



Military Court Watch

Monitoring the treatment of children in Israeli military detention

**Unlawful transfer and detention of protected persons outside
the
Occupied Palestinian Territory**

Submission

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Submitted to:

- [UN Working Group on Arbitrary Detention](#)

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1. Introduction

- 1.1 This submission focuses on the policy of successive Israeli governments of forcibly transferring Palestinian prisoners from the occupied West Bank to prisons located inside Israel in violation of the Convention (IV) relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention) and the Rome Statute of the International Criminal Court (Rome Statute).¹
- 1.2 Evidence published each month by the Israeli Prison Service (IPS), the national detention authority of Israel, indicates that at any given time an average of 88 per cent of Palestinian prisoners, including minors, are detained in facilities located inside the State of Israel following their transfer from the occupied West Bank.²
- 1.3 It is submitted that the following facts and circumstances related to this policy have the potential to undermine the credibility and legitimacy of the international legal order and requires urgent attention as its continuation has adverse implications in both Israel/Palestine and beyond:
- (i) The uncontested evidence indicates that Palestinians from occupied territory have been unlawfully transferred and detained in prisons inside the State of Israel for nearly five decades. This practice is continuing and currently affects approximately 7,000 to 8,000 protected persons, including minors, each year.
 - (ii) The uncontested evidence indicates that the practice of unlawfully transferring Palestinians from occupied territory to prisons inside the State of Israel forms part of a large-scale national policy.³
 - (iii) This policy has been challenged on two occasions in the highest court in the State of Israel and rejected.⁴ Accordingly, there are no reasonable prospects for a domestic remedy.
 - (iv) Although the unlawful detention takes place in the territory of the State of Israel, the unlawful transfer occurs in whole, or in part, in the territory of the State of Palestine, a State party to the Rome Statute.⁵
 - (v) There is evidence indicating that the State of Israel has no intention of changing this policy.⁶
 - (vi) To permit this practice to continue indefinitely without challenge risks undermining the rule of law and bringing the international legal order into disrepute.
- 1.4 Whilst it is not claimed that the detention cases referred to in this submission are arbitrary in nature, it is submitted that they fall within the mandate of the UN Working Group on Arbitrary Detention by virtue of the fact that the practice is “inconsistent with the relevant international standards set forth ... in the relevant international legal instruments accepted by the States concerned”, as stated in the Working Group’s mandate.⁷ In this regard it should be noted that both Israel and Palestine are parties to the Fourth Geneva Convention and

Palestine is a party to the Rome Statute. It should also be noted that the UN Security Council has confirmed by resolution the full application of the Fourth Geneva Convention to the West Bank, East Jerusalem and the Gaza Strip (Occupied Palestinian Territory) (OPT) on at least 20 occasions.⁸

2. Background and evidence

- 2.1 Following six days of armed conflict in June 1967, the State of Israel occupied the OPT.⁹ In accordance with the law of belligerent occupation, Israel established military courts in the OPT which remain in operation in the West Bank to this day.¹⁰ According to UN and non-governmental organisation estimates, during the past 48 years at least 760,000 Palestinian men, women and children have been detained by the Israeli military, and in many cases, prosecuted in the military courts.¹¹
- 2.2 Whilst publicly available statistics on the number of Palestinians held in Israeli detention are incomplete, according to IPS data released for September 2015, there were 5,244 Palestinians from the OPT, including 171 minors, held as “security prisoners” in IPS facilities. According to the same source, a further 1,798 Palestinians from the OPT, including 27 minors, were being held as “criminal prisoners” who are also prosecuted in the military courts for offences such as traffic infringements in Area C and attempting to enter Israel without a permit, usually in an attempt to find employment. Accordingly, a total of 7,042 Palestinians from the OPT were being held in IPS facilities at the end of September 2015, of which 85 per cent (5,986) were unlawfully detained inside Israel.
- 2.3 Based on the data that is available it is estimated that currently each year around 7,000 to 8,000 Palestinians from the OPT will spend some time in an IPS prison facility located inside Israel, bearing in mind that this estimate includes those imprisoned for several weeks as well as those serving life sentences.
- 2.4 Under the Fourth Geneva Convention an occupying power is permitted to establish military courts to try persons accused of endangering its security.¹² However, these courts, and all detention facilities used to incarcerate those prosecuted, must be located within the occupied territory.¹³ The transfer and detention of protected persons out of occupied territory is expressly prohibited and constitutes a “grave breach” of the Convention and is defined as a war crime for the purposes of the Rome Statute.¹⁴
- 2.5 According to monthly data published by the IPS, the overwhelming majority of Palestinian detainees from the OPT imprisoned by Israel are held in facilities located inside Israel. It should be noted that only one prison facility operated by the IPS, Ofer prison, is located inside the OPT and which has a standard maximum operating capacity of around 1,000 prisoners.

Palestinians held as “security prisoners” in IPS facilities (2013-2015). Source: IPS

2013	Adults	Children	Transferred and detained in Israel¹⁵		Total
Jan	4,374	219	3,950	86%	4,593
Feb	4,478	235	4,092	87%	4,713
Mar	4,528	236	4,116	86%	4,764
Apr	4,512	236	4,124	87%	4,748
May	4,594	223	4,169	87%	4,817
Jun	4,634	193	4,147	86%	4,827
Jul	4,633	195	4,218	87%	4,828
Aug	4,582	180	4,149	87%	4,762
Sep	4,627	179	4,193	87%	4,806
Oct	4,594	159	4,159	88%	4,753
Nov	4,612	173	4,184	87%	4,785
Dec	4,614	154	4,135	87%	4,768
2014					
Jan	4,698	183	4,258	87%	4,881
Feb	4,751	210	4,331	87%	4,961
Mar	4,797	202	4,422	88%	4,999
Apr	4,825	196	4,443	88%	5,021
May	4,838	215	4,418	87%	5,053
Jun	5,116	202	4,652	87%	5,318
Jul	5,191	192	4,764	89%	5,383
Aug	5,304	201	4,868	88%	5,505
Sep	5,257	182	4,815	89%	5,439
Oct	5,284	163	4,833	89%	5,447
Nov	5,371	156	4,909	89%	5,527
Dec	5,377	151	4,910	89%	5,528
2015					
Jan	5,386	163	4,915	89%	5,549
Feb	5,427	182	5,014	89%	5,609
Mar	5,409	182	4,981	89%	5,591
Apr	5,390	164	4,978	90%	5,554
May	5,353	163	4,921	89%	5,516
Jun	5,282	160	4,857	89%	5,442
Jul	5,216	153	4,683	87%	5,369
Aug	5,217	156	4,554	85%	5,373
Sep	5,073	171	4,434	85%	5,244
Average				88%	

- 2.6 It should be noted that the data released by the IPS only represents the number of Palestinian detainees held in its facilities on a single day of each month when the detainees are counted for the official statistics. Accordingly, detainees who enter the system immediately after the monthly head-count, and are released before the next count, approximately 30 days later, are not recorded in the IPS statistics.¹⁶ Accordingly, the data in the above table understates the number of protected persons unlawfully transferred and detained inside Israel each month and does not include “criminal” detainees. It should also be noted that the above figures are not cumulative.
- 2.7 The monthly data provided by the IPS relating to Palestinian detainees held inside Israel is included in this submission in both [English](#) and [Hebrew](#) from January 2014 to September 2015 inclusive.¹⁷ This data provides, *inter alia*, a breakdown of the number of Palestinian prisoners from the OPT held inside Israel.
- 2.8 Annexed to this submission are the testimonies of 11 minors (protected persons) who were transferred and detained inside Israel in violation of the Fourth Geneva Convention and the Rome Statute in 2015. (**Annexure A**)

3. Domestic remedy

- 3.1 The policy of the State of Israel of transferring protected persons from the OPT to prisons located inside Israel has been challenged on two occasions in the Israeli Supreme Court, sitting as the High Court of Justice (the High Court). The policy was first challenged in the High Court in the Sejadia Case (1988) and more recently in the Yesh Din Case (2010) (**Annexure B**). In both cases the High Court rejected the petitions based on the primacy of Israeli domestic law over provisions of international law where the two are in direct conflict. However, this position is not maintainable under international law by virtue of Article 27 of the Vienna Convention on the Law of Treaties, reflecting customary international law (Lagrand Case).
- 3.2 It is submitted that the Sejadia and Yesh Din cases establish the following:
- (i) The practice of transferring and detaining protected persons from the OPT inside Israel began in or about June 1967 (Yesh Din case, paragraph 2);
 - (ii) This practice forms part of the policy of the State of Israel evidenced by the fact that responsibility for the detention has been entrusted to the IPS, a governmental instrumentality;
 - (iii) The grounds upon which the Court dismissed the petitions has no legal merit under international law; and
 - (iv) There are no reasonable prospects of a domestic remedy.
- 3.3 In July 2012, the UK Foreign and Commonwealth Office (FCO) confirmed in writing that the UK’s position is that “Israel’s policy of detaining Palestinians within Israel is contrary to

Article 76 of the Fourth Geneva Convention and that domestic law cannot be used as a justification for violations of international law”.¹⁸ ([Annexure C](#))

- 3.4 In February 2013, UNICEF published the report – Children in Israeli Military Detention.¹⁹ After reviewing over 400 affidavits collected from Palestinian children held in Israeli military detention the UN agency concluded that “the ill-treatment of children who come in contact with the military detention system appears to be widespread, systematic and institutionalized throughout the process”. UNICEF made 38 recommendations including a recommendation that: “In accordance with international law, all Palestinian children detained in the Israeli military detention system shall be held in facilities located in the occupied Palestinian territory.”
- 3.5 Following the release of the UNICEF Report, the Israeli Ministry of Foreign Affairs stated that it would “study the conclusions and work to implement them through on-going cooperation with UNICEF”.²⁰
- 3.6 On 15 February 2015, UNICEF issued an update to review progress made in implementing its recommendations during the intervening two years since the publication of its report.²¹ In 2015, UNICEF concluded, *inter alia*, that “reports of alleged ill-treatment of children during arrest, transfer, interrogation and detention have not significantly decreased in 2013 or 2014”.²² In relation to the recommendation that Palestinian children from the West Bank should be held in facilities located in the OPT, UNICEF’s 2015 update reports as follows:

“Two out of the three military detention facilities run by the IPS where Palestinian children are held in detention are located inside Israel (Hasharon and Megiddo). The transfer of Palestinian detainees outside the occupied Palestinian territory constitutes a breach of Article 49 of the Fourth Geneva Convention, prohibiting the transfer of protected persons from occupied territory, and Article 76 of the same Convention, providing that protected persons convicted of offenses shall be detained and serve their sentences within the occupied territory. This matter has been subject to judicial review by Israel’s High Court of Justice on two occasions [...]. In these two cases, the High Court of Justice of Israel (in 1988 and 2010 respectively) ruled that this practice is in line with Israeli law. ***The military prosecutor stated that no further action will be taken***” (emphasis added).

- 3.7 The statement by the Chief Military Prosecutor that “no further action will be taken” in relation to the recommendation that children should not be unlawfully transferred or detained outside the OPT can be interpreted as an admission by an authorised officer that the State has no intention to change its policy and comply with its international legal obligations.

4. Concluding words

- 4.1 In circumstances where the uncontested evidence establishes that for more than 48 years the policy of the State of Israel has been to transfer and detain protected persons from the OPT inside Israel in violation of the Fourth Geneva Convention and the Rome Statute raises a strong case for action. Further, evidence provided by the IPS indicates that a war crime is occurring on a continuing basis and is currently directly affecting around 7,000 to 8,000 protected persons each year.
- 4.2 Due to the longevity, gravity and evidentiary strength of this case, as well as the lack of any domestic remedy, it is submitted that a failure to act poses a serious risk of bringing the international legal order and its institutions into disrepute. Further, without appropriate intervention there is no reason to expect this policy of unlawful transfer and detention to cease resulting in continued and indefinite impunity for what amounts to war crimes.

5. Recommendations

- 5.1 This submission recommends that following an investigation into the matters raised, if satisfied by the evidence and legal conclusions, the Working Group gives consideration to taking the following steps:
- (i) Issuing a communication confirming that the policy of successive Israeli Governments of forcibly transferring Palestinian prisoners from the occupied West Bank to prisons located inside Israel constitutes a grave breach and war crime under the Fourth Geneva Convention and Rome Statute respectively;
 - (ii) Identifying, in general terms, the categories of office holders most likely to be at risk of legal liability as a result of maintaining, implementing, aiding or abetting the policy of successive governments of forcibly transferring protected persons from occupied territory since June 1967; and
 - (iii) Such other and further steps as the Working Group deems appropriate.

End notes

¹ See article 8(2)(a)(vii) of the Rome Statute and articles 49, 76 and 147 of the Fourth Geneva Convention.

² Israeli Ministry of Public Security website. Available at: <http://is.gd/pxjrK9>

³ The Israeli Prison Service (IPS) is the the national detention authority of Israel responsible for detaining Palestinians from the West Bank and falls under the authority of the Israeli Ministry of Public Security. See <http://is.gd/pxjrK9>

⁴ HCJ 253/88 *Sejadia v. Minister of Defense*, IsrSC 43(3) 801; and HCJ 2690/09 *Yesh Din et al v. Commander of the Military Forces in the West Bank*, 28.3.2010 (**Annexure B**).

⁵ Israel and Palestine are both parties to the Fourth Geneva Convention and Palestine is a state party to the Rome Statute.

⁶ In February 2015, UNICEF published an update on the treatment of children held in Israeli military detention and referred to a statement made by Israel's Chief Military Prosecutor that indicates that the policy will not be changed. UNICEF, Bulletin No. 2, February 2015. Available at: <http://is.gd/ECGFkV>

⁷ Mandate of the UN Working Group on Arbitrary Detention. Available at: <http://is.gd/FA7FxX>

⁸ Relevant UN Security Council resolutions on the application of the Fourth Geneva Convention to the OPT are available here - <http://is.gd/wuqLn5> . See also International Court of Justice, Advisory Opinion on the legal consequences of the construction of a wall in the occupied Palestinian Territories, 2004.

⁹ As confirmed by the UN Security Council, *supra* note 8.

¹⁰ Immediately after the occupation of the West Bank, on 7 June 1967, the military commander published the *Proclamation Concerning the Takeover of Administration by the IDF (No. 1) (5727-1967)*, which established military rule in the area, and the *Proclamation Concerning Administrative and Judiciary Procedures (West Bank) (No 2) (5727-1967)*, in which the military commander declared himself the new sovereign of the area and assumed all authorities of "governance, legislation, appointment and administration with regards to the area or its residents." In addition to these proclamations, the military commander published another proclamation and several orders, which established criminal law and a system of military courts (*Proclamation Concerning the Entry into Force of the Order Concerning Security Provisions (West Bank Area) (No. 3) (5727-1967)*); *Order Concerning Security Provisions (5727-1967)*; and *Order Concerning the Establishment of Military Courts (West Bank Area) (No. 3) (5727-1967)*. These orders and proclamation were aggregated in 2009 in the *Order Concerning Security Provisions [consolidated version] (Judea and Samaria) (No. 1651) (5770-2009)*.

¹¹ UN Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, Professor John Dugard, "Human Rights Situation in Palestine and Other Occupied Arab Territories" (21 January 2008, A/HRC/7/17, paragraph 45; B'Tselem: Statistics on Palestinians in the custody of Israeli security forces since 2008; and estimate provided by Israel's chief military prosecutor in the West Bank on 26 February 2014 that approximately 8,000 Palestinians were detained in 2013.

¹² Fourth Geneva Convention, articles 64 and 66. The Fourth Geneva Convention was ratified by Israel in 1951. It is interesting to note that following the conclusion of the war in June 1967, Israeli authorities initially recognised the applicability of the Fourth Geneva Convention. Article 35 of *Proclamation Concerning the Entry into Force of the Order Concerning Security Provisions (West Bank Area) (No. 3) (5727-1967)* (Proclamation No. 3) stated that: "The military court [...] must apply the provisions of the [Fourth Geneva Convention] with respect to judicial procedures". The Proclamation went further and stated that "in case of conflict between this Order and the said Convention, the Convention 'was to] prevail". However, in October 1967, Proclamation No. 3 was amended by Military Order 144 to exclude the reference to the Convention's applicability.

¹³ Fourth Geneva Convention, articles 66 and 76.

¹⁴ Fourth Geneva Convention, article 147; Rome Statute - article 8(2)(a)(vii).

¹⁵ In 2014, the IPS prisons used to detain Palestinians from the West Bank were: Gilboa, Damon, Megiddo, Kishon (Al Jalame), Sha'ata, Ayalon, Hadarim, Nitzan & Magen, Ha'sharon, Jerusalem (Russian Compound), Ofer, Rimonim, Ohalei Keidar, Dekel, Eshel, Nafha, Ketziot, Ramon, Shikma, and Maasiyahu. Children (12-17) are mostly detained in Megiddo and Ofer prisons. Ofer prison is the only facility located in the West Bank in accordance with Article 76 of the Fourth Geneva Convention.

¹⁶ See Military Court Watch testimonies, A.J.L. (August 2015). A 13-year-old boy reports spending 2 nights in Ofer prison operated by the IPS, but there is no record of any minor under 14 being held in IPS facilities for that month. See: <http://is.gd/fgWlXR> and <http://is.gd/z7y8Gw>

¹⁷ Military Court Watch statistics. Available at: <http://is.gd/z7y8Gw>

¹⁸ FCO letter dated 20 July 2012. Available at: <http://is.gd/wRWrz4>

¹⁹ UNICEF, Children in Israeli Military Detention: Observations and Recommendations (February 2013). Available at: <http://is.gd/Yu59IN>

²⁰ UNICEF, Bulletin No. 1 (October 2013), page 1. Available at: <http://is.gd/1m8mqR>

²¹ UNICEF, Bulletin No. 2, February 2015. Available at: <http://is.gd/ECGFkV>

²² Ibid, page 2.