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JUVENILE JUSTICE IN BELLIGERENT OCCUPATION REGIMES: COMPARING THE COALITION PROVISIONAL AUTHORITY ADMINISTRATION IN IRAQ WITH THE ISRAELI MILITARY GOVERNMENT IN THE TERRITORIES ADMINISTERED BY ISRAEL

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I. INTRODUCTION

Juvenile justice has become a theme of great interest, with the international community showing a growing concern with protecting the rights of children under international law[1]—in times of peace as well as in times of war.[2] This article examines the juvenile justice systems unique to occupation regimes, basing the analysis of this type of system on the case studies of the Israeli occupation in the administered territories and the former Coalition Provisional Authority Administration ("Coalition") in Iraq.[3] We maintain that the changing nature of occupation regimes has bearing on their juvenile justice systems, demanding more protections for the rights of children within these criminal structures. These protections can be awarded either through direct application of human rights law or by amending the specific laws that administer territories under occupation.

In order to determine the most adequate set of international norms for securing the interests of juveniles within the juvenile justice systems in occupied territories, we need to assess the tenets and objectives of juvenile justice in general. This is the object of the second section of this paper, in which we discuss the major goals of juvenile justice both in comparative law and in international law. We address the current trends and characteristics of juvenile justice systems worldwide vis-à-vis the goals of the juvenile justice system as they are reflected in international law, most notably in the International Covenant on Civil and Political

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1. Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC]. Under international law, the legal definition of a "child" is embedded in the CRC, which stipulates, "a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier." *Id.* art. 1. We shall adhere to this definition in the article.

2. Geneva Convention Relative to the Protection of Civilian Persons in Time of War arts. 14, 17, 23, 24, 38, 50, 82, 89, 94, 132, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GCIV] (highlighting the rights of children within and during an armed conflict).

3. Several terms are used to describe the territories in the article, such as the "Occupied Palestinian Territories," the "West Bank Territories," and "Judea and Samaria." We have chosen the term that appears in the title, which has, to our mind, no political connotations. We also use a shortened term: the "administered territories."

Rights ("ICCPR"),[4] the International Convention on the Rights of the Child ("CRC"),[5] and subsequent soft law instruments.

As our interest is not simply in the juvenile justice systems that operate within independent states and regimes but more specifically in those that are implemented in occupied territories, we proceed, in the third section, to examine the history of the changes experienced by occupation regimes: from belligerent occupations to transformative occupations and from short-term to long-term ones. We then examine how these transformations affect the legal means for realizing the obligations of the occupying power under the Fourth Geneva Convention (1949)[6] and the Hague Convention and its annexed regulations (1907) ("Hague Regulations"),[7] primarily the duty to ensure the safety and the daily life routine of the occupied population.

In the fourth section, we discuss the mutual application of international humanitarian law and international human rights law in occupied territories through the prism of the objectives of the juvenile justice system in general, and in occupied territories in particular.

We first suggest that the longer an occupier rules in an occupied territory, the more likely that human rights law, rather than humanitarian law, will better serve the interest of the occupied population, as the latter has more limited tools for achieving this goal. Hence, in longer-term occupations, there is more room for the application of human rights law as an interpretative and complementary law. We then return to the conclusions of the second section with regard to the objectives of juvenile justice systems and claim that, given the nature of juvenile justice in general, and in occupied territories in particular, we must see a more extensive application of human rights law in occupation regimes. We substantiate our claims through the analysis of the case study of detention, prosecution, and adjudication of children in formerly occupied Iraq.

In the fifth section, we turn to Israel, discussing the juvenile courts and the legislation of the juvenile justice system in the territories administered by the Israeli army. After addressing the legal views expressed by the Israeli government and the Israeli Supreme Court on the question of the applicability of human rights law in the administered territories, we address the recent developments in juvenile justice in these territories. We propose that the long-term nature of the Israeli occupation in the administered territories demands that Israel keep and strengthen the reform in the juvenile justice system in these territories in order to increase the application of human rights norms. However, in the specific case of Israel, international law is not automatically incorporated within the national legal

4. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, [hereinafter ICCPR] (the relevant articles for this paper will include article 10 and 14).

5. CRC, *supra* note 1.

6. GCIV, *supra* note 2.

7. Convention (IV) Respecting the Laws and Customs of War on Land, with Annex of Regulations, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539 [hereinafter Hague Regulations] (also referred to as the Fourth Hague Convention) (in this piece, articles will be referencing the articles in the regulations found in its annex).

system, and furthermore, Israel objects to the application of human rights treaties in the administered territories. These two facts lead us to conclude that the best way to apply human rights norms, found in both formal and soft law instruments, in the occupation regime in the administered territories is by incorporating them into the legislation of the military governance that regulates the administered territories.

II. THE OBJECTIVES OF JUVENILE JUSTICE SYSTEMS

In order to determine the appropriate set of norms for governing juvenile justice systems in general and in occupied territories in particular, we must extrapolate a definition of such systems, clarifying their basic tenets and objectives. The Council of Europe defines a juvenile justice system as:

> [T]he formal component of a wider approach for tackling youth crime. In addition to the youth court, it encompasses official bodies or agencies such as the police, the prosecution service, the legal profession, the probation service and penal institutions. It works closely with related agencies such as health, education, social and welfare services and non-governmental bodies, such as victim and witness support.[8]

The Council states that the principal aims of a juvenile justice system are to "i. prevent offending and re-offending; ii. to (re)socialise and (re)integrate offenders; and iii. to address the needs and interests of victims."[9]

Scholars identify three central principles in juvenile justice: "diminished responsibility, proportionality and room to reform."[10]

> *Diminished responsibility* refers to the question whether children are less culpable then adults for having offended. Children may lack sufficient cognitive abilities to realize what they are exactly doing and in particular what might be the consequences of their acts. Of course the older the juvenile the more he will be responsible for his acts, but even at age 14 and 16 he might be incapable of grasping the full meaning of his actions.
>
> *Proportionality* refers to the mitigation of punishment because of children's lack of development of social and cognitive capacities. . . .
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> *Room to reform* indicates the importance of the kind of punishments that is meted out, considering what we want to achieve with punishment and what we would want to avoid.[11]

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8. Eur. Comm. of Ministers, *Recommendation*, 853rd Meeting, Rec(2003)20 (2003) (this recommendation is for "new ways of dealing with juvenile delinquency and the role of juvenile justice"), *available at* https://wcd.coe.int/ViewDoc.jsp?id=70063.

9. *Id.*

10. Josine Junger-Tas, *Trends in International Juvenile Justice: What Conclusions can be Drawn?*, *in* INTERNATIONAL HANDBOOK OF JUVENILE JUSTICE 505, 510 (Josine Junger-Tas & Scott. H. Decker eds., 2006).

11. *Id.* (citation omitted).

According to this final principle, for example, preference should be given to penal interventions that promote rehabilitation and the growth of young people into responsible citizens.[12]

The above basic principles of juvenile justice are the result of a long process of development of the concepts of juvenile justice in 20th-century Western thought. This ranged from the rhetoric of child protection and "meeting needs" of the 1970s, where justice for juveniles was considered best delivered through community-based interventions, to the series of diverse "justice-based" principles of the late 20th century, which were "more concerned with responding to the 'deed' of the offence rather than the 'need' of the offender."[13] These changes are reflected in the variety of policies in the juvenile justice systems implemented by Western states, which scholars divide into three clusters:

> The first cluster includes the English speaking countries, with the exception of Scotland but including the Netherlands. It is essentially "justice" oriented, characterized by a retributive, sometimes repressive, approach, placing a strong emphasis on the juvenile's accountability, "just desert" principles and parental responsibility for their child's behaviour . . . .
>
> . . . .
>
> The second cluster of countries mainly covering continental Europe is still very much "welfare" oriented . . . .
>
> A third cluster is formed by the Scandinavian countries and Scotland [that combines approaches from "just desert" and "welfare"].[14]

In the third cluster, the "just desert" philosophy gained an important role because of their relationships with Anglo-Saxon states.[15] In practice, these policies

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12. *Id.*

13. John Muncie & Barry Goldson, *States of Transition: Convergence and Diversity in International Youth Justice*, *in* COMPARATIVE YOUTH JUSTICE: CRITICAL ISSUES 197 (John Muncie & Barry Goldson eds., 2006).

14. Junger-Tas, *supra* note 10, at 526-28

> It is clear that the United States represents these characteristics [of the first cluster] in its extreme form . . . . On the other hand most of these countries—while subscribing to the general just desert philosophy—have also introduced on a large scale alternative sanctions (Canada, the UK, and the Netherlands), restorative justice (Northern Ireland) and preventive and diversionary measures (Ireland, the Netherlands, and the UK).
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> . . . .
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> . . . [The second cluster] is perhaps best represented by the German approach of juveniles and young adults, but one sees a similar approach in many continental European states. Western European states, such as France and Belgium also have a strong welfare legal tradition, although there are pressures to change this and create a more retributive system . . . .
>
> However, this approach is also characteristic for other continental countries, such as Switzerland, Spain, and Greece, as well as the Eastern European states.

Id. at 527-28.

15. *Id.* at 528 (this is traced particularly in Sweden, out of the three Scandinavian states, but there are also some "just desert" innovations in Denmark, for example).

place more emphasis on the offence, on the responsibility of the juveniles for their actions, and on the proportionality principle.[16]

In addition to state-policy rules, juvenile justice is also governed by international law. Three fundamental international conventions and several other non-obligatory instruments regulate juvenile justice systems under international law. The ICCPR guarantees general rights of suspects and accused, such as the rights to avoid arbitrary detention,[17] to be treated "with humanity and with respect for the inherent dignity of the human person,"[18] and to "be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."[19] It also refers specifically to minors' rights by requiring states to provide every child "such measures of protection as are required by his status as a minor"[20] and demanding specifically that "[a]ccused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication."[21] In addition, the ICCPR outlaws capital punishment for those under the age of eighteen.[22] The European Convention for the Protection of Human Rights and Fundamental Freedoms[23] "provides for the due process of law, fairness in trial proceedings, a right to education, a right to privacy and declares that any deprivation of liberty (including curfews, electronic monitoring and community supervision) should not be arbitrary or consist of any degrading treatment."[24]

Yet, the most comprehensive convention regarding juvenile justice is the CRC, which established a near global consensus that "[i]n all actions concerning children . . . the best interests of the child shall be a primary consideration."[25] In addition, it was established that all children have a right to protection,[26] to participation,[27] to personal development,[28] and to basic material provisions.[29] The CRC upholds the following rights for children: "[T]o life, to be protected in armed conflicts, to be safe-guarded from degrading and cruel punishment, to receive special treatment in justice systems," and to be granted "freedom from discrimination, exploitation, and abuse."[30] This "full-fledged Convention, which has increasing importance for Youth protection as well as for Youth Justice . . .

16. *Id.*

17. ICCPR, *supra* note 4, art. 9(1).

18. *Id.* art. 10(1).

19. *Id.* art. 14(1).

20. *Id.* art. 24(1).

21. *Id.* art. 10(2)(b).

22. *Id.* art. 6(5).

23. Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, E.T.S. No. 5, 213 U.N.T.S. 222.

24. Muncie & Goldson, *supra* note 13, at 211.

25. CRC, *supra* note 1, art. 3(1).

26. *Id.* art. 3(2).

27. *Cf. id.* arts. 12, 14-15 (discussing a child's freedom of expression, religion, conscience, thought, association, and peaceful assembly).

28. *Id.* art. 6(2).

29. *Id.* arts. 23-27.

30. Muncie & Goldson, *supra* note 13, at 211.

was adopted in 1989 by the General Assembly and since than has been ratified by 191 countries."[31]

Articles 37, 39, and 40 of the CRC are relevant for juvenile justice. In Article 40, the CRC defines the purposes of juvenile justice to be "promoting the child's reintegration and the child's assuming a constructive role in society."[32] Hence, Article 40 requires that:

> Whenever appropriate . . . [the state shall use] measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected . . . [and shall maintain] [a] variety of dispositions, such as care, guidance and supervision orders; counseling; probation; foster care; education and vocational training programmes and other alternatives to institutional care . . . .[33]

To that end, the CRC requires that a child will be "treated in a manner consistent with the promotion of the child's sense of dignity and worth . . . which takes into account the child's age" and "the needs of persons of his or her age";[34] that detention shall be "used only as a measure of last resort and for the shortest appropriate period of time";[35] that state parties "shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children";[36] and that the child "shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances."[37]

The above basic tenets of juvenile justice are reinforced by several non-binding documents regarding juvenile justice. The United Nations Standard Minimum Rules for the Administration of Juvenile Justice stress the need for special training for the authorities regulating juvenile justice and determine "a minimum training in law, sociology, psychology, criminology and behavioural sciences."[38] The United Nations Rules for the Protection of Juveniles Deprived of their Liberty elaborate on the conditions of detention of minors and reiterate the importance of rehabilitation and return to community.[39] The United Nations Guidelines for the Prevention of Juvenile Delinquency add that youth justice

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31. Junger-Tas, *supra* note 10, at 526. *See also* Muncie & Goldson, *supra* note 13, at 211 ("The only UN member states that have not ratified are Somalia and the USA (Somalia has had no internationally recognised government since 1991, the US has claimed that ratification would undermine parental rights."). South Sudan, since becoming a state in 2011, has also not ratified the CRC. *The Convention on the Rights of the Child: Signatory States and Parties to the Convention*, HUMANIUM, http://www.humanium.org/en/convention/signatory-states (last visited Jan. 29, 2014).

32. CRC, *supra* note 1, art. 40(1).

33. *Id.* arts. 40(3)-(4).

34. *Id.* arts. 37(c), 40(1).

35. *Id.* art. 37(b).

36. *Id.* art. 40(3).

37. *Id.* art. 37(c).

38. G.A. Res. 40/33, Annex, at 211, U.N. Doc. A/RES/40/33 (Nov. 29, 1985) (commenting on Article 22).

39. G.A. Res. 45/113, Annex, ¶¶ 79-80, U.N. Doc. A/RES/45/113 (Dec. 14, 1990).

policy should avoid criminalizing children for minor misdemeanours.[40] Lastly, the United Nations Children's Fund Principles and Guidelines on Children Associated with Armed Forces or Armed Groups ("Paris Principles") deal specifically with children recruited for armed forces during armed conflicts.[41] These principles relate to the mechanism of juvenile justice under these special circumstances and subject them to a "child rights approach" (including the principles of restorative justice and reintegration) and the general principle of the best interests of the child[42] (which is also one of the foundations of the CRC).[43] The Paris Principles also introduce the concept that children who are accused of committing war crimes should be regarded not only as perpetrators but also as victims and treated accordingly.[44]

Collectively, these conventions and rules might be viewed as tantamount to a growing legal global standardization of juvenile justice. Numerous countries "have now used the []CRC to improve protections for children and have appointed special commissioners or ombudspersons to champion children's rights."[45] "A monitoring body—the UN Committee on the Rights of the Child—reports under the Convention and presses governments for reform."[46]

However, the enforcement of children's rights under international law is complicated by the same problems faced by other human rights protected by international human rights law. While the discussion and analysis of these difficulties is beyond the scope of this paper, we note here that the mechanisms of enforcing these laws are relatively weak.[47] The implementation of such rights,

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40. G.A. Res. 45/112, Annex, ¶ 56, U.N. Doc. A/RES/45/112 (Dec. 14, 1990).

41. UNITED NATIONS CHILDREN FOUND., THE PARIS PRINCIPLES: PRINCIPLES AND GUIDELINES ON CHILDREN ASSOCIATED WITH ARMED FORCES OR ARMED GROUPS 4 (2007) [hereinafter PARIS PRINCIPLES], *available at* http://childrenandarmedconflict.un.org/publications/ParisPrinciples_EN.pdf.

42. *Id.* at 8-9.

43. CRC, *supra* note 1, art. 3(1).

44. PARIS PRINCIPLES, *supra* note 41, at 9. For the claim that the special circumstances of children in terrorist groups may turn them from perpetrators into victims, see also Hilly Moodrick-Even Khen, *Child Terrorists: Why and How Should They be Protected by International Law*, *in* INTERNATIONAL LAW AND ARMED CONFLICT: CHALLENGES IN THE 21ST CENTURY 262, 264-72 (Noëlle Quénivet & Shilan Shah-Davis eds., 2010).

45. Muncie & Goldson, *supra* note 13, at 211. The appointment of ombudspersons for children has become so prevalent in Europe that in 1997 a European Network for Ombudspersons for Children was established to connect the independent offices for children in thirty-three countries in Europe. *See European Network of Ombudspersons for Children*, CHILD RIGHTS INT'L NETWORK, http://www.crin.org/enoc (last visited Jan. 30, 2014).

46. Muncie & Goldson, *supra* note 13, at 211.

47. Most human rights law treaties are monitored by monitoring committees whose enforcing authorities are rather limited. JACK DONNELLY, INTERNATIONAL HUMAN RIGHTS 8-10 (4th ed. 2013). They are usually authorized only to make recommendations for the implementation of their respective instruments, while their authority to resolve disputes between states or between individuals and states with regard to the application of the instruments depends on whether the states parties have accepted such authority. *See id. See also* Optional Protocol to the International Covenant on Civil and Political Rights art. 1, Dec. 16, 1966, 999 U.N.T.S. 171 ("A State Party to the Covenant that becomes a Party to the present Protocol recognizes the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by

therefore, relies primarily on the good will of the states formally bound by human rights treaties and customary law.[48] In addition, the CRC is not enforced by an international tribunal, but it is rather a committee that monitors its implementation by state parties and this committee is only authorized to "make suggestions and general recommendations . . . [that] shall be transmitted to any State Party concerned and reported to the General Assembly, together with comments, if any, from States Parties."[49] Breaches attract no formal sanction, even though every five years the U.N. Committee on the Rights of the Child tests the measures taken by individual states to implement the convention.[50] Moreover, non-governmental organizations that critically review juvenile justice proceedings,[51] such as Amnesty International and Human Rights Watch, suggest that "implementation has often been half-hearted and piecemeal."[52] A country will give lip service to rights in order to be "granted status as a 'modern developed state' and acceptance into world monetary systems."[53] The pressure to ratify is both moral and economic. While the CRC may be the most ratified of all international human rights directives, it is also the most violated.[54] Indeed, thirty-three countries' ratification

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that State Party of any of the rights set forth in the Covenant."); Convention on the Elimination of All Forms of Discrimination against Women art. 29(1), Dec. 18, 1979, 1249 U.N.T.S. 13 ("Any dispute between two or more States Parties concerning the interpretation or application of the present Convention which is not settled by negotiation shall, at the request of one of them, be submitted to arbitration. [If this is not successful] . . . any one of those parties may refer the dispute to the International Court of Justice . . . ."). However, states often sign human rights treaties with reservations. *See* Elena A. Baylis, *General Comment 24: Confronting the Problem of Reservations to Human Rights Treaties*, 17 BERKELEY J. INT'L L. 277, 277 (1999). In addition, there is no international body that is authorized to make mandatory decisions or to enforce human rights law instruments, except for the U.N. Security Council, which may decide on matters pertaining to human rights law but only as far as these issues are related to the Council's main objective, which is safeguarding international peace and security. *See* DONNELLY, at 87, 162. The Security Council has taken action in response to different human rights violations to different degrees of success. *See id.* at 90-91, 194-95, 198-99, 206-07 (including embargoes against South Africa in response to Apartheid, creating the International Criminal Tribunal for the former Yugoslavia in reaction to violence in the Balkans, sending peacekeepers to Rwanda to enforce the Arusha Accords, and ordering the International Criminal Court to indict Omar al-Bashir for his responsibility for the humanitarian crisis in Darfur).

48. *See* DONNELLY, *supra* note 47, at 8.

49. CRC, *supra* note 1, art. 45(d).

50. *Id.* arts. 44-45.

51. Junger-Tas, *supra* note 10, at 526.

52. Muncie & Goldson, *supra* note 13, at 211.

53. *Id.*

54. According to "Abramson's (2000) analysis of UN observations on the implementation of juvenile justice in 141 countries" there is a "widespread lack of 'sympathetic understanding' necessary for compliance with the []CRC." *Id.* at 212. ("[Abramson] notes that a complete overhaul of juvenile justice is required in [twenty-one] countries and that in others torture, inhumane treatment, lack of separation from adults, police brutality, bad conditions in detention facilities, overcrowding, lack of rehabilitation, failure to develop alternatives to incarceration, inadequate contact between minors and their families, lack of training of judges, police, and prison authorities, lack of speedy trial, no legal assistance, disproportionate sentences, insufficient respect for the rule of law and improper use of the juvenile justice system to tackle other social problems, are of common occurrence.").

is accompanied by reservations.[55] "For example the Netherlands, Canada, and the UK have issued reservations to the requirement to separate children from adults in detention."[56]

Above all, like other human rights law treaties and instruments, the ICCPR and the CRC are general in their character and lack specific detailed regulations for the legal procedures of juvenile justice; among them, regulations of criminal procedures, specific forms of rehabilitation, and limitation periods for offences committed by juveniles. Hence, it is understood that the importance of the CRC and other soft law instruments lies more in the values they represent and their moral appeal to realize these values, and less in their actual application.

Even more complicated, however, is the question of which human rights norms governing juvenile justice systems in independent and democratic regimes could, and should, be applied within occupation regimes. As we shall see in the following section, both the problem and its suggested solutions emerge from the question of which legal regimes should apply in occupied territories.

III. THE CHANGING NATURE OF THE LAW OF OCCUPATION

Traditional, or classic, international law of occupation sets a very constrained framework of rules to govern belligerent occupation regimes, known as belligerent occupation law or international humanitarian law.[57] However, the last decades have witnessed a proliferation of other types of occupation regimes. These include long-term occupation regimes (for example, in the territories administered by Israel) and transformative occupation regimes, also called multilateral regimes (in formerly occupied Iraq and in Afghanistan).[58] The aim of these latter regimes is to build new societies as end goals of intervention and to protect the occupied population as consistent with international norms and human rights law, and they are characterized by the involvement of the U.N.[59]

The changing nature of occupation regimes—in terms of both the period of the occupation and the goals of the regime—will, in our view, inevitably change

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55. *Id.*

56. *Id.*

57. Hans-Peter Gasser, *Protection of the Civilian Population*, *in* THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 237, 270-73 (Dieter Fleck ed., 2d ed. 2008).

58. *See* Adam Roberts, *Transformative Military Occupation: Applying the Laws of War and Human Rights*, 100 AM. J. INT'L L. 580, 584, 588-89, 604-05 (2006). A recent report on occupation and other forms of administration of foreign territory prepared by the International Committee of the Red Cross questions the legal basis of transformative occupations and suggest that their mandate relies only in U.N. Security Council decisions and not in international law itself. *See* TRISTAN FERRARO, INT'L COMM. OF THE RED CROSS, OCCUPATION AND OTHER FORMS OF ADMINISTRATION OF FOREIGN TERRITORY 67-71 (2012) [hereinafter ICRC REPORT], *available at* http://www.icrc.org/eng/assets/files/publications/icrc-002-4094.pdf. However, in this article we rather accept the main existence of such forms of occupations (or administration of territory) and hence delineate the duties incumbent on such regimes without questioning their legitimacy under international law.

59. Grant T. Harris, *The Era of Multilateral Occupation*, 24 BERKELEY J. INT'L L. 1, 7-9, 13 (2006) (see figure 1).

the normative legal framework that regulates those regimes and the interpretation of existing traditional laws. In order to enable them to fulfill their purposes, both long-term occupation regimes and transformative (even if short-term) occupation regimes demand changes in the set of rules that govern them. For example, since the aim of transformative regimes is to rebuild the legal infrastructure of the territory they occupy and create a new legal order, the governing laws must allow changes in the existing laws in the occupied territory. Long-term occupation regimes, on the other hand, may not require permission to change existing laws in the occupied area, but they must consider the need for development of the occupied area. In this section, we compare the traditional and the new obligations of occupiers in the administered territories (as long-term occupiers) and in formerly occupied Iraq (as transformative occupiers).

The foundations of the traditional law of occupation are the 1907 fourth Hague Convention[60] and the Fourth Geneva Convention.[61] These instruments, which are considered customary international law,[62] establish the framework of belligerent occupations regimes: that is, their goals, the duties of the occupant, and the rights and privileges of the occupied population. They also seek to create a harmonized system that secures the rights of the occupied population, on the one hand, and the security needs of the occupant, on the other hand.

Article 43 of the Hague Regulations contains the crux of the goals of the occupation regime and the obligations of the occupant:

> The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.[63]

Article 64 of the Fourth Geneva Convention completes the legal framework that enables the occupying power to ensure "public order and safety": "The penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention."[64] As one commentator noted, "[t]he main thrust of the international law of occupation is to provide a set of interstitial rules for the administration of territory during an interim period while the fate of the territory is decided."[65]

However, questions arise with regard to the content, the purpose, and the limits of the framework of these rules, especially, as will be discussed further, vis-à-vis the changes that conservative forms of belligerent occupations have

60. Hague Regulations, *supra* note 7.

61. GCIV, *supra* note 2.

62. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 79 (July 8).

63. Hague Regulations, *supra* note 7, art. 43.

64. GCIV, *supra* note 2, art. 64.

65. Harris, *supra* note 59, at 8.

undergone. A recent report prepared by legal experts on behalf of the International Committee of the Red Cross ("ICRC"), aimed at analyzing, clarifying, and developing the laws of occupation, suggested that the obligation to "'restore and ensure public order and safety' contained in the first part of Article 43 of [the Hague Regulations]" would receive a much broader interpretation in terms of the obligations of the occupying power if interpreted according to the authoritative French text, as this version "referred to the restoration and maintenance of '*l'ordre et la vie publics*,'" that is the restoration of "public order and *civil life*."[66] In this interpretation, the occupying power's obligations according to the Hague Regulations "to restore, and ensure, as far as possible, public order and safety" represent a role that is fraught rather than one-dimensional.[67] The occupying power, in this reading, would "no longer be regarded as . . . a disinterested invader but rather . . . a full-fledged administrator."[68]

The above obligations to restore and maintain public order and safety in the occupied territory are realized and performed by the military commander, the incarnation of effective control in the occupied territory. This position has been echoed by the Israeli Supreme Court in several cases:

> As is well known, Article 43 [of the Hague Regulations is a] . . . framework maxim of the belligerent occupation laws, which sets a general framework for the manner by which the military commander exercises its duties and powers in the occupied territory. . . . [T]he commander of the Area must exercise his powers under all circumstances exclusively for the benefit of the Area, while applying only the relevant considerations—the best interest of the protected persons, on the one hand, and the needs of the military, on the other hand.[69]

Thus, when exercising his powers, "the military commander is not allowed to consider the national, economic and social interests of his own state, inasmuch as such interests have no effect on his security interest in the area or the interest of the local population."[70]

However, the ICRC report on occupation suggests that prolonged occupation "call[s] into question some of the underlying principles of occupation law, in particular the provisional character of the occupation and the necessity of preserving the *status quo ante*."[71] Hence, it asserts "[s]ince neither the Hague Regulations nor the Fourth Geneva Convention specifies any lawful deviation from existing law in such circumstances, many have argued that prolonged occupation necessitates specific regulations for guiding responses to the practical problems

66. ICRC REPORT, *supra* note 58, at 56-57 (first emphasis added).

67. Hague Regulations, *supra* note 7, art. 43.

68. ICRC REPORT, *supra* note 58, at 57.

69. HCJ 2164/09 Yesh Din—Volunteers for Human Rights v. Commander of the IDF Forces in the West Bank ¶ 8 [2011] (Isr.).

70. *Id.* (quoting HCJ 393/82 Askaan v. Commander of the IDF Forces in the Area 37(4) PD 785, 794-795 [1983] (Isr.)).

71. ICRC REPORT, *supra* note 58, at 55.

arising from long-term occupation."[72] Indeed, the prolonged nature of the Israeli occupation in the administered territories has generated numerous discussions over the years on the question of how the commander should apply the relevant considerations and exercise his duties. The main question discussed by the Israeli Supreme Court has been how to adjust "the prolonged duration of the occupation, to the continuity of normal life in the Area and to the sustainability of . . . relations between the two authorities—the occupier and the occupied."[73]

These discussions have mainly taken place in the context of securing the rights and freedoms of the occupied population, such as the freedom of movement,[74] the right to property,[75] or the rights of the civilian population in times of armed conflict.[76] These discussions have persisted both when the territories were peacefully administered and when uprisings and even armed conflicts arose.[77]

The Israeli Supreme Court concluded by stating the need for a dynamic view of the duties of the military commander:

> This kind of conception supports the adoption of a *wide and dynamic view* of the duties of the military commander in the [administered territories], which impose upon him, *inter alia*, the responsibility to ensure the development and growth of the Area in numerous and various fields, including the fields of economic infrastructure and its development.[78]

The Supreme Court then quoted a previous ruling: "Thus, a military administration may develop industry, commerce, agriculture, education, health, welfare and other elements regarding good governance, which are required in order to secure the changing needs of a population in an area held in belligerent

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72. *Id.*

73. HCJ 2164/09 *Yesh Din*, ¶ 10 (citing HCJ 393/82 *Askaan* at 800-02; HCJ 9717/03 Naale v. Civil Administration 58(6) PD 97, 103-04 [2004] (Isr.); HCJ 337/71 El-Jamiya v. Minister of Defense 26(1) PD 547, 582 [1972] (Isr.)).

74. HCJ 2150/07 Safiyeh et al. v. Minister of Defense ¶ 32 [2009] (Isr.), *available at* http://elyon1.court.gov.il/files_eng/07/500/021/m19/07021500.m19.pdf.

75. HCJ 2056/04 Beit Sourik Village Council v. Israel 48(5) PD 807, ¶ 8 [2004] (Isr.), *available at* http://elyon1.court.gov.il/Files_ENG/04/560/020/A28/04020560.A28.pdf; *see also* HCJ 7957/04 Mara'abe v. Prime Minister of Israel 60(2) PD 477, ¶ 7 [2005] (Isr.), *available at* http://elyon1.court.gov.il/Files_ENG/04/570/079/A14/04079570.A14.HTM.

76. *See, e.g.*, HCJ 9132/07 Albassioni v. Prime Minister ¶¶ 4-5, 7, 10-11 [2008] (Isr.) (not reported), *available at* http://elyon1.court.gov.il/Files_ENG/07/320/091/n25/07091320.n25.pdf; *see also* HCJ 201/09 Physicians for Human Rights v. Prime Minister ¶ 1 [2009] (Isr.), *available at* http://elyon1.court.gov.il/files_eng/09/010/002/n07/09002010.n07.pdf.

77. *See, e.g.*, HCJ 201/09 *Physicians for Human Rights* ¶¶ 1, 3-4 (discussing IDF activities in Cast Lead operation in 2009); HCJ 4764/04 Physicians for Human Rights v. IDF Commander in Gaza 85(5) PD 385, ¶¶ 1, 3 [2004] (Isr.), *available at* http://elyon1.court.gov.il/files_eng/04/640/047/a03/04047640.a03.pdf (reviewing applications regarding IDF activities in defense operations); HCJ 2936/02 Physicians for Human Rights v. Commander of the IDF Forces in the West Bank 53(3) PD 26 [2002] (Isr.), *available at* http://elyon1.court.gov.il/Files_ENG/02/360/029/L02/02029360.I02.pdf.

78. HCJ 2164/09 *Yesh Din* ¶ 10 (first emphasis added).

occupation."[79] The Israeli Court seems to express a view that is compatible with the authoritative French text of the Hague Regulations. According to this view, the lengthy nature of the Israeli occupation in the administered territories requires that the discretion of the military commander be widened to take into consideration the needs of the restoration and maintenance of the general civil life, as it is his responsibility "to ensure the development and growth of the Area in *numerous and various fields*."[80] In fact, this view supports the concept that the fundamental conservative rules of occupation law should not be interpreted as a general directive to freeze development in occupied territory or leading the territory into a frozen situation.[81]

Yet, it should be clarified that this widened authorization cannot exceed the constraints of the international law of occupation—that is, the Hague Regulations and the Fourth Geneva Convention—which sustain that the interests of the protected persons (the local population living in the occupied territories) must be secured.[82] Therefore, the military commander's discretion may be widened in the administered territories given the prolonged nature of the occupation regime so long as this is done for the benefit of the occupied population: that is, for the protected persons.[83]

The military commander's discretion is also restricted with regard to the occupying power's ability to legislate in the occupied territory. Article 43 of the Hague Regulations orders the occupying power to respect, "unless absolutely prevented, the laws in force in the country."[84] Article 64 of the Fourth Geneva Convention authorizes the occupying power (and hence the military commander) to:

> [S]ubject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfill its obligations under the present Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them.[85]

This indicates that the occupying power should not engage in attempts to change the fundamental legal framework—that is, the legislation and institutions of the occupied territory—as it is not the permanent sovereign of the territory. As the ICRC report suggests, we must interpret the concept of the necessity to change laws governing the occupied territory folded within Article 43 of the Hague Regulations as encompassing, first, the duty of the occupant to fulfill its

79. *Id.* (quoting HCJ 393/82 Askaan v. Commander of the IDF Forces in the Area 37(4) PD 785, 804 [1983] (Isr.)).

80. *Id.* (emphasis added).

81. *See* ICRC REPORT, *supra* note 58, at 72.

82. *See* HCJ 2164/09 *Yesh Din* ¶ 8.

83. *Id.* ¶ 10.

84. Hague Regulations, *supra* note 7, art. 43.

85. GCIV, *supra* note 2, art. 64.

obligations under Fourth Geneva Convention; second, to maintain orderly government in the occupied territory; and third, preserve its ability to ensure its own security.[86] This is the only justification for the occupying power to change the pre-existing legal system in the occupied territory and issue its own military legislation.[87]

With regard to the role of the occupying power emerging from both the Hague Regulations and the Fourth Geneva Convention, then, we can conclude that, on the one hand, it exceeds the conservative framework of a short-term belligerent occupation regime. The occupying power may "develop industry, commerce, agriculture, education, health, welfare and other elements regarding good governance, which are required in order to secure the changing needs of a population in an area held in belligerent occupation."[88] On the other hand, the role of occupying power does not evolve into that of a complete sovereign that can legitimately and indiscriminately change the laws in the area.

In contrast, in formerly occupied Iraq, a broader mandate in terms of the development of the physical and legal infrastructures of the occupied territory was given to members of the Coalition (mainly the United States and the United Kingdom).[89] Following the invasion of Iraq, the United States established the transitional government of the Coalition Provisional Authority ("CPA") on behalf of the Coalition.[90] The U.N. Security Council gave the Coalition members a mandate to administer Iraq,[91] allowing them to

> advance efforts to restore and establish national and local institutions for representative governance, including by working together to facilitate a process leading to an internationally recognized, representative government of Iraq; . . . [to] promot[e] the protection of human rights; . . . [and to] encourag[e] international efforts to promote legal and judicial reform.[92]

However, while the Security Council referred to the administration of the Coalition members in Iraq as occupation,[93] the CPA did not refer to the administrative regime it created as "an occupation regime," but rather as a

86. *See* ICRC REPORT, *supra* note 58, at 56-59.

87. *Id.* (the experts base their interpretation of the concept of necessity in article 43 of the Hague Regulations).

88. HCJ 2164/09 Yesh Din—Volunteers for Human Rights v. Commander of the IDF Forces in the West Bank ¶ 10 [2011] (Isr.) (quoting HCJ 393/82 Askaan v. Commander of the IDF Forces in the Area 37(4) PD 785, 804 [1983] (Isr.)).

89. *See* S.C Res. 1483, U.N. Doc. S/RES/1483 (May 22, 2003).

90. Sean D. Murphy, Ed., *Coalition Laws and Transition Arrangements During Occupation of Iraq*, 98 AM. J. INT'L L. 601, 601-02 (2004).

91. *See* S.C. Res. 1546, ¶¶ 9-10, U.N. Doc. S/RES/1546 (June 8, 2004); S.C. Res. 1511, ¶¶ 13-14, U.N. Doc. S/RES/1511 (Oct. 16, 2003); S.C. Res. 1483, *supra* note 89, ¶ 4.

92. S.C. Res. 1483, *supra* note 89, ¶ 8.

93. *See id.* pmbl. (referring to the Coalition members as "occupying powers").

"transitional administration"[94] regime that intended to "restore conditions of security and stability, to create conditions in which the Iraqi people can freely determine their own political future, (including by advancing efforts to restore and establish national and local institutions for representative governance) and facilitating economic recovery, sustainable reconstruction and development."[95]

The objectives of the powers in Iraq, accompanied by the involvement of the U.N. Special Representative to Iraq in helping the Iraqi people and members of the Coalition achieve these goals, suggest that "the purposes of the occupation [there] . . . went beyond the confines of the Hague Regulations and the Fourth Geneva Convention,"[96] even though not to such an extent that they completely disregarded the traditional law of occupation. Hence, the mandate to reform the existing legal framework in Iraq gained by the CPA and the U.N. Security Council was much wider than that given to the Israeli occupying power in the administered territories.[97]

The differences between the administered territories and formerly occupied Iraq in the objectives and roles of the occupying powers suggest a difference in the application and interpretation of the legal framework governing these occupied territories, be it the traditional law of occupation, which forms part of international humanitarian law,[98] or international human rights law, which, as will be discussed in the next section, contemporary legal theory of international law claims to apply in occupied territories. We will discuss this difference in the following section.

IV. THE APPLICATION OF HUMAN RIGHTS LAW IN JUVENILE JUSTICE SYSTEMS IN OCCUPIED TERRITORIES

The co-application of international human rights law and international humanitarian law has become a prominent topic of discussion in the last decade, yielding controversies and disagreements over both its mere feasibility and its form or degree.[99] In this section, we examine this co-application specifically through

94. L. ELAINE HALCHIN, CONG. RESEARCH SERV., THE COALITION PROVISIONAL AUTHORITY (CPA): ORIGIN, CHARACTERISTICS, AND INSTITUTIONAL AUTHORITIES 8 (2004) (statement for Maj. Frank A. March).

95. *Id.* at 1 (footnote omitted).

96. Roberts, *supra* note 58, at 613.

97. Yet, it is interesting to note that after the conclusion of the formal mandate of the Coalition and since the insurgents' activities in Iraq demanded the continuing presence of Coalition forces, the administrative regime regained its nature as a traditional form of belligerent occupation, which required the application of traditional Hague and Geneva law. *See id.* 617-18.

98. International humanitarian law includes both the laws of belligerent occupation and the laws governing the conduct of hostilities. ICRC REPORT, *supra* note 58, at 7.

99. There are numerous articles on this issue. *See, e.g.*, INTERNATIONAL HUMANITARIAN LAW AND INTERNATIONAL HUMAN RIGHTS LAW (Orna Ben-Naftali ed., 2011) (containing nine essays on the relationship between international humanitarian law and international human rights law); Michael J. Dennis, *Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation*, 99 AM. J. INT'L L. 119 (2005); Cordula Droege, *The Interplay Between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict*, 40 ISR. L. REV. 310 (2007); Hans-Joachim Heintze, *On the Relationship Between Human Rights Law Protection and International Humanitarian Law*, 86 INT'L REV. RED CROSS 789 (2004); Orna Ben-

the prism of norms that apply in the juvenile justice system in occupied territories. We then apply the discussion to the case study of the juvenile justice system in former occupied Iraq.

A. The Mutual Application of International Human Rights Law and International Humanitarian Law

It has been long contested whether human rights law should apply in situations where international humanitarian law traditionally applies, including occupied territories.[100] Some valuable arguments apply against such application, the most significant being that protections provided by international human rights treaties do not normally apply extra-territorially, outside the government-governed relationship.[101] This position is extrapolated from a narrow linguistic interpretation of the "under its jurisdiction" clause of the ICCPR.[102] Others argue that because human rights norms were not drawn up with the circumstances of armed conflict and occupation primarily in mind, the rules of the law of armed conflict regarding military occupations offer more extensive, detailed, and relevant guidance on a wide range of issues than do the general human rights conventions.[103] These two regimes, therefore, are said to mutually exclude each other.[104] Another argument is that "human rights treaty bodies [are not necessarily] competent to find violations of international humanitarian law, or even to evaluate conduct during armed conflicts or military occupation, when the treaties that created these bodies gave them a mandate only to review generally state implementation of obligations under each instrument."[105]

However, contemporary theories of international law and practice do support such co-application.[106] This can be seen, on the one hand, through a direct and

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Naftali & Yuval Shany, *Living In Denial: The Application of Human Rights in the Occupied Territories*, 37 ISR. L. REV. 17 (2003).

100. *See* Dennis, *supra* note 99, at 119-20 (referencing the observation of Jean Pictet, editor of the ICRC commentaries, on the 1949 Geneva Convention).

101. *See id.* at 122-27.

102. *Id.* at 122-23.

103. *E.g.*, Ben-Naftali & Shany, *supra* note 99, at 28.

104. *Id.* at 29; Roberts, *supra* note 58, at 600.

105. Dennis, *supra* note 99, at 121-22.

106. For two of ICJ's core decisions on this subject, *see* Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 25 (July 8) and Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶¶ 106-113 (July 9) (this case included examining Israel's obligations under the ICCPR in the occupied territories). For recent European Court of Human Rights decisions that support the mutual application of international human rights law and international humanitarian law, see Al-Jedda v. United Kingdom, App. No. 27021/08 (Eur. Ct. H.R., July 7, 2011), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-105612 (this and the next case examine the United Kingdom's obligations under the European Convention of Human Rights in their role in the occupation of Iraq); Al-Skeini v. United Kingdom, App. No. 55721/07 (Eur. Ct. H.R., July 07, 2011), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-105606; Issa v. Turkey, App. No. 31821/96 (Eur. Ct. H.R., Mar. 3, 2005), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-67460 (this and the next case cases examine Turkey's obligations under the European Convention of Human Rights

independent application of human rights law in occupied territories according to a contemporary interpretation of the obligations entrusted with the occupying power by traditional occupation law (such as Article 43 of the Hague Regulations and Article 64 of the Fourth Geneva Convention),[107] or, on the other hand, by applying a *lex specialis* concept.[108] According to this latter approach, international humanitarian law is the *lex specialis* in occupation regimes, and hence international human rights law serves as a complementary set of norms that should be applied as an interpretative source of the former, serving to solve lacunas in international humanitarian law and validate the legitimacy of the involvement of international supervisory mechanisms in situations of occupation.[109] This co-application of human rights law and international humanitarian law is based on a paradigm that undermines the traditional great divide between the law of war and the law of peace. It is vested in the idea of universality of human rights that embraces "the interpretation of the jurisdictional clauses of the major human rights treaties, substitut[es] the test of effective control for the concept of territory, and revers[es] the presumption in favor of the territorial application of international treaties, insofar as human right treaties are concerned."[110]

Yet, while the above analysis of the co-application of international humanitarian law and human rights law may seem plausible where the occupying power executes law enforcement actions, its feasibility with regard to situations of armed conflict in an occupied territory requires further substantiation. Indeed, this is quite often the situation that occupying powers face even after establishing a stable occupation regime.[111] As the ICRC report on occupation suggests:

> [O]ccupation law is silent on the separation and interaction between law enforcement measures and the use of military force under the 'conduct-of-hostilities' model . . . [and hence, it] leaves unresolved a number of

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in regards to Turkish soldiers in Iraq); Ergi v. Turkey, 1998-IV Eur. Ct. H.R. 1751; Loizidou v. Turkey, 310 Eur. Ct. H.R. (ser. A) (1995) (this case examines Turkey's obligations under the European Convention of Human Rights in regards to its actions in the 1974 Cyprus invasion and the refugees that resulted). For the U.N. position on the universal application of minimum humanitarian standards, see Comm. on Human Rights, Letter Dated 5 January 1995 from the Permanent Representative of Norway and the Chargé d'Affaires of the Permanent Mission of Finland Addressed to the Commission on Human Rights, U.N. Doc. E/CN.4/1995/116 (Jan. 31, 1995) (notifying that the U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities decided to transmit the Declaration of Minimum Humanitarian Standards).

107. GCIV, *supra* note 2, art. 64; Hague Regulations, *supra* note 7, art. 43. *See also* Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 168, ¶ 178 (Dec. 19).

108. See the cases cited in note 106.

109. ICRC REPORT, *supra* note 58, at 61-66. *See also* Ben-Naftali & Shany, *supra* note 99, at 22.

110. Ben-Naftali & Shany, *supra* note 99, at 100.

111. This was the case between Israel and the Palestinians in Gaza before the disengagement, and partially the case in the administered territories. *See id.* at 19. A similar situation prevailed in formerly occupied Iraq, where continuing insurgent activities have been pitted against the Coalition forces. *See, e.g.*, Seumas Milne, *Insurgents Form Political Front to Plan for US Pullout*, GUARDIAN, July 18, 2007, http://www.theguardian.com/world/2007/jul/19/topstories3.usa.

> issues related to the identification of the legal regime(s) governing the use of force in occupied territory.[112]

The inability to identify the legal regimes that should govern the use of force in occupied territory pertains to a difficulty in determining whether human rights law regimes should apply even to law enforcement missions that the occupying power is to execute under the constraints of an armed conflict, such as detentions, assigning of residence, or issuing of orders that limit movement in the occupied territory.

In scenarios where hostilities arise in the occupied territory, the occupying power may lose, at least to some degree, its effective control. Since the level of effective control needed to apply human rights law is greater than that needed to apply the laws governing the conduct of hostilities, the occupying power may conclude that the latter should prevail over the former.[113] Some have suggested that situations where armed conflict arises infrequently in occupied territories be defined as a mixed conflict,[114] comprising periods where "protracted armed violence between governmental authorities and organized groups" take place and other periods where the occupying power exercises effective control in relatively peaceful circumstances.[115] According to a mixed conflict model, the co-application of human rights law and international humanitarian law is also intelligible, as the occupying power's capacity to exercise some degree of effective control implies its capacity to enforce human rights law in the area.[116]

These assertions regarding the applicability of human rights law in occupied territories are strengthened by the nature of long-term and transformative occupations, discussed above.[117] "[A]n occupant with a transformative project may view human rights norms as constituting part of the beneficent political order being introduced into the territory."[118] A long-term occupant will perhaps be

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112. ICRC REPORT, *supra* note 58, at 109.

113. *See* HCJ 4764/04 Physicians for Human Rights v. IDF Commander in Gaza 85(5) PD 385, ¶ 20 [2004] (Isr.), *available at* http://elyon1.court.gov.il/files_eng/04/640/047/a03/04047640.a03.pdf; HCJ 3239/02 Mar'ab v. IDF Commander in the West Bank ¶ 21 [2002] (Isr.), *available at* http://www.hamoked.org/files/2012/3720_eng.pdf; Yuval Shany, *Israeli Counter-Terrorism Measures: Are They "Kosher" Under International Law?*, *in* TERRORISM AND INTERNATIONAL LAW: CHALLENGES AND RESPONSES 96, 105 (Int'l Inst. of Humanitarian Law ed., 2003), *available at* http://www.iihl.org/iihl/Documents/Terrorism%20and%20IHL.pdf. *See also* Hilly Moodrick Even-Khen, *Can We Now Tell What "Direct Participation in Hostilities" Is?*, 40 ISR. L. REV. 214, 219-31 (2007); *see also* HCJ 769/02 Public Committee Against Torture in Israel v. Israel (2) IsrLR 459, ¶ 16 [2006] (Isr.), *available at* http://elyon1.court.gov.il/Files_ENG/02/690/007/A34/02007690.A34.pdf (citing Israeli Supreme Court's statements in cases dealing with the Israeli Army activities in the territories during the second *Intifada*, that the laws of armed conflict should prevail in those territories).

114. AMICHAI COHEN & YUVAL SHANY, יני מלחמהוקר את עצמו: חקירת חשדות להפרת , צה"ל ח [The IDF and Alleged International Law Violations: Reforming Policies for Self-Investigations] 26-27 (2011) (Isr.), *available at* http://en.idi.org.il/media/230988/pp_93.pdf.

115. Prosecutor v. Tadic, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

116. COHEN & SHANY, *supra* note 114, at 26-27.

117. *See id.*

118. Roberts, *supra* note 58, at 594.

pressured by "the inhabitants, or outside bodies claiming to act on their behalf," to apply standards that secure "the human rights of inhabitants, internees, and others."[119]

Indeed, a long-term belligerent occupant may claim conservatively that international humanitarian law adequately ensures the rights of the occupied population.[120] However, the prototype of belligerent occupations regime that set the model for international humanitarian law, including the laws of belligerent occupation, was of a short-term occupation. This legal framework, most of it intended to expire a year after the commencement of an occupation,[121] was carefully tailored for the purposes of keeping law and order in the occupied territory by imposing limited obligations on the occupant for the rights of the occupied population and by providing the occupant with a confined set of means for derogating from the protected rights of the occupied population.[122] Long-term occupations, which demand the "develop[ment of] industry, commerce, agriculture, education, health, welfare and other elements regarding good governance" are closer in resemblance to sovereign regimes.[123] As the period of occupation extends, they face demands of the civilian population to be protected "from improper exercise of governmental power."[124] The legal framework of human rights law—rather than international humanitarian law—is thus most adequate for fulfilling this mission. Human rights law norms and ideology, which seek to ensure human dignity, are designed to insist that governments provide for the needs of individuals. Hence, as the belligerent occupant exercises most of the powers of the sovereign government—such as "the power to legislate (jurisdiction to prescribe), the power to resolve disputes (jurisdiction to adjudicate), and the

119. *Id. See, e.g.*, NAAMA BAUMGARTEN-SHARON, B'TSELEM, NO MINOR MATTER: VIOLATIONS OF THE RIGHTS OF PALESTINIAN MINORS ARRESTED BY ISRAEL ON SUSPICION OF STONE-THROWING 7-9 (Yael Stein & Maya Johnston eds., Zvi Shulman trans., 2011), *available at* http://www.btselem.org/download/201107_no_minor_matter_eng.pdf (demanding that the Convention on the Rights of the Child be applied by Israel in the occupied territories). For the U.N. Human Rights Committee and the U.N. Economic, Cultural and Social Committee's demands to apply human rights treaties in these territories, see Comm. on Econ., Soc. and Cultural Rights, Rep. on its 22d, 23d, and 24th Sess., Apr. 25-May 12, 2000, Aug. 14-Sept. 1, 2000, Nov. 13-Dec. 1, 2000, ¶ 577, U.N. Doc. E/2001/22; GAOR, 56th Sess., Supp. No. 2 (2001); Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Second Periodic Report, Addendum: Israel, Human Rights Comm., ¶ 8, U.N. Doc. CCPR/C/ISR/2001/2 (Dec. 4, 2001) [hereinafter Human Rights Comm., Considerations of Reports].

120. *See* Human Rights Comm., Consideration of Reports, *supra* note 119, ¶ 8 (detailing Israel's position objecting to the co-application of human rights law and international humanitarian law and claiming that international humanitarian law adequately suffices for the administration of the occupied territory).

121. GCIV, *supra* note 2, art. 6.

122. *See, e.g.*, *id.* arts. 43, 53, 78 (allowing internment, expropriation of property, and assigned residence respectively).

123. HCJ 393/82 Askaan v. Commander of the IDF Forces in the Area 37(4) PD 785, 804 [1983] (Isr.). *See also* Roberts, *supra* note 58, at 601 (indicating specific situations where human rights law should apply).

124. Ben-Naftali & Shany, *supra* note 99, at 61.

power to implement laws and court decisions (jurisdiction to enforce)"[125]—it seems logical that the belligerent occupant apply, *mutatis mutandis*, the apparatus of human rights law in the occupied territory.

The above conclusion connects the argument put forward in this article (namely, that the occupying power's compliance with the obligation to restore and maintain public order and civil life requires certain transformations) to the argument that these transformations are best achieved by the application of human rights law. However, the following questions arise: Does the applicability of human rights law depend only on the occupying power's objectives and obligations in the occupied territory? Or should it also be affected by the willingness of the ousted sovereign's constitutional regime to absorb and apply international human rights law or by the values and goals of the occupied population, if these can be detected? The answer is not immediately clear. It may be argued that the flexibility given to an occupying power "to implement human rights law in occupied territory . . . should not be interpreted as giving it a blank cheque to change legislation and institutions in the name of human rights to make them accord with its own legal and institutional ideas."[126]

Yet, an alternative claim points to the dicta of the International Court of Justice that accepts the applicability of human rights law in occupied territory both as a complementary set of norms and as a direct interpretation and application of belligerent occupation law,[127] and the universality of human rights law and the customary nature of most of its norms. Accordingly, proponents of this view demand the application of human rights law in the occupied territory by the occupying power, and even justify the use of it to make substantial changes in the occupied territory.[128]

Finally, the endorsement of the application of human rights law in occupied territories serves perfectly the interests of securing a legitimate juvenile justice system discussed in the second section of this article. The principal aims of a juvenile justice system—that is "[t]o prevent offending and re-offending; [t]o (re)socialize and (re)integrate offenders; [and] [t]o address the needs and interests of victims" through diminished responsibility, proportionality, and room to reform[129]—are all incorporated both in general human rights instruments and in those specific to children's rights, as was suggested and exemplified above.

In addition, as maintained in this section, international human rights law supplies both the long-term belligerent occupant and the transformative occupant with an additional compatible legal framework to abide by its obligations towards

125. *Id.* at 60-61.

126. ICRC REPORT, *supra* note 58, at 69.

127. See generally the cases in note 106.

128. *See, e.g.*, ICRC REPORT, *supra* note 58, at 70 (noting that "Article 43 of the Hague Regulations and Article 64 of the Fourth Geneva Convention require the suspension or abrogation of oppressive local laws if they hindered the occupying power from discharging its duties under the Fourth Geneva Convention and by extension of this principle, require the occupying power to implement any other obligations derived from international law, in particular human rights law").

129. Junger-Tas, *supra* note 10, at 510-11.

the protected persons in the occupied territory. Therefore, in order to ensure a legitimate juvenile justice system within the occupied territory, the occupying power should be bound both by general human rights law norms and by specific human rights standards that regulate the treatment of children under human rights law.

Having determined the above, we must decide which instruments of international human rights law that substantiate those norms and standards bind the occupying power. As states are bound by their customary and treaty international law obligations, systems of juvenile justice that are established by sovereign states rest, *inter alia*, on general human rights principles such as the prevention of such practices as torture or other cruel, inhuman, or degrading treatment or punishment and prolonged arbitrary detention, considered as customary law,[130] and, secondly, on the rights that are specifically mentioned in the ICCPR regulating standards of legal detention, arrest, and trial for those states that are parties to the Convention.[131] A system of juvenile justice is also compiled of rights and protections specifically tailored to secure the rights of children who are detained, arrested, or tried. These are found in the CRC and in non-binding instruments, such as decisions of U.N. bodies and ICRC documents.

An examination of the applicability of human rights treaty law reveals that a wide interpretation of the "under its jurisdiction" clause of the ICCPR suggests that an occupier has jurisdiction over persons who are under its effective control,[132] which applies when it exercises public powers on the territory of another state.[133] This leads to the conclusion that the ICCPR applies in occupied territories.

However, the case for application of the CRC is more complicated. This convention contains an application clause that determines that "States Parties shall respect and ensure the rights set forth in the . . . Convention to each child *within their jurisdiction*,"[134] and hence has been interpreted by the International Court of Justice to impose a similar obligation on occupying powers to apply this convention in the territory they temporarily administer.[135] However, it may be

130. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 563 (7th ed. 2008); MALCOLM N. SHAW, INTERNATIONAL LAW 256-57 (5th ed. 2003).

131. ICCPR, *supra* note 4, arts. 9, 10, 14.

132. *See* Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶¶ 108-11 (July 9).

133. *See, e.g.*, Al-Jedda v. United Kingdom, App. No. 27021/08, ¶¶ 107-10 (Eur. Ct. H.R., July 7, 2011), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-105612; Al-Skeini v. United Kingdom, App. No. 55721/07, ¶¶ 131-42 (Eur. Ct. H.R., July 07, 2011), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-105606 (noting examples of recent decisions of the European Court of Human Rights, in which the court, in contrast to its former dicta that aimed at limiting the application of the European Convention on Human Rights extraterritorially, ruled that the Convention applied when a state—such as an occupying power—is responsible for maintaining the security of the territory that is under its effective control or when it has the authority to employ governmental authorities); *contra infra* Part V.A (explaining Israel's contrasting position on this issue).

134. CRC, *supra* note 1, art. 2 (emphasis added).

135. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 2004 I.C.J. ¶ 113 ("As regards the Convention on the Rights of the Child of 20 November 1989, that

contended that this convention does not apply in armed conflicts. The specific reference of Article 38 of the CRC to situations of armed conflicts specifies that states "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" and "[i]n accordance with their obligations under international humanitarian law to protect the civilian population in armed conflicts."[136] This may suggest that the CRC intended to exclude other of its articles in times of armed conflict and occupation.[137] Yet, other non-binding human rights standards referring to juvenile justice[138] can be considered as guiding the occupying power regime in the occupied territory, as a manifestation of the general application of human rights law in these territories.

Hence, the specific human rights law norms that apply in occupied territories are primarily those in the ICCPR that determine the rights of suspects and accused, guaranteeing the right to avoid arbitrary detention,[139] to be treated "with humanity and with respect for the inherent dignity of the human person,"[140] and "to a fair and public hearing by a[n] . . . independent and impartial tribunal established by law."[141] As was indicated in the second section of this article, specific reference to minors' rights is also found within the ICCPR when it requires states to provide every child "such measures of protection as are required by his status as a minor"[142] and demands specifically that "[a]ccused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication."[143]

The CRC—whose applicability in occupied territories, while questionable, is possible—focuses on the importance of securing juvenile justice and adds more obligations for states parties.[144] These include seeking "to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children [in the juvenile justice system],"[145] demanding that detention "shall be used only as a measure of last resort and for the shortest appropriate period of time,"[146] and that the child "shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances."[147] These goals are reinforced by the soft law instruments that refer

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instrument contains an Article 2 according to which 'States Parties shall respect and ensure the rights set forth in the . . . Convention to each child within their jurisdiction . . . .' That Convention is therefore applicable within the Occupied Palestinian Territory.").

136. CRC, *supra* note 1, arts. 38(1), 38(4).

137. Dennis, *supra* note 99, at 129.

138. *See supra* notes 38-44 and accompanying text.

139. *See* ICCPR, *supra* note 4, art. 9.

140. *Id.* art. 10(1).

141. *Id.* art. 14(1).

142. *Id.* art. 24(1).

143. *Id.* art. 10(2)(b).

144. *See* Dennis, *supra* note 99, at 129.

145. CRC, *supra* note 1, art. 40(3).

146. *Id.* art. 37(b).

147. *Id.* art. 37(c).

to the detention and rehabilitation of children in juvenile justice systems, which were discussed in the second section of this article.

In the following sub-section we discuss the co-application of the laws of belligerent occupation and human rights law in the juvenile justice system in formerly occupied Iraq. We examine the standards of human rights law that were formally incorporated into the legal instruments regulating the CPA and discuss the question of whether the administration has lived up to its own standards.

B. The Juvenile Justice System in Formerly Occupied Iraq

As explained above,[148] the Coalition occupation regime in Iraq was approved by the U.N. Security Council and implemented by the CPA memorandum.[149] Those instruments, which approved and provided guidance to the Coalition's occupation, based the regime's legal framework explicitly on the laws of belligerent occupation and implicitly on human rights law. Security Council Resolution 1483 instructed the Coalition forces to abide by and comply fully with their obligations under the laws of belligerent occupation, "including in particular the Geneva Conventions of 1949 and the Hague Regulations of 1907."[150] The CPA revised memorandum stipulated that "the relevant and appropriate provisions [of the Fourth Geneva Convention] constitute an appropriate framework consistent with its mandate in continuance of measures previously adopted."[151]

In terms of the application of human rights law, the CPA noted "the deficiencies of the Iraqi Criminal Procedure Code with regard to fundamental standards of human rights,"[152] and intended to "establish[] procedures for applying criminal law in Iraq, recognizing that the effective administration of justice must consider . . . the need to modify aspects of Iraqi law that violate fundamental standards of human rights."[153]

The Security Council addressed the application of human rights law only indirectly by calling upon the Coalition members to act

> consistent[ly] with *the Charter of the United Nations* and *other relevant international law*, to promote the welfare of the Iraqi people through the effective administration of the territory, including in particular working towards the restoration of conditions of security and stability and the creation of conditions in which the Iraqi people can freely determine their own political future.[154]

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148. *See supra* Part III.

149. Memorandum of L. Paul Bremer, Adm'r, Multinational Provisional Auth., Coalition Provisional Auth. Memorandum Number 3 (Revised) (June 27, 2004), *available at* http://www.refworld.org/docid/469cd1b32.html [CPA Memo (Revised)].

150. S.C. Res. 1483, *supra* note 89, ¶ 5.

151. CPA Memo (Revised), *supra* note 149, pmbl.

152. *Id.*

153. *Id.* § 1.

154. S.C. Res. 1483, *supra* note 89, ¶ 4 (emphasis added).

Following the termination of the U.N. mandate for the occupation in Iraq given to the Coalition in 2005, the occupation regime ended,[155] and since the departure of the multinational force from Iraq, the prevailing legal framework has been a subject of debate.[156] According to the United States, after the end of the U.N. mandate, the occupation re-acquired its definition as a belligerent occupation regime in which insurgent activities take place.[157] Under such circumstances, the *lex specialis* is humanitarian law, which is regulated by the Hague and Geneva laws, which generally do not contain specific guarantees for the rights of children detained by the occupying power. However, according to another legal analysis, the completion of the U.N. mandate rendered the *lex specialis* in Iraq human rights law, notwithstanding the armed conflict between dissident forces and the Coalition powers that remained there.[158] In this interpretation, belligerent occupation law lost its relevancy.[159]

However, according to the analysis of this article, both international humanitarian law and human rights law should have applied. International humanitarian law, which includes both the laws of belligerent occupation and the laws of armed conflict, is the *lex specialis*, and human rights law supplies complementary standards of interpretation and resolves situations not satisfactorily regulated by the laws of belligerent occupation or the laws of armed conflict.[160] Juvenile justice seems to be such a situation, requiring co-application of these laws.

The detention and prosecution of children both before the end of the U.N. mandate and afterwards was governed by a legal framework that incorporated general human rights standards only to a very limited extent. "The United States-Iraq status of forces agreement require[d] that juveniles detained by [United States Forces in Iraq] be released, or, if sufficient evidence exist[ed], that they be transferred to the Iraqi justice system for processing."[161] The CPA referred to the detention of children under the age of eighteen only, determining that any person under the age of eighteen interned at any time shall in all cases be released not later than twelve months after the initial date of internment.[162] The CPA formally related only to the basic ICCPR guarantees of the right to freedom[163] and due

155. S.C. Res. 1546, *supra* note 91, ¶ 4(c).

156. *See* Roberts, *supra* note 58, at 617-18; *cf. US: Respect Rights of Child Detainees in Iraq: Children in US Custody Held Without Due Process*, HUMAN RIGHTS WATCH (May 20, 2008), http://www.hrw.org/news/2008/05/19/us-respect-rights-child-detainees-iraq [hereinafter HRW Report].

157. *See* Roberts, *supra* note 58, at 608.

158. *See id.* at 594.

159. HRW Report, *supra* note 156.

160. *See, e.g.*, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶¶ 106-113 (July 9); Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 25 (July 8).

161. U.N Secretary-General, *Promotion and Protection of the Rights of Children: Children and Armed Conflict*, ¶ 100, U.N. Doc. A/65/820-S/2011/250 (Apr. 23, 2011) [hereinafter Report of SG on Children in Armed Conflicts].

162. CPA Memo (Revised), *supra* note 149, § 6(5).

163. ICCPR, *supra* note 4, art. 9.

process of law,[164] and completely disregarded specific juvenile justice norms under international human rights law, such as taking into consideration the interest of rehabilitation or emphasizing the best interest of the child.[165]

Even more so in practice, not only have the juvenile justice standards been ignored, but the general standards of human rights law have also been abused. According to the report of the U.N. Secretary General to the Security Council in April 2011, the detention of children by United States Forces in Iraq ("USF-I") already ceased before the report was prepared: "As of June 2010, no juveniles remained in USF-I custody."[166]

To date, the United States has not released statistics on the number of children under the age of 18 it has transferred to Iraqi custody for trial. According to the United Nations Assistance Mission for Iraq by December 2007

> 89 children transferred from US to Iraqi custody had been convicted of offenses . . . . Between December 2007 and March 2008, there was a drop of 450 children in U.S. custody, but the United States has not made known whether they were released or transferred to Iraqi custody.[167]

According to unofficial data collected by Human Rights Watch, "[s]ince 2003, the US has detained some 2,400 children in Iraq, including children as young as 10. Detention rates rose drastically in 2007 to an average of 100 children a month from 25 a month in 2006."[168] In early 2008, "US military authorities, operating as the Multinational Forces in Iraq, were . . . holding 513 Iraqi children as 'imperative threats to security,' and have transferred an unknown number of other children to Iraqi custody."[169]

Many of the practices of detention and interrogation were in breach of the ICCPR and the CRC. In violation of the ICCPR,[170] young children were not separated from older ones;[171] and in contradiction to the ICCPR, which demand that suspects be treated "with humanity and with respect for the inherent dignity of the human person,"[172] children were interrogated "over the course of days or weeks by military units in the field before being sent to the main detention centers."[173] In spite of the ICCPR's guarantee of the right of due process and the right to be "entitled to a fair and public hearing by a[n] . . . independent and impartial tribunal established by law,"[174] the children had "no real opportunity to challenge their

164. *Id.* art. 14.

165. CPA Memo (Revised), *supra* note 149 (failing to mention child-specific protections).

166. Report of SG on Children in Armed Conflicts, *supra* note 161, ¶ 100.

167. HRW Report, *supra* note 156.

168. *Id.*

169. *Id.*

170. *See* ICCPR, *supra* note 4, art. 10(2)(b).

171. HRW Report, *supra* note 156 ("US officials earlier this year told Human Rights Watch that they separate children from adults at these facilities but do not separate very young or particularly vulnerable children from other child detainees.").

172. ICCPR, *supra* note 4, art. 10(1).

173. HRW Report, *supra* note 156.

174. ICCPR, *supra* note 4, art. 14.

detention."[175] They were "not provided with lawyers and [did] not attend the one-week or one-month detention reviews after their transfer to [the detention facility at] Camp Cropper."[176] The conditions under which these children were detained entailed physical abuse.[177] In contrast to the CRC's demand that the best interest of the child be preferred, children had very limited contact with their families and no efforts were made to ensure, as both the CRC and the ICCPR instruct, that every child will be entitled to "such measures of protection as are required by his status as a minor."[178]

> While the US [did] assign each child a military "advocate" at the mandatory six-month detention review, [the] advocate[s] ha[d] no training in juvenile justice or child development.
>
> As of February 2008, the reported average length of detention for children was more than 130 days, and some children [were] detained for more than a year without charge or trial, in violation of the Coalition Provisional Authority memorandum on criminal procedures. . . .
>
> . . . .
>
> In August 2007, the United States opened Dar al-Hikmah (House of Wisdom) at Camp Cropper with the stated intention to provide 600 detainees, ranging in age from 11 to 17, with educational services pending release or transfer to Iraqi custody. However, in May 2008, US military officials in Baghdad told Human Rights Watch that only "200 to 300" of the 513 child detainees were enrolled in classes at Dar al-Hikmah.[179]

Under "justice for children" in 2009:

> Four mobile legal teams continued to provide assistance to boys in pre- and post-trial detention in Baghdad and Basra in 2010. Many of these boys were accused of being involved in terrorist activities, which carries a 15-year jail sentence if convicted. Others had been in detention without a formal charge for more than 12 months.[180]

Having discussed the co-application of human rights law with international humanitarian law in occupied territories with regard to juvenile justice and having critically examined the juvenile justice system applied by the United States in formerly occupied Iraq, we now turn to an appraisal of juvenile justice in the administered territories. We will first refer to the general legal framework applied in these territories, and then discuss specifically the juvenile justice system.

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175. HRW Report, *supra* note 156.

176. *Id.*

177. *See id.*

178. ICCPR, *supra* note 4, art. 24; CRC, *supra* note 1, art. 2.

179. HRW Report, *supra* note 156. *See also* CPA Memo (Revised), *supra* note 149, § 6(5) (requiring anyone under the age of 18 to be released no later than 12 months after initial date of detention).

180. Report of SG on Children in Armed Conflicts, *supra* note 161, ¶ 100.

V. JUVENILE JUSTICE: THE ISRAELI CASE

Israel has consistently claimed that international humanitarian law, including both the laws of belligerent occupation and the laws of armed conflict, is the sole legitimate legal regime in the occupied territories.[181] However, this system that was set up under security legislation and operated under military rule is beginning to change. In the last several year, the military administered courts have started to question the strict application of international humanitarian law, and have issued rulings with dicta that have led to the adoption of some human rights principles in regards to the rights of child prisoners. While this has been a positive step, there are still concerns that these principles are not being adequately applied to match the norms of international human rights law.

A. Legal Regimes in the Administered Territories: International Humanitarian Law or International Human Rights Law?

Since Israel has claimed that international humanitarian law applies in the occupied territories, it has objected to the application of human rights treaties in the administered territories.[182] In the most current report submitted to the Committee on Economic, Social, and Cultural Rights in 2011, and taking into consideration the political changes that took place in the area, such as the Israeli disengagement from the Gaza Strip in 2005 and the establishment of Hamas regime there in 2007, Israel maintained the following:

> The applicability of the [International Covenant on Economic, Social and Cultural Rights] to the West Bank or to the Gaza Strip has been the subject of considerable debate in recent years. . . .
>
> . . . *In these circumstances Israel can clearly not be said to have effective control in the Gaza Strip, in the sense envisaged by the Hague Regulations.*
>
> It is against this background that Israel is called-on to consider the relationship between different legal spheres, primarily the Law of Armed Conflict and Warfare and Human Rights Law. . . . For its part, Israel recognizes that there is a profound connection between Human Rights Law and the Law of Armed Conflict . . . . However, in the current state of international law and state-practice worldwide, it is

181. *See* STATE OF ISRAEL, IMPLEMENTATION OF THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL, AND CULTURAL RIGHTS IN ISRAEL: ISRAEL'S REPLIES TO LIST OF ISSUES TO BE TAKEN UP IN CONNECTION WITH THE CONSIDERATION OF ISRAEL'S THIRD PERIODIC REPORT CONCERNING ARTICLES 1 TO 15 OF THE INTERNATIONAL CONVENT ON ECONOMIC, SOCIAL, AND CULTURAL RIGHTS (E/C.12/ISR/3) 3-5 (2011) [hereinafter Israel's Replies]. For previous expressions of the Israeli position, see Implementation of the International Covenant on Economic, Social and Cultural Rights: Additional Information Submitted by States Parties to the Covenant Following the Consideration of Their Reports by the Committee on Economic, Social and Cultural Rights, Addendum: Israel, Econ. & Soc. Council, ¶¶ 2-3, U.N. Doc. E/1989/5/Add.14 (May 14, 2001) (containing additional information submitted by Israel to the Council following the consideration of their reports by the Committee on Economic, Social and Cultural Rights); Human Rights Comm., Considerations of Reports, *supra* note 119, ¶ 8.

182. We will explain below that the Israeli Supreme Court has taken a nuanced view in Part V.B.

> Israel's view that these two systems-of-law, which are codified in separate instruments, nevertheless remain distinct and apply in different circumstances.
>
> Furthermore, Israel has never made a specific declaration in which it reserved the right to extend the applicability of the Convention with respect to the West Bank or the Gaza Strip. Clearly . . . in the absence of such a voluntarily-made declaration, the Convention, which is a territorially bound Convention, does not apply, nor was it intended to apply, to areas outside its national territory.[183]

Hence, Israel's position can be summarized as a rejection of the application of treaties in territories that are, according to Israel's interpretation of the "under its jurisdiction" clause, outside its sovereign territory and jurisdiction.[184] Israel's refusal to enact human rights treaties in the administered territories and the lack of effective control in Gaza are used as explanations for its claim that these territories are not under its jurisdiction.[185] Israel also supports its position through its interpretation that human rights law and international humanitarian law are possibly mutually exclusive.[186]

In contrast to the Israeli government position, the Israeli Supreme Court has recently expressed the view that even though human rights law treaties do not directly apply in the occupied territories, human rights law serves as a source for filling in lacunas in the *lex specialis*—that is, international humanitarian law—governing the administered territories.[187] This assertion is compatible with the doctrine of mutual application of human rights law and international humanitarian

183. Israel's Replies, *supra* note 181, at 4-5 (emphasis added). While the ICESCR and ICCPR have different jurisdictional standards, Israel has made similar statements in reference to the applicability of the ICCPR. *Compare* ICCPR, *supra* note 4, art. 2(1) ("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 . . . ."), *with* International Covenant on Economic, Social and Cultural Rights art. 2(1), Dec. 16, 1966, 993 U.N.T.S. 3 ("Each State Party to the present Covenant undertakes to take steps . . . to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means . . . .").

184. Human Rights Comm., Considerations of Reports, *supra* note 119, ¶ 8 ("Israel has consistently maintained that the [ICCPR] does not apply to areas that are not subject to its sovereign territory and jurisdiction. This position is based on the well-established distinction between human rights and humanitarian law under international law. Accordingly, in Israel's view, the Committee's mandate cannot relate to events in the West Bank and the Gaza Strip, inasmuch as they are part and parcel of the context of armed conflict as distinct from a relationship of human rights."). *See also* Ben-Naftali & Shany, *supra* note 99, at 33-38 (explaining the treaty interpretation argument).

185. Israel's Replies, *supra* note 181, at 3-5. *See also* Ben-Naftali & Shany, *supra* note 99, at 38-40 (explaining the effective control argument).

186. Ben-Naftali & Shany, *supra* note 99, at 27-33.

187. *See* HCJ 769/02 Public Committee Against Torture in Israel v. Israel (2) IsrLR 459, ¶¶ 18-21 [2006] (Isr.), *available at* http://elyon1.court.gov.il/Files_ENG/02/690/007/A34/02007690.A34.pdf; HCJ 2150/07 Abu Safiyeh v. Minister of Defense ¶ 16 [2009] (Isr.), *available at* http://elyon1.court.gov.il/files_eng/07/500/021/m19/07021500.m19.pdf; CrimA (TA) 6659/06 A v. State of Israel ¶ 9 (2008) (Isr.), *available at* http://elyon1.court.gov.il/Files_ENG/06/590/066/n04/06066590.n04.htm.

law that we discussed above and claimed to reflect contemporary international law doctrine on this issue. Moreover, it strengthens the other claim this article maintains: that is, that a long-term belligerent occupying power that is required to increasingly take on the powers of a sovereign government in its relations with the population it controls can best fulfill this role by applying human rights law in addition to belligerent occupation law.

The following subsection examines the current juvenile justice system applied in the administered territories, revealing how a co-application of the laws of belligerent occupation and human rights law solves certain deficiencies in the system and best serves the objectives of a long-term occupation in the territories.

B. The Juvenile Justice System in the Administered Territories

The juvenile justice system in the administered territories is applied under the general legal framework of these territories by the belligerent occupant.[188] This system is composed of security legislation[189] and the laws of belligerent occupation of international law—primarily, the Fourth Geneva Convention and the Hague Regulations[190]—and a judicial system of military courts.[191]

A juvenile justice system in general, and in the administered territories in particular, requires actions such as detention and interrogation to be undertaken by several authorities. The first of these is the enforcing authority, which in the administered territories includes "a network of military bases, interrogation and detention centers and police stations in the West Bank, East Jerusalem, and in Israel."[192] "Palestinians, predominantly from the West Bank, are initially taken to one of these facilities for questioning and temporary detention."[193] Later, the system requires the involvement of the judicial authority in the adjudication process.[194]

In this section, we will focus on the current developments in the judicial authority system in terms of legislation governing its conduct and in terms of its actual practice. We will consider first the significant improvements in the absorption and application of norms that forward the best interest of the child concept prompted by human rights law instruments discussed above. Then we will examine criticism aimed both at the judicial procedures and at the procedures of interrogation and detention.

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188. *See* Order Regarding Security Provisions (Judea and Samaria), 5770-2008, No. 1651, §§ 8, 10 (Isr.), *available at* http://nolegalfrontiers.org/en/military-orders/mil01.

189. Zvi Hadar, *The Military Courts*, *in* 1 MILITARY GOVERNMENT IN THE TERRITORIES ADMINISTERED BY ISRAEL 1967-1980: THE LEGAL ASPECTS 171, 177 (Meir Shamgar ed., 1982).

190. David Kretzmer, *The Law of Belligerent Occupation in the Supreme Court of Israel*, 94 INT'L REV. RED CROSS 207, 209-10 (2012).

191. Order Regarding Security Provisions No. 1651, §§ 8-20.

192. DEF. FOR CHILDREN INT'L: PALESTINE, BOUND, BLINDFOLDED AND CONVICTED: CHILDREN HELD IN MILITARY DETENTION 15 (2012) [hereinafter BOUND, BLINDFOLDED AND CONVICTED], *available at* http://www.dci-palestine.org/sites/default/files/report_0.pdf.

193. *Id.*

194. *Id.*

However, before turning to discuss the juvenile justice system applied by the military legislation and courts, we will make a short reference to the Palestinian Authority's legal perception of minors under criminal law.[195] The relevance of such a detour lies in the fact that, as we suggest in Section IV(A) above, the local perception of human rights norms may affect the application of human rights law in occupied territories that is promulgated by this article.

The Palestinian Child Law defines a juvenile as a person who has not yet attained the age of eighteen.[196] The law's objectives are to raise the prestige of the children of Palestine; to promote children's national pride and religious identity; to foster loyalty to Palestine, its land, its history, and its people; to encourage both children's freedom and their responsibility to civil society solidarity; and to create a balance between rights and obligations.[197] Emphasizing the values of justice, equality, tolerance, and democracy, the law aims at protecting children's rights to survive, grow, and enjoy a free, secure, and advanced life.[198] It also aims to raise public awareness of children's rights and to use appropriate measures for achieving this purpose.[199] Finally, the law encourages social involvement of children in their environment according to their age, abilities, and degree of maturity, and aims at fostering their creativity and independence while ensuring they preserve respect for parents and family.[200]

In addition, a draft of Youth Protection Law has been pending since 2011,[201] which the Legislative Council of the Palestinian Authority has not yet signed and ratified. The purpose of the draft law is to expand the legal treatment of juvenile cases in several areas.[202] The guiding principle is respect for children's rights, rehabilitation, and integration in society.[203] This draft forbids the prosecution of any person younger than twelve at the time of committing the criminal offense,[204] and it regulates the methods of punishment of minors under the age of fifteen,[205]

195. *See* Israel-Palestinian Liberation Organization: Interim Agreement on the West Bank and the Gaza Strip, Annex IV, art. 1, Sept. 28, 1995, 36 I.L.M. 551, 635 (stipulating that the Palestinian Authority is authorized to conduct criminal procedures and trials in cases that are not related to the security of the area in which the victim is not Israeli); *see, e.g.*, Agreement on the Gaza Strip and Jericho Area, Isr.-Palestine Liberation Organization, Annex I, arts. 5-7, May 4, 1994, U.N. Doc A/49/180 [hereinafter The Cairo Agreement].

196. Palestinian Child Law No. 7, art. 1 (2004), *available at* http://www.crin.org/Law/instrument.asp?InstID=1476.

197. *Id.* arts. 2(1)-(3).

198. *Id.* art. 2(4).

199. *Id.* art. 2(5).

200. *Id.* art. 2(6).

201. Draft Youth Protection Act 2011 (Palestine). *See also* DEF. FOR CHILDREN INT'L: PALESTINE SECTION, ANNUAL REPORT 2012, at 28 (2013), *available at* http://reliefweb.int/sites/reliefweb.int/files/resources/annualreport2012.pdf (mentioning the Palestinian Juvenile Protection Law Draft approved by the Ministerial Council in October 2011).

202. *See generally* Draft Youth Protection Act 2011 (Palestine).

203. *Id.* art. 1.

204. *Id.* art. 6.

205. *Id.* arts. 38-47.

and the methods of treatment of minors over the age fifteen.[206] It also orders the establishment of juvenile courts and discusses the legal procedures that apply there,[207] such as the manners of processing and control of convicted minors.[208] This law also relates to the establishment of the Center for Child Protection by the Ministry of Social Affairs and Social Services.[209]

What becomes clear from the review of the Palestinian Authority's legal perception of minors in criminal procedures is that their treatment in criminal systems should be guided by specific human rights values that refer to children under the CRC. This concept is consistent with that of the juvenile justice system applied by the military administration discussed below.

As mentioned above, the juvenile justice system in the administered territories is based on the security legislation in the administrated territories and the dicta of the military courts.[210] On "June 7, 1967, the first day of operation of the military government in the West Bank, three proclamations and several orders were published throughout the West Bank and the Gaza Strip."[211] These orders set forth legal procedures in the military courts and defined the offenses and penalties to be imposed upon offenders.[212] "Since then, the [Security Provisions Order ("SPO")] has been the basic enactment regarding military jurisdiction in these Regions."[213] The SPO was amended numerous times up until 2011, when it was issued as a consolidated version containing all the preceding amendments and unifying all remaining valid military orders into one instrument.[214]

The military courts system established by the SPO consists of two courts of first instance, one for the region of Judea and the second for the region of Samaria, as well as an appeals court.[215] The substantive law applied in these courts consists of local statutes and orders issued by the military commander, in his capacity as the sovereign power in the occupied territory under international humanitarian law.[216] The rules of evidence and procedure are similar to those applied in Israel, including legal representation for defendants and the right for a due process of law.[217] The prosecution is conducted by the military prosecutor and the trial is

206. *Id.* art. 48.

207. *Id.* arts. 26-36.

208. *Id.* arts. 49-57.

209. *Id.* art. 65.

210. Order Regarding Security Provisions (Judea and Samaria), 5770-2008, No. 1651, §§ 8-20 (Isr.), *available at* http://nolegalfrontiers.org/en/military-orders/mil01.

211. YESH DIN: VOLUNTEERS FOR HUMAN RIGHTS, BACKYARD PROCEEDINGS: THE IMPLEMENTATION OF DUE PROCESS RIGHTS IN THE MILITARY COURTS IN THE OCCUPIED TERRITORIES 36 (2007), *available at* http://www.yesh-din.org/site/images/BackyardProceedingsEng.pdf.

212. *Id.* at 45-46.

213. Hadar, *supra* note 189, at 177.

214. Since that time, the Order has been amended repeatedly, and constitutes up to 31 amendments at the time of this writing.

215. Order Regarding Security Provisions No. 1651, §§ 9, 10(D).

216. *See* Hague Regulations, *supra* note 7, art. 43.

217. Order Regarding Security Provisions No. 1651, §§ 77, 86, 88.

conducted solely by judges possessing particular legal experience.[218] According to decisions of the Israeli Supreme Court dating from the early days of the military administration, all of the procedures in these courts may be subject to review by the Supreme Court of Israel, in cases when defendants apply to the Supreme Court claiming violation of their rights.[219]

In the past few years, and officially since 2009,[220] the juvenile justice system, governed by the legislative and judicial system described above, has undergone remarkable changes and improvements led by the military courts' dicta.[221] Before 2009, there were no significant differences between criminal procedures for adults and those for minors in the administered territories.[222] If any special attention was given to minors in procedures at the military courts, it was mainly in authorizing the court to close hearings to the public[223] and forbidding the publication of the defendants' names.[224]

However, without a formal legislative foundation and relying on common law judicial legislation, the military courts' dicta have enabled an on-going process of changes aimed at applying higher standards, more in line with human rights law norms, in the juvenile justice system in the administered territories.[225] This venture eventually led to formal changes in the security provisions order.[226] Seeking creative solutions that would focus on rehabilitation instead of retribution at sentencing, the military courts gave considerable weight to the age of the juvenile, stating:

> When sentencing a minor, especially one who just reached the age of criminal liability, a minor without previous convictions, a minor who was lucky enough that his offense did not cause substantial damage to property or to human lives, it is proper to avoid severe punishment and

218. *Id.* §§ 11(A)(1), 11(A)(4), 123(B).

219. *See* Kretzmer, *supra* note 190, at 234.

220. Order Regarding Security Provisions No. 1644 came into force on July 29, 2009. *New Military Order on Juveniles Issued in the West Bank*, DEF. FOR CHILDREN INT'L: PALESTINE (Aug. 25, 2009), http://www.dci-pal.org/english/display.cfm?DocId=1223&CategoryId=1. As it is a temporary order, it has to be annually renewed. Order Regarding Security Provisions (Judea and Samaria), No. 1644 (Amend. No. 109) (Isr.).

221. *See infra* notes 227-33 and accompanying text.

222. STEPHEN SEDLEY ET AL., CHILDREN IN MILITARY CUSTODY 4 (2012), *available at* http://www.childreninmilitarycustody.org/wp-content/uploads/2012/03/Children_in_Military_Custody_Full_Report.pdf. However, younger offenders were able to receive custodial sentences in "an institute of social care." *See* NOAM HOFFSTADTER, PUBLIC COMM. AGAINST TORTURE IN ISR., PERIODIC REPORT: JUNE 2008—NO DEFENSE: SOLDIER VIOLENCE AGAINST PALESTINIAN DETAINEES 14 n.39 (2008), *available at* http://www.stoptorture.org.il/files/No_Defense_Eng.pdf.

223. *See* Order Regarding Security Provisions (Judea and Samaria), 5730-1970, No. 378, § 11 (Isr.), *available at* http://www.israellawresourcecenter.org/israelmilitaryorders/fulltext/mo0378.htm.

224. *See id.*

225. *See infra* notes 227-33 and accompanying text.

226. *See* Order Regarding Security Provisions (Judea and Samaria), No. 1644 (Amend. No. 109) (Isr.); *contra* SEDLEY ET AL., *supra* note 222, at 4 (mentioning that even with the new procedures in 2009, there were still incidences of those under eighteen that were treated as adults).

> give the minor hope and a chance to mend one's ways while he is in his natural environment and surrounded by his family.[227]

The minor's age is also a crucial factor in remand hearings, where minors' age is a strong consideration for release.[228] In addition, the military courts ordered the release of suspects and defendants when they discovered that some of their rights were impaired during the penal procedures, even when these rights were not included in formal legislation but were rather an outcome of judge-made legislation.[229]

All of these *de facto* changes have resulted in *de jure* changes in the military legislation in the administered territories. In 2009, the security order was amended to establish the Military Youth Court.[230] Professional qualification training was given to the judges who were appointed as youth judges and special legislative regulations were made to put more emphasis on the rehabilitation of convicted minors in the area.[231] The main changes in the regulations of the security order were as follows: only youths were to be tried in the Military Youth Court and the indictment against a minor must state the minor's date of birth; the Military Youth Court was authorized to appoint an advocate for the minor if justified by the minor's best interest; the court was enabled to make use of a report prepared by the welfare officer in the civil administration before sentencing; the separation of minors (up to the age of sixteen) and adults in detention facilities was legally determined; the court was authorized to order that the minor's parents be present at all hearings of the case and that they could act in certain instances in their child's name (such as by handling petitions to court or examining witnesses).[232]

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227. Mil. Appeal 58/00 Military Court of Appeals (Judea & Samaria), O. K. v. Military Prosecutor (May 30, 2000), Nevo Legal Database (by subscription) (Isr.) (translated by author).

228. *See Military Court Decisions*, MIL. COURT WATCH, http://militarycourtwatch.org/print.php?id=706zUIAHaTa31383A58dQYNef4o (last visited July 17, 2014).

229. For example, the courts ruled that night-time investigation may lead to release on bail, although at that point such a limitation was not yet mandated to the Security Legislation. *See* Mil. Appeal 2763/09 Military Court of Appeals (Judea & Samaria), A. A. v. Military Prosecutor (Aug. 2, 2009), Nevo Legal Database (by subscription) (Isr.); Mil. Appeal 2912/09 Military Court of Appeals (Judea & Samaria), Military Prosecutor v. A. R. (Aug. 27, 2009), Nevo Legal Database (by subscription) (Isr.) (translated by author). The same was ruled regarding investigation by a person unqualified to investigate minors. Mil. Appeal 2763/09; *cf.* Mil. Appeal 1781/11 Military Court of Appeals (Judea & Samaria), Military Prosecutor v. M. (June 15, 2011), Nevo Legal Database (by subscription) (Isr.) (translated by author) (where the court emphasized that the investigators should allow the detainee reasonable time to sleep and rest; however, the court did not find that a complaint for lack of sleep justified the detainee's release from custody). The courts had also given weight in remand hearings to the infringement of the right of representation. *See* Mil. Appeal 2912/09. Most significantly, there are explicit court rulings determining that prolonged procedures may lead to the release of defendants (and particularly minors) from remand. *See* Mil. Appeal 1411/11 Military Court of Appeals (Judea & Samaria), Military Prosecutor v. D. A. S. (Mar. 22, 2011), Nevo Legal Database (by subscription) (Isr.).

230. Order Regarding Security Provisions (Judea and Samaria), No. 1644 (Amend. No. 109) (Isr.).

231. *See id.*; *see also* BAUMGARTEN-SHARON, *supra* note 119, at 11.

232. Order Regarding Security Provisions, No. 1644. Although the amendment does not refer to remand hearings, the courts are strict about holding public hearings in general and about the presence of

Furthermore, it was determined that in criminal offences a minor would not be indicted for a crime committed one year before the indictment was filed, and in security offences, a minor will not be prosecuted for offences committed more than two years before the indictment without permission from the Chief Military Prosecutor.[233]

In 2011, further amendments were issued by the new consolidated military order that introduced a line of substantial amendments regarding the treatment of minors in the penal procedure.[234] Amendment number ten raised the age of majority from sixteen to eighteen, so that from the date of its entering into force forward all the newly and previously instituted special procedures defined for minors were officially valid for youths under the age of eighteen.[235] In this amendment, all the developments of the 2009 security order regarding juvenile justice were adopted, but this time referring to minors up to the age of eighteen.[236] It established the duty of the police to inform the minors of their right to a legal counsel before interrogation, and to inform parents or other legal guardians about a minor's arrest and interrogation.[237] Finally, the limitation period for indictments of regular criminal offences was shortened to one year, while the limitation period for indictments of national security related offences remained the same (two years).[238]

Amendment number sixteen determined the shortening of the period of detention before judicial review for all detainees.[239] The maximum period of detention before being brought before a judge was set at forty-eight hours for ordinary crimes and ninety-six hours for security offences (with the option of limited extension in special circumstances).[240] If no warrant is issued within these

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parents in particular at remand hearings. *See* ADDAMEER PRISONER SUPPORT & HUMAN RIGHTS ASS'N, EYES ON ISRAELI MILITARY COURT: A COLLECTION OF IMPRESSIONS 5 (2012), *available at* http://www.addameer.org/files/Reports/Eyes%20on%20Israeli%20Military%20Court-%20impressions.pdf (demonstrating that hearings were public as NGOs were able to attend and view them); SEDLEY ET AL., *supra* note 222, at 4 (highlighting that "parents are allowed to participate"). In certain cases, defendants were released because their family members were prevented from being present at the hearings. *See* Mil. Appeal 2912/09 Military Court of Appeals.

233. Order Regarding Security Provisions, No. 1644, art. 46(J).

234. *Compare* Order Regarding Security Provisions, No. 1644, *with* Order Regarding Security Provisions (Judea and Samaria), 5771-2011, No. 1676 (Amend. No. 10) (Isr.), *available at* http://www.dci-palestine.org/sites/default/files/military_order_1676.pdf (unofficial translation).

235. Order Regarding Security Provisions, No. 1676, § 3.

236. *See id.*

237. *Id.* § 4.

238. *Compare id.* § 5, *with* Order Regarding Security Provisions No. 1644, art. 46(J).

239. *See* Order Regarding Security Provisions (Judea and Samaria), No. 1685 (Amend. No. 16) (Isr.) (translated by author). This was established in August 2012. UNITED NATIONS CHILDREN'S FUND., CHILDREN IN ISRAELI MILITARY DETENTION: OBSERVATIONS AND RECOMMENDATIONS 9 (2013) [hereinafter CHILDREN IN ISRAELI MILITARY DETENTION], *available at* http://www.unicef.org/oPt/UNICEF_oPt_Children_in_Israeli_Military_Detention_Observations_and_Recommendations_-_6_March_2013.pdf. *See also DCI-Pal: Children Prosecuted in Israeli Military Courts—Update*, SAMIDOUN (Oct. 2, 2012), http://samidoun.ca/2012/10/dci-pal-children-prosecuted-in-israeli-military-courts-update.

240. *See* Order Regarding Security Provisions, No. 1685.

periods, the suspect is released.[241] The court may not order the detention of a suspect for longer than twenty days, but it may extend a period of detention several times for periods of up to fifteen days each upon further review.[242] A suspect may not be detained for an overall period that exceeds forty days without being indicted.[243]

In amendments twenty five and twenty six, issued a few months later, a reduction of initial detention periods was set specifically for minors so that minors under the age of fourteen are to be brought before a judge within a maximum period of twenty-four hours after their detention with regard to all types of offences (with the option of an extra twenty four hours extension in special circumstances).[244] Minors between the age of fourteen and eighteen are to be brought before a judge within a maximum period of forty-eight hours from their detention, with regard to all types of offences (with the option of an extra forty-eight hours extension in special circumstances).[245] In addition, minors are to be brought before the Military Court of Appeals in cases where they were maintained in custody longer than one year, after filling an indictment without reaching a verdict.[246] Any extension in this concern must be determined by the court every three months.[247]

Amendment number twenty-four refers to the translation of procedures in the military courts from Hebrew to Arabic.[248] The proceedings in the military courts

241. *See id. Contra* SEDLEY ET AL., *supra* note 222, at 29.

242. *See* Order Regarding Security Provisions, No. 1685.

243. *See* Order Regarding Security Provisions (Judea and Samaria), No. 1726 (Amend. No. 40) (translated by author); *see also* DEF. FOR CHILDREN INT'L: PALESTINE, DETENTION BULLETIN: OVERVIEW SEPTEMBER 2013, at 1 (2013), *available at* http://www.dci-palestine.org/sites/default/files/september_2013_detention_bulletin_final_4nov2013.pdf. *But see*, ADDAMER PRISONER SUPPORT & HUM. RTS. ASS'N, DENIAL OF THE RIGHT TO LIFE AND LIBERTY OF A PERSON AS A CRIME OF APARTHEID: TESTIMONY BEFORE THE RUSSELL TRIBUNAL ON PALESTINE 2 (2011), *available at* http://www.addameer.org/userfiles/Addameer%20Testimony%20for%20Russell%20Tribunal%20on%20Palestine%20-%205%20November%202011%5B20111108155735%5D.pdf (stating detention of Palestinians can be renewed up to 180 days).

244. *See* Order Regarding Security Provisions (Judea and Samaria), No. 1711 (Amend. No. 25) (Isr.) (translated by author). *See also* CHILDREN IN ISRAELI MILITARY DETENTION, *supra* note 239, at 9.

245. *See* Order Regarding Security Provisions, No. 1711. *See also* CHILDREN IN ISRAELI MILITARY DETENTION, *supra* note 239, at 9.

246. Order Regarding Security Provisions (Judea and Samaria), No. 1712 (Amend. No. 26) (Isr.) (translated by author).

247. *Id.*

248. *See* Order Regarding Security Provisions (Judea and Samaria), No. 1710 (Amend. No. 24) (Isr.) (translated by author). *See also High Court of Justice Calls Attention to the Obligation to Translate Indictments to Arabic in Cases Before Military Courts (HCJ 2775/11)*, NEWSLETTER (Embassy of Isr., Den Haag, Neth.), Apr. 18, 2013, at 2 [hereinafter Embassy of Isr., NEWSLETTER], *available at* http://embassies.gov.il/hague-en/Departments/Documents/20130418_Newsletter11_ILD.pdf (providing unofficial English translation) ("The general question regarding whether there exists an obligation to translate all military courts decisions [and not just indictments] in order to facilitate the possibility of utilizing them as precedents, has not been sufficiently argued and is not the subject-matter of this petition.").

in the administered territories are conducted mainly in Hebrew and translated to Arabic during the course of the proceedings by court interpreters.[249] Amendment number twenty-four determines that all the indictments must be translated to Arabic.[250]

The above notwithstanding, it is worth considering several critical observations with regard to the procedures undertaken by the judicial authority, including the interrogation and arrest process, and a comparison with the Israeli juvenile justice system. We will first briefly address the criticism of methods of interrogation and detention undertaken by the enforcing authorities—even though these issues venture beyond the scope of this paper.

Several non-governmental organizations have harshly criticized the process of detention and interrogation of Palestinian minors by the Israeli Defense Forces.[251] According to the Defence for Children (Palestine) report of April 2012, over the past eleven years around 7,500 children are estimated to have been detained by the Israeli forces in the administered territories.[252] According to the B'Tselem report of July 2011, between the years 2005 and 2010, more than 800 minors were prosecuted for stone throwing.[253] Some NGO's—basing their findings on interviews with detainees and others who escorted them through detention, interrogation, and imprisonment—report severe violations of the rights of minors.[254] According to Defence for Children International (Palestine), testimonies reveal that most children undergo a coercive interrogation that mixes verbal abuse, threats, and physical violence; approaches torture or inhumane treatment; and usually results in a confession.[255] "The Report also finds that in 29 percent of cases, the children are either shown, or made to sign, documentation written in Hebrew, a language they do not understand."[256]

According to a report of a delegation of British lawyers on the treatment of Palestinian children under Israeli military law, most of the interrogations of children are executed without the presence of a lawyer representing the child—reflecting, according to this delegation, a violation of Military Order 1676.[257] The

249. Embassy of Isr., NEWSLETTER, *supra* note 248, at 2.

250. *See* Order Regarding Security Provisions, No. 1710.

251. *See, e.g.*, BOUND, BLINDFOLDED AND CONVICTED, *supra* note 192, at 22-29, 34-38.

252. *Id.* at 7.

253. BAUMGARTEN-SHARON, *supra* note 119, at 5.

254. *See, e.g.*, BOUND, BLINDFOLDED AND CONVICTED, *supra* note 192, at 22-50; SEDLEY ET AL., *supra* note 222, at 30-31.

255. *See* BOUND, BLINDFOLDED AND CONVICTED, *supra* note 192, at 7.

256. *Id.*

257. *See* SEDLEY ET AL., *supra* note 222, at 18. However, Order No. 1676 provides that children *be notified* of their right to consult with a lawyer and it does not order the lawyer's presence at the investigation. Order Regarding Security Provisions (Judea and Samaria), 5771-2011, No. 1676, § 4 (Amend. No. 10) (Isr.), *available at* http://www.dci-palestine.org/sites/default/files/military_order_1676.pdf (unofficial translation) ("Prior to the investigation of an arrested minor suspect, the investigator will inform a defense attorney named by the minor, detailsregarding [sic] the investigation; without prejudice to the instructions of any law, informing of the defense attorney named by the minor as detailed above, will not delay the

British lawyers' report continues to claim that parents are not present at interrogations,[258] and that the children are generally not informed of their right to remain silent during the interrogation.[259] Children are arrested during night hours with no parental accompaniment and are violently treated by the arresting soldiers.[260] In addition, some children report having been detained in solitary confinement,[261] a practice that according to the United Nations Special Rapporteur on Torture amounts to torture when used against juveniles.[262] Finally, the report points out that periods of detention before and during trial are equal for adults and minors.[263]

Criticism has also been aimed at the procedures in the judicial system.[264] It is important to note that the Military Youth Court functions only in trials and not in interim hearings, bail hearings included,[265] and hence the implications of the reform described above are quite limited. Furthermore, because the practices of the court deviate somewhat from the law, the significant amendments in the military legislation are not always scrupulously followed. Legal practice is full of

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investigation.") (amending article 136(c)). It should be nevertheless mentioned that despite the criticism expressed by the British lawyers delegation of the means of law enforcement and application by law enforcement authorities, the delegation did not criticize the work of the military courts or the military youth courts. *See* SEDLEY ET AL., *supra* note 222, at 30 ("As we have explained, we have been given two radically different accounts of Israeli practice. It is not our role to adjudicate between them. But within them are certain undisputed facts which compel us to conclude that Israel is in breach . . . of the United Nations Convention on the Rights of the Child.").

258. SEDLEY ET AL., *supra* note 222, at 18. However, "Military Order 1676 requires '*notification*' of a parent but does not make provision for the parent's attendance at the interrogation." *Id.*

259. *See id.* at 16.

260. BAUMGARTEN-SHARON, *supra* note 119, at 26-27; SEDLEY ET AL., *supra* note 222, at 17. The criticism of the law enforcement means in the juvenile justice system in the administered territories presented above demands serious consideration and response. However, given that this article focuses on the military youth courts and not on the enforcement means and authorities, we must leave this discussion to another study. Nevertheless, we will mention briefly that the military courts have not disregarded the criticism and many of the changes in formal legislation were perhaps motivated by NGO claims. The B'Tselem report even maintains that the Military Courts are leaders and initiators in bringing about change and protection of minors' rights. *See* BAUMGARTEN-SHARON, *supra* note 119, at 71 ("[O]ne can establish beyond doubt that the Military Courts have initiated and led for changes in the behavioral norms of the enforcement officials in all that concerns the rights of the Minors.").

261. SEDLEY ET AL., *supra* note 222, at 27; *see also* Harriet Sherwood, *The Palestinian Children—Alone and Bewildered—in Israel's Al Jalame Jail*, GUARDIAN, Jan. 22, 2012, http://www.guardian.co.uk/world/2012/jan/22/palestinian-children-detained-jail-israel.

262. *See* Special Rapporteur of the Human Rights Council on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Interim Rep. of the Special Rapporteur of the Human Rights Council on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, ¶ 77, transmitted by Note of Secretary-General, U.N. Doc. A/66/268 (Aug. 5, 2011) (by Juan E. Méndez); *see also* SEDLEY ET AL., *supra* note 222, at 27.

263. SEDLEY ET AL., *supra* note 222, at 27. This was changed by Amendments 16, 25, and 26 of the Order regarding Security Provisions. *See supra* notes 239-47 and accompanying text.

264. *See* NO LEGAL FRONTIERS, ALL GUILTY!: OBSERVATIONS IN THE MILITARY JUVENILE COURT APRIL 2010-MARCH 2011, at 10 (2011), *available at* http://nolegalfrontiers.org/images/stories/report_2011/report_en.pdf.

265. SEDLEY ET AL., *supra* note 222, at 23 (determining, *inter alia*, the jurisdiction of the youth courts).

examples of these failures, as is demonstrated by a survey of seventy-one cases in the Youth Court conducted by the NGO, No Legal Frontiers.[266] In this survey, it was found that numerous indictments are based on the defendants' confessions or on incriminations of co-partners given to the police during the interrogation;[267] most of the cases conclude with a plea bargain;[268] and, most importantly, actual imprisonment is usually the default sentence and is imposed as a first rather than a last resort, especially in cases where the accused was detained during the whole or part of the legal procedure.[269] This is due to the fact that there are no substantial Palestinian welfare services, and even the military judges expressed frustration at the lack of alternatives to imprisonment:

> The Supreme Court has recently ruled that when punishing minors the following factors should be taken into consideration: the lesser responsibility that should be attributed to a minor whose personality is not yet fully formed, the damage caused to the minor by actual imprisonment, damage that is ultimately against the public interest, and on the other hand the severity of the crime.
>
> The situation in the Region is even worse than in Israel in such cases, because the juvenile court does not have any rehabilitation instruments such as: ordered stays in locked facilities, parole officers and so on. . . . It is clear that creating rehabilitation instruments in the Region is not easy, especially when the crimes in question are often committed for ideological reasons and supported by the community surrounding the minor. In any case, I believe that the legislator in the Region cannot avoid addressing this issue and finding creative ways to allow minors to be treated outside of the framework of actual prison.[270]

Other practices in the juvenile court also attest to the failure of the military legislation regulating the administered territories' juvenile justice system to fully meet the legal standards of juvenile justice vested in human rights law, in spite of

266. NO LEGAL FRONTIERS, *supra* note 264, at 8. It should be noted that this report has been strongly rejected by the IDF Spokesman. *See* Letter from IDF Spokesperson, to Organization Law Without Borders, Response to Report on Military Jurisdiction (Aug. 30, 2011). In a response to the No Legal Frontiers report, the IDF Spokesman raises claims against both its factual determinations and the scientific validity of its statistical methods. *Id.* ¶ 4. With regard to the factual claims, the Spokesman states that contrary to the report, most Palestinian minors are not held in custody until the end of their trials. *Id.* The Spokesman adds that the report disregards major developments in both the security legislation and the military courts dicta, which improved the protections for minors in the criminal procedure in the administered territories. *Id.* ¶ 5. Regarding the report's scientific statistical methods, the Spokesman claims that the report's findings are not based on the basic principles of the science of statistics. *Id.* ¶ 4. In its response, the No Legal Frontiers stated that this report is not a scientific representative sample but rather a representation of the impression of reviewers who observed the procedures. *See* Letter from No Legal Frontiers, answer to the response of the IDF Spokesman to the No Legal Frontiers Report (translated by author).

267. NO LEGAL FRONTIERS, *supra* note 264, at 28.

268. *Id.* at 37-38; SEDLEY ET AL., *supra* note 222, at 22.

269. *See* NO LEGAL FRONTIERS, *supra* note 264, at 44.

270. *Id.* at 44-45 (emphasis and quotations omitted).

the changes that have been made.[271] These standards are motivated primarily to preserve the best interests of the child and promote "the child's sense of dignity and worth . . . and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society."[272] The British lawyers' report states that children are brought into the court in iron shackles, which, while removed on their entering the courtroom, are replaced when they leave.[273] The report mentions that this practice stands in contrast to the United Nations standard minimum rules for the treatment of prisoners:

> Which provide that chains and irons shall not be used as restraints; that any other restraints should only be used as a protection against escape during transfer provided they are removed when the prisoner appears before a judicial authority (or on medical grounds or to prevent injury); and that they should not be applied for any longer period than necessary.[274]

Finally, criticism of the juvenile justice system in the administered territories has been made through a comparison between this system and the juvenile justice system within Israel's borders.[275] Some major examples are the discrepancies between the minimum age for custodial sentences,[276] the right of parents to be present during interrogations,[277] and the maximum periods of detention without

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271. *See* The Youth (Trial, Punishment and Modes of Treatment) Law, 5731-1971, 25 LSI 128 (1970-1971) (Isr.) (demonstrating that Israel has passed a specific law for treatment of its juveniles within its domestic system).

272. CRC, *supra* note 1, art. 40(1).

273. SEDLEY ET AL., *supra* note 222, at 23.

274. *Id. See also* UNITED NATIONS, STANDARD MINIMUM RULES FOR THE TREATMENT OF PRISONERS 5 (1955), *available at* http://www.unodc.org/pdf/criminal_justice/UN_Standard_Minimum_Rules_for_the_Treatment_of_Prisoners.pdf.

275. The issues relating to days of detention have been brought before the Israeli Supreme Court. Because a new amendment to the security order was to be applied with regard to the case of juveniles, the Court has decided to leave the applications pending until 1/12/2012, when the respondents (i.e., the Minister of Defence and the IDF Commander in Judea and Samaria) were to report to the Court on the application of the order. The applications are still pending until the time of this writing. *See* HCJ 3368/10 Office of the Palestinian Prisoners v. Minister of Defense (Isr.); HCJ 4057/10 The Association of Civil Rights in Israel v. IDF Commander in Judea and Samaria (Isr.). *See also* HUMAN RIGHTS WATCH, SEPARATE AND UNEQUAL: ISRAEL'S DISCRIMINATORY TREATMENT OF PALESTINIANS IN THE OCCUPIED PALESTINIAN TERRITORIES 34 (2010), *available at* http://www.hrw.org/sites/default/files/reports/iopt1210webwcover.pdf.

276. The minimum age for custodial sentencing is fourteen for Israeli youth in Israel and twelve in the administered territories. *Compare* The Youth (Trial, Punishment and Modes of Treatment) Law (Isr.), § 10(c)(2), *with* Order Regarding Security Provisions (Judea and Samaria), 5771-2011, No. 1676 , (Amend. No. 10) (Isr.), *available at* http://www.dci-palestine.org/sites/default/files/military_order_1676.pdf (unofficial translation); *see also* BOUND, BLINDFOLDED AND CONVICTED, *supra* note 192, at 19.

277. According to the Israeli Youth Law, a parent is allowed to be present at all times in circumstances where the child has not been formally arrested, but may not intervene in the interrogation process. The Youth (Trial, Punishment and Modes of Treatment) Law (Isr.), § 9(H). Exceptions are made upon written authorization of an officer and in cases in which the well-being of the child requires that the parent is not present. *Id.* §§ 9(I)-(J). No such right formally exists for Palestinian youth even

having a right to consult a lawyer.[278] An application before the Israeli Supreme Court to make the legal protections of minors in the administered territories equal to those of Israeli minors is now pending.[279]

Any comparison between the Israeli juvenile justice system and that in the administered territories remains untenable unless we take into consideration the differences between the crimes committed by minors in Israel and those committed by juveniles in the administered territories. Many of the latter crimes are perpetrated for ideological reasons with the encouragement of the minor's friends and family and even the support of recruiters for terrorist organizations.[280] Another difference is the absence of welfare services for minors in the administered territories,[281] a situation that is partially the result of transferring the welfare services in the area to the Palestinian Authority according to the Oslo Accords.[282]

All of the above criticism reflects the need to apply a normative framework for the practical application of human rights law in the juvenile justice system in the administered territories. Indeed, security considerations of the occupying power should not be excluded, however analysis of the particular circumstances calls for a co-application of international humanitarian law and human rights law, and not only a reliance upon the latter as the source of international law in occupied territories. The effects of such a normative framework on military legislation and its application by the judicial system will be to promote concepts such as the best interests of the child and the preference of rehabilitation over retribution. It will also strengthen trends in the military legislation and the military courts, discussed earlier in this article. In the words of the Military Court:

> Amendment number fourteen to the Israeli Youth Law . . . has provided the police with special obligations pertaining to the interrogation of minors. *The essence of this amendment was a new conception, in the spirit of the International Convention on the Rights of the Child and in accordance with the Basic Law: Human Dignity and Liberty*. . . . Th[is] amendment has not been incorporated into the military legislation in the area, yet . . . the Military Appeals Court has opined that "it is impossible to ignore the . . . principles at the

though efforts are made to notify parents of their child being interrogated, there is only a right to be notified if there is an arrest. Order Regarding Security Provisions, No. 1676 (Isr.); *see also* BOUND, BLINDFOLDED AND CONVICTED, *supra* note 192, at 18. *See also* Order Regarding Security Provisions (Judea and Samaria), No. 1644, art. 46(L)(b) (Amend. No. 109) (Isr.) (giving parents the right to attend sessions of the military court).

278. *See* BAUMGARTEN-SHARON, *supra* note 119, at 14.

279. *See id.*

280. Moodrick-Even Khen, *supra* note 44, at 269-70 (describing the motivations for children in occupied territories to join armed groups and perpetrate crimes).

281. *See* File No. 3905/10 Military Court (Judea), Military Prosecutor v. Mohammed Omar (Jan. 17, 2011), Nevo Legal Database (by subscription) (Isr.).

282. *See* The Cairo Agreement, *supra* note 195, art. 3.

> foundation of the protection of the minor's rights . . . and the need to emphasize the supra principle of the minor's best interests.[283]

Promoting the best interest of the child and developing an improved welfare system reflect the obligations of a long-term occupying force to promote the interests of the protected persons and to ensure public life and not only public order. However, as long as the Israeli government objects to a direct application of human rights law in the administered territories, the standards and norms of human rights law, including soft law, should be applied in the administered territories through their incorporation within the security legislation in the territories. This solution lacks the advantage of enabling the supervising mechanisms of international bodies, such as the Human Rights Committee or other U.N. treaty and Charter bodies, to monitor Israel's compliance with international human rights treaty standards in the administered territories; nor would it allow these bodies to influence public opinion in Israel and outside.[284] Nevertheless, this solution does demand that human rights standards that are relevant to the juvenile justice system in the administered territories are obligatory upon the governing authorities in these areas, ensuring that their role and function as temporary holders of the territory are adequately fulfilled.

VI. SUMMARY

Long-term belligerent occupations and transformative occupations face new challenges in terms of the occupying forces' relations with the occupied population and their obligations towards the protected persons. Applying a compatible and just juvenile justice system in occupied territories is one such challenge.

We rely on contemporary theory and practice in international law that supports a mutual application of human rights law and international humanitarian law, where one of these branches of international law is the *lex specialis* and the other may serve as a complementary or interpretative legal framework. We suggest that this model is most appropriate for the long-term belligerent occupying force and for the transformative occupying force to fulfill their legal obligations in general, in particular in establishing a juvenile justice system. We applied this claim to the case studies of the juvenile justice system in formerly occupied Iraq and in Israel's administered territories.

In Iraq, the legal framework of the occupation regime was based both on U.N. Security Council resolutions and in the CPA Memorandum, situating it explicitly on the laws of belligerent occupation and implicitly on human rights law.[285] The

283. File No. 1367/11 Military Court (Judea & Samaria), Military Prosecutor v. D. A. (Jan. 9, 2012), Nevo Legal Database (by subscription) (Isr.) (translated by author); *see also* Mil. Youth Court 3905-10, Military Prosecution v. M. A. (Jan. 17, 2011), Nevo Legal Database (by subscription) (Isr.) (translated by author) ("The military courts have often opined that every effort should be made, subject to the special circumstances in the Region, to equalize as much as possible the situation concerning minors in the Region with the situation in Israel.").

284. Ben-Naftali & Shany, *supra* note 99, at 106.

285. *See* S.C. Res. 1483, *supra* note 89, pmbl., ¶ 8(g); CPA Memo (Revised), *supra* note 149, pmbl.

CPA incorporated only the general standards of human rights law,[286] and with regard to human rights law norms that relate to minors' protection, it established only the demand that children be separated from adults while in custody.[287] In practice, even these limited demands have continuously been violated, and this violation persisted after the U.N. mandate for the occupation ended.[288]

In the administered territories, significant progress in both the military legislation and its application by the military courts has taken place since 2009, when the Military Youth Courts were established. Before 2009, there were no significant differences between criminal procedures for adults and those for minors in the administered territories.[289] However, with the support of the military courts' dicta, an on-going process of changes aimed at applying standards more applicable with norms that protect minors in the criminal procedure resulted in the emergence of important changes in the military legislation. Among these was raising the majority age from sixteen to eighteen,[290] separating minors and adults in detention facilities,[291] reducing periods of detention before being brought before a judge,[292] and relying on welfare reports in criminal trials.[293] Nevertheless, criticism of the application of these changes in practice point out that the changes do not encompass remand procedures and that the punishments meted out by the military courts reflect more a consideration of retribution than of rehabilitation.

Finally, we suggest that the co-application of human rights law and international humanitarian law, while taking into consideration the security needs of both the occupying power and the protected persons, would create legal standards that would see the application of more protections for minors in criminal procedures. This proposal is also supported by the local Palestinian Authority Child Law, which promotes a concept of childhood under criminal law adhering to the values and norms of human rights law that are anchored in human rights law treaties, and especially in the CRC.[294] Yet, since Israel objects to a formal application of human rights treaties in the administered territories, the practical application of human rights law in these territories is rather through military legislation that absorbs human rights norms than through the application of human rights treaties.

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286. *See* CPA Memo (Revised), *supra* note 149, § 1(1)(c).

287. ICCPR, *supra* note 4, art. 10(2)(b).

288. HRW Report, *supra* note 156.

289. As opposed to special arrangements regarding sentencing that allow the serving of custodial sentences in *an institute of social care*. Order Regarding the Judgment of Young Offenders (No.132) (Isr.) (translated by author).

290. Order Regarding Security Provisions (Judea and Samaria), 5771-2011, No. 1676, § 3 (Amend. No. 10) (Isr.), *available at* http://www.dci-palestine.org/sites/default/files/military_order_1676.pdf (unofficial translation) (amending article 136 of Order Regarding Security No. 1651).

291. Order Regarding Security Provisions (Judea and Samaria), No. 1644, art. 46(L)(d) (Amend. No. 109) (Isr.) (adding to Order Regarding Security No. 1651).

292. *See* Order Regarding Security Provisions (Judea and Samaria), No. 1685 (Amend. No. 16) (Isr.) (translated by author).

293. Order Regarding Security Provisions, No. 1644 (Isr.), art. 46(L)(c).

294. *See* Draft Youth Protection Act 2011, art. 2 (Palestine); CRC, *supra* note 1, arts. 37, 39, 40.

Nevertheless, and even though it does not seem that the Israeli belligerent occupation in the administered territories will end in the near future, it is crucial to maintain that a belligerent occupying power, including a long-term one, should avoid changes that will render it a sovereign. While this objective is justified for a transformative regime, such as that in Iraq, it works against the purposes of a long-term belligerent occupant. Hence, any changes of legislation made by the occupying power, such as those suggested in this article, must pertain to the basic tenet of belligerent occupation regime, wherein the roles of the occupying power should be limited to maintain the order and safety and the civil life routine of the occupied territory and population.