Buffalo Human Rights Law Review

Volume 27 Article 3

9-1-2021

Considering Rehabilitation of Minors Sentenced in Juvenile Military Courts - Initial Proposals and Thoughts for the Future

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CONSIDERING REHABILITATION OF MINORS SENTENCED IN JUVENILE MILITARY COURTS - INITIAL PROPOSALS AND THOUGHTS FOR THE FUTURE

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INTRODUCTION

In 2009, the 109th Amendment of the Security Provisions Order came into force and, for the first time in history, juvenile military courts were established in the West Bank (hereinafter "the Region").[1] After establishing this institution, the regional laws underwent two rounds of significant amendments that were central to minor rights in the region. The new laws introduced several new procedural rights, such as shorter arrest periods for minors, stricter rules regarding notifying suspects of their rights, requirements of visual or audio documentation of investigations, shorter limitation periods regarding indictments, establishing parental rights in juvenile proceedings, appointment of advocates by the court, and the option to receive a probation officer's report regarding punishment.

Despite the importance of the Juvenile Military Court to the security of the Region, and notwithstanding its impact on the lives of thousands

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1. The correct terminology with regards to this territory is currently legally disputed. Some term the Region "occupied territories." Some call it "liberated territories." The common term that is *prima facie* detached from a political context is "administrated territories." In this article, we will use the term "the Region" which is the accepted term in the Israeli law and jurisprudence as well as the Mandate's legislation. To the best of our knowledge, juvenile military courts do not exist anywhere else in the world, at least any like the ones in "West Bank." *See generally* Hilly Moodrick-Even Khen, *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*, 42 DENV. J. INT'L L. & POL'Y 119 (2014).

of minors that were processed in this court since its establishment, the academic research in this field is very limited. The rehabilitation of minors convicted of security offenses has not been extensively academically discussed.[2] Academic research regarding the military courts in the Region is quite scarce in general.[3] This article attempts to fill the academic void in the area of juvenile military courts in the Region and the effect on minors who were processed in these courts.[4] The article studies the normative basis for the Juvenile Military Court and examines whether or not this new institution complies with the standards required for juvenile adjudication, according to both Israeli and international law. The article offers a balance between security needs and the minor's interest, which is tailored to the Region. Based on the theoretical and empirical parts, the article offers a series of amendments that might benefit the juvenile offenders in the region, and, in doing so, ameliorate Israel's stance internationally.

The first part of this article describes the background to the founding of juvenile military courts, their role in establishing the rule of law in the Region, and how they are protecting the residents' safety and well-being. The second part presents a legal formula that balances between the rights of minors and the security of the Region. The third part offers solutions to a series of legal and practical problems in the

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2. A central part of the writing on this subject is done as part of reports conducted by non-governmental organizations. *See, e.g.*, NAAMA BAUMGARTEN-SHARON, NO MINOR MATTER: VIOLATION OF THE RIGHTS OF PALESTINIAN MINORS ARRESTED BY ISRAEL ON SUSPICION OF STONE-THROWING (Yael Stein ed., Zvo Shulman trans., 2011) [hereinafter B'Tselem Report]; Backyard Proceedings, YESH DIN (Jan. 1, 2007), https://www.yesh-din.org/en/backyard-proceedings.

3. *But see* Hedi Viterbo, *Rights as a Divide-and-Rule Mechanism: Lessons from the Case of Palestinians in Israeli Custody*, 43 L. & SOC. INQUIRY 764 (2018); ORNA BEN-NAFTALI ET AL., THE ABC OF THE OPT: A LEGAL LEXICON OF THE ISRAELI CONTROL OVER THE OCCUPIED PALESTINIAN TERRITORY (2018); Nathaniel Benisho, *Trends in Criminal Law in Judea, Samaria and Gaza Strip*, 18 T'ZAVA U'MISHPAT 293 (2005).

4. Khen's research touches mainly upon enforcing international human rights law in the juvenile military courts. *See* Khen, *supra* note 1. For international reports that criticize the police and the military courts policy, see U.N. Secretary-General, *Children and Armed Conflict*, U.N. Doc. A/70/836-S/2016/360 (Apr. 20, 2016); UNICEF, Children in Israeli Military Detention: Observations and Recommendations (Feb. 2015), https://www.unicef.org/sop/reports/children-israeli-military-detention [hereinafter UNICEF Report]; U.S. Dep't of State, Bureau of Democracy, H.R. and Lab., Country Reports on Human Rights Practices for 2016 - Israel and the Occupied Territories 4, 14-16 (2016); Stephen Sedley et. al., *Children in Military Custody* (June 2012), http://www.children-inmilitarycustody.org.uk/wp-content/
uploads/2012/03/Children_in_Military_Custody_Full_Report.pdf.

Region, focusing mainly on the rehabilitation of Juveniles. The final part concludes the article and discusses future developments.

I. JUVENILE MILITARY COURTS

A. Legal and Normative Framework

The juvenile military courts are part of the military court system in the Region and Gaza Strip.[5] These courts were established in 1967 by the Israeli military through its obligation and authority to ensure an effective administration in addition to the safety of these regions.[6] The basis for the founding of the military courts, including the juvenile military court, is the Fourth Geneva Convention on the Protection of Civilian Persons in Time of War. Article 64 states that the occupying power may apply laws and regulations in the occupied region to ensure the effective administration and the safety of the region and its inhabitants.[7] Article 66 of the Convention authorizes the occupying power to establish military courts under the condition that these courts are apolitical and sit within the occupied territory.[8]

Additionally, the Convention includes different instructions and principles regarding the nature of the trials including: no retroactive legislation,[9] proportionality between the crime and the punishment,[10] deduction of the arrest period from the punishment,[11] and stipulation that verdicts will be handed out only after a regular trial.[12] Another important rule is the obligation to present the charges to the litigant in a language he understands[13] while granting the option to appoint a

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5. The Military Administration in Gaza Strip ended following Israel's disengagement from Gaza in 2006. *See generally* HCJ 1611/05 Moa'tza Ezorit Hof Aza v. Ha'Knesset, Nevo Legal Database (June 9, 2005) (Isr.).

6. *See* Meir Shamgar, *Legal Concepts and Problems of the Israeli Military Government – The Initial Stage*, *in* MILITARY GOVERNMENT IN THE TERRITORIES ADMINISTERED BY ISRAEL, 1967–1980: THE LEGAL ASPECTS (Meir Shamgar ed., 1982); Yehuda Z. Blum, *The Missing Reversioner: Reflections on the Status of Judea and Samaria*, 3 ISR. L. REV. 279, 289-91 (1968).

7. Geneva Convention Relative to the Protection of Civilian Persons in Times of War, art. 64, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV]. *See also* DAVID KRETZMER, THE OCCUPATION OF JUSTICE: THE SUPREME COURT OF ISRAEL AND THE OCCUPIED TERRITORIES 46 (2002); EYAL BENVENISTI, THE INTERNATIONAL LAW OF OCCUPATION 100 (1993).

8. Geneva Convention IV, *supra* note 7, art. 66.

9. *Id.* art. 67.

10. *Id.*

11. *Id.* art. 69.

12. *Id.* art. 71.

13. *Id.*

defense counsel.[14] Those instructions reflect general international law principles regarding a fair trial. For a clearer picture, it must be stated that the authority of establishing military courts was also derived from part B of the 1945 Emergency Security Regulations legislated by the British Mandate, which was in force when the IDF forces entered the Region in 1967.[15] This authority permits the establishment of military courts by the sovereign in a particular territory. Nonetheless it is claimed that the legal source of authority to set up a military court in an occupied area is Article 66 of the Geneva Convention, as described above.

In short, Israel possesses control over the Region in the way of "belligerent occupation" arising from military control over the Region.[16] The legal significance of this ongoing status is that the Israeli law does not directly apply in the Region. The legal regime is determined mainly according to the rules of public international law.[17] This includes the rules governing the law in the Region enshrined in the Hague Convention (IV) Respecting the Laws and Customs of War on Land (1907) (hereinafter the "Hague Convention").[18]

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14. *Id.* art. 72.

15. The emergency defense regulations were legislated in England in 1937 according to part 6 of the King's Order-in-Council (defense) as part of the emergency laws with regards to the Second World War. *See* Joseph M. Wolf, *National Security v. The Rights of the Accused: The Israeli Experience,* 20 CALI. WEST INT'L L. J. 115, 129-133 (1989). One should not confuse the authority arising from the emergency defense regulations and the authority of a military commander to apprehend property arising from regulations 23(g) and 52 to the Hague Convention.

16. "Occupatio bellica." *See* Yoram Dinstein, *Judicial Review of Military Government Actions in the Occupied Territories*, 3 TEL AVIV U. L. REV. 330 (1973) (Isr.). For judgments by the Israeli Supreme Court adopting this position, see HCJ 3969/06 Chairman of Dir Samat Vill. Council v. Commander of IDF Forces in the West Bank, Nevo Legal Database (Oct. 22, 2009) (Isr.). *See also* HCJ 2056/04 Beit Suriq Vill. Council v. Gov't of Isr., Nevo Legal Database (Feb. 29, 2004) (Isr.); HCJ 393/82 Jam'iat Iscan Al-Ma'almoun v. Commander of IDF Forces in Judea & Samaria, Nevo Legal Database (Dec. 28, 1983) (Isr.).

17. For an overview of the topic, see HCJ 1661/05 Reg'l Council, Coast of Gaza v. Knesset of Isr. 59(2) IsrSC 481, ¶ 5 (2005) (Isr.); Meir Shamgar, *The Observance of International Law in the Administered Territories, in* THE PROGRESSION OF INTERNATIONAL LAW 429, 429-46 (Yoram Dinstein & Faria Domb eds., 2011); Yehuda Z. Blum, *The Missing Reversioner: Reflections on the Status of Judea and Samaria*, 50(3) ISR. L. R. 279, 293-95 (1968).

18. *See* JAMES BROWN SCOTT, TEXTS OF THE PEACE CONFERENCES AT THE HAGUE, 1899 AND 1907: WITH ENGLISH TRANSLATION AND APPENDIX OF RELATED DOCUMENTS 45 (James Brown Scott ed., 1908); Moshe Drori, *The Legal System in Judea and Samaria: A Review of the Previous Decade with a Glance at the Future*, 8 ISR. Y.B. HUM. RTS. 144, 152-53 (1978).

Another regulation appears in the Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War 1949. Its customary rules are part of the existing law in the Region.[19] Finally is the Additional Protocol to the Geneva Conventions of August 12, 1949 Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1977 (hereinafter "The First Protocol").[20]

Under the rules of international law—and more specifically the rules on belligerent occupation—the IDF (Israel Defense Force) being the sovereign in the Region, has full legislative, judicial, and executive powers in the Region, which includes the powers to enforce the laws and orders to protect public order and security.[21] The basic rule in belligerent occupation law is that this legal status is a temporary state which does not confer full sovereignty. Another basic rule is that unless there is a relevant impediment, the state controlling the territory must act to preserve public order and security in the territory while respecting existing laws.[22]

The obligation to preserve public order and security is also enshrined in Article 43 of the Hague Convention, which stipulates that it is the duty of the controlling state to ensure public order and security.[23] Regarding the preservation of original laws in the Region, Article 64 of the Fourth Geneva Convention stipulates that "[t]he 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."[24]

With the end of the Six Day War (1967) and the occupying of the military administration in the Region by the IDF, the proclamation regarding the enforcement of the Security Provisions Order was enacted

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19. *See* HCJ 3969/06 Head of Deir Samat Vill. Council v. Commander of IDF Forces in the West Bank, Nevo Legal Database (2009) (Isr.).

20. *See* HCJ 769/02 Pub. Comm. Against Torture in Isr. v. Gov't of Isr., Nevo Legal Database (2006) (Isr.).

21. *See* Yoram Dinstein, *Judicial Review of Military Government Actions in the Occupied Territories*, 3 TEL AVIV U. L. REV. 330 (1973) (Isr); *see also* YORAM DINSTEIN, THE INTERNATIONAL LAW OF BELLIGERENT OCCUPATION (2019).

22. As mentioned, the correct terminology with regards to this territory is currently legally disputed.

23. Hague Convention (IV) Respecting the Laws and Customs of War on Land art. 43, Oct. 18, 1907, 36 Stat. 2277.

24. Geneva Convention IV, *supra* note 7, art. 64. *See also* Shamgar, *supra* note 6, at 13 (author was the chief justice of the Israeli Supreme Court and the military's advocate general in 1967, thus responsible for all legislation in the region).

in compliance with the Convention.[25] The Security Provisions Order is the main penal code that regulates all branches of criminal law in the Region—orders of judgement, rules of evidence, types of offenses, and punishments.[26] According to this order, military courts are authorized to adjudicate all offenses committed within the Region, as well as offenses committed outside the Region—if offenses intended to interfere or have in fact interfered with the safety of the Region.[27] However, following the signing of the interim agreement between Israel and the Palestinian Authority (PA) in 1995, some of these judicial authorities were passed to the PA.[28] Article 86 of the Security Provisions Order enforces the rules of evidence, which are binding in criminal proceedings within Israeli courts.[29] The order of judgement is quite similar to Israeli courts' procedure, with the exception of arrest periods. Further, the substantive law has become equivalent with the enforcement of the 39th amendment of the 1977 Penal Code in the Region. [30]

Since the establishment of the Security Provisions Order in 1967, besides traffic offenses and different criminal offenses, the military courts have been mainly occupied with terrorism and other security offenses.[31] Generally, and as will be described below, the military courts in the Region are becoming more strongly based on Israeli law.[32] Principles from Israeli law have been implemented by the military courts, with the required changes. The Security Provisions Order has enforced major parts of the Israeli criminal law in the Region, and

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25. Security Provisions Order, 5770-2009, SH 3 (Judea & Samaria).

26. In addition to the Security Provisions Order, the Jordanian Legislation and Defense (Emergency) was in force when the IDF assumed the administration. *See* KRETZMER, *supra* note 7, at 32.

27. *See* Security Provisions Order, *supra* note 25, § 10.

28. *Israeli-Palestinian Interim Agreement on the West Bank and Gaza Strip* (Sept. 28, 1995), https://www.knesset.gov.il/process/docs/heskemb1.htm.

29. *See* Security Provisions Order, *supra* note 25, § 86.

30. *Id.* § 45 (authorities may appeal a judge's decision regarding an arrestee before a *judge* at the military court of appeals).

31. See *generally* Kathleen Cavanaugh, *The Israeli Military Court System in the West Bank and Gaza*, 12 J. CONFLICT & SEC. L. 197, 197-222 (2007); LISA HAJJAR, COURTING CONFLICT: THE ISRAELI MILITARY COURT SYSTEM IN THE WEST BANK AND GAZA (2005); TOBIAS KELLY, LAW, VIOLENCE AND SOVEREIGNTY AMONG WEST BANK PALESTINIANS (2006); EYAL BENVENISTI, LEGAL DUALISM: THE ABSORPTION OF THE OCCUPIED TERRITORIES INTO ISRAEL (2019). *See also* Dvir Saar & Ben Wahlhaus, *Preventive Detention for National Security Purposes in Israel*, 9 J. NAT'L SEC. L. & POL'Y 413 (2018); Masoud Zamani, Detention Without Trial: Historical Evolution, States' Authority and International Law (2015) (Ph.D. thesis, Univ. of Nottingham).

32. *See generally* Meir Shamgar, *The Observance of International Law in the Administered Territories*, 1 ISR. Y.B. HUM. RTS. 262 (1971).

military courts have enforced different principles from the Israeli criminal law through case law. These rulings, adopting principles from Israeli criminal law, have generally bettered the defendants and suspects in the Region.[33]

B. The Foundation of the Juvenile Military Courts

1. First Stage of the Reform Regarding Minors in the Region

On October 1, 2009, the 109th amendment of the Security Provisions Order (hereinafter "the amendment") came into force.[34] Leading to this amendment were numerous rulings of the military courts, which began separating between minor and adult trials in 2008. This amendment introduced several innovations that were intended to strengthen the rights of juveniles in the Region. The main innovation was the establishment of the Juvenile Military Court, where minors under the age of 16 are judged by military judges that are specially trained.[35] According to the amendment, the Juvenile Military Court has authority in cases of minors ages 16 and younger. However, the military court began enforcing the new provisions on all defendants under the age of 18 on its own initiative, even before the founding of the Juvenile Military Court.[36]

Before this extensive reform, the law regarding minors in the region was the Adjudication of Juvenile Delinquents Order, which included provisions regarding minors that are processed in military courts.[37] This order issued, for example, that minors be sorted into three categories, each with its own provisions. "Children," under the age of 12, will not be processed at all.[38] "Adolescents," ages 12 to 14, will be arrested separately

33. Several changes in the criminal law, to the benefit of suspects and defendants, were conducted by the military courts prior to the amendment of the Security Provisions Order: changing the required mental element for murder, the right to an attorney in investigations, and more. *See generally* Benisho, *supra* note 3.

34. Security Provisions Order, *supra* note 25, §§ 135-49.

35. *Id.* § 137 (stating that the Chief Justice of the Military Court of Appeals will appoint military court judges to serve in the Juvenile Military Courts for a specified time period).

36. Following these rulings, the minority age was officially statutorily changed to 18 in 2011.

37. Order Regarding Adjudication of Juvenile Delinquents, 5727-1967, SH 132 (1967) (Judea & Samaria).

38. Prior to the enactment of the Juvenile Adjudication Order, the Jordanian law was in force, according to which the minimum age for indictment was 9. Children ages 9-12 had criminal responsibility if proven that when committing

from adults and will not be incarcerated for longer than six months. "Young adults," ages 14 to 16, will not be incarcerated for longer than one year, other than regarding offenses with a maximum punishment of five years or more. Anyone older than the age of 16 is not considered a minor and can be tried as an adult.[39] Also, minors and adults could be tried and held in arrest and imprisonment together.[40]

In addition to the establishment of the Juvenile Military Court, other unique provisions were enforced. These provisions include: separating minor and adult trials;[41] transferring minor trials from regular military courts to the Juvenile Military Court;[42] separating minor trials from other trials conducted in military courts;[43] shortening the limitation period for indictment up to one year from the commission of offense, or two years in serious offenses;[44] allowing the court to appoint an advocate;[45] and holding minors in custody or imprisonment separate from adults.[46]

The amendment also established parental rights in juvenile proceedings. The amendment states that the court may order a parent to be present in the trial, that a parent may submit a request that the minor-defendant has a right to submit to court, and that the parents have a right to examine witnesses and give testimony in place of the minor or alongside him.[47]

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the offense, they had the capacity to understand that they are doing something prohibited. *See* PENAL CODE art. 94(2) (1960) (Jordan).

39. Case (Military Court of Appeals Judea & Samaria) 128/02 Codassi v. Military Prosecution, Nevo Legal Database (Dec. 23, 2002) (Isr.).

40. *See* LIMOR ETZIYONI, YOUTH IN CRIMINAL LAW 350-52 (2019) (discussing the idea that previously, the parents could be fined or obligated to pay bail and commit to avoid future offenses. In the event that the fine was not paid, the minor could be incarcerated).

41. Security Provisions Order, *supra* note 25, § 139.

42. *Id.* § 140.

43. *Id.* § 143.

44. *Id.* § 144. *See also* Case (Military Court of Appeals Judea & Samaria) 4333-09 Military Prosecution v. Joseph H'alil Abed Alhamid Tartir, Nevo Legal Databse (Oct. 31, 2001) (stating that the failure of the prosecution to receive authority to indict the defendant for an offense committed over two years ago, when he was a minor, is a flaw in its action as in administrative authority).

45. Security Provisions Order, *supra* note 25, § 145. The Order also states that if the minor doesn't have an attorney, the Juvenile Military Court will help with the investigation of the witnesses.

46. *Id.* § 148.

47. *Id.* § 147. Another important provision, which we will expand upon below, is the ability of the court to request a report regarding the minor and possibilities for his rehabilitation, from the relevant authorities in the Civil Administration.

2. Second Stage of the Reform Regarding Minors in the Region

Although this was not preceded by early planning, the second stage of the reform regarding minors in the Region came to force in 2011. The central innovation of these amendments officially changed the minority age to eighteen years old.[48] In addition, the 2011 amendment allowed for the shortening of the limitation period for indictment of a minor to one year in most offenses. The amendment also issued an obligation to notify the parents or an immediate family member of the minor upon his investigation or arrest.[49] The amendment requires an investigator to notify the minor suspect of his right to an attorney, in a language that he understands and that fits the circumstances of his age and maturity.[50]

Another important provision that was enacted is the duty of an audio or video documentation of the investigation, in the Arabic language.[51] These innovative regulations, especially with regards to the investigation of minors, have greatly improved the rights of minors in the Region. The Military Court of Appeals addressed this issue in *Phadi Hamed*. In this case, the Court ruled on the Military Prosecutor's appeal regarding the sentence of three minor defendants convicted of stone-throwing, who were 15 when they committed the offense. The Military Court of Appeals addressed the concerns associated with investigating minors:

> It is well known that following the rulings of military courts in the Region, regarding the need to act in accordance with the essence of the Israeli Juvenile Act (since *Nashami Abu Rahma*), a worthy practice has evolved, according to which police departments adjust investigations of minors to comply with the Israeli standards. This practice was needed in the Region, as it safeguards the rights of the investigated minors.[52]

48. *See id.*

49. *Id.* § 136(a)(c)(2).

50. As will be discussed below, in several decisions, the military courts have ruled the infringement of the right to an attorney as ground for release and have released minors in a number of cases because of the lack of representation due to the closing of barriers. *See*, *e.g.*, Case (Military Court of Appeals Judea & Samaria) AA 3664/09 Military Prosecutor v. Hemza Navil Mahmed Abu Aid, Nevo Legal Database (Dec. 20, 2009) (Isr.).

51. Security Provisions Order, *supra* note 25, § 136(a)(c)(2).

52. Case (Military Court of Appeals Judea & Samaria) AA 1046/12 Military Prosecution v. Hamed, Nevo Legal Database (2013) (Isr.).

3. Third Stage of the Reform Regarding Minors in the Region

The third stage of the reform regarding minors in the Region was in 2014.[53] This reform shortened the limitation period between an arrest and an appearance of the suspect before a judge. The new regulations stated that an "adolescent" can be held up to 24 hours and a "young adult" for up to 48 hours.[54] In addition, the limitation period for an interrogative arrest was shortened,[55] as well as the period of remand for the duration of the trial.[56]

After the three central amendments, additional provisions regarding minors in the Region were added to the Security Provisions Order. In 2016, article 168(d) was added. Article 168(d) states minimum punishments or mandatory incarceration do not apply to defendants who were minors when committing the offense.[57] The amendment also states the Court shall not fine the parents or guardians of a minor before they are given the opportunity to voice their arguments.[58]

What caused such major changes in the minor's laws? This reform was completed in three central changes that coincided with the evolution of Israeli law. In 1991, Israel joined the Convention on the Rights of the Child (UNCRC).[59] Later, in 1997, the Minister of Justice appointed a public committee designed to reassess the Israeli laws regarding the treatment of children by the population and state authorities to ensure Israel's compliance with the UNCRC.[60]

The amendment addresses investigations and criminal proceedings regarding minors. The amendment prohibits the investigation of a minor without his parent's knowledge[61] and without the presence of a parent or another family member.[62] Restrictions regarding night investigations

53. Often due to petitions to the Supreme Court of social organizations.

54. Previously, Military Orders obligated the bringing of suspects, including minors, in front of a judge in 8 days. Security Provisions Order, *supra* note 25, § 31(b).

55. *Id.* § 37(b).

56. *Id.* § 44(c).

57. *Id.* § 168(d).

58. *Id.* § 174.

59. U.N. Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 (1989) [hereinafter CRC].

60. The Committee Regarding the Assessment of Basic Principles of Children and Law and their Adaptation to Legislation, https://www.justice.gov.il/Units/YeutzVehakika/NosimMishpatim/HavaadLeZhuyot/Pages/DochKliali.aspx (2003).

61. Juvenile Act, § 9F (Isr.).

62. *Id.* § 9H.

were also applied.[63] An obligation to notify the minor's advocate or the Public Defense prior to the investigation of the minor was enforced.[64] The guiding principle of the amendment is stated in clause 10A, which states that when deciding upon the arrest of a minor, their age and the possible effects of the arrest on their physical and mental wellbeing and development shall be taken into consideration.[65] In other words, these amendments widened the gap between the Israeli law and that of the Region, and probably encouraged the establishment of juvenile military courts and the improvement of minor's rights in the Region, which came into force shortly afterwards.

In addition to the effect of the Juvenile Act on the establishment of juvenile military courts, the reform in the Regional laws is also linked to the work of military courts, which have called for the rectification of the laws regarding minors in the Region for many years.[66]

Before formal reform in the Region, military courts bridged the gap between Israeli law and Regional law in the adjudication of minors and the protection of their rights. Military courts, on their own initiative, separated minor trials from adult trials and enforced the Israeli minority age (18) in the Region.[67] Military courts prioritized trials of arrested minors and granted the minor's family legal standing in the proceedings.[68] The military courts found night investigations of a minor, which is prohibited by the Juvenile Act in Israel, may lead to the release of a minor defendant in custody even though these restrictions were not

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63. *Id.* §§ 9D, 9H (discussing the investigation of children under the age of 14 is prohibited after 8 P.M, and for children above the age of 14 – after 10 P.M.).

64. *Id.* § 9I.

65. Basic Law: the Knesset, 5769-2008, SH 221, 254 (Isr.).

66. As will be discussed below, this is not a call for applying the Israeli law in the Region, rather one for enhancing the rights of minors in the standards of the Convention on the Rights of the Child as they are applied in the Israeli law. See criticism regarding the application of standards from the Israeli law in the Region below.

67. This separation has caused greater consideration of rehabilitation matters and a shorter time span of cases and has accentuated the need for formal legislation regarding the separation of minors and adults in military courts. For an example of a ruling that recognized, prior to the enactment of amendment 109, the need to consider the defendant's age when sentencing, see LJA (Military Court of Appeals Judea & Samaria) 2891/06 Military Prosecutor v. Yusef Ahmed Abu Hashem, Nevo Legal Database (Aug. 13, 2006) (Isr.) (finding that when the defendant is a minor with no prior convictions and that has not caused bodily or property harm, harsh punishment should be avoided.).

68. *See*, *e.g.*, LJA (Military Court of Appeals Judea & Samaria) 1517/09 Military Prosecution v. Makluf, Nevo Legal Database (Mar. 15, 2009) (Isr.).

yet formally enforced in the Region.[69] In addition, military courts ruled that minors must be investigated by Juvenile Investigators, prior to the formal enactment of the provision.[70] Regional laws were amended following the decisions and influence of military courts.

In conclusion, the central reform regarding minor procedural rights in the Region occurred in three stages (although it probably did not precede special planning). In 2009, the Juvenile Military Court was established alongside the enactment of procedural provisions. This stage mainly regarded the process of indictment and adjudication, the separation of minors and adults in custody, the establishment of parental rights in proceedings, the ability to appoint an advocate, and the option to receive a report regarding the minor.[71] In 2011, the minority age was set to 18, thus matching the Israeli minority age; provisions on the limitation period of indictment were enforced, as well as regulations regarding the investigation of minors. In the third stage, different rights were applied, mainly concerning shortening arrest periods of minors and the overall attempt to bridge the gap between the Israeli law in this field and that of the Region.[72]

However, albeit this extensive reform, the gap between the laws remains substantial. As will be discussed below, the main struggle of the Juvenile Military Court is its inability to help with the minor's rehabilitation.[73] In contrast to the Israeli juvenile courts, the Juvenile Judge in the Region is faced with narrow options of treatment and rehabilitation. With regards to rehabilitative considerations, there is no obligation to receive a report from a probation officer prior to sentencing.[74] Moreover—unlike the Israeli law that grants the Juvenile Court various means of treatment and punishment, such as detention in locked or unlocked institutions, the minor defendant's commitment to

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69. *See, e.g.*, Case (Military Court of Appeals Judea & Samaria) AA 2763/09 Aalam v. Military Prosecutor, Nevo Legal Database (Aug. 16, 2009) (Isr.).

70. *Id*.

71. *See, e.g.*, Case (Military Court of Appeals Judea & Samaria) 4704/10 Military Prosecutor v. P.A, unpublished (Isr.) (deciding the defendant, a minor convicted of throwing a Molotov cocktail, was sent for a report.).

72. *See* HCJ 3368/10 Ministry of Palestinian Inmates v. Minister of Defense (2013) (Isr.); HCJ 405710 Ass'n for Civil Rights in Israel v. Chief of IDF (2013) (Isr.) (cases regarding the shortening of arrest periods in the Security Provisions).

73. For example, regarding investigation, the minor does not have the right to have a parent present. Arrest periods of minors in the Region are different than in Israel. The restrictions on investigation of minors in the Region are a result of judicial legislation. Rather, Israel is required to apply the international law standards. The difference stems from security matters and the characteristics of the offenses committed in the Region.

74. Juvenile Act, *supra* note 61, § 22.

avoid future offenses, a regular follow-up on the minor by a probation officer—the non-incarceration options in the Region are scarce to non-existent.

II. JUVENILE MILITARY COURTS – BALANCING THE MINOR'S BEST INTEREST AND THE SECURITY OF THE REGION

In the previous chapter we described the reform of minor rights in the Region. However, despite this reform, a gap remains between the regulations regarding minors processed in the Israeli courts and those processed in the military courts. In addition, we discussed the lack of treatment and rehabilitation options with juvenile military courts. The non-imprisonment punishment alternatives in juvenile military courts are narrow. The normative analysis of the different issues (to be discussed below) should be conducted through a legal equation that balances the minor's best interest on the one hand, and the security of the Region on the other. In this chapter, we offer a theoretical framework for the proper normative role of the Juvenile Military Court.

As discussed above, the normative framework for military courts is based in the Fourth Geneva Convention, in accordance with the Law of Military Occupation and international humanitarian law. In a nutshell, the purpose of these rules and conventions is to secure the safety of the region while ensuring a fair trial to its inhabitants, whom are considered a "protected population" under a military rule.[75] Military courts, including the Juvenile Military Court, function under articles 64 and 66 of the Fourth Geneva Convention.[76] The purpose of a military court is to ensure public order and safety in the Region.[77] However, the situation in the Region is unprecedented, probably in the western world entirely, because military rule, in many parts of the Region, has been in effect for six decades. In light of this reality, military courts are faced with complicated challenges because the population's needs vary, and the

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75. Yael Ronen, *Blind In Their Own Cause: The Military Courts In The West Bank*, 4(2) CAMBRIDGE J. OF INT'L & COMP. L. 739, 743 (2014); Sharon Weill, *The Judicial Arm of Occupation: The Israeli Military Courts in the Occupied Territories*: 89 INT'L REV. OF THE RED CROSS 395, 396 (2007); Sharon Weill, *The Role of National Courts in Applying International Humanitarian Law*, 96 INT'L REV. OF THE RED CROSS 1143, 1147-48 (2014).

76. Geneva Convention IV, *supra* note 7, art. 64, 66. *See also* Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflict (Protocol 1), June 8, 1977, 1125 U.N.T.S. 3.

77. Geneva Convention IV, *supra* note 7, art. 66. *See also* OSCAR M. UHLER ET AL., COMMENTARY: GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 335-37 (Jean S. Pictet ed., 1958).

state of security undergoes significant changes. In the words of the High Court in *Yesh Din*:

> The Military rule of Israel in the Region has unique characteristics, the most significant one being the term of the occupancy, which requires adjusting the law to the reality, which obligates Israel to ensure a normal life for this period of time that is legally temporary, but is certainly long-term. Thus, traditional occupation law requires an adjustment between the term of occupancy and the enabling of a normal life and ensuring the economic relationship between the two authorities – the occupier and the occupied.[78]

To the best of our knowledge, the Juvenile Military Court is unique. The Juvenile Military Court is an attempted solution for the difficulties that the Region faces and based on the ongoing occupancy. Thus, we must assess its future function within an inclusive normative framework. Over the years, especially since 2009 and the establishment of the Juvenile Military Court, significant changes were made regarding juvenile adjudication, both in Israeli law and in international human rights law. The Convention on the Rights of the Child (1989), ratified by Israel, defines the "Child's Best Interest" as the leading principle in all governing authorities' decisions regarding minors.[79]

There is a wide consensus that the current law regarding juvenile adjudication, and more so post the Reform, is much better than it was prior to 1967[80] (for example, the criminal liability age under Jordanian law was nine).[81] However, it is still unclear how best to shape the law to fit the constant changes in the Region – considering developments in child rights on the one hand and changes in the security status, mainly

78. HCJ 2164/09 Voluntary Org. for Hum. Rhts v. Chief of IDF, ¶ 10, Nevo Legal Database (Dec. 26, 2011) (Isr.).

79. CRC, *supra* note 59, art. 3. In addition, the UN adopted the "Beijing Rules" in 1985, which serve as a completion to the Convention. *See* U.N. Standard Minimum Rules for the Administration of Juvenile Justice, G.A. Res. 40/33 (Nov. 29, 1985) [hereinafter Beijing Rules].

80. According to International Law, the occupier may alter and ameliorate the existing legislation, in order to ensure an effective administration, and on the condition that it is in the inhabitants' best interest. *See* Hague Convention, *supra* note 23, art. 43; Geneva Convention IV, *supra* note 7, art. 64; HCJ 337/71, Christian Soc'y for the Holy Places v. Minister of Defense, 26(1) PD 574 (1971) (Isr.); Smadar Ben Natan, *The Application of Israeli Law in the Military Courts of the Occupied Palestinian Territories*, 43 THEORY & CRITICISM 45, 45-74 (2017).

81. *See* Marco Sassòli, *Legislation and Maintenance of Public Order and Civil Life by Occupying Powers*, 16(4) EUR. J. INT'L L. 661, 675-76 (2005).

terror attacks on Israeli civilians, on the other.[82] Looking forward, should the Juvenile Military Court draw its inspiration from Israeli law, or rather from international human rights law?[83] Over the years, the Juvenile Military Court has been based on Israeli law, which has become more substantial in the Region, both by enforcing Israeli laws formally in the Region and through judicial legislation.[84]

Those in favor of Israeli law as a source of inspiration for juvenile adjudication argue that the Israeli Criminal Law, in relation to minors, is modern, realistic, and can ensure the rights of suspects and defendants. They also argue that it is important for the same rules that apply to Israeli citizens apply to the inhabitants of the Region as well.[85] This view stems from the understanding that the international human rights law is declarative in nature and does not offer the procedural and substantive details.[86]

Others argue that this view is counter to international law and is somewhat an annexation that might not benefit the protected population. Moreover, they claim, adapting the Israeli law into the rules of the Region might give the Military Prosecution, which is well-versed in the Israeli law, an advantage over the Palestinian defendants and advocates.[87] They conceive that the international human rights law must be the main legal source[88] and be adapted into the Regional laws[89] to ensure the rights of the population.

Israel's official stance is that the international humanitarian law does not apply in the Region, as long as it has not become part of the

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82. Matan Shahak, *Data Regarding Fallen Soldiers and Victims of Terrorism in the Years 1947-2017*, THE KNESSET'S CENTRE FOR RESEARCH (May 23, 2017).

83. *See, e.g.*, Yael Ronen, *The Effect of Basic Law: Human Dignity and Liberty in the West Bank*, 7 SHA'AREI MISHPAT 149 (2014); William A. Schabas, *Lex Specialis? Belt & Suspenders? The parallel operation of– Human Rights Law and the Law of Armed Conflict, and the Conundrum of Jus Ad Bellum*, 40. ISR. L. REV. 592 (2007).

84. *Contra* Ronen, *supra* note 75; Ariel Zemach, *Taking War Seriously: Applying the Law of War to Hostilities Within an Occupied Territory*, 38. GEO. WASH. INT'L L. REV. 645, 645-49 (2006).

85. DINSTEIN, *supra* note 21, at 121. Dinstein argues that applying similar legislation in occupied territories can distinguish sincere concern from insincere concern for the inhabitants of the occupied land.

86. *See* Khen, *supra* note 1, at 127.

87. *See* Ronen, *supra* note 75, at 756-58 (discussing Dinstein's proposed test cannot stand on its own due to the difference in social and economic circumstances, as well as needs, of the two regions).

88. *Id.*

89. Khen, *supra* note 1, at 149.

customary international humanitarian law.[90] However, juvenile military courts have sometimes referred to the Convention on the Rights of the Child, both indirectly by referencing the Israeli Juvenile Act and directly by referencing the Convention.[91]

This is an argument regarding political and security matters, as well as legal matters.[92] For our purposes, we shall assume that in any discussion regarding minors' rights in the Region we must take a normative stance that can balance the child's best interests and security considerations. To balance these two, there must be a formula that will be applied in any case presented in Military Juvenile Court. The belief is that a formula such as this would be in accordance with both the principles of Israeli law and international law, making it suitable for juvenile military courts regarding rehabilitation for minors.[93]

In most criminal justice systems, the child's best interests are usually interpreted to consist of three principles: reduced liability, proportionality, and rehabilitation.[94] These principles are balanced based on the severity of the offense.[95] The reduced liability principle considers the difference between a minors cognitive development and an adults cognitive development.[96] The principle of proportionality considers the effects of punishment on the minor's cognitive and social development.[97] Lastly, the rehabilitation principle considers the Public's interest in

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90. Orna Ben-Naftali & Yuval Shany, *Living in denial: the application of human rights in the occupied territories,* 37 ISR. L. REV. 17, 40 (2003).

91. *See id.* at 93-96.

92. *See, e.g.,* FEDERICO ANDREU-GUZMAN, MILITARY JURISDICTION AND INTERNATIONAL LAW: MILITARY COURTS AND GROSS HUMAN RIGHTS VIOLATIONS 10, 66 (2004).

93. *See generally* DINSTEIN, *supra* note 21.

94. *See* Beijing Rules, *supra* note 79, at 5; Khen, *supra* note 1, at 121-22; Josine Junger-Tas, *Trends in International Juvenile Justice: What Conclusions Can Be Drawn?, in* INTERNATIONAL HANDBOOK OF JUVENILE JUSTICE 510 (Josine Junger-Tas & Scott H. Decker eds., 2006).

95. *See* Beijing Rules, *supra* note 79, at 5 ("The juvenile system shall emphasize the well-being of the juvenile and shall always ensure that any reaction to juvenile offenders shall always be in proportion to the circumstances of both offenders and the offence."); *id.* at 17 (stating that the punishment must be proportional to the circumstances of the offense, the circumstances of the offender and his needs, and the public's needs); Khen, *supra* note 1, at 122-24.

96. *See, e.g.*, United Nations Rules for the Protection of Juveniles Deprived of their Liberty, G.A. Res. 45/113, ¶¶ 54, 79, 80 (Dec. 14, 1990).

97. *See* Directive 2016/800, of the European Parliament and of the Council on Procedural Safeguards for Children who are Suspects or Accused Persons in Criminal Proceedings, 2006 O.J. (L 132) 45.

deterring future offenses, and the integration of minors into society.[98] Military courts are designed to maintain public order based on humanitarian law. [99] However, one can argue, that in case of a long and ongoing occupancy, the public interest also consists of the rehabilitation of the offender and the prevention of recidivism. One can even argue that granting the opportunity of rehabilitation, under the appropriate circumstances, is the sovereign's obligation to the protected population.[100]

If we were to base the Regional regulations regarding minors based on the Israeli law, we would find that the Juvenile Act obligates the consideration of rehabilitation, treatment, and integration into society. The Juvenile Act lists numerous punishment and treatment options.[101] For instance, the Act states a minor should not be arrested if the purpose of the arrest can be fulfilled in a way less invasive of his liberty.[102] As mentioned, the formula that is intended to balance the Child's Best Interest and security considerations is applicable, with the necessary changes, in both Israeli and international law. As for Israeli law, Israeli courts are constantly faced with the need to balance the Child's Best Interest with the Public's safety, especially when handling security offenses.[103] In addition, the rehabilitation of minors is prioritized,[104] alongside the need for a punishment proportionate to the severity of the offense. The international human rights law also balances between the need for special treatment of minors and the severity of the offense.[105]

The Regional law falls short of the standards mentioned above. Military courts have always considered the minor's age and personal circumstances. The Juvenile Military Court considers the minor's best interests; the infringement of his rights and a punishment suitable to his age and circumstances. Nevertheless, the proportionality and rehabilitation principles are not applied to the same standard. In addition to the lack of a rehabilitation and treatment assessment, the

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98. *See* Junger-Tas, *supra* note 94, at 526; HJC 1463/09 The State of Israel v. Minor, Nevo Legal Database (June 15, 2009) (Isr.); ETZIYONI, *supra* note 40, at 157-63.

99. *See generally* Naftali & Shany, *supra* note 90.

100. HCJ 2164/09, *supra* note 77.

101. Juvenile Act, *supra* note 61, § 1A(a).

102. *Id.* § 10A.

103. *See, e.g.*, Case (Military Court of Appeals Judea & Samaria) 5957/15 Minor v. State of Israel, Nevo Legal Database (July 21, 2016) (Isr.); Case (Military Court of Appeals Judea & Samaria) 827/14 Minor v. State of Israel, Nevo Legal Database (Sept. 21, 2014) (Isr.).

104. Beijing Rules, *supra* note 79, at 11 (obligating the consideration of an alternative process to the criminal proceedings in appropriate cases); *id.* at 18. (suggesting alternatives to arrest and imprisonment).

105. *Id.* at 6.

Region lacks effective non-imprisonment options like the ones in Israel, such as secure confinements and supervision orders.[106]

Moreover, the circumstances of the Region make it nearly impossible for juvenile military courts to oversee the terms of an alternative to an imprisonment sentence.[107] Non-imprisonment punishment options are scarce. Other than financial obligations, there are no actual provisions that enable treatment and alternatives to incarceration. There are no rehabilitation mechanisms, such as a probation department, secure confinements, or other secure institutions like shelters.

The courts are making efforts to place minors in treatment and rehabilitation programs. Yet, so long as the Region lacks the procedural means for assessment, treatment, rehabilitation, and the appropriate statutory corrections, these efforts will be ineffective. In a sense, the current legal status in the Region is not in compliance with Israeli[108] or international law.[109] Thus, Regional laws need extensive corrections. In the following chapter, we make some suggestions that could rectify some of the mentioned shortcomings.

III. REHABILITATING MINORS SENTENCED IN JUVENILE MILITARY COURTS – AN OUTLINE

In the previous chapter we encountered the fact that no authority or formal procedure exists to ensure the rehabilitation and treatment of minors in the Region. In this chapter, we discuss the factors contributing to this gap as well as the objections to the rehabilitation of minors convicted of security offenses. For example, when an ideological crime is committed and encouraged by the minor's surroundings, the chances of a successful rehabilitation are slim. Perhaps, in some cases, a distinction between ideological crimes and "regular" offenses should be made. Generally, minors processed in juvenile military courts can be divided

106. These institutions serve Israeli citizens exclusively. No such institutions have been established for Palestinian youth. There are welfare establishments of the PA, but they do not usually cooperate with the decisions of the military courts.

107. *See, e.g.*, Case (Military Court of Appeals Judea & Samaria) 1192/10, Military Prosecution v. Mohand Azat Gaver, Nevo Legal Database (Apr. 22, 2010) (Isr.) (a minor convicted of non-security property and violence offenses was sentenced with an alternative to arrest, in a secure confinement institution of the PA. The minor was released immediately, most likely under the PA's order.).

108. Israel Pub. Def. Rep. (2017) (describing that alternate options to imprisonment are hard to find in Israel).

109. Naftali & Shany, *supra* note 90, at 93-96.

into two groups. The first are those who commit "regular" criminal offenses, such as property offenses, like theft or robbery, or driving without a license. The second are those who commit security offenses, like stone-throwing, or those who commit serious crimes such as murder or attempted murder with an ideological background. It is assumed in the former case that rehabilitation odds are higher and that there may be a chance for collaboration with welfare authorities of the PA.

Cases of security offenses are more difficult for the reasons stated above (the offender sees himself as a "soldier"; unwillingness to collaborate with the "enemy"). However, in many cases, the so-called "ideological background" is a cover-up for familial and socio-economic issues, which is characteristic of juvenile delinquency in general.[110] Oftentimes, the minor's parents want to distance them from terror-related activity that might lead to incarceration and life-endangerment. These parents can also take part in the rehabilitation efforts.[111]

In some cases, the Juvenile Military Court has attempted to rehabilitate minors. However, as stated by the American Supreme Court Justice in *In re Gault*: "unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure."[112]

For comparison, in Israel there are several authorities entrusted with the treatment and rehabilitation of minors. Examples include the Israel Prison Service operating rehabilitation services in prisons and the Prisoner Rehabilitation Authority supervising minors released from prison.[113] In contrast, no such authority exists in the Region. In specific cases, besides receiving rehabilitation and treatment assessments, there is no formal procedure regarding the treatment and rehabilitation of minors processed in juvenile military courts, neither during the criminal process nor following it.

One possible criticism to our suggestion is that there should not be rehabilitation programs for minors in the Region. One of the arguments as to why there is no authority in charge of rehabilitation of minors convicted of security offenses is that delinquencies in the Region and Israel differ greatly from one another, and therefore should not be dealt

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110. Sedley et. al.*, supra* note 4, at 25.

111. Anat Berko et al., *Terrorism as Self-Help: Accounts of Palestinian Youth Incarcerated in Israeli Prisons for Security Violations,* 1 J. OF CONTEMP. CRIM. JUST. 1, 5 (2017).

112. *In re Gault*, 387 U.S. 1, 18 (1967).

113. For instance, in recent years, the Prisoner Rehabilitation Authority has established youth centers in districts of Jerusalem, Beer Sheva, Tel Aviv, and Haifa. These centers provide youth released from prison with a place to turn to, and they provide help with finding employment.

with in a similar manner.[114] According to this argument, the majority of the offenses processed in the Juvenile Military Court are violent offenses. In Israel, these are considered serious, life endangering offenses as well, and for that reason the Public's interest will outweigh the rehabilitation principle.[115] Meaning, when an ideological crime is committed with the encouragement of the minor's surroundings, the chances of successful rehabilitation are slim.[116] Another possible criticism is that the few rehabilitative attempts instructed by military courts had failed for various reasons: lack of collaboration on the defendant's part, lack of collaboration on the part of the Palestinian welfare authorities (which do not recognize the military courts), lack of sufficient means for a professional treatment and rehabilitation assessment, and more.[117]

Nevertheless, an examination of specific cases processed in juvenile military courts shows that sometimes the so-called "ideological background" is a cover-up for familial and socio-economic issues, which are general characteristics of juvenile delinquency. For instance, some minors commit offenses due to their refusal to marry.[118] Other minors that are faced with familial or economic issues perceive the delinquency and accompanied incarceration as a way to avoid their day-to-day problems. For example, in some cases, minors commit security offenses in order to receive a better education within the prison. This is how a minor described it in his investigation:

> For a while I have been hearing that it is easier to do the Taujihi [finals for receiving a high school diploma] in the prison and I cannot do the Taujihi here because I don't understand the teachers so I won't succeed and I will fail. Today I left home and my parents thought I went to school but I didn't go to school,

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114. Berko*, supra* note 111, at 121.

115. *See e.g.,* Case (Military Court of Appeals Judea & Samaria) 1822/09 Moder Abu Daia v. Military Prosecutor, Nevo Legal Database (June 28, 2010) (Isr.)*;* Case (Military Court of Appeals Judea & Samaria) 2395/11 Military Prosecutor v. Auwad, Nevo Legal Database (Sept. 13, 2011) (Isr.).

116. *See* B'Tselem Report, *supra* note 2, at 67. *See id.* at 47 ("Generally, the Palestinian society does not perceive a minor who throws stones as someone in need of rehabilitation.").

117. *See id.* at 47 ("Lack of rehabilitation institutions that are agreeable both by the military courts and the PA, alongside matters of internal Palestinian politics, prevent alternatives to arrests for minors.").

118. *See, e.g.,* Case (Military Court of Appeals Judea & Samaria) 4953/10 Military Prosecution v. H.T, unpublished (Isr.) (in which a girl of 15 arrived at an IDF barrier carrying a knife. The same minor had committed this same offense when she was 13. On both occasions, the minor had reported pressure from her family that led her to commit the offense. In coordination with Palestinian welfare agencies, the minor was placed in a hostel for girls in Beth-Lehem.).

> rather I went to the gas station and bought gasoline and hid the gasoline with the bottle in the bag and entered the Qalandia border pass, where they asked to see what's inside the bag, so I took out the Molotov cocktail and showed it to them so they would catch me. . . .[119]

In such cases, finding a solution to the underlying problem can reduce the chances of recidivism among minors that have committed security offenses.[120] Thus, we believe that an approach that does not include an attempt at rehabilitation, and does not leave any room or means for rehabilitation, is doing wrong by both the minors as well as by the Public's interest.[121]

Below we propose an initial outline that includes some legal suggestions that could provide solutions both for minors with an ideological background to their delinquency and for minors without such a background (i.e. difficulties in school or at home, etc.). Our approach, that is based *inter-alia* on practical judicial experience, echoes Judge Rubenstein's words: "We shall never give up on rehabilitation; perhaps following it the public will gain a beneficial citizen."[122]

A. Rehabilitation programs within the holding facilities

Our first suggestion to help enhance the rehabilitation of minors indicted for security offenses (hereinafter "security minors" and "security prisoners" for adults) in the region is to introduce rehabilitative tools and to give these security minors the opportunity to practice using such tools during their imprisonment. The Israeli Prison Service oversees the imprisonment of security minors and security prisoners. Security minors are held in custody in specified institutions. The Prison Services Order was amended in 2012 to include the rights of prisoners to take part in rehabilitative, educational, and leisure activities; it is the Israeli Prison Service's obligation to make such activities available. This means that these programs are not just a privilege for security minors, but that these

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119. Case (Military Court of Appeals Judea & Samaria) 1600/09 Military Prosecution v. Rami Salim Mahmud Zaid, Nevo Legal Database (May 15, 2009) (Isr.).

120. *See, e.g.*, Case (Military Court of Appeals Judea & Samaria) 1959/09 Military Prosecution v. Ghad Talal Isa Abu Turkey, Nevo Legal Database (July 13, 2009) (Isr.). *See also* Naftali & Shany, *supra* note 90; 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, 262-82 (Noëlle Quénivet & Shilan Shah-Davis eds., 2010).

121. S*ee* CivA 8639/13 Amir Aldaves v. State of Israel, Nevo Legal Database (March 17, 2015) (Isr.) (citing Judge Robenstein's judgment).

122. B'Tselem Report, *supra* note 2, at 19.

programs are the prisoner's right and an obligation for the Israeli Prison Service. Taking part in such programs may reduce the minor's odds of recidivism, and thus is beneficial not merely to the minor himself, but to society.

Nonetheless, the Israeli Prison Services' policy is to exclude security prisoners from rehabilitation, treatment, educational, and occupational programs.[123] Accordingly, the current legal status is that rehabilitative programs are statutorily provided only to prisoners that are citizens or residents of Israel. Minors that are sentenced in the Juvenile Military Court do not meet this criterion and therefore are not eligible for these services.[124] In exceptional cases, minors receive treatment from the welfare authorities of the Israeli Prison Services during their imprisonment, but these are rare instances in a time of crisis.[125] This Israeli Prison Services' policy has been criticized by the High Court in several cases, in which the High Court calls for a reform.[126]

Alongside the formal educational and rehabilitative services, we believe that non-formal educational programs should be made available to security minors that show an honest willingness towards rehabilitation within the prison. Such programs are provided to minors that are Israeli citizens or residents. For example, other holding facilities offer psycho-educational workshops in various subjects, such as interpersonal communication, anger management, therapy with animals, and life skills lessons.

We think that the Prison Services Order is clear and does not obligate the state to provide rehabilitative programs to non-citizens or non-residents of Israel. However, our suggestion is to adjust the current legal status so that rehabilitative programs may be provided (in accordance to criteria set by the Israeli Prisons Services) to minors that show a willingness to participate in such programs on the condition that these programs will, indeed, help with their integration into society after

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123. This stems from the legal interpretation of Article 11(iv) of the Prison Service Order, which states that the Prison Services Commissioner will assess the rehabilitative options available to a prisoner that is an Israeli citizen. Prison Service Order, HH (Knesset) art. 11(iv).

124. Rehabilitation of Minor Prisoners, THE KNESSET (Dec. 25, 2016), https://m.knesset.gov.il/activity/info/mmm/pages/document. Minors convicted of illegal stay offenses, held at Ofek Prison, do not take part in rehabilitation groups, as well, due to the language barrier.

125. CivA 1456/07 Minor v. State of Isr., Nevo Legal Database (Oct. 7, 2007) (Isr.).

126. *See* CivA 6257/10 Minor v. State of Isr., Nevo Legal Database (May 29, 2010) (Isr.); CivA 4102/08 Dirvas v. State of Isr., Nevo Legal Database (Dec. 1, 2008) (Isr.); CivA 10118/06 Minor v. State of Isr., Nevo Legal Database (Apr. 30, 2007) (Isr.).

their release.[127] We believe that rehabilitation programs should be made available to minors of the Region, even those who have committed security offenses, in suitable cases. The rehabilitation of these minors is not merely a matter of formal law; it is a matter of the Public's interest.

B. Rehabilitation programs following imprisonment

In addition to operating rehabilitation programs within the confinement institutions, we suggest operating such programs after the minor's release in collaboration with international organizations. The rehabilitation program, for those suitable, will be conducted with as much collaboration from the welfare authorities of the PA as possible, and with the assistance of non-governmental international organizations, mainly UNICEF.[128] For example, a program could be prepared during the minor's imprisonment to integrate them in a rehabilitation program in a supporting community or home, upon parole. The minor could receive one-on-one treatment with a social worker from the PA or an international organization. A treatment group could be arranged for released minors not necessarily held in their hometowns. In addition, a group treatment could be conducted for the minor's parents.[129]

There will be some minors unsuitable for such programs, and some may be uninterested in it, be it due to lack of motivation, refusal to cooperate with the authorities, or an ideology that forbids such cooperation. Nonetheless, such programs should be made available to those willing to participate and who meet the criteria, as will be determined.[130]

Security offenders are difficult to rehabilitate due to their ideological stance regarding cooperating with the "enemy." If, however, these

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127. *See* ELY GOLDBERG, *Incarceration Period as an Opportunity to Treat the Juvenile Criminal*, *in* MESSY YOUTH – MINORS BREAKING THE LAW IN ISRAEL: PREVENTION, ENFORCEMENT & REHABILITATION 268-292 (2015); CivA 10118/06, *supra* note 126, at ¶ 8(2)(b).

128. The United Nations Children's Fund is a United Nations agency responsible for providing humanitarian and developmental aid to children worldwide. It is among the most widespread and recognizable social welfare organizations in the world, with a presence in 192 countries and territories. *See* UNICEF Report, *supra* note 4.

129. According to the Israel Prisoner Rehabilitation Authority, over 700 prisoners, ages 14 to 21, are released from prison each year. Most of them are released with no rehabilitation plan. According to the law (conditional release act), inmates sentenced to 3-6 months could be released on conditional release with no rehabilitation plan. *See* Rehabilitation of Minor Prisoners, *supra* note 124, at 14.

130. For comparison, in 2015, 52% of minors (14-18) were unsuitable or uninterested in rehabilitation programs, see *id.*

rehabilitation programs were operated by international organizations that are not affiliated with the Israeli regime, it could make rehabilitation possible. Thus, the involvement of international organizations, alongside Israel, can introduce a variety of rehabilitative and treatment options for security minors. For instance, the organizations can offer programs designed to enhance the welfare of the minors and their families, on the condition of normative and non-criminal behavior on their part.[131]

One possible critique for this suggestion, as to the previous one, is that there is professional dispute on the effectiveness of a rehabilitation program carried out within non-elective confinement institutions.[132] It is argued that the institutional treatment of minors does not fulfill its objectives and may even encourage their delinquent behavior. According to this opinion, it is doubtful that rehabilitation will be successful in offenses with an ideological or religious background.[133] On the other hand, there are approaches where the stay in a confinement institution enables the minor to process the complex conflicts in their lives and gather strength to lead a normative life.[134] Moreover, even if the rehabilitation is only slightly successful, it is significant.

C. Secure confinement institutions under the supervision of international organizations

Another suggestion is to establish secure confinement institutions supervised by international organizations, with the cooperation of PA authorities, as far as cooperation is available. Article 20(I) of the Israeli Juvenile Act authorizes the juvenile court to order that the minor be put in a hostel or secure institution instead of being arrested. In addition, Article 24(2) states that the juvenile court, after concluding the minor has committed an offense, may issue an order regarding the treatment of the minor and order that the minor be held in a hostel or secure institution for a certain period. Finally, Article 25(I) authorizes the court, upon conviction of the minor, to order that the minor, instead of being

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131. In some cases, juvenile military courts have received reports from such organizations initiated by the defense. *See, e.g.*, Case (Military Court of Appeals Judea & Samaria) 2616/11 Military Prosecution v. R.K., Nevo Legal Database (July 18, 2012) (Isr.).

132. Some opinions reduce expectations from rehabilitation and the effectiveness of treatment and call to focus on inmate management. *See, e.g.*, Malcolm M. Feely & Johnathan Simon, *The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications*, 30 CRIMINOLOGY 449 (1992).

133. *See* CivA 1456/07, *supra* note 125 (Judge Arbel's judgement).

134. *See generally* Dror Volk & Eliav Barman, *Recidivism in Israel: Characteristics of Prisoners and Imprisonment and Criminal Expertise*, 17 STUD. ON THE PRISON IN ISR. 72 (Dec. 2015) (Isr,); GOLDBERG, *supra* note 127.

incarcerated, be held in a secure institution for a certain amount of time. In the region there are no provisions granting such authority regarding the treatment of minors or the option to send them to a closed institution prior to the trial or following it.

Juvenile military courts have tried to place minors in secure institutions of the PA, which has failed because of the lack of cooperation from the PA.[135] Nevertheless, the formula we suggested, balancing between the Best Interest of the Child and the Public's Interest, obligates us to find solutions that will distance minors from prisons, not excluding cases which are not suitable for a community-based program.

D. Using pre-arrest reports and strengthening the Civil Administration's social care

Increasing the use of pre-arrest reports during arrest arraignments in the Juvenile Military Court can help with the rehabilitation of minors. A pre-arrest report is an assessment conducted by a probation officer describing the defendant's emotional and socio-economical state. The report can sometimes include a recommendation regarding the arrest or the juvenile's release on bail. Detention is important in criminal proceedings, and the judge deciding on the minor's arrest is faced with little detail at this early stage of the proceedings. Thus, it is important to enhance the factual basis of the report as much as possible. The pre-arrest review, which includes details regarding the minor and the possible effects of an arrest on him, could help the judge make an informed decision. Thus, the pre-arrest report is central to the process, as it is written by a professional who has immediate contact with the minor and his family.

In some cases, the Juvenile Military Court had ordered the Civil Administration's welfare officer to conduct a report regarding the arrest of a minor, albeit without the formal legal authority to do so.[136] For example, a minor was arrested for refusing to hand over her bag for a security check at the entrance to the Cave of the Patriarchs. Upon her arrest, two knives were found in her bag. The court ordered the pre-arrest report to be conducted by the welfare officer. In her report, the officer detailed how the minor was dealing with an ongoing dispute between her parents and that she was experiencing stress because of upcoming exams. The report stated that the minor acted this way to express her anger with her family's dynamics and as a way to express her need for

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135. B'Tselem Report, *supra* note 2, at 47 ("Generally, the Palestinian society does not perceive a minor who throws stones as someone in need of rehabilitation.").

136. Case (Military Court of Appeals Judea & Samaria) 1406/13 Military Prosecution v. Saleh Mussah, Nevo Legal Database (Aug. 4, 2013) (Isr.).

attention.[137] Following the report, the Court of Appeals ordered the minor's conditional release from arrest and she was transferred to "Beit Jallah" with the PA's commitment to supervise her. In other cases, where there was no report from official authorities, the Juvenile Military Court was forced to rely on reports brought by the defense, despite having no means to effectively validate them.[138]

Nonetheless, prior to October 1, 2019, the Regional laws did not include a provision regarding pre-arrest reports for minors (nor for adults). Military courts have often criticized this, stating: "[t]his is a critical stage, during which the court is to decide if to deprive a defendant of his freedom, at times for a long period of time, based on prima facie evidence and a narrow impression of the defendant."[139]

On October 1, 2019, the Security Provision Order[140] came into force. The amendment authorizes the court to request a written arrest report for specific reasons to be written by the court. The report will be conducted by the welfare officer in the Civil Administration or someone appointed by them. We commend this amendment and our suggestion is to use this important tool.

A possible argument against this suggestion is that the experience with parole reports shows that the reports are often insufficient due to lack of cooperation from the defendant-minor, lack of cooperation from the welfare authorities of the PA, and lack of the professional means needed to conduct the report.[141] This is a valid argument, and should be used as an incentive for the authorities to improve the circumstances so as to make the reports more effective. In our opinion, the welfare authorities in the Civil Administration should be strengthened so that they can supply professional reports, effectively keep track of the minors, and report the conclusions to the court throughout the proceedings.

Nonetheless, we see value in conducting a pre-arrest report by the Civil Administration. A professional report can help the court determine whether the minor should be trusted and whether they will be able to comply with the conditions of the probation. According to our suggestion, the welfare authorities of the Civil Administration, with as much collaboration as possible from the PA, will review the minor's personality, the effects of an arrest on him, and the specific alternative to arrest proposed. The welfare authorities will assist in determining the

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137. Case (Military Court of Appeals Judea & Samaria) 3080/15 Military Prosecution v. Plonit, Nevo Legal Database (Jan. 25, 2016) (Isr.).

138. *See, e.g.*, LJA 3155/16 Military Prosecution v. Y.R, unpublished (Isr.).

139. 2616/11 Military Prosecution v. R.K, *supra* note 131.

140. Security Provisions Order, *supra* note 25.

141. *See* B'Tselem Report, *supra* note 2, at 70.

appropriate alternative.[142] As stated above, involving non-governmental international organizations in this process can help create alternatives to arrest and supervise the minors, especially considering the lack of alternatives in the Region and lack of cooperation from the PA.[143]

E. Using administrative proceedings instead of criminal ones

Security minors are exposed to ideological and "regular" criminality in prison. Therefore, and to prevent this exposure and decrease recidivism, we should consider using administrative proceedings instead of criminal ones.[144] In recent years, there has been a growing recognition that the criminal process has an irreversible and damaging effect on minors. On the other hand, minors, as well as society, could avail from the use of alternative proceedings. Simple cases not involving the minor in criminal proceedings can improve the potential for the minor's rehabilitation.[145] The Convention on the Rights of the Child, as well as the Beijing Rules, encourage the diversion of minor suspects from the formal criminal process to alternative proceedings. These alternative proceedings will ensure an appropriate treatment that will both benefit the minor and be proportionate to the seriousness of the offense.[146]

There are different models of administrative proceedings alternative to the criminal process. There is a model of "no indictment," which is an administrative decision of the investigating and prosecuting authorities to close the case without further action. Other models include family group discussions and treatment or "restorative justice programs," which are sometimes used as alternatives to the criminal process, and other times used within the criminal process.[147]

In Israel, since the 1990s, the "no indictment" model has been used, which includes archiving the investigative materials and leaving the minor with a warning. This model is usually used in a first, non-serious offense, when the minor admits to committing the offense and takes responsibility for their actions.[148] The advantages of this model include: preventing stigmatization, diverting the minor from the official criminal

142. *See id.* We also think that alongside arrest reports, bail should be used more often, as an alternative to arrest, in the suitable cases.

143. *Justice? The Military Court System in the Israeli-Occupied Territories*, AL-HAW DEFENDING HUMAN RIGHTS (July 19, 2011), http://www.alhaq.org/publications/8123.html.

144. *See generally* RON SHAPIRA, FROM CRIMINAL ENFORCEMENT TO ADMINISTRATIVE ENFORCEMENT (2019).

145. Beijing Rules, *supra* note 79, at 11.

146. *See* CRC, *supra* note 59, art. 40; Beijing Rules, *supra* note 79, at 11.

147. Limor Solomon, *Judging Youth - Aggravating, Converting and What's In Between*, CHILDREN'S RTS. & ISR. L. 500, 507-08 (2010).

148. *Id.* at 500-01.

process, deterring future offenses, and the opportunity to receive treatment from the probation department in some cases.[149] However, the model has unclear and ambiguous criteria. Therefore, there is fear that the model might be discriminatory towards certain groups, that there is no commitment of the minor to avoid future offenses, and that the model poses as a potential threat to the right to due process. In addition, the committee argued that the police lack the professional means to consider the minor's best interest in its greater sense. Moreover, the committee criticized both the lack of coordination between the police and the probation department, and that oftentimes there is no further treatment of the minor following the case's closing.[150] The Article authorizes a probation officer to divert a minor to an alternative process outside the courtroom, which generally means conducting a meeting with the minor, his family and supporters; the victim, his family and supporters, and professionals.[151]

The Region differs from Israel with regards to the seriousness of the offenses and the background to their commission. Nevertheless, the need to distance the minor from criminality and terrorism as early as possible remains. In our opinion, proceedings such as restorative justice, which include the victim in a type of "mediation," is somewhat farfetched in the existing circumstances and is inapplicable considering the differences between the victims and offenders.[152] However, we suggest an intermediate model between the "no indictment" and the pre-trial proceedings that take place in Israel. In this model, under certain criteria, instead of being indicted, the minor and his family will participate in an alternative process in the Civil Administration. This process will include their participation in meeting with the welfare officer and the deposit of bail for a certain period of time, at the end of which,

149. MINISTRY OF JUST., THE COMM. ON BASIC PRINCIPLES REGARDING THE CHILD IN LAW AND THEIR ADAPTATION INTO LEGIS., SUB-COMMITTEE'S REPORT REGARDING THE CHILD IN CRIMINAL PROCEEDINGS 200-05.

150. *Id*. at 206-09. *See also* Juvenile Act, *supra* note 61, at introduction to amendment no. 16, 18.

151. This is called Familial Discussion Groups (FDG). *See* FDG Procedure, Ministry of Labor and Social Services (Apr. 27, 2018); 10.41.41 Israel Police Department Order, *Treatment of a Complaint and Investigation File*, cl. 4; DUDI RIVKIN & SMADAR SHMA'AYA IDGAR, ASSESSING FDG'S FOR LAW-BREAKING YOUTH 5-6 (2007).

152. *See, e.g.,* Claire Garbett, *The International Criminal Court and Restorative Justice: Victims, Participation and the Processes of Justice,* 5 RESTORATIVE JUST. 198, 198-220 (2017).

and upon the compliance of the minor with all of the conditions, the case will be closed.[153]

We suggest that cases in which the minor allegedly committed an offense not endangering humans, or without extensive damage to property (a sum to be determined ahead of time), and in which the minor has expressed willingness to participate in an alternative process, a senior police officer or military prosecutor may consider diverting the case to the described model and eventually conclude the case with no liberty-restricting actions. Furthermore, we suggest that all first-offense cases of minors under the age of 14 during the commission of offense that did not result in bodily harm, will be automatically transferred to the suggested model.[154] This suggestion, like our other suggestions, requires the strengthening of the welfare authorities of the Civil Administration. Nonetheless, we believe this allocation of resources will benefit both the minors and the Public's interest in preventing minors from entering the world of crime and terrorism.

CONCLUSION

The founding of the Juvenile Military Court in 2009 is a significant milestone in the bettering of the rights of minors in military courts in the Region. It is part of an extensive reform, conducted in three stages, that has ameliorated the rights of minors in the Region in many ways: rights regarding the minor's investigation (such as the obligation to investigate the minor in a language that he speaks and specific documentation requirements); arrest (such as shorter arrest periods); trial (such as separation of minor trials from adult trials); and punishment (such as authorizing the court to receive a report regarding punishment and the possibility of rehabilitation).

As discussed above, albeit those significant changes, there is still a gap between the legal situation in the region and the requirements regarding juvenile justice both in International and Israeli standards. Considering this gap, we made some legal suggestions that might better the treatment of minors in the region regarding the rehabilitation of minors by military courts. These suggestions include adding

153. In 2014, the Chief Justice of the Military Court of Appeals published a procedure stating that the parents of a minor defendant have a central role in the process, with the purpose of increasing the parent's participation in the minor's rehabilitation process. *See* Internal Procedure of Military Court of Appeals, *Hearings in Minor Cases – Procedure* (Nov. 19, 2014) (the writers have a copy).

154. Our suggestion relates to the age that is seen as the youngest age found in criminal proceedings. Such provisions, relating to minors "younger than 14," exist in the Region's law and in Israeli law, some of which were mentioned throughout this article.

rehabilitative tools in prisons, establishing treatment institutions supervised by international organizations, and strengthening the welfare authorities of the Civil Administration. In certain cases, we suggested using administrative proceedings instead of criminal ones. Rehabilitating security minors is difficult because many of them, as well as segments of their communities, feel that they are not in need of rehabilitation. In addition, the cooperation with Israeli authorities might be seen as a kind of treason in parts of Palestinian society. Shifts in state and security affairs can cause great changes, both regarding the minor's readiness to leave the criminal world, and regarding the authorities' willingness to treat security offenses with what they might consider a lenient treatment.

We believe that our suggestions could ameliorate the special situation of the region and reduce recidivism percentages in the long run. Even partial and imperfect results could have a significant effect. Success is not certain, and other matters need to be taken into consideration, yet the benefit is not just in the interest of the minor, but the Public as well.