Protocol 1, “In so far as they are affected by a situation referred to in Article 1 of this Protocol, persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Protocol shall be treated humanely in all circumstances and shall enjoy, as a minimum, the protection provided by this Article without any adverse distinction based upon race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria. Each Party shall respect the person, honour, convictions and religious practices of all such persons”. The further prohibitions and obligations under Article 75(2)-(6) are also effectively enhanced by the provisions of CEDAW.

⁴⁰⁸ Article 1 CEDAW.

against women and to ensure that public authorities and institutions shall act in conformity with this obligation”. The obligations under Article 2, are supplemented by Article 15(1), which requires the State Party to “accord to women equality with men before the law”; and these obligations, under Article 2 and Article 15, are accompanied by the obligation, under Article 24, of the State Party to “adopt all necessary measures at the national level aimed at achieving the full realization of the rights recognized in the present Convention”.

The CmEDAW, in *General Recommendation No. 33 on Women’s Access to Justice*⁴⁰⁹, in 2015, has provided detailed guidance on the application of CEDAW to civil and criminal justice systems and the relevant obligations of State Parties to ensure compliance with the provisions of CEDAW. The scope of the General recommendation is intentionally broad encompassing “the procedures and quality of justice for women at all levels of justice systems, including specialized and quasi-judicial mechanisms”.⁴¹⁰ The broad scope is complimented by the General recommendation’s definition of “all references to “women” [which] should be understood to include women and girls, unless otherwise specifically noted”.⁴¹¹

The evaluative emphasis of the General recommendation is upon the quality of justice systems for women. The notion of quality extends to the entirety of the stages of the particular process and, therefore, in relation to administrative detention, includes procedures of arrest, charge, detention and review. Thus, State Parties, must ensure that justice systems “adhere to international standards of competence, efficiency, independence and impartiality, as well as to international jurisprudence”.⁴¹² This obligation is combined with the further obligation to

“[p]rotect women complainants, witnesses, defendants and prisoners from threats, harassment and other forms of harm, before, during and after legal proceedings and provide the budgets, resources, guidelines and monitoring and legislative frameworks necessary to ensure that protective measures function effectively”.⁴¹³

An integral aspect of the quality of the justice system of a State Party is the provision of “legal aid, advice and representation” in “judicial and quasi-judicial processes in all fields of law”.⁴¹⁴ This obligation requires that State Parties

“[i]nstitutionalize systems of legal aid and public defence that are accessible, sustainable and responsive to the needs of women, ensure that such services are provided in a timely, continuous and effective manner at all stages of judicial or quasi-judicial proceedings..., and ensure the unhindered access of legal aid and public defence providers to all relevant documentation and other information, including witness statements”.⁴¹⁵

The insistence upon these procedural and substantive elements, flowing from the notion of the quality of a justice system, is combined with the recognition of the presence, within a

⁴⁰⁹ CmEDAW, *General recommendation No. 33 on women’s access to justice*, 2015 CEDAW/C/GC/33.

⁴¹⁰ Ibid., §4.

⁴¹¹ Ibid., §1.

⁴¹² Ibid., §18(a).

⁴¹³ Ibid., §18(g). This recommendation is supplemented by the recommendations, under §19, for access for women to a full range of judicial and non-judicial remedies; and, under §20, for State Parties to monitor the compliance with these recommendations.

⁴¹⁴ Ibid., §36.

⁴¹⁵ Ibid., §37(a).

justice system, of the phenomenon of secondary victimization of women. This arises from the “lack of gender-sensitive, non-custodial alternatives to detention, a failure to meet the specific needs of women in detention and an absence of gender-sensitive monitoring and independent review mechanisms”.⁴¹⁶ The presence of secondary victimization of women is held to affect “their access to justice, owing to their heightened vulnerability to mental and physical abuse and threats during arrest, questioning and detention”.⁴¹⁷

This concern, embedded in the notion of quality, leads to the explicit recommendation that State Parties “use preventive detention as a last resort and for as short a time as possible, and avoid preventive or post-trial detention for petty offences...”.⁴¹⁸

The General recommendation informs the 2017 CmEDAW *Concluding observations on the sixth periodic report of Israel*.⁴¹⁹ The focus of the Concluding observations is upon two elements of the process of administrative detention in the OPT: the context in which arrests of women and girls are made and the length and place of administrative detention of women and girls. In regard to the context of arrests, the decision, by Israeli security forces, to undertake night raids is considered to “disproportionately affect women and girls”, and, reiterating its *Concluding observations on the fourth and fifth periodic reports of Israel* of 2011⁴²⁰, it considers that this predominant practice of the Israeli security forces will only remain compatible with CEDAW to the extent that each decision to undertake a night raid “complies with due process guarantees and rights under the Convention”.⁴²¹

In relation to women and girls upon whom an administrative detention order is imposed, and who are forcibly transferred to detention centres in Israel, the Concluding observations re-emphasize the recognition, in the General recommendation, of the *United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders* (the Bangkok Rules), as an essential compliment to CEDAW.⁴²² Thus, compliance with CEDAW requires that Israel “address prolonged administrative detention by ensuring that Palestinian women and girls who are detained are promptly brought before a judge”.⁴²³ In addition, CEDAW requires that Israel “improve conditions of detention and ensure access to justice and health care services”.⁴²⁴

The concerns and recommendations of the Concluding observations of the CmEDAW are confirmed and rearticulated by the *Report of the Special Rapporteur on violence against women, its causes and consequences, on her mission to Israel 2017*.⁴²⁵ The context of initial arrest is expanded, by the Rapporteur, to include those made in “the streets, [and at] Israeli checkpoints”, and, therefore, that the considerations of due process under CEDAW are also

⁴¹⁶ Ibid., §48. In support of this position, the Committee cites Communication No. 23/2009, *Abramova v. Belarus*, views adopted on 25 July 2011; and the *United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders* (the Bangkok Rules), adopted by the General Assembly in its resolution 65/229.

⁴¹⁷ Ibid., §48.

⁴¹⁸ Ibid., §51.

⁴¹⁹ Op. cit., the General recommendation is specifically acknowledged in §18.

⁴²⁰ CmEDAW, *Concluding observations on the fourth and fifth periodic reports of Israel 2011*, CEDAW/C/ISR/CO/5, §23.

⁴²¹ CmEDAW, *Concluding observations on the sixth periodic report of Israel 2017*, CEDAW/C/ISR/CO/6, §31(c).

⁴²² Ibid., §53.

⁴²³ Ibid.

⁴²⁴ Ibid.

⁴²⁵ *Report of the Special Rapporteur on violence against women, its causes and consequences, on her mission to Israel 2017*, A/HRC/35/30/Add.1.

applicable to these situations. In relation to the context of night raids, their disproportionate affect upon women and children, is heightened by the Rapporteur's finding that "beatings, insults, threats and sexual harassment were reported to be common practices as well as intrusive body searches... as punitive measures".⁴²⁶

At the stage of the arrival of a woman or girl at an "interrogation or detention centre", the Rapporteur states that "female Palestinian detainees are routinely not informed of their rights and the reasons of their detainment. Often, they are denied attorney access and kept for several days or months under interrogation".⁴²⁷ The imposition of an administrative detention order derives from a legislative framework which, for the Rapporteur, "allows indefinite detention of detainees on secret information without laying down the charges or the chance to stand trial".⁴²⁸

The conditions and treatment of women and girls at both interrogation and detentions centres is also a specific focus of attention of the Rapporteur. In these places of detention, torture and other forms of ill-treatment are considered to be systematically embedded in the institutional practices of these centres. The phenomena of "beatings, insults, threats and sexual harassment were reported to be common practices as well as intrusive body searches, which often occur before and after court hearings"⁴²⁹, are combined with a lack of access to specialized medical care and "the absence of trained Arabic speaking female medical specialists".⁴³⁰

9 The Convention on the Rights of the Child and the Optional Protocol thereto on the involvement of children in armed conflict

Israel signed, in 1990, and ratified, in 1991, the *United Nations Convention on the Rights of the Child* (CRC). Israel has also signed, in 2001, and ratified, in 2008, the *Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict* (OPCRC). The rights and obligations, under the CRC and the Optional Protocol, are, under Article 43 of CRC, accompanied by the establishment of the *UN Committee on the Rights of the Child* (CmRC). Israel has neither signed nor ratified the *Optional Protocol to the Convention on the Rights of the Child on a communications procedure* and, therefore, excludes the operation of the individual complaints mechanism (Article 5), the inter-State communication procedure (Article 12), the CmRC's capacity to initiate the inquiry procedure for grave or systematic violations (Article 13) and the CmRC's capacity to impose interim measures (Article 6). Thus, the monitoring function of the CmRC is confined to the evaluation of the progress in the implementation and guarantee of the rights and obligations contained in the regular periodic Report submitted by Israel, under Article 44 of the CRC, and under Article 8 of the OPCRC.

The Israeli Country Reports, under Article 44 of the CRC, are for the CmRC marked by a "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)".⁴³¹ The

⁴²⁶ Ibid., §54.

⁴²⁷ Ibid.

⁴²⁸ Ibid., §53.

⁴²⁹ Ibid., §54.

⁴³⁰ Ibid., §55.

⁴³¹ CmRC, *Concluding observations on the combined second to fourth periodic reports of Israel*, 2013, CRC/C/ISR/CO/2-4, §3.

refusal, in accordance with the Israeli position of the lack of extraterritorial applicability of legal instruments of international human rights law to the OPT, is rejected by the CmRC. The rejection, shared by this Report, extends also to the position of the CmRC with regard to the Israeli denial of the extraterritorial applicability of the OPCRC. The CmRC, in conformity with the common position of the other UN Human Rights Bodies, in the *Concluding observations on the second periodic report of Israel under the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict* 2010,

“reiterates that, in accordance with State responsibility in international law and under the prevailing circumstances, the provisions of the Convention and optional protocols apply to the benefit of the children of the occupied Palestinian territory, notably with regard to all conduct by the State party’s authorities or agents that affects the enjoyment of rights enshrined in the Convention. The Committee underlines the concurrent application of human rights and humanitarian law, as established by the International Court of Justice in its Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, and recalls the explicit references to humanitarian law in the Optional Protocol”.⁴³²

The position is reiterated, by the CmRC, in the *Concluding observations on the combined second to fourth periodic reports of Israel*, 2013, under Article 44 of the CRC.⁴³³

On the basis of the extraterritorial applicability of the CRC and OPCRC to the OPT, the CmRC provides, in its *General Comment No.24 (2019): on children’s rights in the child justice system*⁴³⁴, general guidance upon the rights and obligations, under the CRC, applicable to the Israeli State practice of administrative detention. For the CmRC, the

“[c]hildren differ from adults in their physical and psychological development. Such differences constitute the basis for the recognition of lesser culpability, and for a separate system with a differentiated, individualized approach”.⁴³⁵

The distinct juvenile justice system remains able to be guided by the “legitimate aim” of “preservation of public safety”, but this aim is qualified by the State Party’s “obligations to respect and implement the principles of child justice as enshrined in the Convention on the Rights of the Child”.⁴³⁶

The CmRC emphasizes that, despite the significant advances in juvenile justice since the previous 2007 General Comment, the situation still remains one in which

“State party reports indicate that many States parties still require significant investment to achieve full compliance with the Convention, particularly regarding prevention, early intervention, the development and implementation of diversion measures, a multidisciplinary

⁴³² *Consideration of reports submitted by States parties under article 8 of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict Concluding observations: Israel*, 2010 CRC/C/OPAC/ISR/CO/1, §4.

⁴³³ *Concluding observations on the combined second to fourth periodic reports of Israel*, Op. cit., §3.

⁴³⁴ CmRC, *General Comment No.24 (2019): on children’s rights in the child justice system* CRC/C/GC/24. This General Comment replaces the CmRC’s *General comment No. 10 (2007): Children’s Rights in Juvenile Justice* CRC/C/GC/10.

⁴³⁵ *Ibid.*, §2.

⁴³⁶ *Ibid.*, §3.

approach, the minimum age of criminal responsibility and the reduction of deprivation of liberty”.⁴³⁷

The General Comment of 2019 indicates that full compliance will be achieved through conformity with the aims and objectives of the Report. In relation to the State practice of administrative detention of juveniles, the aims and objectives can be considered to be contained in the following provisions:

- “(a) To provide a contemporary consideration of the relevant articles and principles in the Convention on the Rights of the Child, and to guide States towards a holistic implementation of child justice systems that promote and protect children’s rights;
- (b) To reiterate the importance of prevention and early intervention, and of protecting children’s rights at all stages of the system;
- (c) To promote key strategies for reducing the especially harmful effects of contact with the criminal justice system, in line with increased knowledge about children’s development, in particular:
 - (i) Setting an appropriate minimum age of criminal responsibility and ensuring the appropriate treatment of children on either side of that age;
 - (ii) Scaling up the diversion of children away from formal justice processes and to effective programmes;
 - (iii) Expanding the use of non-custodial measures to ensure that detention of children is a measure of last resort;
 - (iv) Ending the use of corporal punishment, capital punishment and life sentences;
 - (v) For the few situations where deprivation of liberty is justified as a last resort, ensuring that its application is for older children only, is strictly time limited and is subject to regular review;
- (d) To promote the strengthening of systems through improved organization, capacity-building, data collection, evaluation and research...”⁴³⁸

These aims and objectives are provided with further initial definition through the more detailed determination of the requirement under paragraph 6 (c)(i). Under Article 40(3) CRC, State parties are required to “establish a minimum age of criminal responsibility, but the article does not specify the age”.⁴³⁹ On the basis of the CmRC’s analysis of “[o]ver 50 States”, “following ratification of the Convention”, “the most common minimum age of criminal responsibility internationally is 14”.⁴⁴⁰ This generalized State practice is then combined with the relevant scientific findings of “developmental and neuroscience”⁴⁴¹ of the CmRC’s *General Comment No. 20*, in 2016, on the implementation of the rights of the child during adolescence.⁴⁴² From this combination, the CmRC

“commends States parties that have a higher minimum age, for instance 15 or 16 years of age, and urges States parties not to reduce the minimum age of criminal responsibility under any circumstances, in accordance with article 41 of the Convention”.⁴⁴³

⁴³⁷ Ibid., §4.

⁴³⁸ Ibid., §6.

⁴³⁹ Ibid., §21.

⁴⁴⁰ Ibid.

⁴⁴¹ Ibid., §22.

⁴⁴² CmRC, *General comment No. 20* (2016) on the implementation of the rights of the child during adolescence, CRC/C/GC/20.

⁴⁴³ Ibid., §22.

For the CmRC, “the setting of a minimum age of criminal responsibility at a reasonably high level is important”, however, “an effective approach also depends on how each State deals with children above and below that age”.⁴⁴⁴

Those juveniles defined as below the age of minimum criminal responsibility represent a group to whom the State is obliged to formulate and implement “a prevention strategy”.⁴⁴⁵ This “systemic approach to prevention also includes closing pathways into the child justice system through the decriminalization of minor offences”.⁴⁴⁶

The juveniles who are defined as above the minimum age of criminal responsibility, require the State Party, under Article 40 (3) (b) CRC, to establish and respond, “as appropriate”, through procedures which either avoid judicial proceedings or are sufficiently distinct from judicial proceedings for adults.⁴⁴⁷ For the CmRC,

“the measures generally fall into two categories:

- (a) Measures referring children away from the judicial system, any time prior to or during the relevant proceedings (diversion);
- (b) Measures in the context of judicial proceedings”.⁴⁴⁸

The wider conformity of these procedures with the CRC is determined by the degree to which “the child’s human rights and legal safeguards are fully respected and protected”.⁴⁴⁹

Diversion is to be the primary State response to juveniles above the minimum age of criminal responsibility “in the majority of cases”.⁴⁵⁰ States are obliged to “continually extend the range of offences for which diversion is possible” and “[o]pportunities for diversion should be available from as early as possible after contact with the system, and at various stages throughout the process”.⁴⁵¹ States are accorded discretion with regard to “the exact nature and content of measures of diversion, and to take the necessary legislative and other measures for their implementation”.⁴⁵² However, the CmRC specifies the fundamental, invariant elements which any State’s measure of diversion must adhere to in order to qualify as a genuine, non-judicial response.⁴⁵³

In those situations in which the State institutes judicial proceedings against a juvenile above the minimum age of criminal responsibility, “the principles of a fair and just trial are applicable”.⁴⁵⁴ The distinct procedural character of the juvenile justice proceedings is to be accompanied by “ample opportunities to apply social and educational measures, and to *strictly limit the use of deprivation of liberty*, from the moment of arrest, throughout the proceedings and in sentencing”.⁴⁵⁵

⁴⁴⁴ Ibid., §23.

⁴⁴⁵ Ibid., §9.

⁴⁴⁶ Ibid., §12.

⁴⁴⁷ Ibid., §13.

⁴⁴⁸ Ibid.

⁴⁴⁹ Ibid., §14.

⁴⁵⁰ Ibid., §16.

⁴⁵¹ Ibid.

⁴⁵² Ibid., §17.

⁴⁵³ Ibid., §18 (a)-(f)

⁴⁵⁴ Ibid., §19.

⁴⁵⁵ Ibid. (Emphasis added).

Article 40(2) of CRC formulates the principles of a fair and just trial in juvenile justice proceedings as a framework of rights and duties indicating the “minimum standards” to which the proceedings must adhere.⁴⁵⁶ In addition,

“ States parties should enact legislation and ensure practices that safeguard children’s rights from the moment of contact with the system, including at the stopping, warning or arrest stage, while in custody of police or other law enforcement agencies, during transfers to and from police stations, places of detention and courts, and during questioning, searches and the taking of evidentiary samples. Records should be kept on the location and condition of the child in all phases and processes”.⁴⁵⁷

The distinct framework of rights and duties – “minimum standards” – to which any juvenile justice proceedings are to adhere are further specified, in the main, in the subparagraphs of Article 40(2). The proceedings are to be founded upon the presumption of innocence of the juvenile in relation to which the prosecution bears the burden to prove the charge(s) beyond reasonable doubt.⁴⁵⁸ The presumption of innocence and the burden of proof are the corollary of “the fundamental right of the child to be heard in the context of child justice”.⁴⁵⁹ This right is composed of the “right to be heard directly”, from the “moment of contact”, and “the right to remain silent”, which if exercised, is without the capacity for an adverse inference to be drawn by the prosecution or judge.⁴⁶⁰

The presumption of innocence, the burden of proof and the right to be heard are complimented, under Article 40(2)(b)(iv) CRC, by the right to effective participation in the proceedings. For the CmRC, this entails that,

“a child needs to be supported by all practitioners to comprehend the charges and possible consequences and options in order to direct the legal representative, challenge witnesses, provide an account of events and to make appropriate decisions about evidence, testimony and the measure(s) to be imposed. Proceedings should be conducted in a language the child fully understands or an interpreter is to be provided free of charge. Proceedings should be conducted in an atmosphere of understanding to allow children to fully participate”.⁴⁶¹

The full exercise of the right to effective participation is dependent upon the recognition, within the proceedings, of the juvenile’s further rights to prompt and direct information of the charge(s)⁴⁶², to legal and/or other appropriate assistance⁴⁶³, to free assistance of an interpreter⁴⁶⁴, to decisions without delay and with the involvement of parents or guardians⁴⁶⁵, to freedom from compulsory self-incrimination⁴⁶⁶, to the presence and examination of

⁴⁵⁶ Ibid., §38. The section also emphasises that, in relation to these “minimum standards”, “States parties can and should try to establish and observe higher standards”.

⁴⁵⁷ Ibid., §41.

⁴⁵⁸ Ibid., §43 (Article 40 (2) (b) (i) CRC).

⁴⁵⁹ Ibid., §44 (Article 12 CRC).

⁴⁶⁰ Ibid., §45.

⁴⁶¹ Ibid., §46.

⁴⁶² Ibid., §§47-48 (Article 40 (2) (b) (ii) CRC).

⁴⁶³ Ibid., §§49-53 (Article 40 (2) (b) (ii) CRC).

⁴⁶⁴ Ibid., §§64-65 (Article 40 (2) (b) (vi) CRC).

⁴⁶⁵ Ibid., §§54-57 (Article 40 (2) (b) (iii) CRC).

⁴⁶⁶ Ibid., §§58-60 (Article 40 (2) (b) (iv) CRC).

witnesses⁴⁶⁷ and, in relation to the judicial determination of the case, the right of review or appeal.⁴⁶⁸

Thus, the “minimum standards” of the CRC require the recognition and adoption of additional procedural rights for juveniles within the military court system in regard to the imposition of an administrative detention order. In this manner, the CRC requires the State Party to effectively transform the military court into a judicial procedure which embodies these essential requirements of a juvenile justice system. In addition, for the CmRC, these “minimum standards” cannot never be fully realized within a system of military tribunals. For,

“[t]here is an emerging view that trials of civilians by military tribunals and State security courts contravene the non-derogable right to a fair trial by a competent, independent and impartial court. This is an even more concerning breach of rights for children, who should always be dealt with in specialized child justice systems. The Committee has raised concerns about this in several concluding observations”.⁴⁶⁹

Hence, in order to conform with the obligations of the CRC, the implementation of a specialized child justice system requires the combination of these procedural guarantees and a civilian court.

The specific requirements of a child justice system extend beyond the judicial proceedings, commencing from the first contact of the juvenile with law enforcement authorities and encompassing treatment in, and conditions of, detention both prior to, and after, any judicial proceedings. For the CmRC, Article 37 CRC

“contains important principles for the use of deprivation of liberty, the procedural rights of every child deprived of liberty and provisions concerning the treatment of and conditions for children deprived of their liberty”.⁴⁷⁰

The protections and guarantees of Article 37 CRC are, however, to be understood in a context of “providing correct procedures and conditions in the minority of cases where deprivation of liberty is deemed necessary”.⁴⁷¹ This understanding is the corollary of the obligation upon State Parties to “immediately embark on a process to reduce reliance on detention to a minimum”.⁴⁷²

The minimal recourse to deprivation of liberty and detention in relation to juveniles is to be governed by the following leading principles:

⁴⁶⁷ Ibid., §61 (Article 40 (2) (b) (iv) CRC).

⁴⁶⁸ Ibid., §§62-63 (Article 40 (2) (b) (v) CRC).

⁴⁶⁹ Ibid., §96.

⁴⁷⁰ Ibid., §82.

⁴⁷¹ Ibid., §84.

⁴⁷² Ibid., §83. The emphasis results from the Committee directing “the attention of States parties to the 2018 report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, in which the Special Rapporteur noted that the scale and magnitude of children’s suffering in detention and confinement called for a global commitment to the abolition of child prisons and large care institutions, alongside scaled-up investment in community-based services (A/HRC/38/36, para. 53).” (Ibid., §82).

“(a) the arrest, detention or imprisonment of a child is to be used only in conformity with the law, only as a measure of last resort and for the shortest appropriate period of time; and (b) no child is to be deprived of his or her liberty unlawfully or arbitrarily. Arrest is often the starting point of pretrial detention, and States should ensure that the law places clear obligations on law enforcement officers to apply article 37 in the context of arrest. States should further ensure that children are not held in transportation or in police cells, except as a measure of last resort and for the shortest period of time, and that they are not held with adults, except where that is in their best interests. Mechanisms for swift release to parents or appropriate adults should be prioritized”.⁴⁷³

With regard to arrest and detention for the purposes of interrogation, Article 37 (d) CRC provides the relevant procedural rights. The CmRC re-emphasizes the exceptional character of a decision to arrest or detain a juvenile by indicating that “no child be deprived of liberty unless there are genuine public safety or public health concerns”.⁴⁷⁴ This is reinforced by urging “State parties to fix an age limit below which children may not legally be deprived of their liberty, such as 16 years of age”.⁴⁷⁵

For juveniles who are arrested and detained, Article 37(e) CRC accords them “the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action”.⁴⁷⁶ The CmRC further specifies that each juvenile who is

“arrested and deprived of his or her liberty should be brought before a competent authority within 24 hours to examine the legality of the deprivation of liberty or its continuation. The Committee also recommends that State parties ensure that pretrial detention is reviewed regularly with a view to ending it. In cases where conditional release of the child at or before the first appearance (within 24 hours) is not possible, the child should be formally charged with the alleged offences and be brought before a court or other competent, independent and impartial authority or judicial body for the case to be dealt with as soon as possible but not later than 30 days after pretrial detention takes effect”.⁴⁷⁷

The procedural regulation of the decision to arrest and to detain are accompanied by a comprehensive “right to challenge the legality of the deprivation of liberty”.⁴⁷⁸ For the CmRC, this “includes not only the right to appeal court decisions, but also the right of access to a court for review of an administrative decision (taken by, for example, the police, the prosecutor and other competent authorities)”.⁴⁷⁹ In relation to appeals and reviews, State parties “should set short time limits for the finalization of appeals and reviews to ensure prompt decisions, as required by the Convention”.⁴⁸⁰

Article 37(c) CRC specifies the treatment in, and conditions of, detention for juveniles. The distinct character of a system of juvenile justice entails that, whether the deprivation of

⁴⁷³ Ibid., §85.

⁴⁷⁴ Ibid., §89.

⁴⁷⁵ Ibid.

⁴⁷⁶ Ibid.

⁴⁷⁷ Ibid., §90.

⁴⁷⁸ Ibid., §91.

⁴⁷⁹ Ibid.

⁴⁸⁰ Ibid.

liberty is prior to, or after, judicial proceedings, juveniles “are to be separated from adults”.⁴⁸¹ The separation requires that State parties “establish separate facilities for children deprived of their liberty that are staffed by appropriately trained personnel and that operate according to child-friendly policies and practices”.⁴⁸²

The juvenile who is deprived of liberty “has the right to maintain contact with his or her family through correspondence and visits”.⁴⁸³ This, in turn, requires that the State activity facilitate the exercise of this right by ensuring that the juvenile is “placed in a facility as close as possible to his or her family’s place of residence”.⁴⁸⁴ Whilst the CmRC recognizes that “[e]xceptional circumstances that may limit this contact”, these “should be clearly described in law and not be left to the discretion of the authorities”.⁴⁸⁵

The wider character of the treatment in, and conditions of detention, are to be regulated by the State party’s observance of “the following principles and rules”⁴⁸⁶:

- “(a) Incommunicado detention is not permitted for persons below the age of 18;
- (b) Children should be provided with a physical environment and accommodation conducive to the reintegrative aims of residential placement. Due regard should be given to their needs for privacy, for sensory stimuli and for opportunities to associate with their peers and to participate in sports, physical exercise, arts and leisure-time activities;
- (c) Every child has the right to education suited to his or her needs and abilities, including with regard to undertaking exams, and designed to prepare him or her for return to society; in addition, every child should, when appropriate, receive vocational training in occupations likely to prepare him or her for future employment;
- (d) Every child has the right to be examined by a physician or a health practitioner upon admission to the detention or correctional facility and is to receive adequate physical and mental health care throughout his or her stay in the facility, which should be provided, where possible, by the health facilities and services of the community;
- (e) The staff of the facility should promote and facilitate frequent contact by the child with the wider community, including communications with his or her family, friends and other persons, including representatives of reputable outside organizations, and the opportunity to visit his or her home and family. There is to be no restriction on the child’s ability to communicate confidentially and at any time with his or her lawyer or other assistant;
- (f) Restraint or force can be used only when the child poses an imminent threat of injury to himself or herself or others, and only when all other means of control have been exhausted. Restraint should not be used to secure compliance and should never involve deliberate infliction of pain. It is never to be used as a means of punishment. The use of restraint or force, including physical, mechanical and medical or pharmacological restraints, should be under close, direct and continuous control of a medical and/or psychological professional. Staff of the facility should receive training on the applicable standards and members of the staff who use restraint or force in violation of the rules and standards should be punished appropriately. States should record, monitor and evaluate all incidents of restraint or use of force and ensure that it is reduced to a minimum;

⁴⁸¹ Ibid., §92.

⁴⁸² Ibid.

⁴⁸³ Ibid., §94.

⁴⁸⁴ Ibid.

⁴⁸⁵ Ibid.

⁴⁸⁶ Ibid., §95.

(g) Any disciplinary measure is to be consistent with upholding the inherent dignity of the child and the fundamental objectives of institutional care. Disciplinary measures in violation of article 37 of the Convention must be strictly forbidden, including corporal punishment, placement in a dark cell, solitary confinement or any other punishment that may compromise the physical or mental health or well-being of the child concerned, and disciplinary measures should not deprive children of their basic rights, such as visits by legal representative, family contact, food, water, clothing, bedding, education, exercise or meaningful daily contact with others;

(h) Solitary confinement should not be used for a child. Any separation of the child from others should be for the shortest possible time and used only as a measure of last resort for the protection of the child or others. Where it is deemed necessary to hold a child separately, this should be done in the presence or under the close supervision of a suitably trained staff member, and the reasons and duration should be recorded;

(i) Every child should have the right to make requests or complaints, without censorship as to the substance, to the central administration, the judicial authority or any other proper independent authority, and to be informed of the response without delay. Children need to know their rights and to know about and have easy access to request and complaints mechanisms;

(j) Independent and qualified inspectors should be empowered to conduct inspections on a regular basis and to undertake unannounced inspections on their own initiative; they should place special emphasis on holding conversations with children in the facilities, in a confidential setting;

(k) States parties should ensure that there are no incentives to deprive children of their liberty and no opportunities for corruption regarding placement, or regarding the provision of goods and services or contact with family”.⁴⁸⁷

The conformity of the Israeli military governance of the OPT with the CRC, and, in particular, the degree of conformity of the Israeli State practice of administrative detention with the requirements of a distinct system of juvenile justice, commences from the minimum age of criminal responsibility and upper age-limits for juvenile justice.

Whilst the legal age of majority in Israel is attained at 18 years⁴⁸⁸, pursuant to Military Order No. 132, Palestinian children in the OPT were defined as individuals under 16 years of age. The CmRC, in the *Concluding observations on the initial report submitted by Israel, 2002*, considered that the latter provision constituted a measure of discrimination and recommended that it be rescinded.⁴⁸⁹ By Military Order No. 1676 of September 2011, Israel raised the age of majority in the military courts from 16 to 18 years. The CmRC, in the *Concluding observations on the combined second to fourth periodic reports of Israel, 2013*, reported however, that, at the time of publication, the new regulation had “not been fully applied in practice”.⁴⁹⁰

The CmRC’s Concluding Observations on the periodic reports of Israel indicate the extent to which the relevant provisions of the CRC, as part of a distinct juvenile justice system, are evident in the administrative detention of juveniles in the OPT.

⁴⁸⁷ Ibid.

⁴⁸⁸ Capacity and Guardianship Law, 5722-1962, 16 Laws of the State of Israel (LSI) 106 (5722-1961/62).

⁴⁸⁹ CmRC, *Concluding observations on the initial report submitted by Israel, 2002*, CRC/C/121, §§ 574-575.

⁴⁹⁰ CmRC, *Concluding observations on the combined second to fourth periodic reports of Israel, 2013*, CRC/C/ISR/CO/2-4, § 19.

In the Concluding Observations on the first periodic report of Israel in 2002⁴⁹¹, the Committee identifies the Israeli State practice of administrative detention as one which involves potential breaches of the CRC.⁴⁹² The process of arrest and interrogation of Palestinian juveniles has given rise, at the time of the first periodic report, to “allegations and complaints of inhuman or degrading practices and of torture and ill-treatment of Palestinian children by police officers during arrest and interrogation and in places of detention”.⁴⁹³ These allegations lead the Committee to reiterate the negative and positive character of the obligations under the CRC, and, thus, to ensure the establishment and enforcement of policies and practices of arrest, interrogation and detention of juveniles which adhere to the requirements of the CRC.⁴⁹⁴ This set of institutional practices and procedures should be accompanied by an effective mechanism of investigation and prosecution of complaints of “torture and inhuman or degrading treatment or punishment” alleged against Israeli State personnel.⁴⁹⁵ This procedure of investigation and prosecution is to be one in which the juvenile victim is provided “with opportunities for adequate compensation, recovery and social reintegration”.⁴⁹⁶

More than a decade later, in 2013, the concerns with regard to practices of arrest and interrogation of Palestinian juveniles in the OPT are repeated in the Concluding Observations on the second to fourth periodic reports of Israel.⁴⁹⁷ The Committee emphasizes that, despite “repeated concerns expressed by treaty bodies, special procedures mandate holders and United Nations agencies”⁴⁹⁸, instances of torture and other ill-treatment continue to be regularly alleged and subject to an absence of systematic and genuine investigation and prosecution.⁴⁹⁹ In particular, the Committee notes that Palestinian juveniles in the OPT are

“(a) Routinely arrested in the middle of the night by soldiers shouting instructions at the family and taken hand-tied and blindfolded to unknown destination without having the possibility to say good bye to their parents who rarely know where their children are taken;
(b) Systematically subject to physical and verbal violence, humiliation, painful restraints, hooding of the head and face in a sack, threatened with death, physical violence, and sexual assault against themselves or members of their family, restricted access to toilet, food and water. These crimes are perpetrated from the time of arrest, during transfer and interrogation, to obtain a confession but also on an arbitrary basis as testified by several Israeli soldiers as well as during pretrial detention;

⁴⁹¹ *Concluding observations on the first periodic report of Israel*, CRC/C/15/Add.195, 9 October 2002.

⁴⁹² The treatment and detention of Palestinian juveniles within the OPT has been the focus of sustained investigation by Defence of Children International in the following reports: *No Way to Treat a Child, Palestinian Children in the Israeli Military Detention System*, 2016, available at https://d3n8a8pro7vhm.cloudfront.net/dcipalestine/pages/1527/attachments/original/1460665378/DCIP_NWT_TAC_Report_Final_April_2016.pdf?1460665378; *Bound, Blindfolded and Convicted: Children held in military detention*, 2012, available at https://d3n8a8pro7vhm.cloudfront.net/dcipalestine/pages/1294/attachments/original/1433970803/DCIP_Bound_Blindfolded_and_Convicted_2012.pdf?1433970803; *Palestinian child prisoners: The systematic and institutionalised ill-treatment and torture of Palestinian children by Israeli authorities*, 2009, available at https://d3n8a8pro7vhm.cloudfront.net/dcipalestine/pages/1298/attachments/original/1433987832/DCIP_childprisoner_report.pdf?1433987832.

⁴⁹³ *Concluding observations on the first periodic report of Israel*, Op. cit., §36.

⁴⁹⁴ *Ibid.*, §37(a).

⁴⁹⁵ *Ibid.*, §37(b).

⁴⁹⁶ *Ibid.*, §37(c).

⁴⁹⁷ *Concluding observations on the second to fourth periodic reports of Israel*, Op. cit.

⁴⁹⁸ *Ibid.*, §35.

⁴⁹⁹ *Ibid.*

(c) Held in solitary confinement, sometimes for months”.⁵⁰⁰

The failure to refrain from these practices is exacerbated by the failure to implement the positive obligations of investigation and prosecution of the alleged perpetrators and of ensuring “the physical and psychological recovery as well as social reintegration assistance to all children living in the OPT who have been victims of torture and ill-treatment”.⁵⁰¹

The Committee, in the Concluding Observations on first periodic report, also expresses concerns with the wider character of the administration of the juvenile justice system in the OPT. These relate, in particular, to the differential application of “law concerning children” to juveniles in Israel compared with those in the OPT, and the distinct practices of arrest, interrogation and incommunicado detention in relation to Palestinian juveniles in the OPT.⁵⁰² The existence of this differential application of law and the distinct practices of arrest, interrogation and detention are indicative of potential breaches of the underlying principles of Articles 37, 39 and 40 of the CRC⁵⁰³ as well as the presumption “that deprivation of liberty is only used as a measure of last resort, for the shortest possible time”.⁵⁰⁴

The focus of the Committee upon the administration of juvenile justice in the OPT extends to the necessity to ensure procedural guarantees of legal representation and the capacity for a Palestinian juvenile to make an individual complaint which will be the subject of full and independent investigation.⁵⁰⁵

The Committee considers that the rights and duties flowing from the provisions of the CRC and other relevant international legal instruments should be accorded primacy in the legal framework relating to juveniles created by Israeli system of military orders. The primacy of these international legal instruments entails that Israeli should “[r]escind all provisions in the military orders which violate international standards on the administration of juvenile justice”.⁵⁰⁶

The broader concerns of the Concluding Observations of the first periodic report with regard to the administration of juvenile justice in the OPT are re-emphasized in the Concluding Observations on the second to fourth periodic reports of Israel.⁵⁰⁷ In regard to manner in which the Israeli State practice of administrative detention is imposed upon Palestinian juveniles, the Committee

“strongly urges the State party to guarantee that juvenile justice standards apply to all children without discrimination... The Committee also urges the State party to dismantle the institutionalized system of detention and use of torture and ill-treatment of Palestinian children at all stages of the judicial procedure. All those who have been involved in this illegal system should be brought to justice and punished if found guilty”.⁵⁰⁸

The systematic failings of the judicial elements of the administration of juvenile justice in the OPT are compounded by the treatment and conditions of detention of juveniles. The

⁵⁰⁰ Ibid.

⁵⁰¹ Ibid., §36(e).

⁵⁰² *Concluding observations on the first periodic report of Israel*, Op. cit., §62(a)-(c).

⁵⁰³ Ibid., §63(a).

⁵⁰⁴ Ibid., §63(b).

⁵⁰⁵ Ibid., §63(c).

⁵⁰⁶ Ibid., §63(e).

⁵⁰⁷ *Concluding observations on the second to fourth periodic reports of Israel*, Op. cit., §§73-74.

⁵⁰⁸ Ibid., §74.

Committee considers that a significant proportion of Palestinian juveniles from the OPT, who are transferred to detention facilities in Israel⁵⁰⁹, are

“detained in overcrowded cells together with adults in poor conditions, with poor ventilation and no access to natural light. Poor quality and inadequate amounts of food, harsh treatment by prison officials and deprivation of any form of education add to their plights”⁵¹⁰.

Thus, the combined observations of the two Concluding Observations, indicate that, in relation to Palestinian juveniles in the OPT, the Israel State practice of administrative detention is fundamentally at variance with the rights conferred upon Palestinian juveniles and the obligations imposed upon Israel by the provisions of the CRC.

The position of the Committee is reaffirmed in the Concluding Observations on the periodic Reports of Israel under the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict. The Concluding observations on the initial report by Israel⁵¹¹, in 2002, focus upon allegations of the widespread use of torture and other ill-treatment of Palestinian juveniles “during arrest and interrogation and in places of detention”⁵¹². This is accompanied by the emphasis placed upon the wider failings of the administration of juvenile justice in the OPT, in which the Committee raises concerns in relation to:

- “(a) The differential application of law concerning children, such as with respect to the definition of a child in Israel and in the occupied Palestinian territories;
- (b) The practice relating to the arrest and interrogation of children in the occupied Palestinian territories;
- (c) Military Orders Nos. 378 and 1500, as well as all other military orders which may allow prolonged incommunicado detention of children, and which do not provide due process guarantees, access to legal assistance and family visits”⁵¹³.

The Committee reiterates and expands upon its concerns in the subsequent Concluding Observations of 2010.⁵¹⁴ In particular, the provisions of Military Orders Nos. 378 and 1500 remained in force, and, therefore,

“continue to be in violation of international standards on the administration of juvenile justice and the right to a fair trial. The Committee further notes with concern information regarding attempts to incorporate juvenile justice standards within military courts”⁵¹⁵.

The Israel State practice of administrative detention is specifically indicated to be an entirely inappropriate form of procedure and sanction within the framework of the administration of

⁵⁰⁹ The Committee also holds that the Palestinian juveniles who “are transferred out of the OPT and serve their detention and sentences inside Israel”, represents a “breach of article 76 of the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War” (Ibid., §73(g)).

⁵¹⁰ Ibid., §73(g).

⁵¹¹ *Concluding Observations on the periodic Reports of Israel under the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict: Initial Report of Israel, 2002*, CRC/C/15/Add.195.

⁵¹² Ibid., §36.

⁵¹³ Ibid., §62.

⁵¹⁴ *Consideration of reports submitted by States parties under article 8 of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict Concluding observations: Israel, 2010* CRC/C/OPAC/ISR/CO/1.

⁵¹⁵ Ibid., §33.

juvenile justice. The Committee urges Israel to modify the administration of juvenile justice in the OPT in order that it does “not subject children to administrative detention”.⁵¹⁶

The most recent Report, by the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967⁵¹⁷, is devoted, in the first of its two parts, to “the human rights situation of children in the West Bank and in Gaza”.⁵¹⁸ In relation to the West Bank, and the Israeli State practice of administrative detention, the Special Rapporteur reiterates the “previously expressed concern about Israel’s use of administrative detention in contravention of international legal obligations, as well as the arrest and detention of children”.⁵¹⁹

The position of the Committee and the Special Rapporteur, is reinforced by the Opinions of the Working Group on Arbitrary Detention, over the past ten years, relating to individual Palestinian minors subject to administrative detention.⁵²⁰ The Working Group holds that, in each situation, the procedure of administrative detention, from the point of arrest to the confirmation, and any further extension of, the administrative detention order, involves significant and substantial breaches of the Fourth Geneva Convention, the ICCPR and the CRC.

This, in turn, leads the Working Group to conclude that, in each case, the administrative detention of the minor is a form of arbitrary detention, under Category III of the Working Group’s definition of the forms of arbitrary detention.⁵²¹

⁵¹⁶ Ibid., §35(b).

⁵¹⁷ *Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967*, 15 March 2018, A/HRC/37/75.

⁵¹⁸ Ibid., §6.

⁵¹⁹ Ibid., §61, citing the *Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967*, 19 October 2016, A/71/554, §§18-24.

⁵²⁰ Human Rights Council Working Group on Arbitrary Detention *Opinion No. 73/2018* A/HRC/WGAD/2018/73; *Opinion No. 3/2017* A/HRC/WGAD/2017/3; *Opinion No. 24/2016* A/HRC/WGAD/2016/24;

⁵²¹ The Working Group defines arbitrary detention, under Category III, as situations of deprivation of liberty “[w]hen the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character” (Human Rights Council, *Methods of work of the Working Group on Arbitrary Detention*, A/HRC/36/38, §8(c)). These findings of the Working Group are corroborated by the 2012 Report by 9 independent UK legal practitioners from the fields of human rights, crime and child welfare, *Children in Military Custody*, available at http://www.childrenmilitarycustody.org.uk/wp-content/uploads/2012/03/Children_in_Military_Custody_Full_Report.pdf; the 2018 Lawyers for Palestinian Human Rights, *Briefing on Israel's military detention of Palestinian children living in the occupied Palestinian territory*, available at www.lphr.org.uk/wp-content/uploads/2018/02/LPHR-full-briefing-on-Israel's-military-detention-of-Palestinian-children-living-in-the-occupied-Palestinian-territory-Feb-2018.pdf; and the 2018 B’Tselem Report, *Minors in Jeopardy Violation of the Rights of Palestinian Minors by Israel’s Military Courts*, available at www.btselem.org/sites/default/files/publications/201803_minors_in_jeopardy_eng.pdf.

PART IV

The Compliance of the Israeli State practice of administrative detention with International Humanitarian Law and International Human Rights Law: The Main Findings.

This section provides a summary and concluding statement of the findings of the preceding parts of the Report. It recapitulates the central breaches of international humanitarian law and violations of international human rights law that arise from the Israeli State practice of administrative detention.

1 International Humanitarian Law

The territory designated as the OPT is under Israeli military occupation arising from an international armed conflict. The Israeli military occupation is considered to be regulated by international humanitarian law. The provisions of the Hague Regulations of 1907, the Fourth Geneva Convention and Article 75 of Additional Protocol I to the Geneva Conventions have acquired the status of rules of international customary law which apply *de jure* to all actions of Israeli in connection with the international armed conflict in the OPT.

The Israeli State practice of administrative detention of civilians in the OPT involves the violation of the requirements of international humanitarian law. The initial stage at which the violation arises relates to the requirements specified under Article 78(1) of the Fourth Geneva Convention. Rather than being an exceptional response to threats to Israel's military security, administrative detention has become the ordinary, unexceptional means by which to respond to any form of disturbance or risk posed by the civilian population in the OPT.⁵²² The grounds upon which individuals are arrested, and initially detained, are generally formulated in broad terms, with no indication offered as to either the nature of the threat that justified the deprivation of liberty or the area in which security was endangered by the detainee.⁵²³ Thus, in these instances, the imperative reasons of security, under Article 78(1), are never provided with a specific correlation to the situation of the individual detainee.

The protection afforded by Article 78(1) is enhanced by Article 75(3) of Additional Protocol I to the Geneva Conventions. Under Article 75(3), “[a]ny person arrested, detained or interned for actions related to the armed conflict shall be informed promptly, in a language he [she] understands, of the reasons why these measures have been taken”. This further protection commences from the arrest of the individual civilian and requires that the detainee be informed of the reasons for the arrest and subsequent detention. Hence, it prohibits the formulation of the grounds for arrest and detention in broad terms, with no indication offered to the detainee of either the nature of the threat that justified the deprivation of liberty or the area in which security was endangered by the detainee.

The enhanced protection provided by Article 75(3) of Additional Protocol I to the Geneva Conventions, at the stage of the arrest and initial detention, extends to the subsequent stages of the “regular procedure”, required by Article 78(2) of the Fourth Geneva Convention, through which an administrative detention order is imposed and subject to periodic review. For a central aspect of the effectiveness of review proceedings is the right to be informed of the reasons for detention and access to the evidence on which administrative detention orders are based. Lack of knowledge of the reasons for internment is compounded by the non-disclosure of the evidence to either the detainee or to his or her lawyer due to its classification

⁵²² See, also, UN General Assembly, *Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967*, A/71/554, 19 October 2016, §§ 20-21.

⁵²³ Addameer Report 2016, *Administrative Detention in the OPT: A Legal Analysis Report*, pp. 36-37, available at http://www.addameer.org/sites/default/files/publications/administrative_detention_analysis_report_2016.pdf.

as confidential.⁵²⁴ Thus, the capacity of detainees' and defence lawyers' right to challenge evidence is significantly constrained, with a lawyer being prevented, in effect, from introducing evidence to rebut the grounds for arrest or the evidence on which they are based, given that the allegations against the detainee are unknown.⁵²⁵ Secret evidence is presented to the military court judges by the State attorney, in most cases, during an *in camera* hearing, which may not be attended by any legal representative of the detainee. The judge, on the basis of the potential harm to security of the region or public security, can then admit the evidence in the absence of the detainee or her/his legal representative, and is under no obligation to disclose the evidence to them.⁵²⁶

The overwhelming majority of decisions are based on secret evidence and no release order has ever been issued in respect of detainees from the OPT.⁵²⁷ In the absence of an adversarial structure, it is unrealistic to expect that, in place of defence lawyers, judges will act as defence lawyers given that, as explicitly acknowledged by both the Israel Supreme Court and State attorneys, *in camera* proceedings create a systematic, "trust-based relationship" between them, in which judges neither actively challenge the strength of the evidence against the detainee nor disagree with the State representatives' view.⁵²⁸

The "regular procedure", under Article 78(2) of the Fourth Geneva Convention also requires that the occupying power ensure the right of appeal and periodic, independent review of the legality of administrative detention. This is a central procedural protection to prevent arbitrary or unlawful detention of civilians. Israel has introduced review proceedings before military courts, with a final petition which may be filed before the Israeli High Court. Under international humanitarian law, review of administrative detention imposed by a military court may be carried out within the military court system; but this is on condition that such bodies present sufficient guarantees of independence and impartiality represented by a "regular procedure".⁵²⁹

Article 78(2) indicates that the review should be undertaken by "a competent body", and this suggests that both the initial appeal and the periodic review should be conducted by a panel of judges. However, both these stages of review are conducted before a single judge, and there is no apparent requirement for the judge who conducts either stage of review to be part of a distinct group appellate judges separate from those who impose the original administrative detention order. In general, as pointed out by the Special Rapporteur on counter-terrorism and human rights, there are continued doubts as to military courts' appearance of independence and impartiality.⁵³⁰ The system of review, as a "regular procedure", is also placed into question by the pattern which is evident in the review process

⁵²⁴ Ibid., pp. 32-34.

⁵²⁵ Ibid., p. 34.

⁵²⁶ Hamoked/B'Tselem Report, *Without Trial Administrative detention of Palestinians by Israel and the Internment of Unlawful Combatants Law*, October 2009, p. 12, available at http://www.hamoked.org.il/items/111942_eng.pdf

⁵²⁷ Krebs, (2012), Op. cit., p. 683. See, also, Addameer Report, Op. cit., pp. 32-34.

⁵²⁸ Krebs, Op. cit., pp. 683-685.

⁵²⁹ The following explication of the more specific elements of the procedural protection envisaged by Article 78(2) of the Fourth Geneva Convention derives from the fact, as Pejic notes, that the Fourth Geneva Convention and Additional Protocol I "do not sufficiently elaborate on the procedural rights of internees, nor do they specify the details of the legal framework that a detaining authority must implement" (Pejic, Op. cit., p. 377).

⁵³⁰ Human Rights Council, *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, - Addendum, Mission to Israel, including visit to the Occupied Palestinian territory*, 16 November 2007, A/HRC/6/17/Add.4, p. 14, §29.

in which military judges usually approve the detention order without change⁵³¹ and petitions to the Israeli Supreme Court, as the High Court of Justice, are dismissed in most cases.⁵³² As empirical research demonstrates, out of 322 cases subject to judicial review by the High Court of Justice, from 2000 to 2010, not a single administrative detainee was released⁵³³, with 70% of those decisions accompanied by a paucity of judicial reasoning which renders them effectively without a reasoned basis.⁵³⁴ The paucity of judicial reasoning in most cases impedes public (and scholarly) scrutiny and indicates dissonance with the principle, recognised by the High Court of Justice, that long periods of detention warrant a heightened duty to justify the necessity of continuing detention. Of note is a scantily reasoned judgment in which the High Court reversed one of the very few cases in which a military appeal court had (twice) ordered the release of a detainee – who had been interned for more than three years – merely stating that, on the basis of the same secret evidence which was available to the military appeal court, the impugned decision was “extremely unreasonable”, and that, in contrast, it considered the secret evidence “reveals a particularly disturbing picture” as to the detainee’s role in the Hamas movement.⁵³⁵

The judicial regulation is effectively confined to the specification, in broad terms, of the criteria for the exercise of the discretion of the military commander in the decision to seek a further extension/renewal of the initial administrative detention order.⁵³⁶ However, as the recent case of Tariq Abu Matar demonstrates⁵³⁷, these principles of judicial regulation are not sufficiently embedded within the military court system, to prevent the initial confirmation of a further period of administrative detention despite the absence of these criteria.

In light of these procedural deficiencies in the process of review by the Israeli military court system of administrative detention in the OPT, Israel has failed to establish and follow a “regular procedure” as mandated in 78(2) of the Fourth Geneva Convention. The current approach to the release of detainees is at variance with Article 132(1) and 133(1) of the Fourth Geneva Convention, which, together with Article 75(3) of Additional Protocol I, dictate that release must immediately follow when the reasons for internment/detention are no longer present.

In addition, the arrest of individuals in the OPT, as the prelude to interrogation and the imposition/renewal of an administrative detention order, is combined with the regular transfer of these individuals, by Israeli authorities, out of the OPT to detention and interrogation facilities located in Israel.⁵³⁸ Under Article 49 of the Fourth Geneva Convention, there is an absolute prohibition on the deportation of protected persons from the occupied territory to the territory of the occupying power, regardless of their motive. The absolute prohibition, under Article 49, is not confined to the phenomena of mass transfers and mass deportations, but

⁵³¹ Addameer Report, Op. cit., p. 31. See also Human Rights Watch, *Israel and Palestine: Events of 2017*, available at <https://www.hrw.org/world-report/2018/country-chapters/israel/palestine>, indicating that military courts that try Palestinian children have a near-100% conviction rate.

⁵³² Addameer Report, Op. cit., p. 33.

⁵³³ Krebs, (2012), Op. cit., pp. 672-673.

⁵³⁴ Ibid., p. 675.

⁵³⁵ H CJ 1389/07 *Commander of IDF Forces in the Judea and Samaria Area v. Military Court of Appeals*, 28.2.2007, http://www.hamoked.org/files/2010/111190_eng.pdf.

⁵³⁶ See, for example, ADA 2320/98, *Al-'Amleh (al- Ma'maleh) et al. v. Commander of Military Forces in the West Bank et al.*, Piskei Din 52 (3) 346.

⁵³⁷ See Addameer, at <http://www.addameer.org/news/israeli-military-prosecution-last-administrative-detention-order-matar-was-mistake>.

⁵³⁸ Addameer Report, Op. cit., p. 40.

includes the deportation of individuals from the OPT to detention facilities in Israel. Thus, this aspect of the Israeli State practice of administrative detention breaches Article 49 of the Fourth Geneva Convention.

2 International Human Rights Law

The second part of the Report established the applicability of international human rights law to the Israeli State practice of administrative detention in the OPT. International human rights law has the essential and integral function of enhancing the legal regulation, by international humanitarian law, of the Israeli State practice of administrative detention. Israel, as a State Party to the International Covenant on Civil and Political Rights, the UN Convention Against Torture, Inhuman and Degrading Treatment or Punishment, the Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Rights of the Child, and the Convention on the Elimination of All Forms of Discrimination Against Women, remains bound by the relevant provisions of these international human rights treaties in the OPT. The provisions of the treaties have extraterritorial applicability to the Israeli military occupation of the OPT and continue to apply within the context of the international armed conflict in the OPT.

The particular character of the ICCPR enabled Israel, as a State Party, under Article 4, to submit a declaration of derogation, since its accession to the treaty itself, based on the state of emergency in effect from the foundation of the State of Israel in 1948. The derogation provides Israel with the limited capacity to implement measures which diverge from the obligations imposed by the derogable human rights provisions of the ICCPR, without thereby constituting a violation. However, Israel's derogation is not "strictly required by the exigencies of the situation"⁵³⁹, and, as detailed below, in relation to the Israeli State practice of administrative detention, the measures are "inconsistent with their other obligations under international law" and "involve discrimination solely on the ground of race".⁵⁴⁰ The Report affirms the position of the Human Rights Committee, reiterated from the inception of its Reports on Israel, under the ICCPR, that "measures derogating from the provisions of the Covenant must be of an exceptional and temporary nature and are limited to the extent strictly required."⁵⁴¹ Israel is under an obligation to provide compelling reasons showing that derogation measures do not exceed the exigencies of the situation.

In addition, the provisions of the ICCPR consider that the response of State Parties to threats to security and public order, by the civilian population, require primacy to be actively accorded to criminal proceedings conducted within a non-military court system. This reinforces the exceptional character of the Israeli State practice of administrative detention and seeks to minimize, if not render redundant, its imposition upon the civilian population in the OPT.

The prolonged occupation of the OPT, and the tensions arising from this conflict, cannot imply a perpetual and unwavering use of administrative detention. Israel did not convincingly explain why, even during relatively peaceful periods and despite its effective control of the territory, security threats could not be addressed through measures that do not derogate from

⁵³⁹ Article 4 ICCPR.

⁵⁴⁰ Ibid.

⁵⁴¹ HRC, *Concluding observations on the fourth periodic report of Israel*, 21 November 2014, CCPR/C/ISR/CO/4, § 10.

the requirements of the ICCPR. The adoption of a prolonged and inflexible derogation policy based on administrative detention, and the lack of primacy accorded to equally effective yet less restrictive measures of criminal law, indicate that Israel failed to comply with the principles of proportionality and strict necessity that – as held by the Israeli High Court of Justice⁵⁴² – must inform any derogation measure. Furthermore, in most cases Israeli authorities, including review judges, failed to demonstrate that continuing detention is reasonable, necessary and proportionate, assigning due weight to the principle that the longer the period of detention, the most compelling the justification. Therefore, by failing to adjust the derogation regime of administrative detention to the exigencies of a varying situation, Israel violated Article 4 of the ICCPR. This is a further reason to consider that derogation, under Article 4, should not be regarded as effective for the relevant provisions of the ICCPR in relation to the Israeli State practice of administrative detention.

Furthermore, the Human Rights Committee has identified the procedural guarantees, under Articles 9(2) and 9(4), as the essential, non-derogable elements of Article 9 of the ICCPR. Thus, the systematic failure to inform detainees, immediately after arrest, of the reasons for the arrest represents a breach of Article 9(2) of the ICCPR. The absence of information on the grounds for arrest and detention, combined with the use of secret evidence, entails that detainees are unable to meaningfully exercise their right to take proceedings before a court to challenge the lawfulness of arrest and detention pursuant to Article 9(4) of the ICCPR. In addition, by permitting arrested persons be held for up to eight days without being informed of the reasons for arrest, and without being brought before a judge,⁵⁴³ Israel is not acting without delay as required under Article 9(2) and (4). These violations are accompanied, at the appellate level, and during the subsequent process of review, by a persistent and underlying failure to provide comprehensive legal reasoning for decisions at these levels. When this absence of legal reasoning is combined with the reliance upon secret information, it is impossible to determine whether decisions are based upon a detailed consideration of the situation of each individual detainee. The further underlying violation of the purpose of Article 9 is reflected in the extremely low number of release orders issued by the review process which indicates the continued failure to consider the use of administrative detention only if no other less invasive measures would be effective.

The Report, in conformity with the Human Rights Committee, considers there to be an essential connection between the non-derogable procedural guarantees under Article 9 and the right to fair trial of Article 14. This, in turn, is reinforced by the non-derogable status accorded to the central elements of the right to fair trial under Article 14. Israel's violations of Article 9(2) and Article 9(4), through the failure to inform the suspect upon arrest or upon the imposition of the initial administrative order of the reason(s) for the arrest and detention, necessarily affect the general guarantee of a right to fair trial under Article 14(1). The Human Rights Committee has emphasized, in particular, the denial of central elements of right to a fair trial represented by the absence of prompt access to counsel, provision of immediate information, in a language which internees understand, of the charges against them,⁵⁴⁴

⁵⁴² HCJ 11026/05 *Anonymous v. IDF Commander in the West Bank* (2005), judgment of December 22, 2005, §§ 6-8; HCJ 7015/02 HCJ, *Ajuri* case, §§ 25-26.

⁵⁴³ *Order Regarding Administrative Detentions (Temporary Order) (Judea and Samaria) (No. 1591)*, 2007, Section 4(a).

⁵⁴⁴ Addameer notes that court proceedings are conducted in Hebrew, a language that most detainees cannot understand. See Addameer Report, Op. cit., p. 36.

provision of information required to prepare their defence, right to be brought promptly before a judge, and right to be tried in their own or their counsel's presence.⁵⁴⁵

Israel's decision to utilize a military court system for administrative detention is considered, by the Human Rights Committee, to reinforce the systematic potential for the violation of the right to fair trial under Article 14. The independence and impartiality of a military court system is regarded as fundamentally flawed; and the seriousness of these flaws leads to the obligation on State Parties to minimize, if not remove, the jurisdiction of military courts over civilians.⁵⁴⁶

The absence of conformity of the practice of administrative detention with the procedural protections contained in Article 9(2) and Article 9(4), and the concomitant absence of conformity with Article 14, leads, in turn, to the violation of the substantive, non-derogable right to legal personality under Article 16 of the ICCPR. The detainee is effectively deprived of the capacity to actively participate, as an autonomous legal subject, in the military court proceedings through which the administrative detention order is initially imposed or subsequently extended.

From the procedural violations perpetrated by the Israeli State practice of administrative detention, the Report turns to examine the degree of compliance with the substantive obligation of humane treatment, at the stages of interrogation and treatment in, and conditions of detention. In particular, the Report focuses upon the prohibition of torture and other ill-treatment in which the initial provisions of the Fourth Geneva Convention are significantly expanded and supplemented by the ICCPR and UNCAT. The combined effect of these provisions is one which excludes any possibility of derogation and maintains their continued and complete applicability to the armed conflict in the OPT. The comprehensive character of the prohibition of torture under both IHRL and IHL applies without qualification to the extra-territorial Israeli State practice of administrative detention against individuals arrested in the OPT. It is, thus, immaterial, and at variance with the obligations under international law, for the Israeli Supreme Court, to consider the purported justification of necessity for the use of certain techniques of interrogation, and, thereby, confer legal credibility upon the situation originating in a thought experiment of a "ticking time-bomb" scenario.

In regard to the stage of interrogation of detainees from the OPT, allegations continue to be reported of their routine subjection to treatment qualifying as torture or cruel, inhuman or degrading treatment or punishment in order to obtain confessions or other information.⁵⁴⁷

⁵⁴⁵ HRC, *Concluding observations on the third periodic report of Israel*, 3 September 2010, CCPR/C/ISR/CO/3, para. 7. See, also HRC, *Concluding observations on the fourth periodic report of Israel*, 21 November 2014, CCPR/C/ISR/CO/4, §10 (expressing concern at the fact that "in many cases the detention order is based on secret evidence and at the denial of access to counsel, independent doctors and family contacts"); HRC, *Concluding observations on the second periodic report of Israel*, 21 August 2003, CCPR/CO/78/ISR, §12 (mentioning the "frequent use" of administrative detention, "entailing restrictions on access to counsel and to the disclose of full reasons of the detention" limit the effectiveness of judicial review of the lawfulness of detention to an extent not permitted by Article 4 of the ICCPR); *Concluding Observations: Israel*, 18 August 1998, CCPR/C/79/Add.93, §21 (focusing on the lack of mandatory and effective judicial review).

⁵⁴⁶ See, Human Rights Committee, *General comment no. 32, Article 14, Right to equality before courts and tribunals and to fair trial*, CCPR/C/GC/32 23 August 2007, §22.

⁵⁴⁷ Addameer Report, *Op. cit.*, pp. 37-41. See also Human Rights Council, *Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967*, A/HRC/37/75, 15 March 2018, § 62; UN Committee Against Torture (CAT), *Concluding observations on the fifth periodic report of Israel*, 3 June 2016, CAT/C/ISR/CO/5, § 30; Human Rights Council, *Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967*, Richard Falk, A/HRC/25/67, 13 January

Personnel from the Israeli Security Agency, frequently use various techniques, during interrogations, such as violent shaking, shackling detainees in painful positions, excessive use of blindfolds and handcuffs, sleep deprivation, solitary confinement, exposure to loud noises or to very cold or very hot temperatures for extended periods, prolonged denial of food and water, and denial of access to toilets, showers or change of clothes.⁵⁴⁸ The Israeli Supreme Court has acknowledged, since the case of *Public Committee Against Torture v. State of Israel*⁵⁴⁹, that a number of these techniques were used in interrogations, and that there is a *prima facie* presumption of their prohibited character under Israeli domestic law. In addition, the subsequent cases of *As'ad Abu Gosh et al. v the Attorney-General et al.*⁵⁵⁰, in 2017, and, *Tbeish et al. v. State attorney General et al.*⁵⁵¹, in 2018, indicate the continued use of many of these methods of interrogation against detainees from the OPT.

However, the characterization of the prohibition as a *prima facie*, rather than an absolute, prohibition immediately renders the interpretation of Israeli's obligations under international law in violation of the absolute and non-derogable nature of the prohibition against torture and ill-treatment. This is compounded by the Israeli Supreme Court, in *Abu Gosh*, increasing the difficulty of establishing that the allegations of mistreatment under interrogation amount to torture. For, it effectively placed the evidential burden of proof upon the individual alleging torture and combined this with a variable definition of torture determined within the parameters of the discretion of the Israeli Attorney General. In relation to the positive obligation of UNCAT to investigate and prosecute, the decision in *As'ad Abu Gosh*, emphasizes that the Israeli Attorney General is under no direct obligation to initiate a criminal investigation when recourse is made, by interrogators, to certain techniques of interrogation combined with a justification based upon necessity. Thus, the "necessity defence" has no requirement to be tested in formal, criminal proceedings. The Report concurs with the strong criticism of the decision by the UN Special Rapporteur on torture, Nils Melzer, in relation to the decision in *As'ad Abu Gosh*, who reiterated the absolute and non-derogable nature of the prohibition against torture and ill-treatment.⁵⁵² Furthermore, it appears that the most recent decision in *Tbeish* involves a redefinition of certain techniques of interrogation which excludes them from even the limited character of the prohibition in the *Public Committee Against Torture* case.⁵⁵³

The failure to completely close the secret detention centre in which detainees were reportedly subjected to various forms of torture and ill-treatment and to personnel from the International

2014, §§ 60-64; The International Rehabilitation Council for Torture Victims (IRCTV), *Country Factsheet: Torture in Israel*, June 2015, available at <http://stoptorture.org.il/wp-content/uploads/2015/09/Torture-Factsheet.pdf>.

⁵⁴⁸ Addameer Report, Op. cit., pp. 38-40. See, also, Human Rights Council, *Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967*, A/HRC/37/75, 15 March 2018, §62; Human Rights Council, *Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967*, Richard Falk, A/HRC/25/67, 13 January 2014, §62; B'Tselem, *Routine Torture: Interrogation Methods of the General Security Service*, February 1998, available at https://www.btselem.org/download/199802_routine_torture_eng.doc.

⁵⁴⁹ H.C. 5100/94 *Public Committee Against Torture v. State of Israel*, September 6, 1999.

⁵⁵⁰ HCJ 5722/12 *As'ad Abu Gosh et al. v the Attorney-General et al.*, November 15, 2017

⁵⁵¹ HCJ 9018/17 *Tbeish et al. v. State attorney General et al.* November 26, 2018.

⁵⁵² UN expert alarmed at Israeli Supreme Court's "license to torture" ruling, 20 February 2018, at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22675&LangID=E>.

⁵⁵³ This represents the further development of the underlying logic of this "necessity" defence, analysed by Itamar Mann and Omer Shatz, "The Necessity Procedure: Laws of Torture in Israel and Beyond, 1987-2009", *Unbound: Harvard Journal of the Legal Left*, Vol. 6, (2010), pp. 59-110.

Committee of the Red Cross were denied access⁵⁵⁴, remains of serious, continuing concern. The current situation in which this detention centre is not in use, but remains in existence, creates the continued possibility for its reopening and future use.

In relation to the continued instances of recourse to these techniques of interrogation, Israel is not only in violation of the prohibition to refrain from their use, but also of the positive obligation upon Israel to adopt a system of active prevention and repression of acts of torture and other forms of ill-treatment carried out by, or with the involvement of, State agents, as required under international law. This positive obligation relates, beyond those techniques indicated above, to Israeli's continued legal authorization of the use of incommunicado detention for up to three months.⁵⁵⁵ Incommunicado detention, without access to a legal representative or contact with the outside world, exacerbates the vulnerability of detainees and can be considered in itself to constitute a form of inhuman or degrading treatment. Furthermore, contrary to the recommendations advanced, for example, by the UN Committee against Torture and the UN Special Rapporteur on Torture,⁵⁵⁶ individuals who are held in non-incommunicado administrative detention are not afforded a right to *promptly* receive independent legal and medical assistance and to contact relatives.⁵⁵⁷ In response to allegations of torture and ill-treatment, investigations are not conducted in an active or rigorous manner, as not a single criminal investigation has been initiated.⁵⁵⁸ Although proceedings are conducted under the authority of the State Attorney, its decisions depend on the findings of an examination carried out by an office within the Israeli Security Agency,⁵⁵⁹ which lacks, as such, institutional independence from the alleged perpetrators of ill-treatment. In this regard, there are reports of the lack of transparency, independent scrutiny and full accountability, resulting from the recourse to the justification of necessity, to exempt personnel of the Israel Security Agency from investigation and prosecution for alleged acts of torture.⁵⁶⁰ These deficiencies are compounded by Israel's lack of adoption of the investigative methods envisaged in the Istanbul Protocol⁵⁶¹ and does not, as it should, videotape all interrogations, including those of persons suspected of security-related offences and those conducted by the Israel Security Agency.⁵⁶² Israel's reported practice demonstrates a systematic failure to either investigate effectively or, when established, to adequately punish allegations of torture or other forms of ill-treatment.⁵⁶³

⁵⁵⁴ Addameer Report, Op. cit., pp. 40-41.

⁵⁵⁵ Under Military Order No. 378 of 1970 as amended. See, also, Addameer Report, Op. cit., p. 38.

⁵⁵⁶ UNCAT, General Comment No. 2: Implementation of Article 2 by States Parties, 24 January 2008, CAT/C/GC/2, para. 13; UN General Assembly, Report of the Special Rapporteur on Torture [...], Manfred Nowak, 9/02/2010, A/HRC/13/39, §§ 51-56, 77; UN General Assembly, Report of the Special Rapporteur on Torture [...]. Addendum: Study on the phenomena of torture, cruel, inhuman or degrading treatment [...], 5/02/2010, A/HRC/13/39/Add.5 §§ 72 ff.

⁵⁵⁷ UNCAT, Concluding observations on the fifth periodic report of Israel, 3 June 2016, CAT/C/ISR/CO/5, paras 16-17, 20-21; Addameer Report, pp. 42-43.

⁵⁵⁸ Addameer Report, Op. cit., p. 38; UNCAT, *Concluding observations on the fifth periodic report of Israel*, 3 June 2016, CAT/C/ISR/CO/5, §30.

⁵⁵⁹ Addameer Report, Op. cit., p. 38.

⁵⁶⁰ UNCAT, *Concluding observations on the fifth periodic report of Israel*, 3 June 2016, CAT/C/ISR/CO/5, §§ 12-15; IRCTV, Country Factsheet: Torture in Israel, pp. 2-3; Addameer, *Palestinian Political Prisoners in Israeli Prisons*, June 2016, p. 5.

⁵⁶¹ Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

⁵⁶² HRC, *Concluding observations on the fourth periodic report of Israel*, 21 November 2014, CCPR/C/ISR/CO/4, §14; UNCAT, *Concluding observations on the fifth periodic report of Israel*, 3 June 2016, CAT/C/ISR/CO/5, §18.

⁵⁶³ IRCTV, *Country Factsheet: Torture in Israel*, Op. cit., pp. 2-4; UNCAT, *Concluding observations on the fifth periodic report of Israel*, 3 June 2016, CAT/C/ISR/CO/5, §30.

Israel has not adopted the strict exclusionary rule, under Article 15 of UNCAT, thereby rendering confessions admissible which are obtained through torture or other ill-treatment, and this type of evidence is regularly used as evidence in criminal or other proceedings.⁵⁶⁴ The admissibility of this evidence, and its effect upon the procedural legitimacy of the military court system in the OPT, is the corollary of Israel's failure to comply with the wide-ranging obligation to prevent torture encapsulated in Article 2 of UNCAT. It has not introduced a specific, domestic criminal offence of torture defined in accordance with Article 1 of the CAT, and the existing definition of the offence of assault does not encompass non-physical torture.⁵⁶⁵ The position of the CAT confirms the continuing inadequacy of the Israeli legal framework in its response to the recourse to practices of torture or other cruel, inhuman and degrading treatment or punishment in the interrogation of suspects.⁵⁶⁶

In conclusion, Israel has violated several aspects of the prohibition against torture and cruel, inhumane or degrading treatment. Credible reports indicate that internees are often subjected forms of treatment leading to allegations of torture or other prohibited forms of ill-treatment. The extensive body of positive obligations aimed at preventing the occurrence of torture have continued, despite their reiteration and accompanying recommendations, by the relevant international human rights bodies, to be disregarded. Allegations of torture are not investigated promptly and effectively, and alleged perpetrators are never prosecuted. Confessions resulting from interrogations utilizing torture or other forms of ill-treatment remain admissible evidence which is commonly used in legal proceedings. Therefore, Israel has violated Articles 27, 31 and 32 of the Fourth Geneva Convention, Article 7 of the ICCPR as well as several provisions of UNCAT, including Articles 1, 2, 4, 12, 13, 14, 15 and 16.

An equally important element of administrative detention – treatment in, and conditions of detention – is regulated by several provisions of the Fourth Geneva Convention and Article 10 of the ICCPR which requires that all persons deprived of their liberty shall be treated humanely and with respect for the inherent dignity of the human person. This fundamental guarantee is violated in numerous aspects with regard to the treatment in, and conditions of detention.⁵⁶⁷ Individuals in administrative detention have restrictions placed upon their freedom to communicate with, and receive to visits from family members; this is partly a consequence of their incarceration in, and regular transfer between, facilities located outside the OPT. Conditions of detention remain substandard: internees are not accommodated separately from the rest of the prison population; detention centres are often not staffed with properly trained officers; there is excessive use of solitary confinement and isolation; medical care is poor; food is of poor quality, insufficient in amount and, at times, culturally or religiously inappropriate; there is insufficient individual living space, no cooling system, poor hygiene facilities and limited access to personal hygiene products. Detainees are also prohibited from access to education.

⁵⁶⁴ Addameer Report, pp. 38-39; UN Committee Against Torture (CAT), *Concluding observations on the fifth periodic report of Israel*, 3 June 2016, CAT/C/ISR/CO/5, §34.

⁵⁶⁵ UNCAT, *Concluding observations on the fifth periodic report of Israel*, 3 June 2016, CAT/C/ISR/CO/5, §§12-13.

⁵⁶⁶ UNCAT, *Concluding Observations (fourth periodic report of Israel)* June 2009; *Concluding Observations (third periodic report of Israel) Supplement No. 44 (A/57/44)*.

⁵⁶⁷ Addameer Report, Op. cit., pp. 42-43; Addameer, *Palestinian Political Prisoners in Israeli Prisons*, June 2016, p. 4. It is highly probable that the special committee, formed by the present Israeli Minister for Public Security, Gilad Erdan, in June 2018, to examine the reduction of conditions of Palestinian prisoners to a bare minimum in detention facilities outside the OPT, will result in a further decline in both treatment in, and conditions of, detention. See, Addameer, 29 October 2018, <http://www.addameer.org/publications/deterioration-detention-conditions-suffocating-prisoners>.

Convention on the Elimination of All Forms of Racial Discrimination

The Report also finds the Israeli practice of administrative detention breaches Articles 5(a), 6 and 3 of the CED. Violations of Article 5(a) arise from the “maintenance of administrative detention for both Palestinian children and adults based on evidence that is kept secret for security reasons”,⁵⁶⁸ as well as from decision itself to arrest Palestinian children and impose administrative detention upon them through the military court system which is, simultaneously, an “undermining of their [Palestinian children’s] judicial guarantees”, and, therefore, non-compliance with the right of Palestinian children, under Article 6, to effective protection from racial discrimination.⁵⁶⁹ In addition, the introduction and maintenance of a system of administrative detention for Palestinians represents non-compliance with Article 3 due to the “existence of two sets of laws, for Palestinians on the one hand and Jewish settlers on the other hand who reside in the same territory, namely the West Bank...and are not subject to the same justice system (criminal as well as civil matters)”.⁵⁷⁰ The Report also finds Israel’s non-compliance with the positive obligation, under Article 2(1) and (2), to actively intervene, as Occupying Power, to prevent the presence of racial discrimination in the criminal justice system in the OPT.

Convention on the Elimination of All Forms of Discrimination Against Women

The character of the arrest and administrative detention of women and girls in the OPT results in the breach of obligations under CEDAW. The Israeli State practice of administrative detention, and the military court system through which it is imposed, have not adopted the additional principles nor the substantive and procedural protections required to ensure the gender-sensitive approach which underlies CEDAW.⁵⁷¹ Thus, the Israeli State practice of administrative detention, in its application to women and girls, involves the breach of the general obligations, under Article 2 (substantive equality of men and women) and Article 3 (appropriate measures to guarantee the exercise of fundamental rights and freedoms by women and girls) of CEDAW.

In addition, the Report concurs with the concerns of the Special Rapporteur on Violence Against Women in the Mission to Israel, regarding the the manner of the initial arrest in which the decision of Israeli security forces to undertake violent night raids as well as the arrests of women in the street and at Israeli checkpoints, have a disproportionate affect upon women and girls.⁵⁷² The subsequent interrogation of women and girls involves continued allegations of torture and other forms of ill-treatment⁵⁷³ which either remain uninvestigated or result in a decision not to institute a criminal prosecution. The concerns of the Special Rapporteur extend to the “use of administrative detention legislation, including for women

⁵⁶⁸ *Concluding observations of the Committee on the Elimination of Racial Discrimination on the fourteenth to sixteenth periodic reports of Israel* 2012 CERD/C/ISR/CO/14-16, §27.

⁵⁶⁹ *Ibid.*

⁵⁷⁰ *Ibid.*

⁵⁷¹ Committee on the Elimination of Discrimination against Women, *General recommendation on women’s access to justice*, CEDAW/C/GC/33, 23 July 2015. This also extends to the absence of consideration and implementation of the relevant provisions of the *United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules)*, adopted by the General Assembly in its resolution 65/229.

⁵⁷² *Report of the Special Rapporteur on violence against women, its causes and consequences - Mission to Israel* (A/HRC/35/30/Add.1), §54.

⁵⁷³ *Ibid.*

and children, which allows indefinite detention of detainees on secret information without the laying down of charges or the chance to stand trial”.⁵⁷⁴ This position is supported and reinforced by the Concluding Observations of the Committee on the Elimination of Discrimination against Women, regarding the deportation of women and girls from the OPT to a place of detention in Israel and the prolonged length of the period of administrative detention.⁵⁷⁵ The Committee recommends that Israel “address prolonged administrative detention by ensuring that Palestinian women and girls who are detained are promptly brought before a judge”.⁵⁷⁶

The treatment in, and conditions of detention, are also of direct concern to both the Special Rapporteur and the Committee, who both emphasize the inadequate access to medical treatment which is of a generally substandard character.⁵⁷⁷ CEDAW requires that Israel “improve conditions of detention and ensure access to justice and health care services”.⁵⁷⁸

Convention on the Rights of the Child

Finally, the Report finds that the Israeli State practice of administrative detention is used extensively against children in the OPT.⁵⁷⁹ In this regular and wide-spread recourse to administrative detention for juveniles, Israel is in breach of its obligations under the Convention on the Rights of the Child (CRC). The breach results from the absence of an overarching juvenile justice policy in the OPT, in which deprivation of liberty is an exceptional measure, and the absence of the specific procedural and substantive protections required for juveniles subject to arrest, interrogation and detention as part of the Israeli State practice of administrative detention.

In the OPT, it is evident that Israel has largely ignored the detailed requirements of a system of juvenile justice compatible with the CRC as specified in the UN Committee on the Rights of the Child Committee in the *General comment No. 24 on children’s rights in the child justice system*.⁵⁸⁰ There has been no serious, sustained reflection upon whether administrative detention and/or the military court system is in conformity with the CRC. As a result, there are no alternative procedures – diversion – which avoid judicial proceedings and the judicial proceedings are conducted in military courts whose proceedings are insufficiently distinct from judicial proceedings for adults.

For Palestinian juveniles in the OPT, deprivation of liberty at the stages of arrest, detention for interrogation and upon the imposition/renewal of an administrative detention order

⁵⁷⁴ Ibid., §53.

⁵⁷⁵ CmEDAW, *Concluding observations on the sixth periodic report of Israel*, CEDAW/C/ISR/CO/R.6, 17 November 2017, §52.

⁵⁷⁶ Ibid.

⁵⁷⁷ CmEDAW, *Concluding observations on the sixth periodic report of Israel*, CEDAW/C/ISR/CO/R.6, 17 November 2017, §52; *Report of the Special Rapporteur on violence against women, its causes and consequences - Mission to Israel (A/HRC/35/30/Add.1)*, §55.

⁵⁷⁸ CmEDAW, *Concluding observations on the sixth periodic report of Israel*, CEDAW/C/ISR/CO/R.6, 17 November 2017, §53.

⁵⁷⁹ CmRC, *Concluding observations on the second to fourth periodic reports of Israel*, CRC/C/ISR/CO/2-4, 4 July 2013, §73 (“an estimated 7000 Palestinian children aged from 12 to 17 years, but sometimes as young as nine years, have been arrested, interrogated and detained by the State party’s army over the reporting period”); HRC, *Concluding observations on the third periodic report of Israel*, 3 September 2010, CCPR/C/ISR/CO/3, §7(b).

⁵⁸⁰ CmRC, *General Comment No. 24: on children’s rights in the child justice system* CRC/C/GC/24 18 September 2019.

involve potential breaches of Articles 37, 39 and 40 of the CRC. Upon arrest, whose grounds, as with adults, are generally vague and unspecific, Palestinian juveniles are regularly reported to be subjected to techniques of interrogation which are capable of constituting torture or other forms of ill-treatment; and the interrogation is conducted without the additional procedural requirements for juveniles. The regular and continued allegations of instances of torture and other ill-treatment of Palestinian juveniles are not subject to genuine, systematic investigation nor to prosecution. The military court procedure for the imposition of an administrative detention order, which is usually based upon secret evidence, is, in addition, conducted without any of the specific procedural protections for juveniles required by the CRC. The decision to impose an administrative detention order leads to treatment in, and conditions of detention, which result in further instances of ill-treatment, if not torture, with the use of solitary confinement and separation. Thus, the specific rights and duties of juveniles – the “minimum standards” – elaborated in the CmRC’s *General Comment No. 24* remain unrecognized.

The sole alteration has been confined to the age of majority which has been increased from 16 to 18 years. However, it remains unclear whether and to what extent this has been fully implemented within the military court system in the OPT. The absence of a juvenile justice policy in the OPT is the corollary of the dual legal system in the OPT (military court system/civil system); and is in contrast to the consideration and implementation of a different legal treatment of juveniles in Israel. Thus, at this level, the application of the Israeli State practice of administrative detention to juveniles represents a breach of the best interests of the child, under Article 3, and non-discrimination, under Article 2, of the CRC.

In addition, as with adults, upon arrest, Palestinian juveniles are, in the vast majority, deported out of the OPT, to detention facilities in Israel. The deportation is a breach of Article 40 (2) (b) (iii) of the CRC, as it effectively prevents any further involvement of parents or legal guardians in the subsequent proceedings against the juvenile.

PART V

International Criminal Law

1 Introduction: Palestine as a State Party to the Rome Statute of the International Criminal Court

The Report now turns to the most recent development, resulting from Palestine becoming a Party to the Rome Statute (Statute) of the International Criminal Court on 2 January 2015. The accession of Palestine to the Statute was preceded by its submission of Article 12(3) declaration on 1 January 2015. In particular, Palestine accepted the ICC's jurisdiction over alleged crimes committed, under Article 5 of the Statute, "in the occupied Palestinian territory, including East Jerusalem, since June 13, 2014". The declaration and accession of Palestine were followed by the ICC Prosecutor opening, under Regulation 25(1)(c) of the Regulations of the Office of the Prosecutor (OTP), a preliminary examination of "the situation in Palestine".⁵⁸¹

On 15th May 2018, Palestine, under Article 13(a) and Article 14 of the Rome Statute, referred its situation to the ICC Prosecutor, for a preliminary examination of the situation in Gaza and the OPT (including East Jerusalem).⁵⁸² The Referral of 15th May 2018, mentions no limitation upon the period during which the alleged crimes, under Article 5, were committed, as it

"specifically requests the Prosecutor to investigate, in accordance with the temporal jurisdiction of the Court, past, ongoing and future crimes within the court's jurisdiction, committed in all parts of the territory of the State of Palestine".⁵⁸³

The accession of Palestine as a state party to the International Criminal Court enables the Report to consider the potential liability of individuals involved in the Israeli State practice of administrative detention for one or more of the core crimes contained in Article 5 of the Statute.⁵⁸⁴

⁵⁸¹ *The Prosecutor of the International Criminal Court, Fatou Bensouda, opens a preliminary examination of the situation in Palestine*, January 16th 2015, available <https://www.icc-cpi.int/Pages/item.aspx?name=pr1083>.

⁵⁸² *Referral by the State of Palestine Pursuant to Articles 13(a) and 14 of the Rome Statute*, PAL-180515-Ref, dated 15 May 2018, available at https://www.icc-cpi.int/itemsDocuments/2018-05-22_ref-palestine.pdf. As the Referral states, "[t]he State of Palestine comprises the Palestinian Territory occupied in 1967 by Israel, as defined by the 1949 Armistice Line" (Ibid., fn 4.). On the basis of the existence of these preliminary examinations, the Report will not, therefore, consider the other potential form of referral by the UN Security Council, acting as the collective representative of member states of the UN under Chapter VII of the Charter of the United Nations, of the situation in the OPT to the Prosecutor of the ICC. In addition, the preliminary examination by the Prosecutor of the ICC of the situation in the OPT renders Israel's status, as Non-State Party to the Rome Statute, one which makes the separate discussion and determination of the presence of the crimes under the Rome Statute, as customary international law, within the Israeli domestic legal system unnecessary.

⁵⁸³ *Referral by the State of Palestine*, Op. cit., §9.

⁵⁸⁴ The Office of the Prosecutor's Report on *Preliminary Examination Activities 2017*, 4th December 2017, in relation to the first preliminary examination, notes that Israel denies that the Prosecutor of the ICC has jurisdiction to open the preliminary examination, arguing that the OPT, is not a territory under belligerent occupation, but, rather a "disputed territory" (Ibid., § 69). For Israel, in conformity with its stance in regard to the provisions of the international legal instruments of IHL and IHRL, considers that "the specific legal regime applicable to the situation in the West Bank, [...] should not be viewed as occupied territory but as a "disputed territory", subject to competing claims, whose status will ultimately be resolved in the course of peace process negotiations. For this reason, Israel has taken the position to reject the de jure application of the Geneva Conventions to the territory but to apply humanitarian provisions de facto" (Ibid.). However, as the Prosecutor's Report notes, the Israeli position confronts a substantial body authority, from "intergovernmental and international judicial bodies", that "the West Bank, including East Jerusalem, has been occupied since 1967" (Ibid.). Thus, this Report considers that the legal basis upon which it has rejected, in its preceding parts, the Israeli position of the non-applicability of IHL and IHRL to the OPT, forms the legal basis upon which the Israeli position is to be rejected, in regard to the jurisdiction of the ICC and the applicability of the crimes of the Rome Statute to the OPT.

The determination of potential liability under international criminal law follows the procedural stages designated by the Statute, the Rules of Procedure and Evidence (RPE), and the Regulations of the OTP. The Report will, therefore, commence with the initial procedural stage of the OTP's preliminary examination. Here, it will indicate that there is a sufficient basis to proceed to the subsequent stage of opening an investigation, and that this enables the more detailed discussion of the elements of the crimes,⁵⁸⁵ which are potentially perpetrated through the Israeli State practice of administrative detention.

The Report follows the OTP's Policy Paper on Case Selection and Prioritisation⁵⁸⁶, and, on the basis of the criteria of this Paper, seeks to emphasize that the Israeli State practice of administrative detention within the OPT is of sufficient gravity to be considered a distinct focus for potential international criminal liability under Article 5 of the Statute.⁵⁸⁷

2 The status of a preliminary examination

A preliminary examination is the initial stage of the ICC's prosecutorial procedure. It is a process of examining the information available, and involves a distinct procedure based upon the application of the criteria under Article 53(1) of the Rome Statute to the information gathered by OTP.⁵⁸⁸ The satisfaction of the criteria under Article 53(1) is the precondition for the subsequent procedural stage of an investigation. Article 53(1) obliges the Prosecutor to evaluate whether there is a reasonable basis to proceed with the subsequent stage of an investigation.

At present, the preliminary examination is still continuing to gather information guided by Article 53(1), but the OTP has not yet reached the position to make a definite decision as to whether or not to initiate an investigation.⁵⁸⁹

The preliminary examination is, at present guided, in relation to the areas of the West Bank

⁵⁸⁵ For the Report, at the procedural stage of the investigation, the relevant elements of the potential crimes, under Article 5, do not relate to the *mens rea* (mental element) requirement, as this will only become a requirement with the subsequent stage related to the identification of suspects, when the Prosecutor requests an arrest warrant or a summons to appear under Article 58 to the competent Pre-Trial Chamber.

⁵⁸⁶ International Criminal Court, Office of the Prosecutor, Policy Paper on Case Selection and Prioritisation, 15 September 2016, https://www.icc-cpi.int/itemsdocuments/20160915_otp-policy_case-selection_eng.pdf

⁵⁸⁷ The emphasis of the Report is also in conformity with the original intention guiding the referral of Palestine, as indicated by the following statement on the website of the Palestinian Ministry of Foreign Affairs & Expatriates, "the Ministry has provided the Office of the Prosecutor of the International Criminal Court with documents, evidence, and legal arguments highlighting the plight of prisoners and the intrinsic connection between Israel's policy of mass detention with its ongoing policies and practices of colonial occupation. The State of Palestine thus reiterates its call to the Prosecutor to open an investigation into the situation in Palestine without further delay", available at <http://www.mofa.pna.ps/en/2018/04/18/palestinian-prisoners-day/>.

⁵⁸⁸ The preliminary examination is open to the submission and views as part of the information gathered to which it then applies the criteria under Article 53(1).

⁵⁸⁹ The most recent *Report on Preliminary Examination Activities 2018*, by the Office of the Prosecutor, states in its conclusion, with regard to preliminary examination in Palestine, that "[d]uring 2018, the Office has advanced and significantly progressed its analysis on all of the factors listed in article 53(1)(a)-(c), in line with its holistic approach. Given the detailed focus that the Office has given to this situation since 2015, the Prosecutor intends to complete the preliminary examination as early as possible (The Office of the Prosecutor, *Preliminary Examination Activities 2018*, 5 December 2018, §284, available at <https://www.icc-cpi.int/itemsDocuments/181205-rep-otp-PE-ENG.pdf>)

and East Jerusalem⁵⁹⁰, by particular foci for examination. The preliminary examination, as stated in the Report of 2018, concentrates upon following foci:

“269. The Office has focused its analysis on alleged war crimes committed in the West Bank, including East Jerusalem, since 13 June 2014. Namely, the Israeli authorities have allegedly been involved in the settlement of civilians onto the territory of the West Bank, including East Jerusalem, and the forced removal of Palestinians from their homes in the West Bank and East Jerusalem. Settlement-related activities have reportedly included the confiscation and appropriation of land; the planning and authorisation of settlement expansions; constructions of residential units and related infrastructures in the settlements; the regularisation of constructions built without the required authorisation from Israeli authorities (so-called outposts); and public subsidies, incentives and funding specifically allocated to settlers and settlements’ local authorities to encourage migration to the settlements and boost their economic development.

270. Israeli authorities are also alleged to have been involved in the demolition of Palestinian property and eviction of Palestinian residents from homes in the West Bank and East Jerusalem. Moreover, Israeli authorities have reportedly continued to advance plans to relocate Bedouin and other herder communities present in and around the so-called El area, including through the seizure and demolition of residential properties and related infrastructure.

271. The Office has also received information regarding other crimes allegedly committed by officials of the Israeli authorities in the West Bank, including East Jerusalem, which may fall under the purview of article 7 of the Statute on crimes against humanity. Specifically, these allegations relate to the crime of persecution, transfer and deportation of civilians, as well as the crime of apartheid.

272. In addition, the Office has also received allegations that Palestinian security and intelligence services in the West Bank have committed the crime against humanity of torture against civilians held in detention centres under their control. These and any other alleged crimes that may occur in the future, require further assessment.”⁵⁹¹

It would appear from this most recent Report that the preliminary examination in this area of the OPT has to an extent, incorporated within the preliminary examination, the concerns of the Referral, by Palestine of 15th May 2018, which seeks to provide indicative, non-binding guidance to the Prosecutor of the ICC regarding the potential crimes, under Article 5, allegedly committed in the OPT. These crimes are specified in paragraph 12 of the Referral, and are held to be the “core [of] the *present* referral”:⁵⁹²

“i. Crimes involving the unlawful appropriation and destruction of private and public properties, including land, houses and buildings, as well as natural resources;

ii. Crimes involving the forcible transfer of Palestinians, including by means of violence, compulsion, duress and the creation of inhumane living conditions;

⁵⁹⁰ These two areas of Palestine are distinguished, in the structure of the preliminary examination, from Gaza and its separate foci for examination.

⁵⁹¹ The Office of the Prosecutor, *Preliminary Examination Activities 2018*, Op. cit., §28.

⁵⁹² *Ibid.*, §12.

iii. Crimes involving the unlawful transfer of the Israeli Occupying Power's population into Occupied Palestinian Territory;

iv. Crimes involving murders and unlawful attacks on civilians, including through excessive use of force and unlawful killings of Palestinians, including demonstrators exercising their right to protest;

v. Crimes involving the torture, cruel and inhumane treatment of Palestinians;

vi. Crimes involving persecution, including the grave, widespread and systematic denial or violation of basic human rights on discriminatory grounds against Palestinians, including those resulting in or intended to achieve the deportation or forcible transfer, directly or indirectly, of the Palestinian population, the re-populating of "cleansed" territories with Israeli settlers and the unlawful appropriation of Palestinian land and properties; and,

vii. Crimes involving the establishment of a system of apartheid based in particular on the adoption of discriminatory laws, policies and practices as well as the commission of inhumane acts intended to establish an institutionalized regime of separation and advancement of Israeli settlements accompanied by the systematic oppression and domination by Israeli settlers over Palestinians.”⁵⁹³

The Israeli State practice of administrative detention is, however, only included by the Palestinian Referral in the specific subsection devoted to the rationale of the Referral, and not as part of its core referral.⁵⁹⁴ The most recent Report on the preliminary examination of Palestine indicates that, whilst detention is within its purview, the current focus is upon practices of detention by the Palestinian authority.⁵⁹⁵

The Report seeks to argue that the OTP can legitimately extend the current focus upon treatment in detention, indicated in paragraph 272, to the Israeli State practice of administrative detention. In addition, that the broader focus, in paragraph 271, upon the crimes against humanity of “persecution, transfer and deportation of civilians, as well as the crime of apartheid”, are potentially present in the Israeli State practice of administrative detention. Furthermore, that once the preliminary examination focuses upon the Israeli State practice of administrative detention it will become evident that it involves the perpetration of further crimes against humanity and war crimes.

This, in turn, leads the Report to consider Article 53(1) of the Rome Statute, and the grounds upon which a preliminary examination by the Prosecutor of the ICC, within the territory of the OPT, would confer the “reasonable basis to proceed with an investigation” into the Israeli State practice of administrative detention.⁵⁹⁶

⁵⁹³ Ibid., §12.

⁵⁹⁴ The Referral states that “By the end of 2016, 7,000 Palestinians were being arbitrarily detained in Israeli jails, including 700 held under "administrative detention" (indefinitely renewable, without charge or trial or basic legal protections and on the basis of 'secret evidence' kept from both detainee and the attorney), the highest level since 2008. With a bi-weekly average of 79 raids into the West Bank per week and 67 in total into the Gaza Strip in 2017, the policy of mass arbitrary arrest and unlawful imprisonment by Israeli occupation forces continued”; (Ibid., §16 (g)).

⁵⁹⁵ The Office of the Prosecutor, *Preliminary Examination Activities 2018*, Op. cit., §272.

⁵⁹⁶ It should be emphasized here that the focus of the Report is solely upon the potential applicability of international criminal law to the Israeli state practice of administrative detention. It is, therefore, unconcerned with either the wider, indirect effect of this potential liability upon the degree of compliance of Israeli with the

3 The Opening of an Investigation by the ICC Prosecutor under the Rome Statute

Article 53(1)(a)-(c) of the Statute contains a three-part test to evaluate whether there is a reasonable basis to proceed with an investigation. First, under Article 53(1)(a), the information available must provide a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed. Second, under Article 53(1)(b), the case must satisfy the test for admissibility pursuant to the criteria under Article 17(1)(a)-(d) of the Statute. Finally, under Article 53(1)(c), the Prosecutor can decide not to start an investigation if she believes that such investigation would not satisfy the interests of justice. This is a circumstance in which the OTP is not required to prove that the investigation would satisfy the interests of justice. The Prosecutor can rely on the interests of justice only to justify the decision not to start the investigative phase, despite the seriousness of the crime and the interests of victims.

In regard to the first part of the test, under Article 53(1)(a), it should be emphasized that the “reasonable basis test” applies a standard of proof that is the least demanding test provided for in the Statute.⁵⁹⁷ For the underlying rationale of the test is merely to exclude “unwarranted, frivolous, or politically motivated investigations”.⁵⁹⁸ The information held to satisfy the standard of proof for the “reasonable basis test” is not required to be either comprehensive or conclusive. Thus, it is not confined to direct evidence collected by the Prosecutor’s own investigation, but extends to include indirect evidence, such as reports and other materials provided by third parties (e.g., commissions of inquiry, fact-finding missions, NGO reports, etc.).⁵⁹⁹ A preliminary examination of the Israeli State practice of administrative detention in the OPT would satisfy the standard of proof imposed by the first part of the test under Article 53(1)(a) of the Rome Statute.⁶⁰⁰

provisions of IHL or IHRL, or with the strategic or political effect of recourse to international criminal law in regard to Israel’s presence and policies in the OPT.

⁵⁹⁷ See T. Mariniello, “Questioning the Standard of Proof: The Purpose of the ICC Confirmation of Charges Procedure”, *Journal of International Criminal Justice*, Vol. 13, No.3 (2015), pp. 579-599.

⁵⁹⁸ ICC, Pre-Trial Chamber II, *Decision in the Situation in the Republic of Kenya*, 31 March 2010, ICC-01/09-19-Corr., § 32

⁵⁹⁹ *Ibid.*, §21, §26.

⁶⁰⁰ On the basis of reference to the following NGO Reports. See, for the most recent documented allegations of torture and other forms of ill-treatment of administrative detainees, the B’Tselem/Hamoked joint reports: *Backed By The System: Abuse And Torture At The Shikma Interrogation Facility* (2015), available at https://www.btselem.org/sites/default/files/sites/default/files2/201512_backed_by_the_system_eng.pdf; *Kept in the Dark: Treatment of Palestinian Detainees in the Petach- Tikva Interrogation Facility of the Israel Security Agency* (2010), available at https://www.btselem.org/sites/default/files/sites/default/files2/publication/201010_kept_in_the_dark_eng.pdf; *Absolute Prohibition: The Torture and Ill-Treatment of Palestinian Detainees* (2007), available at https://www.btselem.org/sites/default/files/sites/default/files2/publication/200705_utterly_forbidden_eng.pdf; the Annual reports by Addameer, *Violations against Palestinian Prisoners & Detainees In Israeli Prisons & Detention Centers*, available at <http://www.addameer.org/publications/annual-violations-reports> and the Addameer report, *Torture of Palestinian Political Prisoners in Israeli Prisons* (2003), available at http://www.addameer.org/sites/default/files/publications/torture-eng_0.pdf; and the reports of the Public Committee Against Torture in Israel, *Family Matters, Part Two: The Ongoing use of Family Members in GSS Interrogations Against Torture in Israel* (2012), available at <http://stoptorture.org.il/family-matters-part-two-the-ongoing-use-of-family-members-in-gss-interrogations-june-2012/?lang=en>; *When the Exception Becomes the Rule: Incommunicado Detention of Palestinian Security Detainees* (2010), available at <http://stoptorture.org.il/when-the-exception-becomes-the-rule-incommunicado-detention-of-palestinian-security-detainees-october-2010/?lang=en>; *Shackling as a Form of Torture and Abuse* (2009), available at <http://stoptorture.org.il/shackling-as-a-form-of-torture-and-abuse-june-2009/?lang=en>. See, also, the reports of Addameer, *Aggressions by Special Units of the Israeli Prison Service against Prisoners and Detainees during*

The second part of the test, under Article 53(1)(b), which is dependent upon the satisfaction of the criteria of admissibility, under Article 17, would centre upon Article 17(1)(a) and 17(1)(b), the unwillingness or genuine inability of either Palestine or Israel to institute and bring to conclusion an investigation or prosecution; and upon Article 17(1)(d) the sufficient gravity of the case.

The consideration of Article 17(1)(a) and 17(1)(b) concerns the relationship of complementarity between the ICC and the domestic legal systems of Palestine and Israel: the basis upon which the ICC is empowered to undertake the investigation and prosecution in place of a domestic legal system. The Palestinian and Israeli domestic legal systems are not, at present, engaged in any current investigation or prosecution of an individual or individuals for criminal conduct which would also fulfil the definition of the offences defined in Article 5 of the Rome Statute.

In the absence of any investigation or proceedings, it is, therefore, unnecessary to discuss the Pre-Trial Chamber's further determination of the content of the complementarity principle under Article 17 in situations where domestic investigations or proceedings have been initiated.⁶⁰¹

The Palestinian domestic legal system, originating from the Oslo Accords, remains profoundly affected by the continued Israeli occupation and presence and operation of the Israeli military court system within the OPT, the separation between Gaza and the West Bank, and the stunted capacity of Palestinian institutions. Palestine can, therefore, be characterized as genuinely unable undertake the effective investigation and prosecution of crimes relating to the Israeli State practice of administrative detention at domestic level.⁶⁰²

Transfers and Raids (2014), available at http://www.addameer.org/sites/default/files/publications/special_units_of_the_ips.pdf; Adaameer, Physicians for Human Rights-Israel, *The Sounds of Silence: Isolation and Solitary Confinement of Palestinians in Israeli Detention July 2008*, available at <http://www.addameer.org/sites/default/files/publications/isolation-eng.pdf>; Adalah, Physicians for Human Rights-Israel and Al Mezan, *Solitary Confinement of Prisoners and Detainees in Israeli Prisons June 2011*, available at https://www.adalah.org/uploads/oldfiles/upfiles/2011/Solitary_confinement_position_paper_English.pdf; The Public Committee Against Torture in Israel, *When the Exception Becomes the Rule: Incommunicado Detention of Palestinian Security Detainees – October 2010*, available at <http://stoptorture.org.il/when-the-exception-becomes-the-rule-incommunicado-detention-of-palestinian-security-detainees-october-2010/?lang=en>; Physicians for Human Rights-Israel, *The Politics of Punishment Solitary confinement of prisoners & detainees in Israeli prisons Status Report*, available at <http://cdn3.phr.org.il/wp-content/uploads/2015/03/Politics-of-Punishment-report-phri-prisoners-palestinians-2016.pdf>; Physicians for Human Rights-Israel, *Position Paper July 2012: Inhumane Conditions of Imprisonment of Palestinian Security-Classified Prisoners in Israeli Prisons*, available at http://cdn3.phr.org.il/wp-content/uploads/2017/02/PHRI_Report_Inhumane-Conditions-of-Imprisonment-of-Palestinian-Security-Classified-Prisoners-in-Israeli-Prisons_2012.pdf

⁶⁰¹ ICC, Pre-Trial Chamber I, *Situation in the Democratic Republic of Congo in the Case Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-8-Corr, PTCI, 24 February 2006, §3.

⁶⁰² V. Azarova and S. Weill, "Israel's Unwillingness? The Follow-Up Investigations to the UN Gaza Conflict Report and International Criminal Justice", *International Criminal Law Review*, Vol. 12, No.5 (2012), pp. 905-935. See, also, the earlier considerations of the incapacity of the Palestinian domestic legal system, in Nathan Brown, *Palestinian Politics After the Oslo Accords: Resuming Arab Palestine*, Berkeley: University of California Press, 2003; Glen Robinson, 'The Politics of Legal Reform in Palestine', *Journal of Palestine Studies*, 27:1 (Autumn 1997), pp. 51-60; United Nations Special Coordinator for the Occupied Territories, *Rule of Law Development in the West Bank and Gaza Strip, Survey and State of the Development Effort*, 31 May 1999.

The Report's evaluation of the lack of capacity of the Palestinian domestic legal system is supported by the most recent Report of *Preliminary Examination Activities 2018* in which it considers that "the Palestinian authorities are unable to exercise jurisdiction over the alleged Israeli perpetrators".⁶⁰³

In contrast, the Israeli domestic legal system appears to be characterized by an unwillingness to initiate genuine investigations and/or investigations which lead to the initiation of prosecutions. The preceding parts of the Report have indicated that, despite the use of administrative detention in the OPT since the inception of the occupation in 1967, the grounds for the arrest and subsequent administrative detention of individuals have only ever been annulled by the Israeli Supreme Court in one instance. Furthermore, even in this single instance, the detainee was not immediately released, and no investigation nor prosecution of the relevant Israel state personnel was ever undertaken.⁶⁰⁴ The interrogation of detainees and their treatment in, and conditions of detention, have led to regular and continued allegations of torture and ill-treatment. In the rare instances in which Israel has initiated an investigation, this has not led to the prosecution of any individual or individuals.⁶⁰⁵

The evidence of a systematic unwillingness, within Israeli State institutions, to engage in effective and independent investigation and prosecution, in regard to the Israeli State practice of administrative detention, is the reflection of a wider unwillingness of Israeli State institutions revealed by United Nations experts in the aftermath of the Gaza Conflict of December 2008-January 2009.⁶⁰⁶ In particular, the Fact-Finding Mission on the Gaza Conflict (the "Goldstone Report") concluded that "there are serious doubts about the willingness of Israel to carry out genuine investigations in an impartial, independent, prompt and effective way as required by international law".⁶⁰⁷ The Committee of Experts on the follow-up investigations to the Goldstone Report, affirmed this conclusion, finding that, although "there are mechanisms in place within the Israeli legal order to investigate allegations of war crimes", the "actual operation" of Israel's military investigations system raised serious doubts as to its compliance with international standards.⁶⁰⁸

The absence of compliance, and, therefore the effective unwillingness, derives from the "inherent conflict of interest" of the prosecutorial office within the military, that is, the Military Advocate General ("MAG"), which was not found to conduct investigations independently and impartially.⁶⁰⁹ The Committee of Experts concluded that the Israeli military justice system "would not be the appropriate mechanism" to carry out an effective and impartial investigation into the alleged violations of IHL and IHRL committed in West Bank and Gaza.⁶¹⁰

⁶⁰³ The Office of the Prosecutor, *Preliminary Examination Activities 2018*, Op. cit., §277.

⁶⁰⁴ See above Part I and II.

⁶⁰⁵ See above Part II.

⁶⁰⁶ HRC, *Report of the United Nations Fact-Finding Mission on the Gaza Conflict* ("Goldstone Report"), A/HRC/12/48, 25 September 2009, §§ 1832, 1961. See, also, Human Rights Council, *Report of the Committee of independent experts in international humanitarian and human rights laws to monitor and assess any domestic, legal or other proceedings* [...], A/HRC/15/50, 23 September 2010, §§89-95. See, also, V. Azarova and S. Weill, Op. cit.

⁶⁰⁷ HRC, *Report of the United Nations Fact-Finding Mission on the Gaza Conflict*, Op. cit., §1961.

⁶⁰⁸ HRC, *Report of the Committee of independent experts in international humanitarian and human rights laws to monitor and assess any domestic, legal or other proceedings* [...], Op. cit., §§ 90-91, 94-95.

⁶⁰⁹ Ibid., §41.

⁶¹⁰ Human Rights Council, *Report of the Committee of independent experts in international humanitarian and human rights laws to monitor and assess any domestic, legal or other proceedings* [...], A/HRC/15/50, 23 September 2010, §§94-95.

The findings of the Committee of Experts are reinforced by the International Federation for Human Rights Report, *Shielded From Accountability. Israel's Unwillingness to Investigate and Prosecute International Crimes*, in 2011; and the B'Tselem Report, *The Occupation's Fig Leaf: Israel's Military Law Enforcement System as a Whitewash Mechanism*, in 2016. These Reports reveal the structural and functional deficiencies in Israel's investigation system arising from its lack of promptness, independence and impartiality in the conduct of investigations and prosecutions and reinforced by the introduction and approval of legislation aimed at shielding high-level military and political officials from criminal responsibility.⁶¹¹

The position of these Reports is provided with further support from the response of a number of Israeli professors of international law in their expert response submitted to The Public Commission to Examine the Maritime Incident of 31 May 2010 ("Turkel Commission") established by Israel in relation to the Flotilla raid, in June 2011.⁶¹² The response relates to the evidence given by the Military Advocate General to the Commission in regard to the investigatory practices utilized in response to allegations of violations of IHL. Their expert response and emphasizes the structural obstacles to the effective procedural regulation of investigation and prosecution of perpetrators of international crimes.⁶¹³

The 2014 Gaza War is, at present, the subject of a preliminary examination by the OTP, and the Israeli investigation exemplifies these structural deficiencies, as emphasized by the UN Fact-Finding Mission's comprehensive and detailed Report of 2015, which states that

"[t]he commission is concerned about a number of *procedural, structural and substantive shortcomings*, which continue to compromise Israel's ability to adequately fulfil its duty to investigate".⁶¹⁴

The Fact-Finding Mission, in their Report containing the main findings and

⁶¹¹ FIDH - International Federation for Human Rights, *Shielded From Accountability. Israel's Unwillingness to Investigate and Prosecute International Crimes*, October 2011 (see also reports and case studies cited therein), available at <https://www.fidh.org/en/region/north-africa-middle-east/israel-palestine/Shielded-from-accountability>; B'Tselem, *The Occupation's Fig Leaf: Israel's Military Law Enforcement System as a Whitewash Mechanism*, available at https://reliefweb.int/sites/reliefweb.int/files/resources/201605_occupations_fig_leaf_eng.pdf. The structural deficiencies are also highlighted by Cohen and Shany, who consider that "[a]lthough the IDF MAG, the most senior lawyer in the Israeli military, is nominally independent in his decisions, he is appointed jointly by the Chief of the IDF General Staff (CGS) and the Minister of Defense. In addition, his term of office is not defined, and recent MAG's have been promoted (to the rank of Major General) during their term of office. Naturally, this raises some concerns regarding the independence of their office when conducting investigations that may implicate the highest ranks in the military and government. An additional problem afflicting the Israel system of military investigations involves the dual capacity of the MAG as both the chief legal advisor of the military and the head of military prosecutions (and in effect also the head of military investigations). This highly centralized system creates the appearance of partiality: the MAG is responsible both for giving operational advice with respect to military operations and for conducting investigations which sometimes involve operations which followed the same advice". (Amichai Cohen and Yuval Shany, "Beyond the Grave Breaches Regime: The Duty to Investigate Alleged Violations of International Law Governing Armed Conflicts", in M. N. Schmitt and L. Arimatsu (eds.), *Yearbook of International Humanitarian Law*, Vol. 14, (2011), pp. 38-84 (p.73)).

⁶¹² The proceedings of the Turkel Commission are available in Hebrew at <http://www.turkel-committee.com/connt-153-b.html>

⁶¹³ See, Yuval Shany et al., "Response to the Military Advocate General's Position Paper on the Investigation of Allegations of Violations of International Humanitarian Law", February 2011.

⁶¹⁴ HRC, *Report of the detailed findings of the independent commission of inquiry established pursuant to Human Rights Council resolution S-21/1*, 24 June 2015, A/HRC/29/CRP.4, §618.

recommendations, while articulating these concerns with regard to the existing Israeli institutional framework for investigation and prosecution, sought to ensure, through its recommendations, that the Israeli investigations

“comply with international human rights standards and that allegations of international crimes, where substantiated, are met with indictments, prosecutions and convictions, with sentences commensurate to the crime, and to take all measures necessary to ensure that such investigations will not be confined to individual soldiers alone, but will also encompass members of the political and military establishment, including at the senior level, where appropriate”.⁶¹⁵

The Commission’s final Report affirmed this, noting that “impunity prevails across the board for violations of international humanitarian law and international human rights law allegedly committed by Israeli forces, whether it be in the context of active hostilities in Gaza or killings, torture and ill-treatment in the West Bank”.⁶¹⁶

In addition, the UN Commission of Inquiry’s final Report, in its analysis of Israel’s ‘military culture’, based on patterns of attacks, concluded that to ensure compliance and accountability it was necessary that Israel fundamentally review its military doctrine and rules of engagement.⁶¹⁷ The UN Commission indicates that the previous practices of investigation and prosecution indicate an exclusive focus in Israeli military investigations upon the actions of individual soldiers in relation to violations of Israel’s military code of conduct. This focus entails the absence of consideration of the wider responsibility of “members of the military and political establishment”⁶¹⁸, and removes the responsibility for international crimes as an integral part of an investigation.

The limited focus of Israeli military investigations, in relation to incidents arising from the 2014 Gaza War, is compounded by the closure of investigations and the absence of significant prosecution of military personnel for international crimes.⁶¹⁹ The status of investigation, by August 2018, was one in which

“the office of the Military Advocate General (MAG)—Israel’s chief military legal officer—has reviewed some 360 incidents, referring 24 of them for criminal investigation. These have led so far to the conviction of three soldiers for the crime of looting. Additionally, 220 of the incidents were referred for examination by a high-level fact-finding team. On the basis of that team’s findings, the MAG decided to continue with criminal investigations of seven incidents. Of these, five did not result in criminal charges and two remain ongoing”.⁶²⁰

⁶¹⁵ Ibid., §86(a).

⁶¹⁶ Ibid., §76.

⁶¹⁷ Ibid., §85.

⁶¹⁸ Ibid., §681(a).

⁶¹⁹ By June 2015, “approximately 190 alleged incidents have been referred by the MAG for examination by the FFA Mechanism; 105 of these incidents have already been examined and referred to the MAG for decision. Of these incidents, it was decided by the MAG to refer seven for criminal investigation”. Operation Protective Edge: Investigation of exceptional incidents - Update 4, Decisions of the IDF Military Advocate General, 11 June 2015, available at <http://mfa.gov.il/MFA/ForeignPolicy/IsraelGaza2014/Pages/Operation-Protective-Edge-Investigation-of-exceptional-incidents-Update-4.aspx>.

⁶²⁰ See, Amichai Cohen and Yuval Shany, “Israel’s Military Advocate General Terminates ‘Black Friday’ and Other Investigations: Initial Observations”, August 27th 2018, available at <https://www.lawfareblog.com/israels-military-advocate-general-terminates-black-friday-and-other-investigations-initial>.

The investigation has been accompanied by the regular announcement of the conclusion and closure of particular investigations, in a series of Updates issued by the Office of the MAG. In relation to the most recent Update, Update 6⁶²¹, which relates, in part, to the closure of an investigation into a potentially serious incident of civilian casualties, the criteria applied to determine the decision to close the investigation combined with the character and duration of the procedure of evidence gathering indicate number of significant difficulties. There is a lack of comprehensive consideration of relevant obligations under international law, the absence of careful evaluation of evidence compounded by the four-year duration of the investigation.⁶²²

The Report's evaluation of the lack of willingness of the Israeli domestic legal system is reinforced and extended by the most recent Report of *Preliminary Examination Activities 2018* in which the OTP considers that

“the Israeli government has consistently maintained that settlements-related activities are not unlawful and the High Court of Justice (“HCJ”) has held that the issue of the Government's settlement policy was non-justiciable”.⁶²³

From this analysis of the respective institutional capacities of the Palestinian and Israeli domestic legal systems, it appears that neither Israel nor Palestine would be considered as willing or able to prosecute the persons responsible for the possible crimes connected with administrative detention.

The final element of Article 53(1)(b), the further consideration of gravity, under Article 17(d), is provided with specific guidelines in the Pre-Trial Chamber decision in relation to the *Flotilla* incident.⁶²⁴ For the Pre-Trial Chamber, confirming the previous jurisprudence of the ICC, the assessment of gravity involves the following main elements:

- (i) a gravity determination involves a generic assessment (general in nature and compatible with the fact that an investigation is yet to be opened) of whether the groups of persons that are likely to form the object of the investigation capture those who may bear the greatest responsibility for the alleged crimes committed; and
- (ii) gravity must be assessed from both a “quantitative” and “qualitative” viewpoint and factors such as nature, scale and manner of commission of the alleged crimes, as well as their impact on victims, are indicators of the gravity of a given case.⁶²⁵

The application of these criteria of the gravity test to the Israeli State practice of administrative detention involves the more detailed consideration of the five aspects of gravity: consideration with respect to the potential perpetrators of the crimes, scale of the crimes, nature of the crimes, manner of commission and impact of the crimes.

⁶²¹ Update 6, August 18th 2018.

⁶²² See, Amichai Cohen and Yuval Shany, Op. cit.

⁶²³ The Office of the Prosecutor, *Preliminary Examination Activities 2018*, Op. cit., §277.

⁶²⁴ Pre-Trial Chamber, Situation on the Registered Vessels of the Union of the Comoros, Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation, ICC-01/13-34, 16 July 2015.

⁶²⁵ Ibid., §21. Affirming the previous decisions in Pre-Trial Chamber II, *Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya*, 31 March 2010, ICC-01/09-19-Corr §§60-62; and Pre-Trial Chamber III, *Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire*, 15 November 2011, ICC-02/11-14-Corr, §§203-205.

In regard to the potential perpetrators of the crimes, the Report adopts the position of the Pre-Trial Chamber in the *Flotilla* case, that the central focus of this aspect of gravity is upon the conduct, and, as such, should then proceed to determine “those being the most responsible for the crimes under consideration”⁶²⁶. Therefore, it is necessary to proceed in two stages. First, to determine the gravity of the potential case(s), and, only after having established that this is sufficiently grave, to identify, in the second stage, the extent of responsibility of the individual personnel and office holders of the relevant Israeli State institutions. On this basis, the conduct resulting from the Israeli State practice of administrative detention would satisfy this degree of gravity of the first stage. The fulfilment of the first stage would then be the basis to proceed to the second stage in order to indicate that individual responsibility for this conduct would extend to those occupying the highest levels in the Israeli Government, the commanders of the Israeli military and the security agencies, and the directors of the relevant interrogation or detention facilities.

The application of the aspect of the scale of the crimes would lead to examination of the extent of the Israeli detention estate and the number of individuals, both adults and children, subject to administrative detention and/or suffering harm from treatment in or conditions of detention. This aspect of gravity would be satisfied.

The application of the aspect of the nature of the crimes involves consideration of “the relative gravity of the possible legal qualifications of the apparent facts, *i.e.* the crimes that are being or could be prosecuted”.⁶²⁷ As detainees, Palestinian civilians in the OPT, have been, and remain, subject at the stages of arrest, interrogation and treatment and conditions in detention to the numerous forms of harm capable of constituting violations of IHL, IHRL and ICL. This has inevitably had a significant impact on detainees who, as the victims of these violations, have suffered physical, psychological and emotional harm. Thus, this provides the requisite factual background for the determination of their further legal qualification as crimes that are being or could be prosecuted.

The application of the manner of commission focuses upon the existence of systematic commission and/or a deliberate policy or plan directing the commission. The Israeli State practice of administrative detention forms part of the Israeli military governance of Palestinian occupied territories. The regularity with which, at each of its stages, harm is inflicted upon detainees, indicates that these harms are committed systematically, and that their degree of systematicity is also indicative of a deliberate policy or plan directing their commission.

The application of the final aspect, the impact of the crimes, follows the approach of the Pre-Trial Chamber in the *Flotilla* case. On this basis, the analysis would commence from a determination of impact in which it was *not* necessary for a direct connection between the harm to the victims and the harm to the civilian population of the Palestinian occupied territories to be established. Thus, the harm to the victims would, in itself, be sufficient to satisfy the requirement of impact without the need to consider the harm to the civilian population of the Palestinian territories.

⁶²⁶ Pre-Trial Chamber, Situation on the Registered Vessels of the Union of the Comoros, Decision on the request of the Union of the Comoros to review the Prosecutor’s decision not to initiate an investigation, ICC-01/13-34, 16 July 2015, §23.

⁶²⁷ *Ibid.*, §28.

The demonstration of the satisfaction of the criteria, under both Article 53(1)(a) and Article 53(1)(b), leads to the consideration of whether the further criterion, under Article 53(1)(c), of the interests of justice. This ground is a distinct criterion, which, in contrast to the preceding subsections of Article 53, is a “*countervailing* consideration”, which requires determination of whether there remains a “reason *not* to proceed” despite the fulfilment of the tests under these preceding subsections.⁶²⁸

The determination of the existence of this “*countervailing* consideration” is guided by the character of the criterion of the interests of justice which is “exceptional in its nature and that there is a presumption in favour of investigation or prosecution wherever the criteria established in Article 53(1) (a) and (b) or Article 53(2)(a) and (b) have been met”.⁶²⁹ This emphasizes that the application of this criterion remains guided by “the objects and purposes of the [Rome] Statute – namely the prevention of serious crimes of concern to the international community through ending impunity”.⁶³⁰ Hence, the Report considers that, as a result of demonstration of the fulfilment of Article 53(1)(a) and Article 53(1)(b), that it would represent an exceptional departure from recognized prosecutorial practice, by the OTP, if a decision not to initiate an investigation was based upon the interests of justice under Article 53(1)(c).⁶³¹ For, as the Report has demonstrated, in the preceding sections, the practice of administrative detention is an institutionally organised and widespread activity, which has been utilized over several decades and affected thousands of Palestinian civilians.

On the basis of this analysis of Article 53(1) of the Rome Statute, should the Israeli State practice of administrative detention become the subject of a preliminary examination by the Prosecutor of the ICC, there is sufficient foundation upon which to conclude that there is a reasonable basis to proceed with an investigation by the Prosecutor of the ICC.⁶³² This, in turn, leads the Report to analyse the applicable crimes under Article 5 of the Rome Statute.

4 The Applicable Crimes under Article 5 of the Rome Statute

Introduction

The Report proceeds to consider, within the context of the procedural stage of an investigation, the crimes which are potentially applicable to the Israeli State practice of administrative detention. The Report, therefore, indicates those crimes, which are potentially committed as a result of the alleged harm caused to individuals by the Israeli State practice of

⁶²⁸ Office of the Prosecutor, *Policy Paper on the Interests of Justice*, September 2007, p. 2, available at <https://www.icc-cpi.int/nr/rdonlyres/772c95c9-f54d-4321-bf09-73422bb23528/143640/iccotpinterestsofjustice.pdf>.

⁶²⁹ *Ibid.*, p.1.

⁶³⁰ *Ibid.*

⁶³¹ See, also, Azarova, Mariniello, ‘Why the ICC Needs a ‘Palestine Situation’, *Op. cit.*, Section 4.

⁶³² The Report, through its sole focus upon the legal analysis of potential liability of the Israeli State practice of administrative detention for offences under Article 5 of the Rome Statute and potential jurisdiction of the ICC, leaves aside the further question of whether liability and prosecution, under international criminal law, should be the predominant or exclusive orientation. The Report merely indicates that liability and prosecution, under international criminal law, arises as possibility in relation to the Israeli State practice of administrative detention. In addition, it does not discuss the question of the parameters of the exercise and review of the Prosecutor’s discretion to proceed with an investigation, which is the focus of the *Comoros* jurisprudence (*Situation On The Registered Vessels Of The Union Of The Comoros, The Hellenic Republic And The Kingdom Of Cambodia*, ICC-01/13, 16 July 2015; *Situation On The Registered Vessels Of The Union Of The Comoros, The Hellenic Republic And The Kingdom Of Cambodia*, No. ICC-01/13, 15 November 2018).

administrative detention. The purpose of this section is merely to indicate a range of potential offences without any intention to impinge upon the exercise of the Office of the Prosecutor's discretion in the further determination of either a hierarchy or greater pertinence amongst them.

Article 7 of the Rome Statute: The Contextual Element of Crimes Against Humanity

The definition of crimes against humanity, under Article 7, is of the contextual element and the individual act.⁶³³ The contextual element requires that the individual act is perpetrated as part of a widespread and systematic attack against a civilian population. Under Article 7(2)(a), the widespread and systematic attack must, in addition, be one which is carried out "pursuant to or in furtherance of a State or organizational policy to commit such attack". In relation to the policy element of the contextual definition, a clear State policy commences from the military occupation of the Palestinian Territories in 1967, and is reinforced by the character and dynamics of the military institutions and administration involved in the continued occupation of the Palestinian territories.⁶³⁴

The notion of an attack is not confined to a military attack on a civilian population, rather, it extends to "a campaign or operation carried out against the civilian population".⁶³⁵ The attack has to be "directed against the civilian population as a whole and not merely against randomly selected individuals".⁶³⁶ This is the corollary of the requirement of the widespread or systematic character of the attack and, "this contextual element applies disjunctively, such that the alleged acts must be either widespread *or* systematic to warrant classification as crimes against humanity".⁶³⁷

The term "widespread" refers to

"both the large-scale nature of the attack and the number of resultant victims. The assessment is neither exclusively quantitative nor geographical, but must be carried out on the basis of the individual facts. Accordingly, a widespread attack may be the "cumulative effect of a series of inhumane acts or the singular effect of an inhumane act of extraordinary

⁶³³ As discussed above, this Section will not examine the subjective element (*mens rea*) of international crimes, because at the situational stage, prior to the identification of individuals and their conduct, determination of the subjective element is unnecessary.

⁶³⁴ Thus, it is already a clearer and more evident State policy than required by the definition contained in ICC case law (See, ICC, *Prosecutor v. Ruto, Koshey and Sang*, "Decision on the confirmation of charges", ICC-01/09-01/11, 23 January 2012, paras. 185, 210, 219; *Prosecutor v. Callixte Mbarushimana*, "Decision on the confirmation of charges", ICC-01/04/01/10, 16 December 2011, para. 266; ICC, *Prosecutor v. Germain Katanga*, ICC- ICC-01/04-01/07, 7 March 2014, paras. 1106ff), and, as a result, would be accepted as fulfilling the definition by the predominant position in contemporary academic discussion (See, for example, Darryl Robinson, "Crimes Against Humanity: A Better Policy on 'Policy'", in Carsten Stahn (ed.), *The Law and Practice of the International Criminal Court* (Oxford: Oxford University Press, 2014), pp. 705-731; William A. Schabas, "Crimes Against Humanity: The State Plan Or Policy Element", in Leila Sadat and Michael Scharf (eds.), *The Theory and Practice of International Criminal Law: Essays in Honor of M. Cherif Bassiouni* (Leiden: Brill, 2008), pp. 347-364).

⁶³⁵ Elements of Crimes, Introduction to Article 7 of the Statute, §3. As affirmed by ICC, PTC, Situation in Kenya, ICC-01/09, 31 March 2010, § 80; ICTY, Kunarac, Appeal Judgment, 12 June 2002, § 86.

⁶³⁶ ICC, PTC, Situation in Kenya, ICC-01/09, 31 March 2010, §81. Citing Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ICC-01/05-01/08-424, §77.

⁶³⁷ ICC, PTC, Situation in Kenya, Op. cit, §94

magnitude”⁶³⁸.

In contrast, the term “systematic” refers to the degree of organization, rather than the large-scale nature of the attack. The capacity to designate an attack against a civilian population as systematic rests upon the pattern evident in the attack relevant which indicates the organized character of the attack.⁶³⁹

The widespread or systematic attack on a civilian population has to form a nexus with individual conduct committed against the civilian population in order to establish a crime against humanity. Thus, prior to identifying the specific crimes against humanity which are potentially committed by individuals under the Israeli State practice of administrative detention, it is necessary to establish the existence of the contextual element. Hence, it has to be addressed whether Israel has engaged in a series of interconnected actions against civilians living in the OPT which, as a whole, are capable of representing a widespread and/or systematic attack against a civilian population.

The following non-exhaustive catalogue of Israeli actions in the OPT indicates the geographically extensive character of a multifaceted attack against the Palestinian civilian population. These actions show the attack against the civilian population in the OPT is widespread. The non-exhaustive catalogue is composed of the following:

(i) the process of settlement construction, which has been proclaimed to be illegal under international law by several United Nations bodies, including the Security Council and the International Court of Justice,⁶⁴⁰ and is coupled with laws and policies, which involve the territorial dispossession, through house demolitions and forcible evictions⁶⁴¹, of Palestinian civilians. These aspects of settlement construction entail the destruction and unlawful appropriation of Palestinian houses, land and natural resources⁶⁴² and, in addition, the breach

⁶³⁸ Ibid., §94. Citing ICTY, *Prosecutor v. Blagojevic and Jokic*, Case No. IT-02-60-T, Judgement, 17 January 2005, §545; Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ICC-01/05-01/08-424, § 83; ICTY, *Prosecutor v. Blaskic*, Case No. IT-95-14-T, Judgement, 3 March 2000, §206; ICTY, *Prosecutor v. Kordic and Cerkez*, Case No. IT-95-14/2-A, Appeal Judgement, 17 December 2004, §94; ICTY, *Prosecutor v. Blaskic*, Case No. IT-95-14-A, Appeal Judgment, 29 July 2004, §101.

⁶³⁹ ICC, PTC, Situation in Kenya, Op. cit., §96. Citing §99 ICTR, *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgement, 2 September 1998, §580; ICTY, *Prosecutor v. Blaskic*, Case No. IT-95-14-T, Judgement, 3 March 2000, §203.

⁶⁴⁰ See ICJ *Wall Advisory Opinion*, Op. cit., §120 (and legal materials cited therein); UN Secretary-General, *Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories*, 24 August 2016, A/71/355, §3 (and legal materials cited therein).

⁶⁴¹ UN Secretary-General, *Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories*, Op. cit., §24.

⁶⁴² See HRC, *Concluding observations on the third periodic report of Israel*, 3 September 2010, CCPR/C/ISR/CO/3, §16 (expressing concern at the restrictions to Palestinians’ freedom of movement, frequent refusal to grant agricultural permits to reach land, increase of Israeli population in the settlements), §17 (frequent denial of construction permits to Palestinians and related demolition of property, homes and schools, and “discriminatory municipal planning system [...] disproportionately favouring the Jewish population”), §18 (water shortages disproportionately affecting Palestinians); Committee on Economic, Social and Cultural Rights, *Concluding Observations on Israel’s Third Periodic Report*, E/C.12/ISR/CO/3, 16 December 2011, §26 (house demolitions and forced evictions in the West Bank), §29 (access to water); Committee on Economic, Social and Cultural Rights, *Concluding Observations on Israel’s Second Periodic Report*, E/C.12/1/Add.90, 23 May 2003, § 25 (expressing particular concern at inequitable management of water management in the OPT, resulting in limited access to water for Palestinians), §26 (expropriation of Palestinian properties and resources in the OPT for the expansion of Israeli settlements); Committee on Economic, Social and Cultural Rights,

of numerous other human rights of Palestinians. In particular, the “rights to freedom of self-determination, non-discrimination, freedom of movement, equality, due process, fair trial, not to be arbitrarily detained, liberty and security of person, freedom of expression, freedom of access to places of worship, education, water, housing, adequate standard of living, property, access to natural resources and effective remedy”.⁶⁴³ The effect of upon the Palestinian civilian population is repeated and increased in geographical scope in each instance of construction of additional individual settlements.⁶⁴⁴ The continued expansion of settlement construction is linked to the wider purpose of the annexation of parts of the West Bank to the territory of Israel as the occupying power.⁶⁴⁵

(ii) the transfer of the Israeli population into the OPT to become settlers within the settlements constructed by Israel in the OPT which involve the territorial dispossession and forcible transfer of the Palestinian civilian population.

(iii) the creation of two distinct legal regimes in the West Bank, and their respective application to two separate classes of the civilian population (Israeli settlers and Palestinians) based on ethnic and religious grounds, with Palestinians subject to the Israeli military court system and Israeli settlers falling under the jurisdiction of civil courts.⁶⁴⁶

(iv) the disproportionate use of force by Israeli security forces against Palestinians in the West Bank, often resulting in ill-treatment, coupled with the failure of Israel, as occupying power, to protect Palestinians from the violence of Israeli settlers.⁶⁴⁷

(v) incidents of the recourse to the use of excessive, lethal force by Israeli security forces against Palestinian civilians in the context of law enforcement operations or civilian demonstrations, and incidents of collective punishment – penalizing individual Palestinian civilians for crimes which they did not commit.⁶⁴⁸

Concluding Observations on Israel’s Initial Report, E/C.12/1/Add.27, 4 December 1998, § 21 (settlement policy and transfer of Israeli residents into East Jerusalem), §24 (expropriation of Palestinian land and resources, limitation on Palestinian freedom of movement, discriminatory allocation of water resources).

⁶⁴³ HRC, *Report of the independent international fact-finding mission to investigate the implications of the Israeli settlements on the civil, political, economic, social and cultural rights of the Palestinian people throughout the Occupied Palestinian Territory, including East Jerusalem*, 7 February 2013, A/HRC/22/63, §105; UN Secretary-General, *Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories*, Op. cit., §25 ff. (detailing the human rights violations stemming from the settlements in the city of Hebron).

⁶⁴⁴ UN Secretary-General, *Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories*, Op. cit., §24.

⁶⁴⁵ HRC, *Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967*, A/HRC/37/75, 15 March 2018, §§17-20; HRC, *Report of the independent international fact finding mission to investigate the implications of the Israeli settlements on the civil, political, economic, social and cultural rights of the Palestinian people throughout the Occupied Palestinian Territory, including East Jerusalem*, 7 February 2013, A/HRC/22/63, §§39-49.

⁶⁴⁶ FIDH - International Federation for Human Rights, *Shielded From Accountability. Israel’s Unwillingness to Investigate and Prosecute International Crimes*, October 2011, Sections 2.3, 3.1 (pointing out that “As a result, Palestinians and settlers who commit the same crime in the same place, are subjected to two distinct legal systems: one military and the other civilian. These two legal systems differ considerably in many respects, including in substantive and procedural criminal provisions, due process, prosecution policies, level of punishment, and sentencing”).

⁶⁴⁷ HRC, *Report of the United Nations Fact-Finding Mission on the Gaza Conflict (so-called “Goldstone Report”)*, A/HRC/12/48, 25 September 2009, §§1381-1383.

⁶⁴⁸ See, for example, Office of the United Nations High Commissioner for Human Rights, *Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories Human Rights Council*, A/72/565, 1 November 2017, §§6-17 (Use of force in

These instances, which indicate a widespread character, are also accompanied by a systematic character. The Israeli State is at the foundation of the settlement policy and maintains a central role in the creation, promotion and expansion of settlements in the OPT through a wide range of measures, such as

“allocation of land for the purposes of constructing settlement homes and infrastructure, [...] delivery of public services, the encouragement of economic activities, including agriculture and industries around the settlements, the development of national parks and tourist sites, support for private initiatives and the retroactive approval of unauthorized constructions [so-called outposts]”.⁶⁴⁹

The support for the settlement project is explicitly acknowledged by senior members of the Israeli government,⁶⁵⁰ the allocation and use of public funds⁶⁵¹ and the provision of benefits and incentives to settlers.⁶⁵² The settlement construction policy has been substantially accelerated between April 2016 and March 2017 and, at present, it appears to be continuing to maintain this accelerated character.⁶⁵³ The purpose of this State policy and its implementation involve the destruction and unlawful appropriation of Palestinian houses, land and natural resources, the gross violation of the rights of Palestinian people on

the context of law enforcement); §§18-27 (Practices raising concern of collective punishment). See, also, Amnesty International, *Trigger-Happy: Israel's Use Of Excessive Force In The West Bank*, 2013, available at https://www.humanite.fr/sites/default/files/legacy/rapport_amnesty_2013_israel.pdf. *Report of the United Nations Fact-Finding Mission on the Gaza Conflict (so-called "Goldstone Report")*, A/HRC/12/48, 25 September 2009, §§1430-1436.

⁶⁴⁹ UN Secretary-General, *Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories*, 24 August 2016, A/71/355, §4. See also HRC, *Report of the independent international fact-finding mission to investigate the implications of the Israeli settlements on the civil, political, economic, social and cultural rights of the Palestinian people throughout the Occupied Palestinian Territory, including East Jerusalem*, 7 February 2013, A/HRC/22/63, §20.

⁶⁵⁰ In June 2017, Prime Minister Benjamin Netanyahu heralds the construction of a brand new settlement, see <https://www.theguardian.com/world/2017/jun/20/israel-new-settlement-benjamin-netanyahu-jared-kushner-amichai-amona>. See also HRC, *Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem, and the occupied Syrian Golan, Report of the United Nations High Commissioner for Human Rights*, A/HRC/37/43, 6 March 2018, §2 (“The Government of Israel declared that establishing settlements in the West Bank was a natural right of Israeli citizens”).

⁶⁵¹ HRC, *Report of the independent international fact finding mission to investigate the implications of the Israeli settlements on the civil, political, economic, social and cultural rights of the Palestinian people throughout the Occupied Palestinian Territory, including East Jerusalem*, 7 February 2013, A/HRC/22/63, §§21-22; Human Rights Council, *Report of the Special Rapporteur on adequate housing [...] Addendum*, 24 December 2012, A/HRC/22/46/Add.1, §95 (despite the Oslo agreements, Israel has continuously dedicated important public financial and technical resources to promote the expansion of settlements in the OPT).

⁶⁵² UN Secretary-General, *Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories*, 24 August 2016, A/71/355, §4.

⁶⁵³ Peace Now, “Central Bureau of Statistics: 70% Rise in Construction of Settlements during The Past Year, Compared to Previous Year”, 19 June 2017, available at <http://peacenow.org.il/en/central-bureau-statistics-70-rise-construction-settlements-past-year-compared-previous-year> (revealing the commencement of the construction of 2,758 housing units between April 2016 and March 2017, compared to 1,619 in the previous 12 months (the figures include illegal construction); in contrast, and interestingly, there was a drop of 6.5 % in building starts in Israel's sovereign territory, excluding Jerusalem district). See, also, a more recent report, confirming the upsurge in new construction of settlements and outposts, available at http://peacenow.org.il/wp-content/uploads/2018/03/Annual-Report-2017_Final.pdf. Human Rights Council, *Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem, and the occupied Syrian Golan, Report of the United Nations High Commissioner for Human Rights*, A/HRC/37/43, 6 March 2018, §2 (from 1st November 2016 to 31st October 2017, the Israeli settlement enterprise continued unabated in the West Bank, including East Jerusalem, and even accelerated).

discriminatory grounds, the forcible displacement of Palestinians, and the unlawful transfer of the Israeli population into Palestinian occupied territory.

The settlement project is an aspect of the Israeli governance of the OPT which operates upon the basis of two separate legal systems, one military and other civilian, with the system of military courts reserved exclusively for the Palestinian civilian population. The separation of the legal systems based upon the criteria of ethnicity is rendered more overtly discriminatory by the significantly weaker degree of procedural protection afforded to individuals subject to the military legal system. The substantial difference in the character of the military court system is a reflection of the broader operational policies and rules of engagement of the Israeli Defence Force in relation to the treatment of the Palestinian civilian population. This is evident in the Israeli Defence Force's use of excessive, lethal force and collective punishment against the Palestinian civilian population and the failure of the Israeli Defence Force to prevent the use of lethal force by Israeli settlers against the Palestinian civilian population.⁶⁵⁴

⁶⁵⁴ See HRC, *Concluding observations on the third periodic report of Israel*, 3 September 2010, CCPR/C/ISR/CO/3, §16 (expressing concern at the restrictions to Palestinians' freedom of movement, frequent refusal to grant agricultural permits to reach land, increase of Israeli population in the settlements), §17 (frequent denial of construction permits to Palestinians and related demolition of property, homes and schools, and "discriminatory municipal planning system [...] disproportionately favouring the Jewish population"), §18 (water shortages disproportionately affecting Palestinians), §22 (difference in the treatment of Israeli and Palestinian juvenile offenders); HRC, *Concluding Observations: Israel*, 21 August 2003, CCPR/CO/78/ISR, §11; HRC, *Concluding Observations: Israel*, 18 August 1998, CCPR/C/79/Add.93, §§13, 23; Committee on Economic, Social and Cultural Rights, *Concluding Observations on Israel's Initial Report*, E/C.12/1/Add.27, 4 December 1998, §21 (settlement policy and transfer of Israeli residents into East Jerusalem), §24 (expropriation of Palestinian land and resources, limitation on Palestinian freedom of movement, discriminatory allocation of water resources); Committee on Economic, Social and Cultural Rights, *Concluding Observations on Israel's Second Periodic Report*, E/C.12/1/Add.90, 23 May 2003, § 25 (expressing particular concern at inequitable management of water management in the OPT, resulting in limited access to water for Palestinians), §26 (expropriation of Palestinian properties and resources in the OPT for the expansion of Israeli settlements); Committee on Economic, Social and Cultural Rights, *Concluding Observations on Israel's Third Periodic Report*, E/C.12/ISR/CO/3, 16 December 2011, §26 (house demolitions and forced evictions in the West Bank), §29 (access to water), §36 (restrictions on freedom of movement in the OPT); Committee on the Elimination of Racial Discrimination, *Concluding Observations on Israel's Fourteenth to Sixteenth Periodic Reports*, 3 April 2012, CERD/C/ISR/CO/14-16, § 24 ("extremely concerned at the consequences of policies and practices which amount to *de facto* segregation, such as the implementation by the State party in the Occupied Palestinian Territory of two entirely separate legal systems and sets of institutions for [Jewish settlers] and Palestinian populations [...]); unequal access to roads, infrastructure, basic services and water resources. The Committee found that those policies and practices violated Israel's duty to prohibit and eradicate racial segregation and apartheid), §25 (discriminatory planning and zoning policy), §27 (dual system of law in the West Bank, one for Palestinians and one for Jewish settlers); CmRC, *Concluding observations on the combined second to fourth periodic reports of Israel*, 4 July 2013, CRC/C/ISR/CO/2-4, §§ 25-26 (killings and injuring of children), §§35-36 (torture and cruel or degrading treatment or punishment of Palestinian children in the OPT); Human Rights Council, *Report of the Special Rapporteur on adequate housing [...] Addendum*, 24 December 2012, A/HRC/22/46/Add.1, §96 (establishment of a development model that systematically excludes, discriminates against and displaces minorities in Israel and which has been replicated in the OPT); CmAT, *Concluding observations on the fifth periodic report of Israel*, 3 June 2016, CAT/C/ISR/CO/5, §30 (allegations of torture and other cruel, inhuman or degrading treatment or punishment of persons deprived of liberty, including minors, which are mostly perpetrated by law enforcement and security officials; particular concern at the total lack of prosecution vis-à-vis the hundreds of complaints brought against interrogators of the Israel Security Agency), §32 (allegations of excessive use of force by security forces, mostly against Palestinians in the West Bank), §36 (allegations of degrading treatment at checkpoints), §38 (acts of violence committed by settlers), §40 (punitive house demolitions); Human Rights Council, *Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967*, A/HRC/37/75, 15 March 2018, §22 (restrictions imposed by Israel on freedom of movement in Gaza affect the realization of a broad range of human rights, including the rights to health and education, especially of children); UN Secretary-General, *Report of the Special Committee*

There is, therefore, a sufficient indication of a continuing, widespread and/or systematic attack, under against the Palestinian civilian population in the OPT. The attack conforms with the further requirement, under Article 7(2)(a), for a multiplicity of incidents of attack against a civilian population, resulting from the wide-ranging effect of Israel's settlement policy on the human rights of Palestinians, the character of the military court system combined with the violations related to Israel's military actions against civilians. This widespread and/or systematic attack affects the whole of the OPT and originates from explicit, Israeli policy with regard to the military governance of the Palestinian civilian population of the OPT. The effect of this deliberate, long-term Israeli State policy has been, through this widespread and/or systematic attack, to produce a significant number of Palestinian civilian victims with the OPT. This, in turn, confirms the further element of Article 7(2)(a) that the attack on the civilian population is "pursuant to or in furtherance of a State or organizational policy to commit such attack".⁶⁵⁵

Within this context of a widespread and/or systematic attack against the Palestinian civilian population in the OPT, the next requirement of crimes against humanity, under Article 7, is that the conduct in question – administrative detention – must, by its nature or consequences, objectively be a part of the attack against the civilian population.⁶⁵⁶ In other words, the acts of the perpetrator must be sufficiently connected with the attack, that is, not so far removed from it that they might reasonably be considered to be isolated acts.⁶⁵⁷

The Israeli State practice of administrative detention fulfils this contextual element of crimes against humanity, once it is acknowledged that variations in the recourse to administrative detention are intimately connected to the escalation or renewed outbreak of military hostilities in the OPT⁶⁵⁸. Hence, the decision to arrest and the imposition and/ or renewal of an administrative detention order is not confined to the evaluation of the risk of particular individual Palestinian civilian but, rather, is exercised as a supplementary form of sanction in relation to the Palestinian civilian population *as a whole* in accordance with the military objectives of the Israeli Defence Force.

For, in place of a degree of variation based upon purely legal considerations of the military prosecutor and the military court system, the variations in the recourse to administrative

to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories, 24 August 2016, A/71/355, §18 (settler violence against Palestinians resulting in a murder, injuries and property damage); Human Rights Council, *Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem, and in the occupied Syrian Golan, Report of the Secretary-General*, A/HRC/25/38, 12 February 2014, §§11-20 (Israeli zoning and planning policy in the West Bank is restrictive, discriminatory and incompatible with requirements under international law, as it favours Israeli settlement interests over the needs of the protected population, resulting in the effective denial of basic services and infrastructure). See also, United Nations Office for the Coordination of Humanitarian Affairs (OCHA), *Monthly Figures*, available at <https://www.ochaopt.org/content/monthly-figures>; OCHA, *Fragmented Lives: Humanitarian Overview* 2016, available at https://www.ochaopt.org/sites/default/files/fragmented_lives_2016_english.pdf; as well as the various reports, documents, analysis and news accessible through the links at <https://www.ochaopt.org/theme/opt-wide-%28movement-and-access%29>; <https://www.ochaopt.org/theme/humanitarian-impact-of-settlements>; <https://www.ochaopt.org/theme/displacement>, and <https://www.ochaopt.org/theme/destruction-of-property>.

⁶⁵⁵ Article 7(2)(a) of the Rome Statute.

⁶⁵⁶ ICTY, *Kunarac*, Appeal Judgment, 12 June 2002, § 99.

⁶⁵⁷ *Ibid.*, §100.

⁶⁵⁸ Addameer, *Administrative Detention in the OPT A Legal Analysis Report*, 2016, pp. 9-10; UN Committee Against Torture (CAT), *Concluding observations on the fifth periodic report of Israel*, 3 June 2016, CAT/C/ISR/CO/5, §22.

detention are intimately connected to the escalation or renewed outbreak of military hostilities in the OPT. Thus, on this basis, the use of administrative detention can be considered to constitute one of the multiplicity of acts contained in the definition of the contextual element of crimes against humanity in the Elements of Crimes for Article 7. The Israeli State practice of administrative detention is directed by a State policy that is the equivalent of “a campaign or operation carried out against the civilian population”⁶⁵⁹, which is “directed against the civilian population as a whole and not merely against randomly selected individuals”.⁶⁶⁰

In this manner, administrative detention is revealed as an integral element, together with the settlement project, demolitions, discrimination, restrictions upon the exercise of human rights, and the military campaigns, of an Israeli State policy of military governance of the OPT which represents a widespread and/or systematic attack upon the Palestinian civilian population as a whole.

On this basis, the general contextual element for all crimes against humanity is potentially established and proceeds to indicate the specific crimes against humanity allegedly perpetrated by individuals involved in the Israeli State practice of administrative detention.

5 The Specific Crimes Against Humanity⁶⁶¹

Torture – Article 7(1)(f) or Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health – Article 7(1)(k)

The instances of alleged torture have the potential to arise, within the Israeli State practice of administrative detention, after arrest, at the stage of interrogation in detention; and, subsequently, from the treatment in, and conditions of, in detention prior to, or after, the imposition of an administrative detention order.

Under Article 7(2)(e), torture, as a crime against humanity, is defined as

⁶⁵⁹ Elements of Crimes, Introduction to Article 7 of the Statute, §3. As affirmed by ICC, PTC, Situation in Kenya, ICC-01/09, 31 March 2010, § 80; ICTY, *Kunarac*, Appeal Judgment, 12 June 2002, §86.

⁶⁶⁰ ICC, PTC, Situation in Kenya, ICC-01/09, 31 March 2010, §81. Citing Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ICC-01/05-01/08-424, §77.

⁶⁶¹ The most recent Report of the Office of the Prosecutor of the ICC on Preliminary Examination Activities states that, in regard to the situation in the West Bank and East Jerusalem, “[t]he Office has also received information regarding other crimes allegedly committed by officials of the Israeli authorities in the West Bank, including East Jerusalem, which may fall under the purview of article 7 of the Statute on crimes against humanity. *Specifically, these allegations relate to the crime of persecution, transfer and deportation of civilians, as well as the crime of apartheid*” (The Office of the Prosecutor of the ICC, Report on Preliminary Examination Activities, §271 (p. 67). (Emphasis added). However, the status of these allegations is determined by the preceding statement, that “[t]he following summary is without prejudice to any future determinations by the Office regarding the exercise of territorial or personal jurisdiction by the Court. It should not be taken as indicative of, or implying, any particular legal qualifications or factual determinations regarding the alleged conduct. Additionally, the summary below is without prejudice to the identification of any further alleged crimes which may be made by the Office in the course of its continued analysis” (Ibid., §268 (p.66)).

“the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions”.⁶⁶²

The detainees, upon whom torture is alleged to be inflicted are, from the outset in the custody or control of the accused and subject to interrogation and detention by Israel State personnel. Thus, the victims of instances of alleged torture are “in the custody or under the control of the accused”, and, the definition imposes no further requirement with regard to specific purpose of the severe physical and/or mental pain or suffering which is inflicted upon them.

The definition of the act(s) of torture as “the intentional infliction of severe pain or suffering, whether physical or mental”, under Article 7(2)(e), is based upon the definition of torture in The UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Therefore, it accords primacy to the definition of torture at the level of international law which remains autonomous from the determination, by the Israel Supreme Court⁶⁶³, of the distinction between torture and lawful sanctions in situations of interrogation, based upon a justification of necessity. The definition also remains independent in the same manner with regard to the evaluation of treatment and conditions of detention of administrative detainees as torture.

The consideration of the (alleged) perpetration of torture, as a crime against humanity, would be unaffected by the Israel Supreme Court’s recourse to argument from necessity with regard to the justification for the use of certain techniques of interrogation. It would, in contrast, consider whether the individual or individuals were subjected to techniques of interrogation which inflicted “severe pain or suffering, whether physical or mental” in themselves or in combination. In addition, whether or not the administrative detainee was subject to these techniques of interrogation, the detainee’s treatment in, and conditions of detention, would be a separate and further focus of consideration for potential instances of torture.

In the preceding part of the Report devoted to the discussion of the UN Convention, the Committee’s Concluding Observations on Israel, in combination with the evidence contained in the Reports of Addameer, B’Tselem and Hamoked, indicate continuing allegations of systematic mistreatment during interrogation. This usually involves the use of violent shaking, shackling detainees in painful positions, excessive use of blindfolds and handcuffs, sleep deprivation, solitary confinement, exposure to loud noises or to very cold or very hot temperatures for extended periods, prolonged denial of food and water, and denial of access to toilets, showers or change of clothes.⁶⁶⁴ The use of these practices is accompanied by the

⁶⁶² Article 7(2)(e) Rome Statute. For the Report, it is unnecessary, in relation to the Israeli State practice of administrative detention, to discuss the divergence between Article 7(2)(e) and the UN Convention Against Torture and the Fourth Geneva Convention in regard to the requirement for the pain and suffering to be inflicted by a public official. For, all instances of allegations of torture, within the Israeli State practice of administrative detention, result from the actions of public officials.

⁶⁶³ HCJ 5100/94, *The Public Committee Against Torture v. Israel*, 1999; HCJ 5722/12, *Abu Gosh v. Attorney General*, 2017; HCJ 9018/17, *Tbeish v. Attorney General*, 2018.

⁶⁶⁴ For example, Addameer *Report*, Op. cit, pp. 38-40; B’Tselem, *Torture and Abuse in Interrogation*, 11 November 2017, available at <https://www.btselem.org/torture>. See also HRC, *Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967*, A/HRC/37/75, 15 March 2018, §62; HRC, *Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967*, Richard Falk, A/HRC/25/67, 13 January 2014, §62; B’Tselem, *Routine Torture: Interrogation Methods of the General Security Service*, February 1998, available at https://www.btselem.org/download/199802_routine_torture_eng.doc.

frequent denial of the right of detainees to legal advice or other visitors and detainees are, thus, in these instances, held incommunicado throughout the interrogation period.⁶⁶⁵ The treatment and conditions of administrative detainees are characterized by poor conditions of detention involving excessive use of solitary confinement and isolation, poor medical care, inadequate food, insufficient individual living space, poor ventilation and hygiene.⁶⁶⁶

The evaluation of the perpetration of torture is undertaken by a determination of the duration of the detainee's mistreatment⁶⁶⁷ and its physical and mental effects are important factors, but the acts need not cause a permanent or lasting physical or mental impairment.⁶⁶⁸

There is the potential for the use of techniques of interrogation and/or the treatment and conditions of administrative detainees, to amount to the infliction of "severe pain or suffering, whether physical or mental" upon detainees.

In those instances in which the perpetration of the crime against humanity of torture cannot be established, there is the potential for liability, under Article 7(1)(k), for the crime against humanity of other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health. The perpetration of this crime against humanity involves the infliction upon the detainee of "great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act".⁶⁶⁹ This inhumane act has to be of "a character similar to any other act" referred to in Article 7(1), in which the term "character" designates "the nature and gravity of the act".⁶⁷⁰

The determination of the perpetration of this crime against humanity involves the complete examination of the particular circumstances, including the context, the specific circumstances of the victim and the physical and mental effects of the inhumane acts inflicted.⁶⁷¹ Hence, an examination of both the techniques of interrogation and/or the treatment and conditions of

⁶⁶⁵ See, the reports of Addameer, *Aggressions by Special Units of the Israeli Prison Service against Prisoners and Detainees during Transfers and Raids*, 2014, available at http://www.addameer.org/sites/default/files/publications/special_units_of_the_ips.pdf; Addameer, Physicians for Human Rights-Israel, *The Sounds of Silence: Isolation and Solitary Confinement of Palestinians in Israeli Detention*, July 2008, available at <http://www.addameer.org/sites/default/files/publications/isolation-eng.pdf>; Adalah, Physicians for Human Rights-Israel and Al Mezan, *Solitary Confinement of Prisoners and Detainees in Israeli Prisons June 2011*, available at https://www.adalah.org/uploads/oldfiles/upfiles/2011/Solitary_confinement_position_paper_English.pdf; The Public Committee Against Torture in Israel, *When the Exception Becomes the Rule: Incommunicado Detention of Palestinian Security Detainees – October 2010*, available at <http://stoptorture.org.il/when-the-exception-becomes-the-rule-incommunicado-detention-of-palestinian-security-detainees-october-2010/?lang=en>; Physicians for Human Rights-Israel, *The Politics of Punishment Solitary confinement of prisoners & detainees in Israeli prisons Status Report*, available at <http://cdn3.phr.org.il/wp-content/uploads/2015/03/Politics-of-Punishment-report-phri-prisoners-palestinians-2016.pdf>; Physicians for Human Rights-Israel, *Position Paper July 2012: Inhumane Conditions of Imprisonment of Palestinian Security-Classified Prisoners in Israeli Prisons*, available at http://cdn3.phr.org.il/wp-content/uploads/2017/02/PHRI_Report_Inhumane-Conditions-of-Imprisonment-of-Palestinian-Security-Classified-Prisoners-in-Israeli-Prisons_2012.pdf.

⁶⁶⁶ Ibid.

⁶⁶⁷ ICTY, *Naletilic and Martinovic*, Appeal Judgment, 3 May 2006, §299 ff.

⁶⁶⁸ ICTY, *Kvočka*, Trial Judgment, §148.

⁶⁶⁹ Elements of Crimes, Op. cit., p.12.

⁶⁷⁰ Ibid, p.12; fn. 30.

⁶⁷¹ ICTY, *Martic*, Trial Judgment, §84.

detention would be based upon this form of evaluation of the situation of the individual detainee.⁶⁷²

The primary focus for this crime against humanity has been the consideration of the particular instances of the infliction of inhumane acts and, thus, would define the Israeli State practice of administrative detention as the context or circumstances in which these acts were inflicted. However, it is possible to suggest that the Israel State practice of administrative detention is *in itself* the infliction of an inhumane act as

“the uncertainty that such measures imply for the detainee in the absence of any charges, known evidence or trial, as well as of any foreseeable detention period, may amount to ill-treatment”.⁶⁷³

Thus, in relation to this crime against humanity of other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health, both the situation of the individual detainee *and* the Israel State practice of administrative detention should be distinct parts of the examination.

Therefore, there is the potential for both the Israeli State practice of administrative detention and the use of techniques of interrogation and/or the treatment and conditions of administrative detainees, to amount to the crime against humanity under Article 7(1)(k).

Deportation or Forcible Transfer of Population – Article 7(1)(d)

Article 7(1)(d) of the Rome Statute contains the crime against humanity of deportation or forcible transfer. The potential for the Israeli State practice of administrative detention to fall within the definition, relates *solely* to the element of deportation.⁶⁷⁴ This potential arises from the stages of interrogation and detention, in which the individual Palestinian, who is arrested

⁶⁷² ICTY, *Prlić*, Case No. IT-04-74-T, Judgement (TC), 29 May 2013, §§79-80; *Delalić et al.*, Case No. IT-96-21-T, Judgment (TC), 16 November 1998, §544.

⁶⁷³ HRC, Human rights situation in the Occupied Palestinian Territory, including East Jerusalem Report of the High Commissioner for Human Rights, 21 February 2018, A/HRC/37/42, § 17. The position of the Human Rights Council is reinforced by the UN Committee Against Torture, in the *Concluding observations of the Committee against Torture, Israel* CAT/C/ISR/CO/4, 23 June 2009, §17 and the *Concluding observations of the Committee against Torture, Israel*, CAT/C/ISR/CO/5, 3 June 2016, §22, which both consider that administrative detention, through its imposition for “inordinately length periods” accompanied by its lack of “basic procedural safeguards”, represents a breach of Article 16 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT). Article 16(1) states that: “Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article I, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment”. Under Article 16 (2), the provisions of (UNCAT) are to be considered “without prejudice to the provisions of any other international instrument or national law which prohibits cruel, inhuman or degrading treatment”, and, thus, complement, Article 7(1)(k) of the Rome Statute of the International Criminal Court.

⁶⁷⁴ In relation to the OPT, forcible transfer relates to the non-consensual, coerced movement of non-Israeli civilians *within* the OPT, and, therefore, is not related to the Israeli State practice of administrative detention in the OPT. It is not necessary, therefore, to assess whether forcible transfer – which was not codified prior to the Rome Statute – forms part of customary international law. Nor is it necessary to tackle the debate concerning whether the crossing of an international border is an essential element of the crime under Article 7(1)(d) of the Rome Statute, or if the same provision contains two separate crimes (See ICC, *Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute*, 9 April 2018, ICC-RoC46(3)-01/18-1).

in the OPT, is then interrogated and detained in detention facilities located outside the OPT in Israel: the transfer of civilians from one country to another.⁶⁷⁵

The ICC Elements of Crimes defines the acts constituting the offence, as the deportation, “without grounds permitted under international law”, of “one or more persons to another State..., by expulsion or other coercive acts”.⁶⁷⁶ The deportation, without grounds permitted under international law, must be of “[s]uch person or persons [who] were lawfully present in the area from which they were deported...”.⁶⁷⁷

The fact of the arrest, by Israel, of an individual within the OPT, on the grounds of the risk to public order or military security, under Article 42 of the Fourth Geneva Convention, does not remove the individual’s status as lawfully present in the OPT and, therefore, does not confer upon Israel the authority, under international law, to deport the individual out of the OPT into a detention facility in Israel.⁶⁷⁸

Apart from the single Israeli detention facility in the OPT, the remainder of the Israeli detention estate is located in Israel.⁶⁷⁹ Palestinian civilians, arrested in the OPT pursuant to an administrative detention order are, therefore, regularly, as part of Israeli policy, and on a large-scale, transferred into Israel’s sovereign territory – that is, beyond the borders of the OPT. The obligation remains on Israel, as the occupying power, to ensure that all Palestinian civilians, if arrested pursuant to administrative detention, are detained within detention facilities in the OPT.

On the basis of the preceding analysis by the Report of the Fourth Geneva Convention, the deportation of Palestinian civilians, upon arrest within the OPT, to detention facilities in Israel, represents the relevant conduct of the crime against humanity of deportation, under Article 7(1)(d).

Imprisonment – Article 7(1)(e)

The crime against humanity of imprisonment, under Article 7(1)(e) of the Statute, arises from a deprivation of liberty which is the equivalent of “arbitrary imprisonment”.⁶⁸⁰ The severity of the arbitrary character of the imprisonment results from its imposition without due process of law.⁶⁸¹ The jurisprudence of the ICTY has determined that the absence of due process of law is not restricted to grave breaches of the Geneva Conventions⁶⁸², and entails that the

⁶⁷⁵ ICTY, Krstic, Trial Judgment, para. 521; ICTY, Prlic, Trial Judgment, para. 55. See also Christopher K. Hall, Article 7(1)(e), in O. Triffterer (ed.), *Commentary on the Rome Statute of the International criminal court: Observers notes, article by article*, 2nd edn, Munich, Oxford, 2008, §§ 99, 102. This Report will not address the question of whether deportation covers the transfer across *de facto* borders (see ICTY, *Stakic*, Appeal Judgment, §§ 278, 300 ff.).

⁶⁷⁶ Elements of Crimes, Op. cit., p.6.

⁶⁷⁷ Ibid.

⁶⁷⁸ Reaffirming the Report’s earlier rejection of the Israeli Supreme Court’s position in H CJ 97/79, *Abu Awad v the Military Commander* (1979), §11. See also H CJ 785/87 *Afu v. IDF Commander in the West Bank* (1988) PD 42(2) 4.

⁶⁷⁹ Goldstone Report, Op. cit., §1441.

⁶⁸⁰ The contextual element of the arbitrary imprisonment being undertaken as part of a widespread or systematic attack directed against a civilian population is already assumed to be established in the previous section.

⁶⁸¹ ICTY, *Kordic and Cerkez*, Trial Judgment, §§292-303.

⁶⁸² ICTY, *Simic*, Trial Judgment, §63-64. Citing and affirming the position of the earlier ICTY, *Krnjelac*, Trial Judgement, §111.

deprivation of liberty, through reference to *The Body of Principles for the Protection of all Persons under Any Form of Detention or Imprisonment*⁶⁸³,

“refers to the terms detention and imprisonment interchangeably, and defines detention and imprisonment as the condition of detained or imprisoned persons, which is further described as “any person deprived of personal liberty *except as a result of conviction for an offence*”.⁶⁸⁴

The definition of the absence of due process of law renders the deprivation of liberty arbitrary as “no legal basis can be invoked to justify the deprivation of liberty”.⁶⁸⁵

The absence of due process, as the absence of a legal basis for the deprivation of liberty, is thus differentiated into two situations. The first, in which the individual(s) are simply deprived of their liberty without any legal basis, and the second, in which the individual(s) are detained on the basis of provisions of domestic law, but the relevant provisions “violate international law”.⁶⁸⁶ In the second situation,

“the legal basis for the initial deprivation of liberty must apply throughout the period of imprisonment. If at any time the initial legal basis ceases to apply, the initially lawful deprivation of liberty may become unlawful at that time and be regarded as arbitrary imprisonment”.⁶⁸⁷

Thus, if there is no longer a legal basis for deprivation of liberty at any stage in the second situation, then it will become arbitrary and represent the potential crime against humanity of imprisonment.

In relation to the Israeli State practice of administrative detention, the arrest and detention are based upon provisions of military orders arising from Israel’s military governance of the OPT. Hence, the determination of the crime against humanity of imprisonment rests upon the demonstration that this legal basis involves the violation of international law.

The preceding parts of the Report have established that the international legal instruments of international humanitarian law and international human rights law have *de jure* extraterritorial application to the OPT. Hence, the legal basis for the Israeli State practice of administrative detention is required to conform with the relevant provisions of these international legal instruments.

The Fourth Geneva Convention, complimented by Additional Protocol I to the Geneva Conventions, require that the decision to arrest is based upon absolute necessity⁶⁸⁸ arising from the specific threat posed by a particular individual to the military security of the OPT. Upon or immediately after arrest, the individual “shall be informed promptly, in a language he understands, of the reasons why these measures have been taken”.⁶⁸⁹ The mutually

⁶⁸³ *The Body of Principles for the Protection of all Persons under Any Form of Detention or Imprisonment*, as adopted by General Assembly Resolution 43/173, 9 December 1988.

⁶⁸⁴ ICTY, *Simic*, Trial Judgment, §66. Citing the Use of Terms section of *The Body of Principles*, Op. cit. (Emphasis added).

⁶⁸⁵ ICTY, *Krnjelac*, Op. cit., §115.

⁶⁸⁶ *Ibid.*, §114. The section adds, in fn. 346, that, “[i]n particular, the national law itself must not be arbitrary and the enforcement of this law in a given case must not take place arbitrarily”.

⁶⁸⁷ *Ibid.*

⁶⁸⁸ Fourth Geneva Convention, Article 42.

⁶⁸⁹ Additional Protocol I to the Geneva Conventions Article 75(3).

complimentary relationship between IHL and IHRL specified by Additional Protocol I entails that the provisions of international human rights law supplement and enhance the minimum standards of international humanitarian law.⁶⁹⁰ Hence, Article 9 and Article 14 of the ICCPR are to be considered to be integral elements in the determination of the adherence of the legal basis of the Israeli State practice of administrative detention to the provisions of international law.

At the stage of arrest, Article 9 supplements the framework of IHL by requiring that the recourse to an arrest, commencing the further consideration of an application for an administrative detention order, should always involve a consideration of the alternative possibility of the commencement of criminal proceedings.⁶⁹¹ In addition, Article 9(2) reaffirms that “[a]nyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him”.⁶⁹²

The imposition of an administrative detention order, by an occupying power, involves the requirement for a “regular procedure”⁶⁹³ and this minimum guarantee is supplemented, by Article 9(4) of the ICCPR, which requires that the detainee shall have the entitlement “to instigate proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful”.⁶⁹⁴ The decision to impose an administrative detention order, by the military court, is to be one which “is subject to periodical review, if possible every six months”.⁶⁹⁵

The application of these provisions of international law, as the foundation for the determination of the legal basis of the Israeli State practice of administrative detention, has revealed, in the previous parts of the Report, that the practice results in the breach of IHL and IHRL provisions.

In particular, the basis for the arrest is conventionally formulated in general terms without the identification of the specific threat represented by the particular individual which renders administrative detention absolutely necessary. This represents a breach of Article 42 of the Fourth Geneva Convention. The individual or individuals arrested are not informed of the grounds of their arrest, as the evidence upon which it is based is held to be secret and, therefore, unable to be disclosed to either the detainee or her/his legal representative. This represents a breach of Article 75(3) of Additional Protocol I to the Geneva Conventions and Article 9(2) of the ICCPR. The effect of the non-disclosure, under Article 9(2) of the ICCPR, deprives both the detainee and her/his legal representative of the entitlement, under Article 9(4) of the ICCPR, to challenge the lawfulness of the detention.⁶⁹⁶ The imposition of an administrative detention order based upon secret evidence then affects character of each “periodic review”, under Article 78 of the Fourth Geneva Convention, of the initial detention order. For the detainee and her/his legal representative remain unable to effectively challenge

⁶⁹⁰ Additional Protocol I to the Geneva Conventions Article 75(1), “shall be treated humanely in all circumstances and shall enjoy, as a *minimum*, the protection provided by this Article [75]”. Emphasis added.

⁶⁹¹ HRC, *General Comment No.35- Article 9 (Liberty and security of person)*, Op. cit., §15.

⁶⁹² ICCPR Article 9(2).

⁶⁹³ Fourth Geneva Convention Article 78.

⁶⁹⁴ ICCPR Article 9(4).

⁶⁹⁵ Fourth Geneva Convention Article 78.

⁶⁹⁶ As the Report has emphasized, the essential interconnectedness of Article 9(2) and Article 9(4) of the ICCPR in regard to the Israeli State practice of administrative detention is indicated by The Working Group on Arbitrary Detention in its consideration of individual applications by Palestinian adults and children subject to administrative detention. See, also, for the more general criteria, Human Rights Council, *Methods of work of the Working Group on Arbitrary Detention*, 13 July 2017, A/HRC/36/38.

the military prosecutor's case for the renewal of detention. Thus, the Israeli State practice of administrative detention can be considered to deprive the detainee of the right of legal personality, under Article 16 of the ICCPR. For the stages of arrest, imposition and renewal of the administrative detention order do not recognize the individual as autonomous legal personality reflected in the procedural rights and protections required by the relevant provisions of international humanitarian law and international human rights law.

In addition, there is the further consideration, arising from Article 14 of the ICCPR, of the compatibility between a military court system and due process. The question of the legal basis for deprivation of liberty shifts its focus, from the primacy of criminal proceedings in comparison to administrative detention, under Article 9 of the ICCPR, to the primacy accorded to a system of non-military courts rather than a system of military courts, under Article 14 of the ICCPR.⁶⁹⁷ The primacy accorded to a system of non-military courts is the corollary of the explicit characterization of civilians subject to a system of military courts as inherently problematic with regard to compliance with a State's obligations under Article 14. Thus, the State should, as an integral aspect of the legal basis for the deprivation of liberty, regularly consider the continued applicability of the jurisdiction of military courts to civilians. This regular consideration should be oriented by, and respond to, the inherent difficulty of rendering a military court system compatible with the requirements of Article 14.

The Israeli State practice of administrative detention, therefore, involves an absence of due process which entails the arbitrary deprivation of detainees' liberty. From this it follows that, with the preceding establishment that the Israeli State practice of administrative detention is part of a widespread or systematic attack directed against a civilian population, there is the reasonable basis to believe that the crime against humanity of imprisonment has been committed.

Persecution – Article 7(1)(h)

Under Article 7(1)(h) of the Rome Statute, the crime against humanity of persecution is defined as

“[p]ersecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court”.⁶⁹⁸

Persecution, in contrast to the other crimes against humanity enumerated above, is a crime against humanity which enables additional, *cumulative* liability to be established commencing from the demonstration of the perpetration of one or more of the other crimes against humanity and/or one or more of the other crimes within the jurisdiction of the ICC under Article 5. In addition, the crime against humanity of persecution is to be distinguished from the crime against humanity of apartheid, discussed below, because, although “[p]ersecution” means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity⁶⁹⁹, it lacks the “context of an institutionalized regime of systematic oppression and domination by one racial

⁶⁹⁷ HRC, *General Comment No.32 – Article 14*, Op. cit, §22.

⁶⁹⁸ Article 7(1)(h) of the Rome Statute.

⁶⁹⁹ Article 7(2)(g) of the Rome Statute.

group over any other racial group or groups and committed with the intention of maintaining that regime”.⁷⁰⁰

The possibility of additional, cumulative liability, arises from the commission of one or more offences under Article 5 of the Rome Statute, and the commission is accompanied by an overt or explicit targeting of an individual or individuals “by reason of the identity of a group or collectivity or targeted the group or collectivity as such”.⁷⁰¹ The targeting is persecutory as it has a *discriminatory* purpose based upon the political, racial, national, ethnic, cultural, religious, gender identity of the group or collectivity or “other grounds that are universally recognized as impermissible under international law”.⁷⁰² Hence, in addition to the commission of the other crime or crimes against humanity or other crimes enumerated under Article 5, the discriminatory purpose, as persecution, “severely deprived, contrary to international law, one or more persons of fundamental rights”.⁷⁰³

The Israeli State practice of administrative detention has the potential to amount to the crime against humanity of persecution on the initial basis of the (alleged) commission of the crimes against humanity of torture (Article 7(1)(f)), other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health (Article 7(1)(k)), deportation (Article 7(1)(d)) and imprisonment (Article 7(1)(e)). It also has the potential to stem from the initial perpetration of the war crimes (see section below) of torture or inhuman treatment (Article 8(2)(a)(ii)), wilfully causing great suffering, or serious injury to body or health (Article 8(2)(a)(iii)), unlawful deportation (Article 8(2)(vii)), wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial (Article 8(2)(a)(vi)) and unlawful confinement (Article 8(2)(a)(vii)).

In relation to each of these crimes against humanity and war crimes, the crime results from a distinct, self-contained definition which is established without reference to a requirement of discrimination. Hence, the additional, cumulative liability, under Article 7(1)(h), has the potential to apply if each of these crimes against humanity or war crimes, committed by the Israeli State practice of administrative detention, is held to be perpetrated as an “intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity”.⁷⁰⁴

Therefore, in order to demonstrate the additional targeted discrimination of the crime against humanity of persecution, it is necessary to indicate that the denial or violation of fundamental rights, under international law, of comparable gravity to the crimes against humanity and/or war crimes, has a discriminatory purpose based upon the political, racial, national, ethnic, cultural, religious, gender identity of the group or collectivity or “other grounds that are universally recognized as impermissible under international law”.⁷⁰⁵

The preceding part of the Report on international human rights law, has indicated, through the examination of the UN Committees’ Concluding Comments on Israeli country reports to the respective UN Committee’s, that the Israeli State practice of administrative detention, involves serious breaches of fundamental rights contained in the international legal

⁷⁰⁰ Rome Statute, definition of apartheid, under Article 7(1)(h).

⁷⁰¹ Elements of Crimes, Op. cit., p.10.

⁷⁰² Ibid.

⁷⁰³ Ibid.

⁷⁰⁴ Article 7(2)(g) of the Rome Statute.

⁷⁰⁵ Ibid.

instruments of international human rights law of the UN Convention on Torture, the International Covenant on Civil and Political Rights and the UN Convention on the Rights of the Child. The connection between these serious breaches the targeted discrimination against Arab Palestinians in the OPT is indicated by the breaches of the UN Convention on the Elimination of All Forms of Racial Discrimination⁷⁰⁶ and UN Convention on the Elimination of All Forms of Discrimination Against Women. The indication of these serious breaches, by the relevant UN Committees, has been accompanied by continually reiterated recommendations to Israel both to refrain from, and to actively prevent, these serious breaches; and to end the Israeli State practice of administrative detention.⁷⁰⁷

In addition, the Report has also indicated that the UN Working Group on Arbitrary Detention, in its most recent opinion on a referral from an administrative detainee from the OPT, has concluded that a pattern of discrimination is discernible in the character of the administrative detention of individual referrals by adult and child Arab Palestinian detainees: a “pattern of cases involving the arrest and detention of Palestinians under administrative detention orders on the basis of their nationality.”⁷⁰⁸ This, in turn, has led the Working Group to refer “the present case to the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967”.⁷⁰⁹ Thereby, further indicating that the Israeli State practice of administrative detention is considered as the violation of fundamental rights based upon the targeted discrimination of Arab Palestinians as a group or a collectivity.

Therefore, the Israeli State practice of administrative detention, on the assumption of the initial commission of the alleged crimes against humanity, under Article 7(1), and/or alleged war crimes, under Article 8, involves, in relation to each of these crimes, the additional element of an “intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity”.⁷¹⁰ It is, therefore, possible to indicate that, due to the presence of this additional element, there is the reasonable basis to believe that the crime against humanity of persecution has been committed.

Apartheid – Article 7(1)(j) and Article 7(1)(h)

The crime against humanity of apartheid, under Article 7(1)(j) is defined, under Article 7(1)(h), as

“inhumane acts of a character similar to those referred to in [Article 7] paragraph 1, committed in the context of an institutionalized regime of systematic oppression and

⁷⁰⁶ For example, the CmEDAW, *Concluding observations on the fourteenth to sixteenth periodic reports of Israel*, CERD/C/ISR/CO/14-16, 3 April 2012, §27. The interstate complaint by Palestine against Israel, filed on 23 April 2018, under Article 11 of CERD, may well provide additional, detailed determination of the targeted, discriminatory character of administrative detention imposed upon Arab Palestinians. In particular, due to the explicit reference, in the interstate complaint, to the violation of CERD, by Israel, in the OPT, of the right of Arab Palestinians to equal treatment under the law and the prohibition of racial segregation and apartheid.

⁷⁰⁷ For example, HRC, *Concluding observations on the fourth periodic report of Israel*, 21 November 2014, CCPR/C/ISR/CO/4, §10 (b); Committee against Torture, *Concluding observations on the fifth periodic report of Israel*, 3 June 2016, CAT/C/ISR/CO/5, §§22-23; Committee against Torture, *Concluding observations on the fourth periodic report of Israel*, 23 June 2009, CAT/C/ISR/CO/4, §17.

⁷⁰⁸ HRC, Working Group on Arbitrary Detention, *Opinion No. 86/2017*, A/HRC/WGAD/2017/86, 18 December 2017, §44.

⁷⁰⁹ Ibid.

⁷¹⁰ Article 7(2)(g) of the Rome Statute

domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime”.⁷¹¹

The distinctiveness of the crime against humanity of apartheid is not, therefore, determined by the degree of resemblance of the actions to the historical origin and of the form of apartheid in South Africa (1948-1991). Rather, apartheid, as a crime against humanity, is without a fixed, invariant, historical form, and indicates, within the crimes against humanity in the Rome Statute,

“the systematic, institutionalized, and oppressive character of the discrimination involved, and the purpose of domination that is entailed. It is this institutionalized element, involving a state-sanctioned regime of law, policy, and institutions, that distinguishes the practice of apartheid from other forms of prohibited discrimination”.⁷¹²

Hence, as the Elements of Crimes of the Rome Statute indicates, apartheid involves the commission of any of the other crimes against humanity within Article 7(1) and the commission of these crimes is “committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups”.⁷¹³

In order for the Israeli State practice of administrative detention to potentially amount to the crime of apartheid, the other crimes against humanity allegedly (discussed above) have to be perpetrated by one racial group over another racial group as “an institutionalized regime of systematic oppression and domination”.

Thus, the crimes against humanity arising from the interrogation of detainees, the treatment in and conditions of detention, under either Article 7(1)(f) (torture) or Article 7(1)(k) (other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health), the absence of due process of law leading to arbitrary detention in the form of imprisonment, under Article 7(1)(e), the transfer of detainees out of the OPT to detention facilities in Israel, as deportation under Article 7(1)(d), have to indicate this additional institutionalized and systematic character of oppression and domination by one racial group over another.

The preliminary requirement for the crime against humanity of apartheid is to determine the origin and continuation of the institutionalized and systematic Israeli military occupation of the OPT as oppression and domination perpetrated by one racial group over another. This, in turn, requires that the Israeli military occupation of the OPT can be defined as a legal and territorial space containing two distinct racial groups whose relationship is distinguished by this specific form of racial oppression and domination by one racial group over another.

⁷¹¹ Article 7(2)(h) of the Rome Statute.

⁷¹² John Dugard and John Reynolds, “Apartheid, International Law, and the Occupied Palestinian Territory”, *European Journal of International Law*, 24, (3), (2013), pp. 867–913 (p. 881). See, also, C.K. Hall, in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, 2nd ed., (Munich/Oxford: Beck/Hart, 2008), Art. 7, §123.

⁷¹³ *Elements of Crimes*, Op. cit., p.12. The existence of a preliminary examination by the Prosecutor of the ICC, and the later State referral by Palestine, removes the need, for the Report, to engage in a wider discussion of applicability of the prohibition of apartheid, under international law, to the practices of Israel, as the occupying power, in the OPT.

In conformity with the broad, subjective characterization⁷¹⁴ of the notion of a racial group, under international law, including the Rome Statute⁷¹⁵, it is possible, for the purpose of the crime of apartheid, to delineate two racial groups within the OPT.

“For the purposes of applying the definition of apartheid in international law, therefore, assessment must be made of whether Jews and Palestinians comprise distinct racial groups in their localized relation to one another, in the broad sense of the term under international law. Of critical importance is whether they can be identified as groups whose membership is generally understood as fixed and incontestable from acquisition at birth, and which are entwined in a relationship of domination. Such an interpretation is compatible with contemporary race theory that now sees racial discrimination as the product of a process of ‘racial formation’, whereby a dominant group constructs a subordinate population as racially distinct in order to ensure its political and/or economic marginalization. In essence, the question of racial groups is a sociological rather than a biological one”.⁷¹⁶
With regard to the OPT,

“[f]or the purposes of applying the definition of apartheid to the situation in the occupied Palestinian territory, however, the interpretation of racial groups as developed in international law appears sufficiently broad to understand Jewish Israelis and Palestinian Arabs as distinct groups. Jewish and Palestinian identities, while not typically seen as ‘races’ in the old (discredited) sense of biological or skin colour categories, are constructed as groups distinguished by ancestry or descent as well as ethnicity, nationality, and religion. As such they are distinguished from each other in a number of forms within the parameters of racial discrimination under international human rights law”.⁷¹⁷

The presence, within the territory of the OPT, in conformity with this definition, of two distinct racial groups, furnishes the foundation to proceed to determine the existence of “an institutionalized regime of systematic oppression and domination” by Jewish Israelis over Palestinian Arabs.

⁷¹⁴ The Report utilizes the phrase, “subjective characterization”, to refer to a notion of racial group resulting from self-designation by its members which is itself generated by a wider process of the formation of collective identity as a racial group. The phrase is also to be understood contrastively to that of “objective characterization” in which the designation of a racial group would be determined by the application of external, methodological criteria derived from the natural and, in particular, the biological sciences.

⁷¹⁵ See, Article 1 International Convention on the Elimination of All Forms of Racial Discrimination, and to be read in conjunction with UN Committee on the Elimination of Racial Discrimination General Recommendation VIII, ‘Identification with a particular racial or ethnic group’, UN Doc. A/45/18, 22 Aug. 1990. For the Rome Statute, see C. K. Hall, Op. cit., §120. In addition, as Dugard and Reynolds, Op.cit., emphasize (pp.885-889), the primacy accorded to the subjective characterization is upheld by relevant jurisprudence of both the ICTY (*Prosecutor v. Jelusic*, Case No. IT-95-10, Trial Judgment, 14 Dec. 1999, §70; *Prosecutor v. Krstic*, Case No. IT-98-33, Trial Judgment, 2 Aug. 2001, §555; *Prosecutor v. Blagojevic and Jokic*, Case No. IT-02-60-T, Trial Judgment, 17 Jan. 2005, §667;) and the ICTR (*Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Trial Judgment, 2 Sept. 1998, §§512–515; *Prosecutor v. Rutaganda*, Case No. ICTR-96-3, Trial Judgment, 6 Dec. 1999, §§57, 55).

⁷¹⁶ Dugard and Reynolds, Op. cit., p. 889. See, also the detailed discussion of this question of the designation of Jewish Israelis and Palestinian Arabs as a racial group under international law, in Richard Falk and Virginia Q. Tilley, "Israeli Practices towards the Palestinian People and the Question of Apartheid." *Palestine and the Israeli Occupation*, No. 1 (2017), pp. 1-65 and Virginia Q. Tilley, (ed.), *Beyond Occupation: Apartheid, Colonialism and International Law in the Occupied Palestinian Territories*, (London: Pluto Press, 2012), p.109ff.

⁷¹⁷ Dugard and Reynolds, Op. cit., p.889.

The existence of the OPT as a territory under Israeli military occupation and governance since 1967, indicates the existence of an institutionalized regime within the OPT. The further requirement that the regime is characterized by the systematic domination and oppression of Palestinian Arabs is indicated by a number of aspects of the legal framework and practices of the military governance of the OPT which include the Israeli State practice of administrative detention.

The 2014 *Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967*⁷¹⁸ forms the basis for the further determination of the systematic domination and oppression of Palestinian Arabs within the OPT. Having previously determined the existence of the contextual element common to the crimes against humanity in the OPT, the difference between the definition of the crime against humanity of apartheid and the definition of the internationally wrongful act of apartheid, under Article 2 of *The International Convention on the Suppression and Punishment of the Crime of Apartheid*, is deprived of any significance, such that an essential compatibility between the two definitions is to be assumed. Hence, that the Rapporteur's decision to proceed to the determination of the evidence for the existence of apartheid, on the basis of the definition, under Article 2, represents an effective determination under, Article 7(1)(j) and Article 7(1)(h), of the crime against humanity of apartheid.⁷¹⁹

For the purposes of the Report, the determination that the Israeli State practice of administrative detention involves the commission of the crime against humanity of apartheid commences from the creation of two separate legal systems: military governance, based upon military orders and a military court system, within the West Bank of the OPT and the civil legal system in Israel.⁷²⁰

There is then a further distinction, within the system of military governance of OPT, based upon the decision by the Israeli Military Advocate General in the 1980s⁷²¹, to apply the civil legal system in Israel to Israeli settlers in the OPT. This effective exclusion of Israeli settlers from the system of military governance of the OPT is combined with a continuing reluctance to initiate proceedings, whether for administrative detention or criminal offences, against Israeli settlers in the OPT. Thus, there is an almost exclusive use of administrative detention within the OPT in relation to adult and juvenile Arab Palestinians combined with a *de facto* impunity for Israeli settlers.⁷²² The breaches of international humanitarian law and the

⁷¹⁸ HRC, *Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967*, Richard Falk, 13 January 2014, A/HRC/25/67.

⁷¹⁹ Ibid., §54.

⁷²⁰ To the extent that the current proposals for the extension of Israeli civil law to Jewish Israeli settlers in the OPT are enacted, the legal system in the OPT itself will then reflect the current division between the OPT and Israel. This, in turn, will further reinforce the systematic domination and oppression of Arab Palestinians in the OPT.

⁷²¹ The relevant extract from the IDF confirming this decision is contained in the Yesh Din Report, *Backyard Proceedings: The Implementation of Due Process Rights in the Military Courts in the Occupied Territories*, December 2007, p. 59, available at (<https://s3-eu-west-1.amazonaws.com/files.yesh-din.org/%D7%9E%D7%A9%D7%A4%D7%98%D7%99%D7%9D+%D7%91%D7%97%D7%A6%D7%A8+%D7%94%D7%90%D7%97%D7%95%D7%A8%D7%99%D7%AA/BackyardProceedingsfullreportEng+full+report.pdf>).

⁷²² As Dugard and Reynolds emphasize, “[t]he practices are discriminatory in that they are applied virtually exclusively to Palestinians. [...] The use of administrative detention as a form of domination over the local population is indicated by the figures: in contrast to the tens of thousands of Palestinians interned by rolling six-month orders lasting up to several years in many cases, just nine Jewish Israeli settlers in the Palestinian

violations of international human rights law, perpetrated by the Israeli State practice of administrative detention within the OPT, disproportionately affect Arab Palestinians. This can be held to represent the arbitrary arrest and illegal imprisonment of the members of a racial group, a violation of Article 2(a)(iii) of *The International Convention on the Suppression and Punishment of the Crime of Apartheid*.⁷²³

These elements of the Israeli State practice of administrative detention are combined with regular recourse to techniques of interrogation upon arrest, but prior to the imposition of an administrative detention order, which can be considered, as indicated in the previous part of the Report, to represent a breach of the absolute prohibition upon torture and/or inhuman or degrading treatment or punishment. There are further instances of torture and/or other forms of ill-treatment arising from treatment in, and conditions of detention. These occurrences breach the absolute prohibition upon torture and/or other forms of ill-treatment under Article 32 Fourth Geneva Convention, Article 75(2)(a), (e) Additional Protocol I to the Geneva Conventions, Article 7 of the International Covenant on Civil and Political Rights and Articles 3 and 7 of the UN Convention Against Torture, Inhuman or Degrading Treatment or Punishment. This position is supported by the Report of the Special Rapporteur who, citing the *UN Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories*⁷²⁴, of 2013, indicates that “[d]espite the absolute prohibition of torture, Palestinians detained by Israel continue to be subjected to torture and ill-treatment”.⁷²⁵ This can be held to represent serious bodily and mental harm, infringement of freedom, and torture of the members of a racial group, a violation of Article 2(a)(ii) of *The International Convention on the Suppression and Punishment of the Crime of Apartheid*.

The systematic domination and oppression embedded in the Israeli State practice of administrative detention is an element of a wider Israeli state policy of systematic domination and oppression. The separate civil and military legal systems are complimented by the creation of further separation based upon the criterion of a racial group.

“[t]he creation of Israeli legal zones for settlers and the resulting segregation was noted in the 2013 report by the independent fact-finding mission on settlements (A/HRC/22/63). The Committee on the Elimination of Racial Discrimination in 2012 expressed that it was “extremely concerned” at policies and practices amounting to de facto segregation and that it was “particularly appalled at the hermetic character of the separation of the two groups” (CERD/C/ISR/CO/14-16, para. 24)”.⁷²⁶

The creation of these exclusive zones is the corollary of the

“expropriation of Palestinian land [which] is an obvious part of the expansion of settlements and of the construction of the wall. The fragmentation of Palestinian land and creation of separate reserves and enclaves, including the plans threatening to cut off East Jerusalem from

territories have been administratively detained over the course of the occupation, generally for periods of 40 to 60 days” (Op. cit., p. 895).

⁷²³ Ibid., §§60-1.

⁷²⁴ *UN Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories*, A/68/379, 11 September 2013, §§10-15.

⁷²⁵ *Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967*, Richard Falk, Op. cit., §62.

⁷²⁶ Ibid., §68.

the rest of the West bank, is well documented (A/HRC/22/63) ...The Special Rapporteur has previously drawn attention to the dual system of roads in the West Bank, as a clear example of segregation, where Palestinians are largely relegated to alternative roads and forced to take long detours (A/HRC/16/72, paras. 20–22).⁷²⁷

Hence, the Israeli State practice of administrative detention, which breaches of Article 2(a)(ii) and Article 2(a)(iii) of *The International Convention on the Suppression and Punishment of the Crime of Apartheid*, exists as part of the wider framework of the Israeli military occupation of the OPT which breaches of Article 2(c) and Article 2(d) of the *International Convention*⁷²⁸.

On the basis of the preceding analysis, an institutionalized regime of oppression and domination of Arab Palestinians exists in the OPT, and that this can be held to represent the relevant conduct of the crime against humanity of apartheid, under Article 7(1)(j) and Article 7(1)(h).

6 Article 8 of the Rome Statute: War Crimes

War Crimes under the Geneva Convention as War Crimes under the Rome Statute

Under Article 8 of the Rome Statute, a war crime arises from the existence of grave breaches of the Geneva Conventions. The potential liability of the Israeli State practice of administrative detention in the OPT for war crimes is dependent upon the commission of grave breaches of the Geneva Conventions as specified in Articles 8(2)(a)-(c) of the Rome Statute.

The preceding part of the Report on IHL has demonstrated that the Fourth Geneva Convention, Additional Protocol I to the Geneva Conventions, and the relevant international legal instruments of international human rights law have the status of customary international law and, therefore, are applicable *de jure* to the Israeli State practice of administrative detention in relation to the civilian population in the OPT. The further determination in this preceding part of the Report, that the Israeli occupation is one in which the OPT is an occupied territory in a situation of international armed conflict, entails that both the contextual element of the existence of an armed conflict is established⁷²⁹, and that the war

⁷²⁷ Ibid., §70.

⁷²⁸ *The International Convention on the Suppression and Punishment of the Crime of Apartheid*, Article 2(c) states: “any legislative measures and other measures calculated to prevent a racial group or groups from participation in the political, social, economic and cultural life of the country and the deliberate creation of conditions preventing the full development of such a group or groups, in particular by denying to members of a racial group or groups basic human rights and freedoms, including the right to work, the right to form recognized trade unions, the right to education, the right to leave and to return to their country, the right to a nationality, the right to freedom of movement and residence, the right to freedom of opinion and expression, and the right to freedom of peaceful assembly and association”; *The International Convention on the Suppression and Punishment of the Crime of Apartheid*, Article 2(d) states: “any measures, including legislative measures, designed to divide the population along racial lines by the creation of separate reserves and ghettos for the members of a racial group or groups, the prohibition of mixed marriages among members of various racial groups, the expropriation of landed property belonging to a racial group or groups or to members thereof”.

⁷²⁹ ICTY, *Tadic*, Decision of 2 October 1995, Appeals Chamber, §70. See also ICC, *Lubanga*, Trial Judgment, 14 March 2012, §§ 531-533. The situation of the OPT as one of an international armed conflict is also accepted by the Israeli Supreme Court in *Public Committee against Torture in Israel v. Government of Israel*, Case No. HCJ 769/02, 13 December 2006.

crimes listed in Articles 8(2)(a)-(b) are potentially applicable to the Israeli State practice of administrative detention. The Report now proceeds to indicate the relevant war crimes, under Article 8(2)(a)-(b), based upon the previous determination of the perpetration of grave breaches of the Fourth Geneva Convention and Additional Protocol I to the Geneva Conventions.

7 Specific War Crimes

Article 8(2)(a)(ii) – Torture, or inhuman treatment; Article 8(2)(a)(iii) – Wilfully causing great suffering, or serious injury to body or health

The war crime of torture, as set out in Article 8(2)(a)(ii) of the Rome Statute, differs from the corresponding crime against humanity because it requires that the infliction of severe physical or mental pain or suffering is carried out with a *specific purpose*, which is non-exhaustively indicated in the Elements of Crimes, as “obtaining information or a confession, punishment, intimidation or coercion or for any reason based on discrimination of any kind”.⁷³⁰ However, this difference in the respective definitions of torture is without effect upon the applicability of the war crime to the situation of interrogation or the treatment in, and conditions of, detention for those individuals subject to the Israeli State practice of administrative detention.

The war crime of torture or inhuman treatment, under the Rome Statute, is founded upon grave breaches of the Geneva Conventions and, therefore, creates a direct connection between the definition of this war crime and the definition of torture in the preceding part of the Report. Thus, the Israeli State practice of administrative detention, has the potential to perpetrate torture or inhuman treatment in its recourse to techniques of interrogation which inflict severe physical or mental pain or suffering. The indication of this potential perpetration of torture or inhuman treatment arises from the evidence contained in the Reports of Addameer, B’Tselem, Hamoked and The Public Committee Against Torture, cited in the previous part of this Report. These will be considered, if directed by the specific purpose, under Article 8(2)(a)(ii), to be torture, or, if inflicted without this specific purpose, will be considered to be inhuman treatment. The absolute prohibition upon torture remains invariant between the crime against humanity and the war crime, under the Rome Statute, and, therefore, maintains a strict independence and autonomy from the recognition, by the Israeli Supreme Court⁷³¹, of any ground of justification, in whatever form, for the infliction of this type of suffering.

The further potential for the perpetration of torture or inhuman treatment results from the infliction of severe physical mental pain or suffering in the subsequent treatment in, and conditions of detention. This will be considered, if directed by the specific purpose of “punishment, intimidation or coercion or for any reason based on discrimination of any kind”, to be torture, or, if inflicted without this specific purpose, will be considered to be inhuman treatment.

⁷³⁰ Elements of Crimes, Op. cit.

⁷³¹ HCJ 5100/94, *The Public Committee Against Torture v. Israel*, 1999; HCJ 5722/12, *Abu Gosh v. Attorney General*, 2017; HCJ 9018/17, *Tbeish v. Attorney General*, 2018.

In addition, should any of these instances be considered to be of insufficient severity to fulfil the definition of torture or inhuman treatment, under Article 8(2)(a)(ii), there remains the possibility that they will be considered to represent the infliction of “great physical or mental pain or suffering to, or serious injury to body or health”, under Article 8(2)(a)(iii).

On the basis of the essential correspondence between the factual elements establishing torture and inhuman treatment, under Article 8(2)(a)(ii), and the crimes against humanity, under Article 7(1)(f) and Article 7(1)(k), combined with the demonstration, in the previous part of the Report, of the widespread and systematic recourse to the use of particular techniques of interrogation and the predominant character of the treatment in, and conditions of detention, the Report considers that there is potential for the commission of the war crime under Article 8(2)(a)(ii). In addition, there is the further possibility that all these forms of maltreatment, if not capable of definition as the war crime of torture or inhuman treatment, will have the capacity to perpetrate the war crime, under Article 8(2)(a)(iii).

Article 8(2)(a) (vii)-2 – Unlawful Confinement

The non-contextual elements of the war crime of unlawful confinement, under Article 8(2)(a)(vii), are identical to those of the crime of imprisonment as a crime against humanity, under Article 7(1)(e).⁷³² The two crimes differ only in regard to their respective contextual elements with the contextual element of a war crime requiring, in contrast to the contextual element of a crime against humanity, the existence of an (international) armed conflict.⁷³³

The applicability of this war crime, under the Rome Statute, to the Israeli State practice of administrative detention, commences from the commission of a grave breach or breaches of Articles 42 (detention without reasonable grounds to believe that the military security of the occupying power makes it absolutely necessary) and 78⁷³⁴ (absence of a regular procedure) of the Fourth Geneva Convention combined, as a result of the designation of the armed conflict in the OPT as an international armed conflict, with Article 75(3) of Additional Protocol I to the Geneva Conventions (the right to be informed promptly, in a language s/he understands, of the reasons why these measures have been taken). The applicability of Additional Protocol I Article 75(3) entails that the relevant provisions of international human rights law (ICCPR Articles 9(2), 9(4), 14), are also applicable, due to the status of the fundamental guarantees, under Article 75, as minimum standards.

The dependence of the war crime, under Article 8(2)(a)(vii), on the Fourth Geneva Convention, Additional Protocol I and the relevant provisions of international human rights law, results in a situation in which the violation of this Article can be committed by individuals under the Israeli State practice of administrative detention, within the OPT, at the stage of the initial arrest, the imposition of an administrative detention order and the character of the subsequent review of the continued necessity for the individual’s detention.

The underlying framework of the Fourth Geneva Convention which guides the determination of the violation of Article 8(2)(a) (vii) is one which regulates, rather than prohibits, the occupying power’s capacity to detain and confine civilians, as protected individuals, under the Fourth Geneva Convention. The purpose of regulation is to ensure that, whilst the occupying power’s considerations of security enable the detention and confinement of the

⁷³² ICTY, *Kordic*, Trial Judgment, §301; ICTY, *Kordic*, Appeal Judgment, §§114-115.

⁷³³ Article 8(1) of the Rome Statute.

⁷³⁴ The procedural protection, in relation to situations of belligerent occupation, is that under Article 78, rather than under Article 43.

civilian population within the occupied territory, the recourse to this measure is based upon the specific risk to military security posed by a *particular individual* civilian and the *absolute necessity* of a response of detention/confinement. It is the requirement of the continued, specific risk to military security which then forms the criterion upon which the subsequent stages of the imposition of confinement and periodic review of its continued imposition are to be enacted.

The breach and its gravity – the perpetration of a war crime – derive from confinement which is imposed without foundation in the Fourth Geneva Convention, Additional Protocol I and the relevant provisions of international human rights law and, therefore, the violation of the protected status of civilians under the Geneva Conventions and their human rights under international human rights law. The violation is not merely the arbitrary character of the individual confinement, but, through this arbitrariness, the designation of the entirety of the civilian population as potentially subject to confinement on “a collective basis”.⁷³⁵ This represents the connection between the confinement and its connection to a part of a plan or policy or as part of a large-scale commission of such crimes: unlawful confinement.

On the basis of the preceding demonstration of the potential commission of the crime against humanity of imprisonment, there is the reasonable basis to believe that the Israeli State practice of administrative detention involves the potential commission of the war crime of unlawful confinement.

Article 8(2)(a)(vi) – Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial

The war crime of denial of a fair and regular trial to civilians (protected persons under the Geneva Conventions), under Article 8(2)(a)(vi) of the Rome Statute, involves the denial of “judicial guarantees as defined, *in particular*, in the third and the fourth Geneva Conventions of 1949”.⁷³⁶ The use of the term, “in particular”, indicates that the guarantees of fair trial contained in these Geneva Conventions, whilst a specific focus of consideration, are complimented by the guarantees contained in relevant international legal instruments and customary international law.⁷³⁷ Thus, the gravity of the crime, in relation to the context of an international armed conflict, arises from the absence of central procedural protections, from all these sources of international law, which are essential to the designation of the judicial trial procedure, which precedes the imposition of a sanction, as fair and regular.

This war crime represents the criminalization, under the Rome Statute, of the grave harm specifically inflicted by the absence of a genuine, independent and impartial judicial procedure. It is this specific, grave harm which differentiates it from the crime against

⁷³⁵ As the ICTY Appeals Chamber in *Celebici* emphasizes, “It is perfectly clear from the provisions of Geneva Convention IV referred to above [Articles 42 and 43] that there is no such blanket power to detain the *entire* civilian population of a party to the conflict in such circumstances, but that there must be an assessment that each civilian taken into detention poses a particular risk to the security of the State.”, (ICTY *Celebici*, Appeal Judgment Case No.: IT-96-21-A 20 February 2001, §327 (italics in original)). Furthermore, the unlawful, collective basis of confinement reveals, “that the detention was a collective measure aimed at a specific group of persons, based mainly on their ethnic background” (Ibid., §323. Affirming the finding of the Trial Judgment, §1134).

⁷³⁶ Elements of Crimes, Op. cit., p. 16 (Emphasis added).

⁷³⁷ See Knut Dörmann, *Elements of war crimes under the Rome statute of the International Criminal Court: sources and commentary*, (Cambridge: Cambridge University Press, 2002), p. 100.

humanity of imprisonment and the war crime of unlawful confinement as both these crimes consider the defectiveness of the judicial procedure in relation to the broader question of the arbitrariness of the deprivation of liberty of the individual or individuals subject to detention. The Report, rather than subsuming the defective character of the initial judicial procedure under the crime against humanity of imprisonment or the war crime of unlawful confinement, emphasizes that this grave harm of the war crime of denial of a fair and regular trial is to be maintained as a distinct ground of potential individual criminal liability.

The Israeli military governance of the OPT distinguishes within the Israeli legal framework between a framework of offences of substantive criminal law and the non-criminal risk to military security of administrative detention. This, in turn, defines the judicial procedure of the military court in relation to the decision to impose a non-criminal, administrative detention order as a non-criminal, administrative procedure, and, therefore, incapable of classification as a trial.

However, the designation by the State Party of the character of its judicial procedures cannot in itself exclude the potential applicability of Article 8(2)(a)(vi). In regard to the designation of the procedure as a trial, whose defective guarantees of fairness and impartiality inflict grave harm, the term “trial”, under Article 8(2)(a)(vi), is to be understood as a one which is to be determined independently of the designation of the character of the judicial procedure by the state party. The independence of the notion of a trial is evident from the Preparatory Commission to the Rome Statute in which the regularity, fairness and impartiality of the trial is held to be determined separately from, and without the requirement for, punishment to be attached to the procedure.⁷³⁸

Thus, it is unnecessary to adopt, by analogy, the autonomous concept of a fair trial, under Article 6(1) of the European Convention of Human Rights (ECHR). On the basis of this separability of punishment and judicial procedure, under the Rome Statute, it enables the judicial procedure itself, irrespective of the State Party’s definition of both the procedure and the attendant punishment, to be immediately open to evaluation, under Article 8(2)(a)(vi). It removes the requirement, under Article 6 ECHR, to establish the effective equivalence of the designated procedure with the central aspects of a criminal trial and a criminal sanction in order for Article 6 to be applicable.⁷³⁹

Therefore, the potential applicability of the war crime of denial of a fair, regular and impartial trial commences from the evaluation of the degree of adherence of the judicial procedure, through which an administrative detention order is imposed, to the relevant provisions of IHL of the Fourth Geneva Convention and Additional Protocol I to the Geneva Conventions and the relevant provisions of IHRL of the ICCPR. The requirement of a “regular procedure”, under Article 78 of the Fourth Geneva Convention is supplemented, by the procedural requirements of Article 75(3) of Additional Protocol I. The status of the fundamental guarantees of Article 75 of Protocol I, as minimum standards, entail that the relevant provisions of IHRL assume the position of supplementary procedural guarantees in relation to these provisions of IHL.

The procedural guarantees resulting from the combination of these provisions of international law require that the judicial proceedings are ones in which the individual “shall be informed

⁷³⁸As emphasized by Knut Dörmann, *Op. cit.*, p.100, fn.1, citing the Preparatory Commission Reports of PCNICC/1999/DP.4/Add.2 of 4th February 1999 and PCNICC/1999/DP.5 of 23rd February 1999.

⁷³⁹See, for example, *Engel v Netherlands* [1976] ECHR 3.

promptly, in a language he understands, of the reasons why these measures have been taken”, under Article 75(3) Additional Protocol I, confirmed and supplemented by “[a]nyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him”, under Article 9 ICCPR. This, in turn, has an essential relationship with the right to effective legal representation in the proceedings for “[a]nyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful”, under Article 9(4) ICCPR.

These procedural guarantees are absent from the judicial proceedings of an Israeli military court that determines, after the initial arrest and interrogation, whether or not to impose an administrative detention order upon an individual. The individual is arrested on the basis of the threat to a broad notion of security without further definition of the specific risk posed by the particular individual, and this is accompanied by the military prosecutor’s reliance upon secret evidence which is never disclosed to either the detainee or her/his legal representative. The absence of these procedural guarantees has the further consequence of depriving the individual of the capacity to effectively challenge either the ground for the detention order and/or the evidence upon which it is based. This, in turn, transforms the position of the judge, who has sole access to the secret evidence, from the position of impartial decision-maker based upon the adversarial presentation of prosecution and defence cases, into the sole evaluator of the prosecution case. The judicial procedure is, therefore, one which has undermined the distinct roles of judge, prosecution and defence; and, as a result, breached the further right to legal personality of the individual subject to the proceedings, under Article 16 ICCPR. For, the absence of these procedural guarantees and their consequent effect upon the character of the judicial procedure excludes the individual’s participation in the proceedings, and, thereby, removes the individual, as an independent legal personality, from the procedure and its eventual decision.

The lack of procedural guarantees, and their consequent effect upon the fair trial of adults, is accompanied, in relation to these judicial proceedings concerning juveniles, by the absence of the additional procedural guarantees required by the UN Convention on the Rights of the Child (CRC). The judicial procedure in the OPT has yet to establish a specific, comprehensive policy and adopt attendant procedural mechanisms in relation to the particular situation of juvenile justice. In particular, the UN Committee on The Rights Of The Child, in *General Comment No. 10: Children’s rights in juvenile justice*, insists upon the essential interconnection between the general principles of the CRC and its more specific provisions.⁷⁴⁰ It then provides a detailed presentation of the leading principles of a comprehensive policy of juvenile justice, and subsequently describes the requirements that this comprehensive policy imposes upon the character and procedural guarantees of judicial proceedings in relation to juveniles.⁷⁴¹

In relation to the discussion of the war crime of denial of fair trial, the General Comment identifies the mutually supportive relationship between Article 14 ICCPR and Article 40 CRC, in relation to the additional procedural guarantees to be accorded to juveniles.⁷⁴² Thus, the character of the judicial procedure, established above, which applies without distinction to

⁷⁴⁰ UN Committee On The Rights Of The Child, *General Comment No. 10: Children’s rights in juvenile justice*, CRC/C/GC/10, 25 April 2007, §4.

⁷⁴¹ *Ibid.*, §5, §40 ff.

⁷⁴² *Ibid.*, §40.

the decision to impose an administrative detention order upon an adult or a juvenile, is taken to involve the absence of the central procedural guarantees, under the CRC. The absence of information with regard to the reason for arrest, and the secret evidence upon which the application for an administrative detention order is made, involve the absence of prompt and direct information of the charge(s) (Article 40 (2) (b) (ii) CRC). This, in turn, undermines the right to legal or other appropriate assistance (Article 40 (2) (b) (iv) CRC) of the juvenile, and the combination of the breach of these two articles removes the juvenile's right to effective participation in the proceedings (Article 40 (2) (b) (iv) CRC).

The cumulative effect of the absence of these procedural guarantees, for both adults and juveniles, renders the judicial procedure irregular, impartial and unfair and, thus, represents the denial of a fair trial. The effect of the absence of these procedural guarantees upon the trial is reinforced by a judicial procedure which is undertaken within a military court system. The adoption of military court system for the conduct of judicial proceedings against civilians is considered, under the right to fair trial, pursuant to Article 14 ICCPR, to represent an inherent and continued potential for impartiality, due to the lack of sufficient differentiation and independence of the personnel who undertake the judicial role from the wider policies and practices of the armed forces of which they are a part.⁷⁴³ The broader concern with the adoption of a military court system is explicitly indicated in the *Report by the Special Rapporteur on the independence of judges and lawyers*, for whom,

“[u]sing military or emergency courts to try civilians in the name of national security, a state of emergency or counter-terrorism poses a serious problem. This regrettably common practice runs counter to all international and regional standards and established case law. The Human Rights Committee has time and again asserted that military courts may only hear cases involving military personnel charged with crimes or offences relating to military matters. The Inter-American Court of Human Rights has established a wealth of case law in this regard and has also considered that bringing civilians before military courts is a violation of due process and the principle of the “lawful judge”. The European Court of Human Rights has also asserted this principle: although military courts are not competent to try civilians in the European system, it has had to pronounce on the action of national security courts composed of civilian and military judges. The African Commission on Human and Peoples’ Rights has held that the trial of civilians by military courts is contrary to articles 6 and 7 of the African Charter and the Basic Principles on the Independence of the Judiciary.”⁷⁴⁴

The Israeli military court system in the OPT requires a heightened and conscientious adherence to the procedural guarantees of a fair trial in order to rebut the presumption of their potential violation which inheres in a military court system whose jurisdiction extends to civilians. Hence, the absence of the procedural guarantees established above is of greater gravity and, therefore, even more strongly indicative of the denial of a fair trial, within the context of a judicial procedure of a military court.

In relation to the further demonstration of the denial of fair trial, the denial of fair trial is a *systematic*, institutional feature of the judicial procedure of the military courts in the OPT in

⁷⁴³ See, HRC, *General comment no. 32, Article 14, Right to equality before courts and tribunals and to fair trial*, CCPR/C/GC/32 23 August 2007, §22. Nor, as the Human Rights Committee emphasizes, can the adoption of a military court system be utilized in order to avoid the non-derogable requirements of a fair trial under Article 14.

⁷⁴⁴ *Report of the Special Rapporteur on the independence of judges and lawyers*, Leandro Despouy E/CN.4/2004/60 31 December 2003, §60.

regard to the determination and imposition of an administrative detention order.⁷⁴⁵ As a result, its systematic character is capable of demonstration by a representative sample of the character of these judicial proceedings which exemplify this systematic, structural denial of fair trial. This, in turn, enables the Report to return to the individual applications to the UN Working Group on Arbitrary Detention, and to focus upon the Working Group's findings with regard to the stage of the judicial procedure prior to the imposition of the administrative detention order. The most recent individual application was held by the Working Group, in relation to the character of the judicial procedure in the previous individual applications, to establish a *pattern* of lack of procedural guarantees. The judicial procedure commenced upon the basis of an application for an administrative detention order which lacked an explicit, legal foundation and the proceedings themselves effectively denied the right to challenge the legality of the detention.⁷⁴⁶

On the basis of the preceding analysis, the judicial procedure through which an administrative detention order is imposed represents the relevant conduct of the war crime of denial of fair trial, under Article 8(2)(a)(vi).

Article 8(2)(a) (vii) – Unlawful deportation or transfer

The Report, in the part devoted to IHL⁷⁴⁷, has indicated that Articles 49 and 76 of the Fourth Geneva Convention prohibit civilians, as protected persons, being forcibly transferred *within* or deported *out of* the OPT. The Israeli State practice of administrative detention, as demonstrated in the preceding part of the Report on IHL, involves a grave breach of these Articles of the Fourth Geneva Convention when detainees are transferred *out of* the OPT to detention facilities in Israel.

In order for deportation to become a war crime, under Article 8(2)(a)(vii) of the Rome Statute, the Elements of Crimes require deportation of one or more persons, who have the protected status of civilians under the Fourth Geneva Convention, to another State. The deportation of civilians must have occurred in the context of and be associated “with an international armed conflict”.⁷⁴⁸ In addition, this deportation must, in accordance with the general requirement for all war crimes, under Article 8(1), be “a part of a plan or policy or as part of a large-scale commission of such crimes”.⁷⁴⁹

⁷⁴⁵ The Report follows the distinction, introduced by Jennifer DePiazza, “Denial of Fair Trial as an International Crime”, *Journal of International Criminal Justice*, 15, (2) (2017), pp. 257-289, between denial of fair trial (Category One), “through evidence of the details of trial proceedings against individual victims” and denial of fair trial (Category Two) “through evidence demonstrating that the system as such was incapable of delivering a fair trial with little evidence tendered pertaining to the trial circumstances of individual victims” (Ibid., p. 288).

⁷⁴⁶ HRC, Working Group on Arbitrary Detention, *Opinion No. 86/2017*, A/HRC/WGAD/2017/86, 18 December 2017, §§27-43.

⁷⁴⁷ See above, Part I.

⁷⁴⁸ *Elements of Crimes of the Rome Statute*, p. 17. The existence of an international armed conflict in the OPT has been established, in Part I of the Report.

⁷⁴⁹ Article 8(1) of the Rome Statute. It should be emphasized that definition of deportation does not require the permanent, forcible relocation of the deportee to another State. Thus, for the purposes of the Israeli State practice of administrative detention, the fact that a Palestinian civilian detainee who is deported to a detention facility in Israel, when released, returns to the OPT, does not fall outside the definition of the war crime of deportation. Here, the Report follows the precisions offered in the ICTY, *Stakic*, Appeal Judgment, IT-97-24-A, 22 March 2006, §307, in regard to the interpretation of Article 49 of the Fourth Geneva Convention.

Apart from the single Israeli detention facility in the OPT, the remainder of the Israeli detention estate is located in Israel.⁷⁵⁰ Palestinian civilians, arrested in the OPT pursuant to an administrative detention order are, therefore, regularly, as part of Israeli policy, and on a large-scale, transferred into Israel's sovereign territory – that is, beyond the borders of the OPT. The fact of the arrest, by Israel, of an individual within the OPT, on the grounds of the risk to public order or military security, does not remove the individual's status as lawfully present in the OPT and, therefore, does not confer upon Israel the authority, under international law, to deport the individual out of the OPT into a detention facility in Israel.⁷⁵¹ The obligation remains on Israel, as the occupying power, to ensure that all Palestinian civilians, if arrested pursuant to administrative detention, are detained within detention facilities in the OPT.

On the basis of the preceding analysis of the Report of the Fourth Geneva Convention, the transfer of Palestinian civilians, upon arrest within the OPT, to detention facilities in Israel, represents the relevant conduct of the war crime of deportation, under Article 8(2)(a)(vii).

⁷⁵⁰ Goldstone Report, Op. cit., §1441.

⁷⁵¹ Reaffirming the Reports earlier rejection of the Israeli Supreme Court's position in H CJ 97/79, *Abu Awad v the Military Commander* (1979), §11. See also H CJ 785/87 *Afu v. IDF Commander in the West Bank* (1988) PD 42(2) 4.