

Lacuna

war crimes in Israeli Law
and Court-Martial Rulings



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LACUNA

WAR CRIMES IN ISRAELI LAW AND COURT-MARTIAL RULINGS



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CONTENTS

EXECUTIVE SUMMARY	6
--------------------------	----------

INTRODUCTION	10
---------------------	-----------

CHAPTER 1: THE LEGAL DUTY TO PUNISH WAR CRIMES	14
INTERNATIONAL CRIMES	14
WHAT ARE WAR CRIMES?	14
THE DUTY TO ENACT PENAL SANCTIONS FOR PEOPLE RESPONSIBLE FOR WAR CRIMES	17
DIFFERENT APPROACHES TO LEGISLATION TO PUNISH WAR CRIMES	18
Legislation by referral to international law	18
Legislation based on the existing domestic law	21

CHAPTER 2: WAR CRIMES IN ISRAELI LAW	23
THE ABSENCE OF WAR CRIMES IN ISRAELI LEGISLATION	23
The Law for the Prevention and Punishment of the Crime of Genocide	23
The Nazis and Nazi Collaborators (Punishment) Law	24
Section 16(a) of the Penal Code	25
General Staff Order 33.0133	26
“The IDF spirit”	26
WAR CRIMES: PARALLEL OFFENSES IN ISRAELI LAW AND MISSING OFFENSES	27
The lack of suitable general principles Offenses missing from Israeli law	28



The absence of the principle of command responsibility in Israeli law	31
---	----

SRAELI SUPREME COURT: THE EXISTING LEGISLATION IS SUFFICIENT, CONDITIONALLY	32
--	-----------

CHAPTER 3: WAR CRIMES IN THE COURTS-MARTIAL	33
--	-----------

THE LAWS OF WAR AND PROSECUTION OF SOLDIERS: THE MILITARY PROSECUTION'S DIRECTIVES	33
---	-----------

Offenses of illegal use of weapons	34
------------------------------------	----

The offense of looting	35
------------------------	----

Crimes of abuse	35
-----------------	----

TEST CASE: PROSECUTION BASED ON THE USE OF "HUMAN SHIELDS"	37
---	-----------

PLEA BARGAINS: LENIENCY OF INDICTMENT AND SENTENCING	42
---	-----------

THE ABSENCE OF INTERNATIONAL LAW FROM THE COURTS-MARTIAL'S RULINGS	47
---	-----------

The Courts-Martial on the status of protected persons	47
---	----

The Courts-Martial on war crimes	49
----------------------------------	----

TEST CASE: CONVICTION AND PUNISHMENT FOR OFFENSES OF HARMING BOUND DETAINEES	50
---	-----------

"REDUCED CRIMINAL RECORD": AMENDMENT NO. 61 OF THE MJA	53
---	-----------

CONCLUSION: THE NEED TO CRIMINALIZE WAR CRIMES IN ISRAELI LAW	55
--	-----------

APPENDIXES	59
-------------------	-----------

APPENDIX I: CONVICTION AND SENTENCING CLAUSES IN CASES IN WHICH	
--	--

DEFENDANTS WERE CONVICTED OF HARMING BOUND DETAINEES, BY DEFENDANT, 2000-2012	59
--	----

APPENDIX II: COMPLAINTS, INVESTIGATIONS AND INDICTMENTS IN THE MILITARY JUSTICE SYSTEM, 2000-2012	64
---	----

EXECUTIVE SUMMARY

The family of nations considers war crimes to be among the worst crimes, and it includes them in the group of “international crimes” – offenses that violate the common values of the entire international community, to which all countries and all people are committed: genocide, war crimes, crimes against humanity and others. Throughout the world special laws are enacted to criminalize such offenses and punish their perpetrators. Israel, too, has enacted clear laws to prohibit and punish the crime of genocide.

However, the Israeli legal system does not contain legislation forbidding war crimes and setting corresponding punishments. This report outlines the need for Israeli legislation on that subject. The report reviews the existing provisions of Israeli law, presents international models of legal systems that criminalize war crimes, and examines the Israeli military prosecution’s policy and the sentences levied by the courts-martial in cases in which soldiers are charged with crimes that may amount to war crimes.

Each of the four Geneva Conventions from 1949, which Israel signed and ratified in its earliest years of statehood, includes an article about the duty to investigate and prosecute anyone who commits a “grave breach” of the convention. Article 146 of the Fourth Geneva Convention establishes the duty of its High Contracting Parties to enact suitable legislation to allow the investigation, prosecution and penalization of anyone responsible for such grave breaches. The list of offenses that constitute war crimes in the appropriate circumstances can be found in various legal instruments in addition to the Geneva Conventions: international agreements and treaties, the founding statutes of international judicial tribunals and the legislation and case law of different countries. However, the list of war crimes that appears in chapter 8(2) of the Rome Statute of the International Criminal Court is viewed as a comprehensive list of war crimes that receive wide international agreement.

As international criminal law develops, the principle of universal jurisdiction for international crimes expands and the International Criminal Court (ICC) in the Hague establishes its activity, it should be remembered that the “principle of complementarity” provides those allegedly involved in committing international crimes protection against criminal prosecution and judgment, as long as the law enforcement system in their country fulfills its role, as the international system gives priority to the mother country and its legal proceedings. Therefore, a legal system fulfilling its duty and perceived as such by external observers is of paramount interest to anyone who wishes to defend Israelis against foreign legal intervention.

Different states and legal traditions use different approaches to enact legislation that criminalizes international crimes, including war crimes. Chapter 1 of this report briefly presents the essence of the two main approaches followed in the world to criminalize war crimes in local (or “domestic”) law. One approach is legislation by referral to international law. One model of this approach is called “static referral”: a kind of “cut-and-paste” of the provisions of the conventions from international law into the domestic law. Another model of this approach is called “dynamic referral,” where provisions of domestic law refer to international customary law. The other main approach is legislation based on the domestic law of the country. Within that approach, one model is to insert special legislation into the domestic law: either creating a separate law that incorporates all international crimes into the domestic law, or alternatively enacting laws as an integral part of the existing criminal code. Israel is among a small group of states that follow another model: these states believe that their criminal law as it stands provides a legal response to international crimes. This position contradicts the belief of most of the remaining states in the world in the need to enact dedicated legislation in this area.

Some of the offenses that appear in the Israeli criminal code are essentially parallel to offenses that (under appropriate circumstances) amount to war crimes. These include: willful killing; conducting biological experiments; willfully causing great suffering, or serious injury to body or health; extensive destruction and appropriation of property, not justified by military necessity, and several other offenses. However, the Israeli criminal code lacks many other offenses that constitute war crimes and thus defendants cannot be prosecuted for them. The first part of Chapter 2 reviews the existing provisions of Israeli law in relation to international crimes and war crimes. The second part lists the offenses that appear in the ICC’s Rome Statute and are missing in Israeli law, and highlights some principles of Israeli law that are inconsistent with the requirements of international law.

In a ruling at the end of 2011, Supreme Court Chief Justice Dorit Beinisch cited two conditions which, when taken together, render domestic Israeli law sufficient even without integrating the provisions of international law into it. One condition is that the indictment charges express the gravity of the offenses described by the indictment; the other is for the punishment to reflect the special circumstances of committing a crime against protected persons. Chapter 3 of the report shows, following a review of the Israeli military prosecution’s professional directives and the judgments rendered since 2000 by the Courts-Martial, that the combination of conditions cited by Chief Justice Beinisch is not effectively upheld in the military justice system.

The military prosecution's policy is set forth in the Chief Military Prosecutor's (CMP) Directives, professional directives that guide the Military Advocate General's Corps's prosecutors in their policy for handling the various offenses. This report reviews the CMP Directives concerning offenses of use of weapons, shooting and abuse. Generally speaking, these directives make no mention of the laws of war or international crimes. If they do make reference to offenses against Palestinians in the Occupied Palestinian Territories, they make no mention of obligations under international law or the exceeding gravity that should be attached to offenses that concern harming protected persons under the laws of war, or in cases that raise the suspicion of committing war crimes.

In the vast majority of judgments granted by the Courts-Martial in the cases of soldiers accused of offenses against Palestinians and their property, not the slightest mention can be found of the status of the victims as "protected persons" under international law. Soldiers convicted in Courts-Martial of offenses committed against Palestinians and their property receive various sentences that are justified by a long list of explanations. These explanations, concerning the considerations for leniency or severity in punishing the convicted soldier, usually rely on the existing rulings of the Court-Martial of Appeals. They contain different kinds of reasoning, but as a rule they make no mention at all of a soldier's duty toward protected persons in occupied territories.

One of the test cases in the report relates to the prosecution of defendants accused of using "human shields." This action is considered a war crime, but since Israeli law does not include an offense of using a human shield, soldiers accused of doing so are prosecuted for minor offenses. The test case reviews the prosecution of soldiers and officers in (only) three cases since 2000 and shows how the defendants were convicted of minor offenses and received very light sentences.

Another test case reviews the results of the prosecution of 39 soldiers charged with violent assault of Palestinian detainees, most of whom were handcuffed and blindfolded. Humiliating, degrading and physically assaulting detainees by authorized people, especially when the detainees are bound, in addition to violating Israeli law, constitute war crimes under international law when they occur in the context of armed conflict. A review shows that between September 2000 and the end of 2012 the vast majority of defendants convicted of assaulting bound detainees were convicted of minor offenses with short maximum sentences.

Furthermore, a recent amendment significantly reduces the length of the criminal record of convictions of soldiers receiving sentences under a certain threshold. Since Israeli law is silent on war crimes, this amendment makes no distinction between soldiers convicted of war crimes and other crimes. This substantial reduction of the length of the criminal record even in cases of war crimes undermines the principle that imposes a grave stigma on crimes of this sort and on the criminals convicted of committing them. Furthermore, enactment of this amendment considerably undermines the protection that the principle of complementarity could provide to defendants convicted of war crimes.

Only a few states in the democratic world take a similar approach to Israel's that the existing law is sufficient to prosecute a defendant for acts that could amount to war crimes. Yesh Din's position is that **considering the practice of the Courts-Martial and the absence of material offenses in Israeli domestic law, special offenses of war crimes should be incorporated through legislation into Israel's legal system.** In the coming months Yesh Din, along with other partners, will draft a bill which, if enacted into law, will position Israel as an equal member of the family of nations who have committed to do everything possible to eradicate war crimes and protect their victims.

INTRODUCTION

On January 15, 2009, shortly before the end of Operation Cast Lead, an Israeli military force occupied a building in the Gaza City neighborhood of Tel al-Hawa. While the force searched the building the women and children were gathered in one room, whereas bags and suitcases were placed in another. In an indictment submitted 14 months later against two of the soldiers on the force, Staff Sgt. S.A. and Staff Sgt. G.A.,¹ the incident was described as follows:

“When the soldiers feared there was an explosive device or a terrorist hiding in the room, a nine year-old boy, R.M., was ordered to open a number of bags and suitcases. After the child R.M. opened several bags and scattered their contents, and the defendants ascertained that there was nothing suspicious in them, the boy expressed his apprehension and was not able to open one of the bags. Then the defendants moved the child away from the bag and [Staff Sgt. G.A.] fired a shot at one of the bags. After the shooting the child was brought back to the room where his mother was waiting.”²

In his testimony in court, the child described the fear he felt when he was taken away from his mother (to the point that he wet his pants when he was taken out of the room in which his family was gathered), said he was hit on his face and recalled how he felt when one of the soldiers shot the bag: “I was afraid they were going to kill me.”³

In this event, which became known publicly as the “child procedure affair,” the Military Prosecution accused two soldiers from the Givati Brigade of “exceeding authority to the point of risking life or health” according to section 72 of the Military Justice Act (MJA),⁴ and the accompanying offense of improper behavior. At the end of the evidentiary trial the two

1 In the case described here and several other cases, the Court-Martial ordered the full names of the accused to be classified. It should be noted that unless the court makes a specific decision to conceal the names of defendants (whether they were convicted or not), there is no prohibition against publishing their identities according to the constitutional principle of publicity of judicial proceedings. However, Yesh Din has chosen in this report to denote all mentioned defendants by their initials only, even when publication of their names was not barred by a judicial ruling.

2 Indictment GFC/150/10, **Military Prosecutor v. Staff Sgt. S.A. and Staff Sgt. G.A.**, submitted on March 11, 2010.

3 Judgment, GFC/150/10, **Military Prosecutor v. Staff Sgt. S.A. and Staff Sgt. G.A.**, sections 5, 8. Delivered on October 3, 2010.

4 Section 29(b) of the Penal Code, which is concerned with the responsibility of accomplices, was added to this charge later.

defendants were convicted of the offenses with which they were charged. The sentence began with the court's question: "How should we judge two young combatants who, during strenuous and dangerous fighting to which they were sent by the State of Israel for the security of its people, exceeded their authority by sending a nine year-old local boy to open a bag suspected of containing an explosive charge, while putting his life and his health at real risk?"

In its review of the parties' petitions regarding the severity of the sentences, the Court-Martial quoted the prosecutor as stating that the defendants' actions "contradict the instructions they received and international moral values, as expressed by the Fourth Geneva Convention, and the IDF's values, as specified in the document called 'the IDF Spirit.'"⁵ But after laying out the facts of the case and its considerations for severity or leniency, the court levied on the two soldiers a three-month suspended prison sentence and a demotion by a single rank to the rank of sergeant. Furthermore, the court noted that the "many merits" the defendants had accumulated during their military service would be taken into account by the competent authorities when they would hear a future request to clear the two men's criminal records.

Thus, a serious case of using a child as a "human shield" by two soldiers – a war crime by any accepted definition⁶ – morphed into an indictment in which the main charge is one that carries a maximum sentence of three years in prison, and a verdict in which the two defendants may have been found guilty as charged but received very light sentences. When it comes to offenses by Israelis, the Israeli justice system makes no reference to punishing war crimes as such. When Israelis commit offenses that are considered war crimes (and such crimes may be committed either by civilians or members of the security forces), Israeli law includes no sanction that derives from the special severity attributed to such crimes by the family of nations.

Just before the writing of this document was completed, the Public Commission to Examine the Maritime Incident of 31 May 2010 (hereinafter: "the Turkel Commission") published its

5 Sentence, GFC/150/10, Military Prosecutor v. Staff Sgt. S.A. and Staff Sgt. G.A. delivered on November 21, 2010. Section 5 (1).

6 See, inter alia, Article 28 of **The Geneva Convention relative to the Protection of Civilian Persons in Time of War** (hereinafter "the Fourth Geneva Convention"); Article 51(7) of **The Additional Protocol Relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I)**; Article 8(2)(b)(xxiii) of the Rome Statute of the ICC. See also HCJ 3799/02 **Adalah et al. v. General of Central Command et al.**; ICRC, "Rule 97: Human Shields, *Customary IHL Database* (http://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter32_rule97); Michael N. Schmitt, "Human Shields in International Humanitarian Law," *Columbia Journal of Transnational Law* 47 (2009), p. 292.

long-awaited second report. At the center of that report was an examination of how Israel's law enforcement system responds to complaints of violations of the laws of war, some of them amounting to suspicion of war crimes. The Turkel Commission's very first recommendation concerns the need to supplement existing Israeli law with "legislation enabling effective penal sanctions for anyone committing a war crime or instructing its execution."⁷ Besides its concrete recommendation on this subject, the Commission notes that it:

*"[...] sees importance in the explicit adoption of the international norms relating to war crimes into Israeli domestic legislation. This is because such legislation goes beyond the practical needs (i.e., to charge and punish violators of international humanitarian law), and also serves a normative purpose (i.e., to promote deterrence and education). As noted, [...] it appears that the accepted approach is to incorporate the international criminal offenses into domestic legislation."*⁸

The first two chapters of the Turkel Commission's second report are about the legal obligation to prosecute people accused of committing war crimes, and present the different approaches to war crimes legislation in domestic law. Later on, the document presents the existing and missing legal instruments in Israeli law in relation to offenses that constitute war crimes, on the basis of a previous study by the Concord Center (hereinafter: "the Concord study").⁹

Over the last several years Yesh Din has been monitoring the activities of the military justice system in enforcing the law on IDF soldiers who are responsible for crimes (according to existing Israeli law) against Palestinians and their property in the Occupied Territories. In that capacity Yesh Din's legal team represents hundreds of Palestinian victims of offenses before military investigative and prosecutorial bodies: it helps file complaints, monitors the progress of investigations and coordinates as needed between the victims of the offense and the witnesses, investigators and prosecutors, in order to facilitate the chances of effective investigation and prosecution. Meanwhile, for several years Yesh Din has been monitoring the entirety of law enforcement procedures in the IDF in the context of crimes against Palestinians and their property (even in cases in which Yesh Din does not represent

7 The Public Commission to Examine the Maritime Incident of 31 May 2010, Examination and **Investigation in Israel of Complaints and Claims of Violations of Laws of Warfare pursuant to the Rules of International Law** (February 2013) (hereinafter: the Turkel Commission Report), pp. 362-366.

8 Ibid., p. 365-366. Emphasis in the original.

9 Yaniv Vaki and Noam Wiener, **The Rome Statute of the International Criminal Court and Israeli Criminal Law: Complementarity and Compatibility** (The Concord Research Center for Integration of International Law in Israel, 2011).

the victims of the offense). This monitoring allows Yesh Din to present a full and credible picture of the extent to which Israel upholds its duty to protect the civilian population of the Occupied Palestinian Territories against crimes by its soldiers by using Israeli criminal law.

Based on that monitoring, in the second part of this document (Chapter 3) we will examine the way in which the military justice system processes war crimes and the place granted – or not granted – to international law in the Military Prosecution's instructions to its prosecutors, as well as the rulings of the Courts-Martial from the perspective of international law and war crimes. Two case studies in this chapter present the law enforcement system's handling of cases in which soldiers harmed bound detainees and cases in which soldiers used Palestinians as human shields.

In writing this chapter Yesh Din reviewed the full collection of decisions rendered by the Courts-Martial and indictments submitted following crimes committed by soldiers against Palestinians and their property from the beginning of the second Intifada (September 2000) until today. These decisions, which the IDF does not make public, were provided to Yesh Din at its request on the basis of the principle of publicity of judicial proceedings. Yesh Din has also reviewed the Military Prosecution's directives, which it received in response to a request under the Freedom of Information Act.



CHAPTER 1

THE LEGAL DUTY TO PUNISH WAR CRIMES

INTERNATIONAL CRIMES

The development of international law over the last decades has led to the development of a series of offenses called “international crimes”: offenses that violate the whole international community’s common values and are binding upon all countries and all people.¹⁰

These offenses break down into a number of categories: war crimes, crimes against humanity, genocide, torture (as distinct from the offense of torture that is contained in war crimes and crimes against humanity), the crime of aggression and several “extreme forms” of international terror. Individuals carry personal criminal responsibility for crimes of this sort, as opposed to the responsibility of the country on whose behalf those individuals act. International crimes meet four criteria: (a) violation of the provisions of international customary law, which (b) were meant to defend values perceived by the entire international community as important and therefore are binding on all states and individuals. Added to the first two conditions is (c) a universal interest to suppress such crimes and (d) the absence of immunity from criminal and civil procedures the a state can claim in relation to officials who fill certain offices in its service.¹¹

WHAT ARE WAR CRIMES?

This report is concerned with a single category of international crimes: the category of war crimes. The list of offenses which, under the appropriate conditions, constitute war crimes can be found in various legal instruments: international agreements and treaties,

10 Article 5 of the Rome Statute, defining the jurisdiction of the International Criminal Court, enumerates the four international crimes that fall under the jurisdiction of the ICC and calls them “[...]The most serious crimes of concern to the international community as a whole.”

11 Antonio Cassese, *International Criminal Law* (2008: Oxford University Press, 2nd edition), p. 11-12. This division does not count among international crimes other crimes such as piracy, drug trafficking, illegal arms trading, slave trafficking, human trafficking and more. As serious as these crimes may be, and although they have a salient international aspect, they do not meet the four cumulative conditions enumerated by Cassese.

the founding statutes of international judicial tribunals and the legislation and case law of different countries. A study by the International Committee of the Red Cross (ICRC) provides a full list of those offenses and their sources.¹² However, the list of war crimes that appears in chapter 8(2) of the Rome Statute of the International Criminal Court is viewed as a comprehensive list of war crimes that receive wide international agreement.

The sources of war crimes (not all of which were included in the Rome Statute¹³) appear in the following legal instruments:¹⁴

- Grave breaches of the Geneva Conventions from 1949 and their Additional Protocol I;
- Other serious violations of the laws of war and customs of war that apply to armed international conflict. The sources of these are mainly the Hague Convention of 1899, the Regulations attached to the Fourth Hague Convention of 1907, the Geneva Protocol of 1925, the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954) and its protocols, the Convention on the Rights of the Child (1989), the Convention concerning the Safety of the United Nations and Associated Personnel (1994) and the Statute of the International Criminal Tribunal for the former Yugoslavia.
- Serious violations of the laws of war and customs of war that apply to armed conflict that is not of an international nature. The sources thereof are mainly Common Article 3 of the 1949 Geneva Conventions, Additional Protocol II of 1977, the Second Protocol of 1999 to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954), the Convention on the Rights of the Child (1989), the Convention Concerning the Safety of the United Nations and Associated Personnel (1994), and the Statutes of the International Criminal Tribunals for Rwanda and the former Yugoslavia and the Special Court for Sierra Leone.

As stated, acts are considered “grave breaches” or serious violations, and therefore war

12 ICRC, “Rule 156: Definition of War Crimes” in *Customary IHL Database* (http://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter44_rule156).

13 Thus, the Rome Statute does not include war crimes listed as grave breaches of Additional Protocol I of the Geneva Conventions, because that document was not adopted by the international community to the same extent as the Geneva Conventions.

14 ICRC, “War Crimes under the Rome Statute of the International Criminal Court and their Source in International Humanitarian Law” (Geneva: 2008), p. 2.

crimes, if they violate the customary or conventional laws concerning armed conflict (international or non-international) and are performed during armed conflict under circumstances that require those responsible for them to be penalized¹⁵ – endangering protected persons or objects or violating important values shared by the international community.

The ICRC's analysis of the list of offenses that appear as war crimes in international conventions and in the legislation and case law of different countries shows that it is not necessary for acts that “endanger protected persons or objects” to result in actual damage to the protected persons or objects. The very attempt to do so is sufficient to place the act under that category. Likewise, the rule that acts will be considered war crimes inasmuch as they “violate important values” does not require the direct physical endangerment of their victims. According to the ICRC's analysis, acts of this kind include abusing dead bodies, subjecting persons to humiliating treatment, making persons undertake work that directly helps the military operations of the enemy, violating the right to fair trial and recruiting children under 15 years of age into the armed forces.¹⁶

For an act to be classified as a war crime it is not necessary that it be committed in a systematic or widespread manner (a requirement that does exist in the case of offenses classified as “crimes against humanity”): the requirement is only for the action to be such that it is defined as a “serious violation” during an armed conflict. **The required “seriousness” refers to the forbidden act, not to the extent of its casualties.** Simultaneously, the fact that a certain act is a violation of a provision of the laws of war does not turn the act itself into a war crime: a degree of severity is required in the action and its consequences for the victim.¹⁷

Criminal responsibility for committing war crimes can be placed both on civilians and on members of the armed forces because of their acts: it is not necessary for a person to be a soldier to be found guilty of committing war crimes. Civilians commit such crimes too. Furthermore, in order to find someone who committed a war crime criminally liable one must identify in the accused a psychological element of willfulness or recklessness in

15 Cassese (*supra* note 11), p. 81; Chile Eboe-Osuji, “‘Grave Breaches’ as war crimes: much ado about... ‘Serious Violation’?” Available online at the ICC Office of the Prosecutor website (<http://www.icc-cpi.int>).

16 ICRC, “Rule 156” (*supra* note 12).

17 Cassese (*supra* note 11), p. 81.

committing the crime.¹⁸

THE DUTY TO ENACT PENAL SANCTIONS FOR PEOPLE RESPONSIBLE FOR WAR CRIMES

Each of the four Geneva Conventions from 1949 (which Israel signed that year and ratified in 1951) includes an article about the duty to investigate and prosecute anyone who commits a grave breach of the convention. Article 146 of the Fourth Geneva Convention establishes the duty of the High Contracting Parties to enact suitable legislation to allow the investigation, prosecution and penalization of anyone responsible for grave breaches of the Convention. The provision concerns the duty on the part of the states to act themselves or through extradition to a suitable party:¹⁹

“The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.

Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a ‘prima facie’ case.”²⁰

The duty to investigate and prosecute those responsible for serious crimes (that amount

18 ICRC, “Rule 156” (*supra* note 12).

19 This article concerns both “internal” law enforcement by the High Contracting Parties to the Convention in relation to their citizens or persons who harm their citizens, and the principle of universal jurisdiction.

20 Article 147 of the Fourth Geneva Convention provides a list of grave breaches thereof, as follows: “Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: willful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or willfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.”

to war crimes in the appropriate circumstances) appears in a series of other conventions, some of which Israel joined: Article 6 of the Convention on the Prevention and Punishment of the Crime of Genocide;²¹ Article 28 of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954),²² Article 7 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984),²³ Article 14 of the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (1993),²⁴ Article 9 of the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (1997), and Articles 15-17 of the Second Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict.²⁵

DIFFERENT APPROACHES TO LEGISLATION TO PUNISH WAR CRIMES

Different states and legal traditions use different approaches to enact legislation that criminalizes international crimes, including war crimes. Knut Dormann and Robin Geiss, of the ICRC Legal Division, enumerate the main approaches to legislation that criminalizes war crimes:²⁶ legislation by way of referral to international law and legislation based on domestic law.

LEGISLATION BY REFERRAL TO INTERNATIONAL LAW

States that take this approach enact laws that refer to the relevant provisions of international law. This approach allows the legislator to avoid the effort required by adopting and adapting the provisions of international law to the domestic law. One of the advantages of this approach is that it prevents the distortion of the provisions of international law when adjusting them to the domestic law. On the other hand, this approach prevents the legislator from adjusting the provisions of international law (and the possible defects therein) to the

21 Israel signed the Convention in 1949 and ratified its signature in 1950. The Convention went into effect for Israel on January 12, 1951. **Treaties** 5, Vol. 1, p. 65.

22 Israel signed the Convention in 1954. It was published in the Gazette in 1957. **Treaties** 213, Vol. 7, p. 485.

23 Israel signed the Convention in 1986 and ratified its signature in 1991. **Treaties** 1039, Vol. 31, p. 249.

24 Israel signed the Convention in 1993 but has not yet ratified it. <http://www.opcw.org/about-opcw/non-member-states>.

25 Israel did not join the last two agreements.

26 Knut Dormann and Robin Geiss, "The implementation of of grave breaches into domestic legal order," *Journal of International Criminal Justice* (2009, 7(4)), pp. 703-721.

domestic legal framework. This approach has two main models: the static referral model and the dynamic referral model.

The static referral model

Several countries have adopted into their domestic law the offenses from the Geneva Conventions, their Additional Protocols or the Rome Statute word for word: a kind of “cut-and-paste” of the provisions of the conventions from international law into domestic law. This kind of referral freezes the offense – its foundations and its penalty – and requires additional legislation every time the need arises to adjust domestic law to constantly changing and developing international law. This kind of referral appears in British and New Zealand law.²⁷

→ Britain

The International Criminal Court Act (2001) adopts into domestic British law war crimes, crimes against humanity and the crime of genocide and the relevant offenses as they appear in the Rome Statute. The law enumerates the different articles of the Rome Statute and adopts them wholesale into British law.²⁸

The dynamic referral model

As opposed to legislation based on the static referral model, the advantage of legislation that refers to “laws of war” or its customs, relative to the dynamic nature of customary international law, is its flexibility. This kind of legislation makes it possible for a country's courts to rely on customary law without requiring frequent amendments to legislation. The main drawback of this system is that it leaves wide berth for the presiding judge to interpret the principles of international law – which judges in domestic courts are not used to interpreting. Furthermore, there are commentators who believe this legislative approach contradicts the principle of legality. The dynamic referral approach is the

²⁷ Ibid, p. 711-713.

²⁸ Furthermore, the War Crimes Act (1991) refers to crimes committed in Germany and areas under its control during World War II by people who were not British citizens at the time but became British citizens later.

prevailing approach in the US, Canada, Russia, Sweden and some other countries.²⁹

→ Canada

The Canadian Crimes against Humanity and War Crimes Act was enacted in 2000.³⁰ With this legislation Canada became the first country to adopt the Rome Statute and incorporate it into its domestic law. Article 4(3) of the law defines “war crimes” by referring to customary international law or conventional international law. The subsequent section of definitions clarifies that the law applies to the crimes described in Articles 6, 7 and 8(2) of the Rome Statute and to international law inasmuch as it is constantly evolving:

“‘war crime’ means an act or omission committed during an armed conflict that, at the time and in the place of its commission, constitutes a war crime according to customary international law or conventional international law applicable to armed conflicts, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission.

(4) For greater certainty, crimes described in Articles 6 and 7 and paragraph 2 of Article 8 of the Rome Statute are, as of July 17, 1998, crimes according to customary international law. This does not limit or prejudice in any way the application of existing or developing rules of international law.”

²⁹ Hankins notes that Finnish criminal law combines both referral models, the static and the dynamic, so that some international crimes – war crimes and crimes against humanity – are explicitly defined in Chapter 13 of the Finnish Penal Code, while the law also criminalizes the violation of the provisions of customary or conventional laws of war that apply to Finland. See Durmann and Geiss, *supra* note 26; and Stephane J. Hankins, “Overview of Ways to Import Core International Crimes into National Criminal Law.” In Morten Bergsmo et al. (Eds.), *Importing Core International Crimes into National Law* (Oslo: FICHL, 2010), p. 7-8.

³⁰ Previous legislation from 1985 (Geneva Conventions Act) adopted into Canadian law the grave breaches specified in the Geneva Conventions and established penalties for them:

3. (1) Every person who, whether within or outside Canada, commits a grave breach referred to in Article 50 [of the 1949 Geneva Convention I], Article 51 [of the 1949 Geneva Convention II], Article 130 [of the 1949 Geneva Convention III] Article 147 [of the 1949 Geneva Convention IV] or Articles 11 or 85 [of the 1977 Additional Protocol I] is guilty of an indictable offence, and

(a) if the grave breach causes the death of any person, is liable to imprisonment for life; and

(b) in any other case, is liable to imprisonment for a term not exceeding fourteen years.

LEGISLATION BASED ON THE EXISTING DOMESTIC LAW

The second model that Dormann and Geiss present uses existing criminal law or the introduction of international crimes into it with adjustments to domestic law and legal tradition. They call this model “legislation on an autonomous national legal basis.” The advantage of this approach is the clear response it provides to the question of what actions constitute punishable criminal activity. However, one of its main disadvantages is that it does not resolve the need to interpret legal principles not commonly used on the state level according to international law (for example “protected persons,” “international armed conflict” and so on) at the time of prosecution.³¹

Incorporating specific provisions into domestic law

States that take this approach might enact a separate law that includes international crimes in their domestic law or alternatively enact articles of law as an integral part of their existing criminal codes.

Seventeen of 34 countries surveyed in a study between the years 2001-2006 included articles of law in their existing criminal codes (in their regular criminal codes or military criminal codes, or in such a way that applied the relevant articles to both the civilian and military codes). Four countries enacted separate codes that introduced international crimes into their domestic law.³²

→ Germany

In 2002 Germany enacted the Crimes against International Law Act. This law empowers the German courts to try international crimes regardless of the place in which they were committed and the identity of their perpetrators and victims (universal jurisdiction). Among other things, the law criminalizes the crimes of genocide, crimes against humanity and different groups of war crimes: war crimes against persons, war crimes against property and other rights, war crimes against humanitarian activities and their symbols and war crimes involving the use of forbidden methods of warfare.

31 Dormann and Geiss (*supra* note 25), p. 713.

32 *Ibid.*, pp. 713-716.

Use of existing domestic criminal law

Israel is a member of a small group of states that believe that their criminal law provides a legal response to international crimes. Other than Israel this group also includes Turkey, Austria and France (and until 2002 it included Germany).³³ This position contradicts the belief of most of the states in the world in the need to enact dedicated legislation in this area.³⁴

The advantage of this approach is that it can “avoid” a cumbersome legislative process of incorporating crimes similar to those that already exist in the domestic law of the country. The problem with this position, however, besides the fact that the unique crimes in a state of war or occupation are not necessarily reflected by domestic law, is the equalization of the status of “regular” crimes such as murder with the crime of deliberate killing of protected persons as part of an armed conflict.³⁵ This approach ignores the unique gravity of the crimes perceived throughout the world as grave breaches of a state’s duties during armed conflict.³⁶

One way to deal with that problem is to establish in the criminal code “aggravated circumstances” that take into account the special case of international crimes, both in their circumstances and their penalties.³⁷ In the laws of Israel, which as mentioned above, is a member of a very small group of states that opt to employ existing domestic law, there are no “aggravated circumstances” related to international crimes, war crimes or any other protection of protected persons under international law.

33 As opposed to Israel that uses the system of common law, the three other countries use civil law.

34 Dormann and Geiss (*supra* note 25), pp. 714-715.

35 Ibid, p. 714.

36 Stephane and Hankins (*supra* note 29), p. 7.

37 Dormann and Geiss (*supra* note 25), pp. 714-715. However, it is doubtful that this course of action is consistent with the duty under international law. For example, in the Bagaragaza affair the International Criminal Tribunal for Rwanda (ICTR) prevented the extradition of a man suspected of involvement in the Rwanda genocide for prosecution in Norway, even though the local criminal law contains “aggravated circumstances” that allow severe punishment of people involved in international crimes, because the defendants were being tried at that time in Norway on “regular” charges. **Prosecutor v. Bagaragaza**, Case No. ICTR-05-86-AR11bis, Decision on Rule 11bis Appeal (Aug. 30, 2006). In March 2008 Norway incorporated into its domestic law legislation that criminalizes genocide, crimes against humanity and war crimes.

CHAPTER 2

WAR CRIMES IN ISRAELI LAW

THE ABSENCE OF WAR CRIMES IN ISRAELI LEGISLATION

Due to the special importance international law attaches to international crimes (including war crimes), and considering the fact that Israel is in a state of armed conflict with its neighbors and belligerent occupation of the Occupied Palestinian Territories, it is remarkable that legislation for the purpose of punishing war crimes by Israelis is completely absent from Israeli law.

THE LAW FOR THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE

War crimes are not foreign to Israeli law. As early as 1950, shortly after the UN adopted the Convention on the Prevention and Punishment of the Crime of Genocide and before it went into effect (in 1951), the Israeli Knesset (Parliament) enacted a law that introduced the prohibition of genocide into Israeli law. The Crime of Genocide (Prevention and Punishment) Law, 5710-1950, adopted the provisions of the convention and established the crime of “genocide,” whose maximum sentence is death. The law also provided that a series of possible defenses available to defendants under the criminal law that applied at the time were not valid for offenses under this law.³⁸

A separate statute enacted 16 years later – the Annulment of Statutory Limitations on Crimes against Humanity Law, 5726-1966 – established that there would be no statute of limitations on crimes under this law and under the Nazis and Nazi Collaborators (Punishment) Law, 5710-1950. The cancellation of the statute of limitations of crimes under the Crime of Genocide (Prevention and Punishment) Law as a separate enactment rather than an amendment of the law itself, and its binding with the Nazis and Nazi Collaborators (Punishment) Law (even though the latter was already enacted with a provision that prevented statutory limitation), was explained by MK Moshe Unna, Chairman of the Knesset Constitution, Law and Justice Committee, as follows: the separate enactment was meant to “express and exhaust the public’s profound feeling towards these crimes and the way

38 Crime of Genocide (Prevention and Punishment) Law, 5710-1950, Section 6.

they should be treated.”³⁹

THE NAZIS AND NAZI COLLABORATORS (PUNISHMENT) LAW

War crimes appear as crimes in Israeli criminal law only in the context of the crimes of the Nazi regime. The Nazis and Nazi Collaborators (Punishment) Law, 5710-1950, establishes a number of crimes that are chronologically and geographically delimited to the period of the Nazi regime (from the rise of the Nazi party to power in Germany in January 1933 until the end of World War II in May 1945) and in the territories of Germany, its allies and the areas that were under their control during that time.⁴⁰ In other words, the law applies to crimes that were committed before Israel was established and outside of its territory.

Alongside other crimes established by this law, Section 1(a) of the law sets forth a series of grave offenses: crimes against the Jewish people, crimes against humanity and war crimes. The law prescribes that a person convicted of these crimes be sentenced to death. Section 1(b) defines these crimes, and among them defines “war crime” as follows:

“‘War crime’ means any of the following acts: murder, ill-treatment or deportation to forced labor or for any other purpose, of civilian population of or in occupied territory; murder or ill-treatment of prisoners of war or persons on the seas; killing of hostages; plunder of public or private property; wanton destruction of cities, towns or villages; and devastation not justified by military necessity.”⁴¹

39 Knesset Minutes 46 (1966), pp. 616-617. Before the vote, MK Arieh (Lova) Eliav proposed that due to the law's importance, Members of Knesset who were in the cafeteria be called into the plenum. The Knesset speaker rejected the proposal but did accept the proposal by MK Menachem Begin that the vote on the law be taken while standing up.

40 The Nazis and Nazi Collaborators (Punishment) Law (5710-1950). Section 16 defines the terms “during the Nazi regime” and “in a hostile country.”

41 The Nazis and Nazi Collaborators (Punishment) Law also defines, as previously mentioned, a separate offense of crimes against humanity: “a ‘crime against humanity’ means any of the following acts: murder, extermination, enslavement, starvation or deportation and other inhumane acts committed against any civilian population, and persecution on national, racial, religious or political grounds.” In addition to those two crimes, Section 1(b) also defines a separate offense of crimes against the Jewish people, an offense that includes a series of acts undertaken with the purpose of destroying the Jewish people.

In formulating this section the Knesset at the time relied manifestly on the “Nuremberg Principles,”⁴² which were also passed in 1950, the year the Nazis and Nazi Collaborators (Punishment) Law was passed. The definition of war crimes and the definition of crimes against humanity in the Nazis and Nazi Collaborators (Punishment) Law are almost identical to the definitions that appear in Nuremberg Principle No. 6.

SECTION 16(A) OF THE PENAL CODE

Section 16(a) of the Israeli Penal Code provides that “Israel’s penal laws will apply to foreign offenses, which Israel has, under multilateral conventions that are open to accession, committed itself to punish, even if they are perpetrated by a person who is neither a citizen nor a resident of Israel, and irrespective of the place in which the offense was committed.”

This section is considered to be the source of universal jurisdiction in Israeli law. Some believe that through this section crimes that appear in various international conventions, including the Geneva Conventions, were integrated into Israeli law. However, that interpretation is controversial, and in any case Israel does not have a practice of prosecuting based on clauses from international law that are not specifically enacted in its domestic law.⁴³

42 Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, 1950. The Nuremberg Principles were drafted by the International Law Commission based on the Charter of the Nuremberg Tribunal in which Nazi war criminals were tried, and subsequent to the judgments handed down by that Tribunal. The purpose of the principles was to define war crimes, crimes against humanity and crimes against peace. Principle 6 of the Nuremberg Principles defines war crimes as follows: “Violations of the laws or customs of war include, but are not limited to, murder, ill-treatment or deportation to slave-labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war, of persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity.” Crimes against humanity are defined in the same section as follows: “Murder, extermination, enslavement, deportation and other inhuman acts done against any civilian population, or persecutions on political, racial or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connection with any crime against peace or any war crime.”

43 For a brief discussion of this matter, see Amichai Cohen and Yuval Shany, **The IDF investigates itself: the investigation of suspected breaches of the laws of war** [Hebrew] (Jerusalem, Israel Democracy Institute, 2011), pp. 29-32. Cohen and Shany list several reasons why Section 16 does not provide for actual prosecution in Israel of criminal offenses based on international law, among them the fact that the Geneva Conventions themselves do not establish penal sanctions for persons convicted of offenses, and the section is about the universal application of Israel’s Penal Code but does not establish additional offenses for Israeli citizens.



GENERAL STAFF ORDER 33.0133

Reference to the duty of IDF soldiers to act according to the provisions of the Geneva Conventions can be found in General Staff Order 33.0133 issued in the 1980s, entitled “Conduct in accordance with international conventions to which Israel is a party.” The order sets forth the duty of IDF soldiers to act in accordance with the provisions of the Fourth Geneva Convention of 1949 and in accordance with the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict. Section 10 of the order provides that soldiers be briefed on the provisions of the conventions prior to each exercise of military power in circumstances that are relevant to the various conventions.⁴⁴

A General Staff order, which is an internal army directive and not a direct source that establishes criminal offenses, cannot constitute the basis for prosecuting a person suspected of war crimes. It may help prosecute soldiers for criminal offenses of a disciplinary nature that are set forth in the Military Justice Act (MJA) (“improper behavior,” “exceeding authority” etc.);⁴⁵ but, this general directive, which does not carry clear criminal sanctions, is certainly not enough. In addition to the aforesaid, the General Staff orders apply to IDF soldiers only when they are in active duty and do not apply to other populations that could be involved in war crimes, such as police officers, members of the Israel Security Agency or civilians.

“THE IDF SPIRIT”

In the 1990s, a committee headed by a major general wrote a document known as “the IDF spirit,” which was defined as “the identity card of the IDF’s values.” According to the document itself,⁴⁶ it and “the guidelines of operation resulting from it” constitute the IDF’s ethical code. The document cites as one of its four sources⁴⁷ “universal moral values based on the value and dignity of human life,” which includes the values of human dignity (one

44 General Staff Order 33.0133. Discipline – Behavior in accordance with international treaties to which the State of Israel is party.

45 Cohen and Shany *supra* note 43), p. 32.

46 The document was updated in 2000, adding, among other things, a list of the traditions that served as its sources, defining three “basic values” and updating the definition of “purity of arms.” A description of the changes appears on the IDF Manpower Branch’s website: <http://www.aka.idf.il>.

47 The other sources are “the tradition of the IDF and its military heritage as the Israel Defense Forces; the tradition of the State of Israel, its democratic principles, laws and institutions, and the tradition of the Jewish People throughout their history” (IDF website: <http://www.idf.il/1497-en/Dover.aspx>).

of three values defined as “basic values”), “purity of arms,”⁴⁸ and the assertion that an IDF serviceperson shall refrain from obeying blatantly illegal orders (under the value “discipline”).⁴⁹

“The IDF spirit” as a document concerning military ethics does not hold binding legal force. However, according to Court-Martial of Appeals case law, when considering the punishment of a soldier convicted of a crime, the extent to which the actions of which the defendant was convicted violate the IDF’s “ethical code” as expressed in that document carries weight.⁵⁰

WAR CRIMES: PARALLEL OFFENSES IN ISRAELI LAW AND MISSING OFFENSES

The State’s position, as recently expressed before the Turkel Commission, is that “in Israel there is no specific offense of ‘commission of a war crime.’ However, violation of the laws of war generally enters the framework of the offenses that appear in the Penal Code or in other specific laws.”⁵¹ The Commission’s report also cites the Attorney General’s position that “there is actually a high level of correspondence between the Israeli criminal code and the offenses set forth by international law.”⁵²

However, as the Military Advocate General (MAG) admits, only a small number of the relevant

48 “The IDF servicemen and women will use their weapons and force only for the purpose of their mission, only to the extent necessary and will maintain their humanity even during combat. IDF soldiers will not use their weapons and force to harm human beings who are not combatants, or prisoners of war, and will do everything in their power to avoid causing harm to their lives, bodies, dignity and property.”

49 The translation of binding legal rules into soft “ethical” directives continues in another document, less known than “the IDF spirit,” called “The Ethical Code for Fighting Terrorism,” and which serves as a sort of appendix to it. “The Ethical Code for Fighting Terrorism” draws on 11 principles from the laws of war: the principle of discrimination, the principle of proportionality, the prohibition against looting, and others. The document was written in 2004 upon the initiative of Maj. Gen. Amos Yadlin and Prof. Asa Kasher, but the IDF to this day apparently has not yet officially adopted it. As opposed to “the IDF spirit,” “The Ethical Code for Fighting Terror” does not appear on the IDF website. See: Hanan Greenberg, “The IDF presents: the new ethical code for fighting terror,” Ynet, February 9, 2004; Amos Harel, “Chief of Military Intelligence to Chief of Staff: the IDF must adapt a new code for fighting terror,” Haaretz, September 30, 2009.

50 Court-Martial of Appeals, Appeals/62/03, **Chief Military Prosecutor v. Sgt. A.A.**, p. 9.

51 Letter from Deputy State Attorney (Special Assignments) Shai Nitzan to Atty. Hoseha Gottlieb, Secretary of the Turkel Commission, April 6, 2011 (on the committee’s website: <http://www.turkel-committee.gov.il>).

52 Letter from Attorney General Yehuda Weinstein to Justice Yaacov Turkel (retired), Commission Chair, September 27, 2011. Quoted in the Turkel Commission Report (supra note 7), p. 306.

offenses in Israeli law reflect the offenses defined by international law, such as the offense of looting, which the MAG singled out.⁵³ Other offenses that are parallel to the war crimes listed in the Rome Statute exist in Israeli law as “regular” criminal offenses. The Association of Civil Rights in Israel (ACRI), which relied on the Concord study, listed in its submission to the Turkel Commission those offenses considered to be war crimes and to which parallels can be found in Israeli law:⁵⁴ a. willful killing; b. conducting biological experiments; c. willfully causing great suffering, or serious injury to body or health; d. extensive destruction and appropriation of property, not justified by military necessity; e. unlawful deportation or transfer; g. taking of hostages; h. rape and other acts of sexual violence.

THE LACK OF SUITABLE GENERAL PRINCIPLES

Article 17 of the Rome Statute establishes the “principle of complementarity,” which states that the existence of a criminal procedure against people accused of performing acts that are international crimes, in a country that has jurisdiction over the action or the defendant, excludes the incident from the jurisdiction of the court. However, although Israeli law criminalizes the actions listed above, which in the appropriate circumstances constitute war crimes in international law, this does not necessarily mean that prosecution for offenses in Israeli criminal law provides the defendants with the protection of the “principle of complementarity.” There are two main reasons that this is the case:

1. The Rome Statute provides that in order for offenses to be considered war crimes they must occur during armed conflict and with the perpetrator’s awareness of their occurrence. In general, no such condition appears in the Israeli criminal code (except for the Nazi and Nazi Collaborator (Punishment) Law).
2. Furthermore, the statute of limitation applies to most offenses in Israeli law, contrary to the international principle that says that there is no limitation on international crimes, including war crimes, and defendants can be prosecuted for them at any time.⁵⁵

53 The Military Advocate General, **The accordance of Israel’s mechanisms for examining and investigating complaints and claims of violations of the laws of armed conflict with Israel’s duties under international law, and the Implementation of that mechanism in relation to the maritime incident on May 31, 2010**. Position paper (December 19, 2010), p. 6 (note 10) (hereinafter: the MAG’s position paper).

54 Letter from Atty. Limor Yehuda of ACRI to the Turkel Commission, October 25, 2011 (hereinafter: ACRI’s letter).

55 The Concord study (*supra* note 9), pp. 14-17.

Therefore, prosecuting defendants for grave breaches of international law according to the provisions of existing Israeli law may not satisfy the terms of the “principle of complementarity.”

OFFENSES MISSING FROM ISRAELI LAW

Alongside the offenses listed as war crimes in the Rome Statute that have parallels in Israeli law, ACRI, following the Concord study, provided a long list of war crimes that do not appear in Israeli law at all,⁵⁶ including the following:

- Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;⁵⁷
- Willfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;⁵⁸
- Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;⁵⁹
- Intentionally directing attacks against civilian objects;⁶⁰
- Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping missions;⁶¹
- Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;⁶²
- Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives;⁶³
- Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations;⁶⁴

56 ACRI (*supra* note 54).

57 Rome Statute, Article 8(2)(a)(5).

58 *Ibid.*, Article 8(2)(a)(6).

59 *Ibid.*, Article 8(2)(b)(1).

60 *Ibid.*, Article 8(2)(b)(2).

61 *Ibid.*, Article 8(2)(b)(3).

62 *Ibid.*, Article 8(2)(b)(4).

63 *Ibid.*, Article 8(2)(b)(5).

64 *Ibid.*, Article 8(2)(b)(7).

- The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;⁶⁵
- Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;⁶⁶
- Killing or wounding treacherously individuals belonging to the hostile nation or army;⁶⁷
- Declaring that no quarter will be given;⁶⁸
- Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict;⁶⁹
- Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;⁷⁰
- Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including willfully impeding relief supplies as provided for under the Geneva Conventions.⁷¹

THE ABSENCE OF THE PRINCIPLE OF COMMAND RESPONSIBILITY IN ISRAELI LAW

As was mentioned above, the Israeli criminal code lacks the principle of “command responsibility” for actions that might be considered war crimes. Under international law, military commanders and other superiors are obligated to ensure that their subordinates are acting according to the law and to take effective measures in response to any suspicion that they have committed war crimes or other international crimes.⁷² Yet, Israeli law does not contain the principle of command responsibility, and a commander or civilian cannot be

65 Ibid., Article 8(2)(b)(8).

66 Ibid., Article 8(2)(b)(9).

67 Ibid., Article 8(2)(b)(11).

68 Ibid., Article 8(2)(b)(12).

69 Ibid., Article 8(2)(b)(20).

70 Ibid., Article 8(2)(b)(23).

71 Ibid., Article 8(2)(b)(25).

72 Ibid., Article 28. See also: ICRC, “Rule 153: Command Responsibility for Failure to Prevent, Repress or Report War Crimes”. *Customary IHL Database*. (http://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter43_rule153).

prosecuted in Israel for war crimes committed by his or her subordinates unless he or she personally ordered them to be committed.⁷³

Indeed, one of the important recommendations of the Turkel Commission has to do with the need to adopt legislation that includes the principle of command responsibility in Israeli law, to impose “direct criminal liability on military commanders and civilian superiors for offenses committed by their subordinates, where the former did not take all reasonable measures to prevent the commission of offenses or did not act to bring the matter to the attention of the competent authorities when they became aware of the offenses after the event.”⁷⁴

ISRAELI SUPREME COURT: THE EXISTING LEGISLATION IS SUFFICIENT, CONDITIONALLY

In 2007 three human rights organizations petitioned the High Court of Justice⁷⁵ demanding criminal investigations against people suspected of being responsible for acts of killing and destruction in the Gaza Strip during military operations that took place in 2004. In the decision rendered in December 2011 rejecting the petition, then Supreme Court Chief Justice Dorit Beinisch elaborated on the question of Israel's responsibility to amend its laws on the basis of the Geneva Conventions:

“It is important to make clear that this Israeli policy, even without applying international law as an independent part of the Israeli criminal code, does not violate Israel's duties under the Geneva Conventions because it allows effective criminal sanctions to be imposed on violators of material articles in [the Fourth Geneva Convention], Article 146 [...], as long as the indictment reflects the criminality of the action attributed to the defendant and the punishment imposed in case of conviction reflects the aggravated circumstances of committing the crime against protected persons under the laws of war [...]. Furthermore, various scholars argue that the choice to handle war crimes through the existing local criminal system (instead of enacting new offenses of war crimes or integrating the laws of war into the local system word for

73 The Concord study (*supra* note 9), p. 46. For comparison, Article 4 of the German Crimes against International Law Act states that a military commander or civilian superior (as well as anyone who fills de facto the equivalent functions of a commander or superior) who did not prevent his/her subordinates from committing a crime enumerated in this law will be prosecuted, and his/her punishment will be identical to the punishment of those who committed it.

74 Turkel Commission Report (*supra* note 7), p. 369.

75 The three organizations are Adalah, The Palestinian Center for Human Rights (Gaza) and al-Haq.

*word) has clear advantages such as prosecutors' familiarity with the elements of the offenses and their subsequent enhanced ability to conduct effective trials in these cases [...]."*⁷⁶

Chief Justice Beinisch cited two conditions which, when taken, together render domestic Israeli law sufficient even without integrating the provisions of international law into it. One condition is for the indictment charges to express the gravity of the offenses described by the indictment;⁷⁷ the other is for the punishment to reflect the special circumstances of committing the crime against protected persons. However, accumulated experience indicates that the effective practice does not fully conform to the aforesaid. That is the subject of the following chapter.

76 HCJ 3292/09 **Adalah – the Legal Center For the Rights of the Arab Minority in Israel et al. v. the Attorney General et al.** (unpublished, December 8, 2011), Section 10. Our emphasis.

77 The Turkel Commission also adopts the position that it is sufficient to prosecute those who commit war crimes for offenses under the existing domestic law, "provided that it reflects the severity of the violation under international law." See: Turkel Commission Report (supra note 7), p. 365.

CHAPTER 3

WAR CRIMES IN THE COURTS-MARTIAL

Israeli citizens can be prosecuted under Israeli law and in regular Israeli courts for acts that might be considered “war crimes.” IDF soldiers are subject to Israel’s regular criminal code (especially the Penal Code and other laws) as well as to the Military Justice Act (MJA).

The MJA does not apply to civilians and members of other security forces, such as police⁷⁸ (including soldiers who were transferred to service in the Border Police), jail wardens⁷⁹ (including soldiers who were transferred for military service to the Prison Service) or employees of the Israel Security Agency. When any of these people stand trial for criminal offenses against Palestinians it is on the basis of the Penal Code and in Israel’s “regular” courts: the magistrate and district courts, depending on the severity of the offenses in the indictment.

THE LAWS OF WAR AND PROSECUTION OF SOLDIERS: THE MILITARY PROSECUTION’S DIRECTIVES

As was already mentioned, Israeli soldiers who violate the laws of war are prosecuted on the basis of offenses set forth in Israeli law, especially the MJA and the Penal Code. As stated in a document submitted by the Military Advocate General (MAG) to the Turkel Commission:

“It should be noted parenthetically that indictments submitted to the Courts-Martial include only offenses enshrined in Israeli law and are not based directly on the provisions of the laws of war, even when they are worded in the form of an offense (for example, the articles of “grave breaches” in the four Geneva Conventions [...]) and even if they are considered to have customary status. Therefore, in the process of writing the indictments, the Military Prosecution must “translate” the alleged violation of the laws of war to a criminal offense under the Penal Code or the MJA. In a small number of cases, such as the offense of looting, the criminal count accurately reflects the allegedly violation [...]. In other cases it requires seeking out a criminal offense with a similar

⁷⁸ Defense Service Law (Consolidated Version), 5746-1986, Section 25(a).

⁷⁹ Ibid., Article 24c(a).

normative content whose ascribed punishment befits the severity of the prohibition under international law."⁸⁰

"Translating the alleged violation of the laws of war into a criminal offense," in the words of the MAG, is based on "the Chief Military Prosecutor's Directives" (hereinafter: "the CMP directives") – professional directives that guide the military prosecutors as to the prevailing policy concerning indictments for the various offenses.⁸¹ As a rule these directives make no mention of the laws of war or international crimes. Inasmuch as they make reference to offenses against Palestinians in the Occupied Palestinian Territories, they make no reference to obligations from international law or the enhanced gravity that should be attached to offenses that concern harming protected persons under the laws of war or in cases that raise suspicions of war crimes.

OFFENSES OF ILLEGAL USE OF WEAPONS

The chapter concerning the Military Prosecution's policy in the CMP directive on the subject of illegal use of weapons (under Section 85 of the MJA) lists different kinds of illegal use of weapons: negligent handling of weapons, playing with weapons, shooting at family celebrations and so on. Among other things, circumstances related to the Occupied Palestinian Territories are mentioned: "Use of weapons in violation of the rules of engagement (especially during Intifada events); [...] threatening a commander/another soldier/local population in the Occupied Territories/in civilian circumstances while using a weapon."⁸²

The chapter on sentencing arguments in cases in which indictments are served discusses at length the exceeding gravity attached to the illegal use of weapons as part of private shooting ranges and firing at family celebrations, but makes no mention of the exceeding gravity of the illegal use of weapons while harming protected persons under international law. The CMP directives, therefore, do not attach any "aggravated circumstances" to

⁸⁰ Position paper by the MAG (*supra* note 53), p. 6, note 10.

⁸¹ The CMP directives mentioned here were provided to Yesh Din on August 29, 2010, as a partial response to a request under the Freedom of Information Act submitted by Yesh Din on May 12, 2009. If any changes were made in their contents at a later time, Yesh Din was not informed. As part of the request for information Yesh Din asked for further directives, but none were provided, and no reason was given for failing to provide them. The directives that were not provided have to do with the offenses of disgraceful behavior, exceeding authority, negligence and taking bribes.

⁸² Chief Military Prosecutor, CMP Directive No. 2.07: "Illegal use of weapons."

weapon offenses against protected persons in the Occupied Palestinian Territories.

THE OFFENSE OF LOOTING

Section 74 of the MJA, entitled “looting,” states the following: “A soldier who has looted or broken into a house or another place to loot shall be sentenced to ten years in prison.” The CMP directives for this offense (which, as noted by the MAG document quoted above is one of the only offenses in Israeli law that directly reflects a provision of the laws of war)⁸³ fill a chapter in the directives document about offenses of the theft type. Section 11, the general section in the looting chapter, indicates the special severity of the offense of looting, but it is explained by the offense’s violation of “morality, which is the ‘twin brother’ of the purity of arms.” The severity of the offense, according to the Military Prosecution’s directives, derives from the severe violation of the army’s morality, and not from the severity of harming civilians who are subject to the control of soldiers of a military force of an occupying power and protected by the provisions of the laws of war.

Only in Section 13 of the CMP directives, in which the Military Prosecution is instructed how to approach sentencing people convicted of the offense of looting, is there any mention of the offense’s violation of the army’s duty to protect the population under its control mentioned. Even that mention is presented in passing, as one of a range of considerations that concern harm to the army’s image and its “operational readiness” as a result of the offense.⁸⁴

CRIMES OF ABUSE

The CMP directive entitled “crimes of violence and abuse” provides that soldiers involved in crimes of violence or abuse against Palestinians in the West Bank and the Gaza Strip be prosecuted based on Section 65 of the MJA, which is concerned with the crime of abuse,

83 *Supra* note 21.

84 Section 13 of CMP Directive no. 2.08: “Crimes of theft: When presenting sentencing arguments in the crime of looting, the prosecution should stress, besides the gravity arguments that shall be specified henceforth concerning theft crimes in general, the special aspects of gravity concerning the crime of looting, including the harm to the IDF’s morality, both internally and externally (from the international, awareness and media perspectives), and the harm to the population under control [...], and the damage to operational readiness when a soldier is busy looking for property instead of fighting/guarding.”

and Sections 379-382 of the Penal Code.⁸⁵

Section 65 of the MJA is about crimes of abuse. Section 65(a) stipulates a sentence of up to three years in prison for a soldier who batters or abuses a soldier whose rank is lower or a person held in custody. Section 65(c) provides a sentence of up to seven years in prison for the crime of “abuse under aggravated circumstances.”

The MJA does not define what “aggravated circumstances” are for the crime of abuse in Section 65(c). A CMP directive provides that the interpretation of the aggravated circumstances should be made according to the offenses set forth by the Penal Code concerning joint assault or against a spouse, a minor or a helpless person.⁸⁶ When none of these apply, “the prosecution may consider attributing [to the defendant] abuse under aggravated circumstances, provided that other circumstances exist, even if they are not those defined by the Penal Code.”⁸⁷ In any case, there is no positive provision that provides that “aggravated circumstances” may be crimes against protected persons under international law. The directive provides for considering the use of additional sections of the Penal Code in cases in which the violence caused aggravated trauma (Section 333 - aggravated trauma, punishable by up to seven years in prison), injury (Section 334 - injury, punishable by up to three years in prison). In “other aggravated circumstances” the directive instructs the prosecution to consider charging the defendant with Section 335 of the Penal Code – trauma and injury under aggravated circumstances. The aggravated circumstances in this case, according to the directive, may be the use of a cold weapon, using violence jointly or in front of others, or while the victim is in custody, bound or blindfolded.⁸⁸

85 Section 379 of the Penal Code establishes the crime of assault (subject to two years in prison); Section 380 is about assault that causes real damage (up to three years in prison); Section 381 “various assaults” (assault with the goal of committing a crime, theft, evading arrest etc. – up to three years in prison); Section 382 establishes the crime of assault under aggravated circumstances: a crime based on Sections 379 or 380 with the aggravated circumstances being that the assault is undertaken in the presence of two people or more or at their initiative, and assault under Section 379 against a family member (including spouse and minor or helpless person for whom the assailant is responsible) or assault under Section 380 against a spouse. The punishment for any of the above is up to twice the punishment set forth in the aforesaid sections.

86 Section 368a of the Penal Code (1977) defines a “helpless person”: “A person who because of their age, illness or physical or emotional handicap, mental disability or any other reason cannot take care of their livelihood needs, health or well-being.”

87 CMP Directive no. 2.02: “Violence and abuse offenses,” Section 10.

88 Ibid., Section 11.

The directive establishes a policy for requesting the remand of suspects until the end of legal proceedings. The aspects of gravity provided as justifications for a request for remand until the end of proceedings include: a particularly severe kind of violence; causing real damage; the act having been planned; cases of abuse of persons who are “helpless (handcuffed/blindfolded), held in custody, and especially the local population;⁸⁹ or violence during a police function or quasi-police function [...]”⁹⁰ As for the suitable sentencing policy, the directive provides that in cases of crimes against Palestinians, “a severe sentence should be sought that denounces and condemns the use of violence against the local civilian population.”⁹¹

TEST CASE: PROSECUTION BASED ON THE USE OF “HUMAN SHIELDS”

The use of protected persons and people who are not participating in combat activities as “human shields” is a criminal offense in many countries, whether as the adoption of the offenses from the Rome Statute into domestic law or through unique legislation. The Australian criminal code, for example, establishes the offense, “war crime – use of protected persons as shields,” and its maximum sentence is 17 years in prison. If the offense led to the death of any of the protected persons who were used as human shields, the convicted criminal can be sentenced up to a life sentence.⁹²

Israeli law does not have an offense that clearly criminalizes the use of civilians as “human shields.” In 2002 a petition was filed at first challenging the military practice referred to as

89 The terms “local population” or “locals” refer to Palestinian civilians.

90 CMP Directive no. 2.02: “Violence and abuse offenses,” Sections 15-16.

91 Ibid., Section 17.

92 ICRC, “*Practice Relating to Rule 97: Human Shields*” in *Customary IHL Database* (http://www.icrc.org/customary-ihl/eng/docs/v2_rul_rule97).

the “neighbor procedure,”⁹³ which later was redirected against a different procedure offered by the IDF – a procedure called “early warning,” after the State announced that it, too, considered the “neighbor procedure” illegal). In the decision, the then Chief Justice of the Supreme Court, Justice Aharon Barak, noted, based on Article 28 of the Fourth Geneva Convention and Article 51(1) of the First Additional Protocol, that “it is clear that the Army is not permitted to use local residents as ‘human shields,’” and added, following the scholar Pictet, that it is a “cruel and barbarian” practice.⁹⁴

In the few cases in which soldiers were prosecuted for using Palestinians as “human shields,” they were usually charged (originally, before the charges were further reduced as part of plea bargains) with offenses of “exceeding authority to the extent of risking life or health” (Section 72 of the MJA), an offense whose maximum penalty is up to three years in prison.⁹⁵

→ Lieutenant Colonel G.S. was accused of grave abuse of a Palestinian while interrogating him in his house, as well as using a foreign national as a human shield on another occasion. In April 2002, Lieutenant Colonel G.S. entered a home in the village of Doha with a military force in search of wanted operatives. He was accompanied by another two officers of the same rank. The door was opened by a migrant worker, a Senegalese national, who told Lieutenant Colonel G.S. that the owners were not home. In the Special Court-Martial’s verdict the incident was described as follows: “The defendant ordered

93 The commander of the Judea and Samaria Division at the time, Brigadier General Amos Ben Avraham, described the “neighbor procedure” in his Military Police Criminal Investigation Division (MPCID) testimony in the Sagi affair: “According to this procedure, when you surround the home of a wanted operative, you arrest and take a neighbor from a neighboring house, ask him to open the door and then ask him to lead the search in the house. During the search he, the neighbor, walks before the force, opens the doors of the rooms and closets and is asked to call on the people in the house to come out. But if and when there is a danger of a bomb or of getting caught in a shooting situation, the ‘neighbor’ is moved aside, taken to the back of the line and not exposed to danger.” Special/1/02, **Military Prosecutor v. Lieutenant Colonel G.S.**, p. 3. On August 14, 2002, 19-year-old Nidal Abu Mukhaysen was killed after a soldier ordered him at gunpoint to go to the home of a wanted operative as part of the “neighbor procedure.” The wanted operative, who apparently thought he was an IDF soldier, shot and killed him. B’Tselem, “IDF is Responsible for Death of ‘Human Shield’” (Press Release, August 14, 2002), http://www.btselem.org/press_releases/20020814.

94 HCJ 3799/02 **Adalah et al. v. OC Central Command et al.**, section 21 of Chief Justice Barak’s ruling.

95 This occurred in at least two of three indictments that were submitted concerning the use of “human shields.” In the third case (the case of Captain M.A., see below) Yesh Din does not know what the original charge was before the indictment was amended.

[the foreign national] to turn around, so that she stood before him, and grabbed her shirt so that she walked ahead of him leading the force to encounter any possible danger, with the defendant's personal gun aimed in the direction in which they were walking and at the height of her shoulder,. During the search of the Nikola house, Lieutenant Colonel [B.G.A.] fired two shots at suspicious places on the top story and in the bedroom.”⁹⁶

The original indictment charged Lieutenant Colonel G.S. with extortion under threat and the accompanying charge of inappropriate conduct for abuse of an interrogee. For using the foreign national as a “human shield,” Lieutenant Colonel G.S. was charged with exceeding authority to the point of risking life or health and another accompanying charge of inappropriate conduct. As part of a plea bargain between the prosecution and the defense, all of the counts against Lieutenant Colonel G.S. were substituted with the single count of “inappropriate conduct.”⁹⁷ The Special Court-Martial (where officers from the rank of Lieutenant Colonel and above are tried) sentenced Lieutenant Colonel G.S. to 60 days of military labor, a three-month suspended prison sentence, and demotion by one rank to the rank of major. The Court-Martial of Appeals stiffened G.S.’s sentence by demoting him by another rank to the rank of lieutenant, which is still an officer’s rank.⁹⁸

- In June 2003, a force from the Nahal Brigade’s 50th Battalion identified a suspicious object in Hebron. The sappers who were summoned to the site were delayed and company commander Captain M.A. ordered the force commander to choose a Palestinian passerby at random and order him to move the suspicious object while the force’s soldiers took cover. The force commander did as Captain M.A. ordered and went over to pick up the suspicious object with a Palestinian civilian who had been selected randomly. On another occasion Captain M.A.’s soldiers noticed a folded fabric that they suspected was a roadside bomb. Since in this case again the sappers were delayed, the officer ordered a random Palestinian civilian who was walking by to unfold the fabric, but the civilian refused and Captain M.A. let him go. In an amended indictment submitted as part of a plea bargain, Captain M.A. was charged with exceeding authority under Section 68 of the MJA, a punishment whose maximum sentence is two years in prison and does not carry a criminal record.

96 Special/1/02, **Military Prosecutor v. Lieutenant Colonel G.S.**, p. 3.

97 Amended indictment in Special Court-Martial File 1/02, **Military Prosecutor v. Lieutenant Colonel G.S. and Sergeant Y.A.**. For more about this case, see Yesh Din report, **Exceptions: Prosecution of IDF soldiers during and after the second Intifada, 2000-2007** (Tel Aviv, 2008), pp. 90-92.

98 Appeals/153/03 **Lieutenant Colonel G.S. v. Military Prosecutor**.

In the Court-Martial's verdict, which was delivered after the Supreme Court ruling in the "early warning" affair, there is a rare reference to the provisions of international law. The Court-Martial noted "the clear and absolute prohibition against using local residents as 'human shields'" and the prohibition against "volunteering" them to cooperate with the occupying army, and it referred to Articles 28 and 51 of the Fourth Geneva Convention, Article 51(7) of the First Additional Protocol and Article 23(b) of the Hague Convention. "In spite of the aforesaid," noted the Court-Martial,

*"we cannot ignore the accused's considerations when giving the orders. In both cases a force under his command was in hostile territory unable to advance because of the suspicious object, waiting for the delayed bomb squad to arrive. The accused acted to prevent risk to his soldiers. The decision he made may have been wrong because it did not respect the principle of not harming civilians, but we must still give weight to the fact that it was made in a difficult situation in which he was afraid to risk the safety of his soldiers."*⁹⁹

The Court-Martial, which adopted the plea bargain between the parties, sentenced Captain M.A. to a two-month suspended prison sentence, according to the agreed upon penalty. One of the judges, in a minority opinion, found it fitting to rule beyond the agreement, provide more leniency to the defendant and sentence him to a mere "warning." In his opinion there was no reason to launch a criminal procedure in this case altogether. "As an aside to the sentence," wrote the court, expression was given to the MAG's statement that he would recommend to the head of the IDF Manpower Branch to shorten the period in which the defendant's promotion is delayed, such that he would receive the rank of major only one year after the original date on which he should have received it had he not been convicted of a crime.

- Following the incident in which two IDF soldiers ordered a nine year-old boy to open bags and suitcases in a room in which they suspected a terrorist or bomb were hiding (the "child procedure affair" detailed in the introduction to this report), the two defendants were prosecuted for the crime of exceeding authority to the point of risking life or health, under Section 72 of the MJA. The defendants were convicted after a full evidentiary trial and sentenced to a three-month suspended prison sentence and demoted by a single rank to the rank of sergeant (which is still a commanding rank). Furthermore, the court noted sympathetically that the two men's excellent military service would stand to their credit in the future when they would request to expunge their criminal records.

99 Center/44/06 **Military Prosecutor v. Captain M.A.**, p. 3.

In the verdict of the Abu Rahma case, which centered on the MAG's decision to charge an officer and soldier with a minor charge for shooting a rubber-coated bullet at the leg of a bound and blindfolded detainee, the Supreme Court upheld its previous ruling that the charges should reflect the severity of the offenses described in the indictment. This particular appeal was against the prosecutor's discretion when choosing a minor charge compared to other charges that may have been more fitting to the circumstances of the matter. The court, however, stressed the duty to match the severity of the criminal actions in the public system of norms with the gravity of the charges and the penalties they carry:

36. [...] It is a fundamental rule of drawing up an indictment that of the various possible charges, the prosecution must select the normative-punitive option that best fits the nature of the criminal action as described by the facts of the indictment. Thus, a factual narrative that describes a very serious event, embodied in a charge that expresses a moderate and minor criminal norm, might indicate a lack of accord between the facts and the charge, which could constitute a material defect in the indictment [...]

*37. Phenomena characterized by exceeding gravity in that they offend the public's accepted moral norms must be matched by an appropriate punitive norm that is as grave as the action [...]*¹⁰⁰

The fact that the prohibition against using human beings as “human shields” has not been introduced explicitly into Israeli law has resulted in the fact that in the (few) cases in which soldiers were prosecuted for using Palestinians as “human shields,” they were charged with minor offenses. The offenses of “improper behavior,” “exceeding authority” (neither of which even entail a criminal record) and “exceeding authority to the point of risking life or health” do not reflect the gravity of the action of which these defendants were convicted – and which former Chief Justice Barak called “cruel and barbarian.” Additionally, the sentences, none of which include active prison time, do not fit the gravity of the offenses.

PLEA BARGAINS: LENIENCY OF INDICTMENT AND SENTENCING

Plea bargains are an inherent component of the Israeli criminal legal system. A plea bargain is “an agreement between the prosecution and the defendant or his attorney over the

100 HCJ 7198/08, **Ashraf Abu Rahma et al. v. Brigadier General Avichai Mandelblit, Military Advocate General et al.** (unpublished, July 1, 2009).

charges, details of the indictment or the penalty to which the defendant will be sentenced.”¹⁰¹ From the prosecution’s point of view, plea bargains are meant to save the public some of the time and money involved in administering full legal proceedings; whereas from the defendant’s point of view, a plea bargain might reduce the gravity of the indictment or the penalty.¹⁰²

Since the beginning of the second Intifada in September 2000, 196 defendants, soldiers and officers, have been tried by the Courts-Martial on charges concerning harm to Palestinians and their property. In 181 cases, the legal proceedings were exhausted by way of conviction or acquittal.¹⁰³ Forty-four defendants, which comprise 24% of the total defendants, underwent full evidentiary trials. Ten defendants (5%) concluded their cases by confessing to the indictment (and Yesh Din has no indication whether that was part of a plea bargain). But most of the defendants in the Courts-Martial tried for offenses against Palestinians – 127 defendants (70%) – pled guilty as part of plea bargains, with or without agreement on sentencing.¹⁰⁴

According to the Supreme Court, Israeli courts must honor plea bargains between the prosecution and the defense as a rule, unless there are particular reasons not to do so.¹⁰⁵ When considering a plea bargain with a defendant, the Military Prosecution must consider whether the arrangement is in the public interest.¹⁰⁶ Both the Military Prosecution’s directives and case law stipulate that this consideration should take a number of factors

101 CMP Directives, Directive no. 3.06: Plea Bargains. This language is almost identical to the language of Directive no. 8.1 of the State Attorney’s Directives: “Directives for conducting plea bargains” (these directives are binding upon the civilian prosecution).

102 A recently published study found that 76.5% of defendants in Magistrate courts and 85.7% of defendants in District courts, whose cases ended with judgments and sentences, reached at these decisions through plea bargains. See Oren Gezel-Eyal, Inbal Galon and Keren Winschel-Margel, **Rates of conviction and acquittal in criminal proceedings** (Haifa University: The Center for the Study of Crime, Law and Society, May 2012), pp. 22, 24. As for the military court system in the Occupied Territories (where the IDF prosecutes Palestinians), the CMP estimated in 2006 that the rate of plea bargains therein is about 95%. Yesh Din’s report, **Backyard Proceedings: The Implementation of Due Process Rights in the Military Courts in the Occupied Territories** (December 2007), p. 137.

103 In the cases of twelve other defendants the military prosecution canceled the indictment after it was submitted. Two legal proceedings are still underway.

104 In one additional case Yesh Din does not know whether the judgment was delivered following a full evidentiary trial, a plea bargain or an admission without a plea bargain.

105 Criminal Appeal 2034/91, **Anonymous v. State of Israel** (unpublished, June 16, 1991).

106 ACH 1312/93, **Felder and Markovitz v. State of Israel**, PD 47(2) 558 (1993).

into account: the extent of evidentiary difficulties in proving the charges or their severity, the circumstances of the offense (its gravity, frequency, the time that has passed since it was committed), circumstances related to the victim of the offense (the gravity of the harm, reparation for the harm caused, and whether upholding the plea bargain would spare the victim's testifying in court), circumstances related to the defendant (status at the time of committing the offense,¹⁰⁷ age, past, personal and familial circumstances, etc.).¹⁰⁸

As was mentioned, most of the defendants accused of harming Palestinians and their property conclude the criminal proceedings in their cases with plea bargains, and almost all of the plea bargains are adopted by the Courts-Martial.¹⁰⁹ Most of the bargains lead to very light sentences for the defendants,¹¹⁰ but as a rule the judgments do not include reference to the victim's status as a "protected person" under international law in cases in which the offense could be considered a war crime. The victim's status is almost never expressed in the prosecution's arguments or the court's rulings. The following are some examples.

→ **Center/337/02:** Sergeant A.R., a tank driver, was tried because during a military operation in the city of Ramallah in January 2002 he strayed off the route of his travel and ran over a Mitsubishi vehicle that was parked on the side of the road with his tank. The damage was estimated at NIS 43,000. The defendant was initially put on disciplinary trial in his unit and served seven days of detention out of the fourteen to which he was sentenced. The original indictment against him charged him with willful damage under section 413e of the Penal Code, which holds a maximum sentence of five years in prison. Following a plea bargain, the charge was replaced by the much lighter offense of damaging property by exceeding authority (Section 70 of the MJA), an offense whose maximum sentence is two years in prison and which does not carry a criminal record. In its arguments for severity, the Court-Martial noted that the defendant's "grave and superfluous" actions should be condemned because "they do nothing but provoke hatred of the local residents with whom we are in conflict and cause damage to the moral fortitude and image of the whole IDF." On the other hand, the court noted the

107 Following case law, the CPM directive provides that when weighing plea bargains the prosecution must consider, among other things, circumstances related to the defendant's status when committing the offense (for example, whether he was a soldier or military police officer), but the directive does not include a parallel consideration of the status of the victim, such as his/her status as a protected person under the provisions of the Geneva Conventions.

108 CMP Directives, Directive Number 3.06: "Plea Bargains," section 3.

109 See **Exceptions** (*supra* note 97), pp. 40-42.

110 For a review of the sentencing of individuals convicted of offenses against Palestinians and their property in the Courts-Martial in the years 2000-2007, see **Exceptions** (*supra* note 97), pp. 42-52.

defendant's emotional upheaval following combat incidents that preceded this incident, his excellent functioning during his military service and the fact that he already had served a few days in prison as a result of the disciplinary proceeding. Sergeant A.R. was sentenced to twenty-one days of military chores, a suspended jail sentence and demotion to the rank of private. The car's owner was not mentioned in the verdict, nor was any provision made to compensate him for the damage caused to his car.¹¹¹

→ **Staff/46/06:** In February 2005 a force from the Golani Brigade detained a group of Palestinians on the Philadelphi Route. The Palestinians, who were suspected of attempted infiltration and smuggling of weapons, were taken to an IDF base. Golani officer Captain S.A. interrogated one of the detainees while shouting at him and hitting him on the back of his head. Then Captain S.A. ordered his subordinates to take off the detainee's pants, and before they did so he attached a pair of wire cutters to the detainee's penis above his pants and threatened that if the latter did not answer his questions he would cut his penis. The original indictment, which charged Captain S.A. with abuse under Section 65(a) of the MJA and the accompanying offense of improper behavior, said that the detainee fainted following the threat. That description was deleted from the amended indictment that was filed following the plea bargain, such that the effect of the described act on the detainee did not appear therein. In the amended indictment the charge of abuse was substituted by that of exceeding authority. Captain S.A. was sentenced to two months of military work and suspended imprisonment. The officer's rank did not suffer, but the court recommended that he not be promoted for two years.¹¹²

→ **Staff/816/10:** In one of the only indictments submitted following Operation Cast Lead, a soldier from the Givati Brigade, Staff-Sergeant H.S., was indicted for what was known as the "white flag affair." The case began with the investigation of the killing of Ria Abu Hajaj, 65, and her daughter Majda, 35. According to an investigation by the B'Tselem human rights organization, the two were shot and killed while marching with a group of relatives who were waving a white flag after being forced to flee their home.¹¹³ The Military Police Criminal Investigation Division (MPCID) failed to link the shooting incident of which the defendant was ultimately convicted with the death of the mother and

111 Center/337/02, **Military Prosecutor v. Sergeant A.R.**

112 Staff/46/06, **Military Prosecutor v. Lt. S.A.**

113 For a description of the findings of the B'Tselem inquiry, see the report on the B'Tselem site: **Following B'Tselem's action, prosecution of soldier appears likely on charges of killing Majda and Rihay Abu Hajaj while they carried white flags during Operation Cast Lead** (June 16, 2010) (http://www.btselem.org/gaza_strip/20100616_soldier_to_be_charged_with_killing_two_gazan_women).

daughter, and instead the indictment charged the defendant from the outset with manslaughter (and the associated offense of improper behavior) for the killing of an anonymous “figure” that was walking in a group waving a white flag.

The plea bargain that the parties later reached was explained mainly by “real difficulties” in proving a causal connection between the defendant’s shooting and the “figure’s” death, as well as the impairment of the defendant’s defense because of the inability to use the findings of the operational inquiry into the same affair. In the plea bargain the offense of manslaughter was substituted with the illegal use of a weapon, severing any association between the defendant’s shooting and the killing of the “figure.” However, in the amended indictment, as was detailed in the verdict, the defendant confessed to aiming his gun and shooting at the upper body of “one of the figures” in the group of people above which “at least one white flag” was waving, and which was walking toward the place in which the military force was located, after having fired a few shots in the air and near the people’s feet. The defendant confessed to having done so without receiving an order and despite the fact that his commanders were present. As part of the plea bargain the parties appealed to the Court-Martial jointly to sentence the defendant to 40 days in prison, a suspended prison sentence and demotion to the rank of private. The court adopted the plea bargain and accepted the petition for sentencing (the suspended prison sentence was three months), despite the fact that even without confessing to manslaughter the defendant had confessed to the deliberate shooting at the upper body of a person marching in a group that was waving a white flag. The court called those actions “a serious digression from the appropriate cautionary measures and a serious digression from the limits of the authority given to every soldier during fighting.”¹¹⁴

- **North/292/11:** A combatant in the Golani Brigade Patrol Company (publication of whose identity is under a Court-Martial gag order) was accused of having beaten a Palestinian detainee with his gun in October 2009. During the beating the detainee was sitting bound and blindfolded on the floor of a military vehicle. The judgment stated that the beating was not preceded by any provocation by the victim and the perpetrator had no explanation for his action except for the pressures of military service.

As part of a plea bargain between the parties the main charge in the indictment was reduced from abuse under aggravated circumstances (under Sections 65(a) and (c) of the MJA, an offense that carries a maximum sentence of seven years in prison) to

114 Staff/816/10 **Military Prosecutor v. St.-Sgt. H.S.**

abuse (Section 65(a) of the MJA, whose maximum sentence is three years in prison). The amended indictment, just like the original one, noted the accompanying offense of improper behavior. When accepting the plea bargain, the Court-Martial noted that most of the judges on the bench thought the bargain was balanced, “considering the obsolescence of the offense, the degree of its gravity, the defendant’s excellent military service and his regret of his actions,” and because he had served seven days of imprisonment to which he was sentenced in a disciplinary proceeding in his unit before the MPCID investigation opened. The Court-Martial sentenced the defendant to a two-month suspended prison sentence and demotion to the rank of private. The judgment makes no reference to the victim and his condition or to the victim being a “protected person” under international law, nor to the fact that the offense is one that could be considered “war crime.”¹¹⁵

- **Center/315/11:** Maj. A.T., commander of a patrol company, confessed that in November 2008 he ordered the driver of the jeep in which he was riding to run over a Palestinian youth in the village of a-Dik during the pursuit of a group of youths who were fleeing a roadblock. The indictment notes that the order was given even though the young man, Naji Ma’an, posed no danger to the jeep’s passengers. As a result of being hit by the jeep Ma’an fell, his face began to bleed and his jaw and eight of his teeth were broken. After hitting Ma’an the officer got out of his vehicle to check his condition, but when a crowd began to gather he left the site and the casualty behind. The indictment was served nearly three years after the incident. As a result of a plea bargain the defendant was charged with exceeding authority to the point of risking life or health and improper behavior. In the joint petition of the parties to the Court-Martial to accept the agreed upon plea bargain and penalty, they emphasized that the reasons for the bargain were evidentiary difficulties, the passage of time since the incident and the fact that the officer was discharged from his military service following the incident. They also noted that “the bargain wishes to express the ‘operational coefficient’” as a mitigating circumstance that should be taken into consideration, since the act took place in the course of “the pursuit of stone throwers.”¹¹⁶

115 North/292/11 **Military Prosecutor v. Anonymous.**

116 Center/315/11 **Military Prosecutor v. Major A.T.**

THE ABSENCE OF INTERNATIONAL LAW FROM THE COURT-MARTIAL RULINGS

The IDF's actions in the Occupied Palestinian Territories are subject to the provisions of international law. The Supreme Court, sitting as the High Court of Justice, has discussed the legality of the IDF's actions in the OPT many times, relying, among other things, on these provisions. Nonetheless, the Courts-Martial's judgments hardly make any reference to the various branches of international law.

THE COURTS-MARTIAL ON THE STATUS OF PROTECTED PERSONS

In the vast majority of judgments delivered by the Courts-Martial in the cases of soldiers accused of offenses against Palestinians and their property, not the slightest mention can be found of the status of the victims as "protected persons" under international law. Soldiers convicted in Courts-Martial of offenses they have committed against Palestinians and their property are sentenced to various penalties that are explained by a long list of justifications. These justifications, concerning the considerations for leniency or severity in penalizing the convicted soldier, usually rely on the existing rulings of the Court-Martial of Appeals. They contain different kinds of justifications, but as a rule they make no mention at all of the soldiers' duties toward protected persons in occupied territories.

In only a small number of judgments by the District Courts-Martial (the first instance) is passing mention made of the fact that the Palestinians in the Occupied Palestinian Territories are "protected persons" under the provisions of international law. In the judgment in the case of a soldier convicted of assaulting a detainee held in a detention facility in Gush Etzion, the court quoted the prosecutor's arguments that "this is not a matter of a 'regular' detainee but a detainee in an occupied territory, whose rights are vested not only by virtue of domestic law but also by virtue of international conventions."¹¹⁷ In another case of a soldier looting various objects in Ramallah during Operation Defensive Shield, the court commented: "There is no doubt this is blatant abuse of the status and power he was given by virtue of being a soldier in an occupied territory against the civilian population which at that point was subject to his authority and benevolence."¹¹⁸ The judgment of the Court-Martial of Appeals that discussed the appeal of a soldier who was convicted of kicking and head-butting a twelve year-old Palestinian minor mentioned the Military Prosecution's

¹¹⁷ Staff/268/08, **Military Prosecutor v. Sergeant A.M.**

¹¹⁸ Center/70/03, **Military Prosecutor v. Sergeant A.L.**

reference to the defendant's actions having harmed "the moral fortitude of IDF soldiers, the IDF's image and the delicate fabric of relations between the army and the local population, especially considering that it is a population protected by international conventions."¹¹⁹

One of the cases briefly discussed the question of the difference between the status of victims of a crime when they are residents of the Occupied Palestinian Territories and those who are not. A soldier from the Paratroopers Brigade was tried and convicted for beating a resident of East Jerusalem in the area of the Hawara checkpoint.¹²⁰ Among the defense's sentencing arguments was the argument that since the victim of the offense was a resident of East Jerusalem and not a "local resident," in this case there was no room for "considerations connected to the army's image and its activity towards the local population."¹²¹ The District Court-Martial completely rejected the defense's argument and ruled that no distinction must be made between the status of the Palestinians going through the checkpoint (which is located within the Occupied Palestinian Territory) and that of any other person who is subject to the authority of IDF soldiers:

*"We must state at the outset that we do not accept the distinction that the defense wanted to make between violence against the local population and the case before us, in which violence was used against a resident of East Jerusalem. First of all, both groups possess dignity that must not be trampled upon, and it is clear to all that IDF soldiers must protect the dignity of every person subject to their authority, whether he is local or not. During the incident the complainant was subject to the authority of the defendant and the other soldiers at the checkpoint and therefore the learned prosecutor's considerations as to the harm to the IDF's image still apply to this matter. Secondly, the incident occurred in the Hawara checkpoint and violence that is exercised in that place impacts the IDF's image toward the local population, **because the place in which the incident took place is more important than the identity of the complainant.** It is important to remember that local residents go through IDF checkpoints every single day. They may witness the kind of violence we are dealing with here. They may even be victims of such violence."¹²²*

When the Court-Martial of Appeals also had to address the question of the differences in

119 Appeals/145/08, **Military Prosecutor v. Staff Sergeant S.S.**

120 According to Israeli law, East Jerusalem was annexed to the territory of the State of Israel and is not "occupied territory."

121 Center/381/09, **Military Prosecutor v. Corporal S.T.**, p. 3.

122 Center/381/09, **Military Prosecutor v. Corporal S.T.**, p. 4. Our emphasis.

the status of an Israeli citizen and a resident of the Occupied Palestinian Territories, as part of the defense's appeal against the severity of the sentence, the Court of Appeals adopted the District Court-Martial's position and also rejected the claim that special severity should be attached to offenses against protected persons:

*"We, just like the lower court, did not find that a distinction should be made between acts of violence against local residents and the act of violence that is the subject of this conviction. The appellant exercised violence against **a civilian, while he was subject to his authority, at a military checkpoint, as part of a security mission he was fulfilling as a soldier, in uniform.**"*¹²³

THE COURTS-MARTIAL ON WAR CRIMES

In 2003 the first appeal in twenty years (since 1983) was submitted concerning the offense of looting: Appeals/62/03: **Chief Military Prosecutor v. Sergeant A.A.** Therefore the court's ruling discussed at length the essence of the crime of looting, its severity and its penalty. Sergeant A.A. was convicted in the District Court-Martial of performing a number of acts of looting in the city of Nablus. In Section 5 of the judgment the Court-Martial of Appeals reviewed the prohibition against looting in reference to "the IDF spirit" document and mentioned the crime of looting in Jewish heritage and in the IDF's heritage since the War of Independence. Toward the end of the review, under the heading "universal values of morality in combat," the judgment lists provisions from international law that forbid looting: Articles 28 and 47 annexed to the Hague Convention and Article 33 of the Fourth Geneva Convention. The Court-Martial of Appeals also quoted from US legislation (and referred to provisions from Australian and Canadian law as well) and from a judgment on the crime of looting handed down by the International Criminal Tribunal for former Yugoslavia,¹²⁴ noting that that judgment ruled that acts of looting motivated by greed constitute war crimes.

The Rome Statute is mentioned as an interpretive source in one Court-Martial judgment. In the decision acquitting Captain R., who was charged (among other things) with "confirming the killing" of the girl Iman al-Hams, the Court-Martial referred to the foundations of the offense of killing or assaulting protected persons under the Rome Statute in order to analyze the defendant's actions. The court noted that even though Israel did not ratify the Rome

123 Appeals/83/09, **Corporal S.T. v. Chief Military Prosecutor**. Emphasis in the original.

124 **Prosecutor v. Zejnil Delalic et al.** ICTY Case no. IT-96-21-T (*Celebici camp case*) Trial Chamber, 16 November 1998.

Statute, “it is clear that the principles contained therein are part of public international law and can be used when we attempt to examine the degree of legality of one action or another committed on the battlefield.”¹²⁵

However, with the exception of those two judgments, the last of which (in the matter of Captain R.) was delivered in 2005, the Courts-Martial have never seen fit to explore the possibility of defining acts brought before them as war crimes, with the special severity that entails, even in cases in which the offenses under discussion allegedly amounted to war crimes.

TEST CASE: CONVICTION AND PUNISHMENT FOR OFFENSES OF HARMING BOUND DETAINEES

Humiliating, degrading and physically assaulting detainees by persons of authority, especially when the detainees’ helplessness is enhanced by their being handcuffed, in addition to violating Israeli law, constitute war crimes under international law when they occur in the context of armed conflict.¹²⁶

Appendix I of this report contains a table of figures on all of the judgments delivered by the Courts-Martial since the beginning of the second Intifada in the cases of all 39 defendants who were convicted of harming handcuffed detainees. The table states the nature of the act and the charges of which the defendants were convicted. Some of the defendants were convicted of a single act that did not cause injury (for example, a single blow to the head of a handcuffed and blindfolded detainee), and others of extensive series of abuses.

As was previously stated, in offenses of violence and abuse the Military Prosecution’s directives specify the possibility of establishing “aggravated circumstances” in the indictment, derived from the very fact of the victim being a person held in custody, especially in cases in which he is blindfolded or handcuffed. However, as described above, in most cases, “aggravated circumstances” do not appear in the indictments against defendants charged with offenses against bound and blindfolded detainees.

125 South/400/04, **Military Prosecutor v. Captain R.**, p. 72.

126 Fourth Geneva Convention, Article 147; Rome Statute, Article 8(2)(a)(2) - Torture or inhuman treatment; and Article 8(2)(b) (21) - Committing outrages upon personal dignity, in particular humiliating and degrading treatment. As was mentioned previously, for a forbidden act to be considered a war crime it is not necessary for it to be extensive or cause real damage.

A review of the offenses of which the defendants were convicted shows that in only two cases were the defendants convicted of charges that include “aggravated circumstances” and carry relatively severe penalties: in one case, concerning the beating of detainees shortly after their detention and while transferring them to the Israel Police, four defendants were convicted (out of six defendants in the affair) of battery under aggravated circumstances (with a maximum penalty of four years in prison)¹²⁷ and abuse under aggravated circumstances (seven years in prison).¹²⁸ Those defendants were sentenced to periods of 4.5-9 months in prison. In another case the Court-Martial of Appeals stiffened the sentence of two military police officers who were convicted of abuse under aggravated circumstances and set their sentences at seven and ten months in prison, respectively.¹²⁹

In all of the other cases the defendants were convicted of lesser offenses:¹³⁰

- Eleven defendants were convicted of offenses whose maximum penalty is one year in prison and do not carry criminal records: exceeding authority,¹³¹ disgraceful behavior¹³² and improper behavior.¹³³
- Eight other defendants were convicted of offenses whose maximum penalty is two years in prison: assault¹³⁴ and illegal use of weapons.¹³⁵
- Fourteen defendants were convicted of offenses whose maximum penalty is three years in prison: abuse,¹³⁶ exceeding authority to the point of risking life or health¹³⁷ and assault causing real injury.¹³⁸

127 Center/365/03; Center/376/05.

128 Center/366/03 (two charges of abuse under aggravated circumstances); Center/386/03.

129 Appeals/146/03, **Chief Military Prosecutor v. Corporal R.R. and Corporal L.L.**

130 In cases in which the defendants were convicted of more than one offense, or of an accompanying offense to the main offense, the cases here are listed by the most serious offense.

131 Staff/46/06; four defendants in Center/712/07 (three counts of exceeding authority for each one of them).

132 Center/526b/04; Center/329/08; Center 330/08.

133 Center/454/03; Center/526/04; Center/562/08.

134 Center/92/03; Center/300/04; Center/526a/04; North/176/07; Center/106c/08; Center/399/11.

135 Center/581/10.

136 Center/387/03; Center/526c/04; Center/472/05; Center/471/05; Center/274/06; South/08/08; South/14/08; Center/106a/08; Center/106b/08; Center/580/10; Center/582/10; North/292/11.

137 Center/240/02.

138 Center/500/02.

Nearly one third of those convicted – 12 out of 39 – were not sentenced to active prison terms following their convictions.

In its ruling on the prosecution's appeal against the leniency of the sentences of Corporal R.R. and Corporal L.L.,¹³⁹ the Court-Martial of Appeals noted that the punishments to which the two defendants were sentenced in the first instance – five and three months in prison respectively – “miss the point of the punishment,”¹⁴⁰ and changed them to ten and seven months in prison, respectively. But this sentence by the Court-Martial of Appeals remained the highest threshold for punishing soldiers accused of violence against Palestinians (whether or not they were detained or bound).

An examination of the judgments of the Courts-Martial that convicted soldiers of harming bound detainees (who were usually also blindfolded) shows that in the vast majority of cases the charges are minor and inconsistent with the gravity of the actions described therein. The sentences in most of those cases are also light, and in more serious cases of violence, even following the judgment in the matter of Corporal R.R. and Corporal L.L., the sentences, at most, reach the threshold that the Court-Martial of Appeals described as “missing the point of the punishment.”

One of the primary reasons for the leniency of the charges of which those defendants were convicted and the leniency of their punishment is the fact that the vast majority of defendants had made plea bargains with the prosecution, in which the charges were reduced to lesser offenses, and usually the parties agreed to sentences for which they would petition the court jointly: only four of the 39 defendants listed here stood full evidentiary trials.¹⁴¹ Plea bargains, as discussed, are a significant part of criminal law in Israel and there is nothing wrong with them in and of themselves. However, in the cases before us, when the actions of which the defendants are accused should be granted exceeding weight, the plea bargains in many cases are the result of the weakness of the military investigation and prosecution mechanisms in responding to offenses by soldiers against Palestinians,¹⁴² as well as the

139 Military police officers who beat two detained minors who were bound and blindfolded while transporting them, using, among other things, the barrel of one of the police officer's guns.

140 Appeals/146/03, **Chief Military Prosecutor v. Corporal R.R. and Corporal L.L.**, pp. 17-18.

141 In another case a defendant, Staff Sergeant Z.K., was acquitted after undergoing an evidentiary trial. Four of his friends who were charged with him in the same affair (Center/712/07) were convicted on the basis of their confessions for reduced charges as part of a plea bargain.

142 For further information about this subject see Yesh Din's report **Alleged Investigation: The Failure of Investigations into Offenses Committed by IDF Soldiers against Palestinians** (Tel Aviv, 2011).

result of the military law enforcement system's reluctance to enforce the law against actions that amount to war crimes.

“REDUCED CRIMINAL RECORD”: AMENDMENT NO. 61 OF THE MJA

Until recently, soldiers convicted in the Courts-Martial of “civilian” offenses, and most of the “military” offenses (except for a few general offenses whose maximum sentence is one year in prison: disgraceful behavior, improper behavior, exceeding authority, etc.) were entered into the criminal registry just like any Israeli citizen who is convicted of a crime. The criminal registry is a database managed by the Israel Police that contains information about convictions and sentences in the courts.¹⁴³ A criminal record prevents one from engaging in certain professions, and information from the criminal registry is provided by law to public bodies, such as government offices and agencies and diplomatic missions. As a rule, records are erased from the criminal registry ten years after the offense's limitation has run.¹⁴⁴ The limitation itself is calculated based on the length of the sentence given.¹⁴⁵ For example, if a sentence is up to one year in prison, the period of limitation is the length of the sentence plus seven years. Therefore, a criminal record generally is erased according to Israeli law at least 17 years after the the sentence has been served.

Amendment no. 61 of the MJA enacted in March 2011 provides a “reduced criminal record” that reduces the number of public bodies who may be given information about the criminal record of a defendant who was convicted and drastically shortens the period of the criminal record of some of the defendants convicted in the Courts-Martial so that their criminal records are erased after only five years. The reduced record applies to soldiers who were sentenced up to the maximum threshold of one of the following sentences:

- A penalty that does not include prison time;
- A penalty that does not exceed two months of prison time;
- A penalty that does not exceed three months of prison time, where the court decided some of the sentence would be served through military work, as long as the part that is served in prison does not exceed two months;
- A penalty that does not exceed four months of prison time, where the court decided

143 Criminal Registry and Rehabilitation Law, 5741-1981.

144 Ibid., Section 16.

145 Ibid., Section 14.

that the entire period be served by way of military work.¹⁴⁶

And if that were not enough, the amendment to the law says that it applies retroactively, even to those who were convicted before the law took effect. The result is that a large number of the soldiers who were convicted of offenses against Palestinians and their property enjoy “reduced criminal records.” For example, of the 39 defendants who were convicted of offenses that entail hurting bound detainees, 22 will enjoy the erasure of their criminal records after five years.¹⁴⁷

The law’s explanatory note states that the source of the need for the criminal record reduction is that military law does not allow the sentencing of defendants to probation or public service orders without conviction, as does Israel’s civilian criminal law. Furthermore, it describes at length the law’s purpose of sparing young soldiers the criminal stain that could interfere with their employment options after being discharged from military service.¹⁴⁸

This significant reduction of the length of the criminal record of defendants who were convicted of committing acts that are war crimes undermines the principle that imposes a grave stigma on crimes of this sort and on the criminals convicted of them. Furthermore, this legislation and the justification given for it significantly undermine the protection that the principle of complementarity could provide defendants convicted of offenses that are within the jurisdiction of the ICC.

146 Section 404a of the MJA.

147 Of the defendants prosecuted for using Palestinians as human shields, two were convicted of offenses that do not carry criminal records anyway, and the sentence handed to the two defendants in the “child procedure” affair meets the criteria for the “reduced criminal record.”

148 From explanatory note of the government-sponsored bill: “The problem with the current situation is the effect of the criminal record on the ability of soldiers convicted in Courts-Martial to enter civilian workplaces. These are young people at the beginning of their adult lives who have their whole lives ahead of them, and staining them with a long criminal record at this stage of their lives could disrupt the course of their lives badly, and sometimes even irreversibly. Even though the need to enforce strict discipline in the army requires a policy of severity in prosecution and punishment compared to the needs of the civilian legal system, these considerations in and of themselves do not justify the prolonged criminal labeling of a soldier, especially as far as it relates to his civilian life[...].” MJA Draft Bill (Amendment No. 61) (Restriction on Providing Information from the Criminal Registry and Shortening the Length of Registration) (5770-2010); **Government Draft Laws** 479, January 25, 2010, p. 228.

CONCLUSION

THE NEED TO CRIMINALIZE WAR CRIMES IN ISRAELI LAW

When the Military Justice Act was discussed in the early 1950s, several members of Knesset suggested including in it chapters about the laws of war, but the Attorney General at the time, Yaacov Shimshon Shapira, opined that the IDF “is not an occupying army but an army that defends the country’s borders and, therefore, there are no provisions here on how to treat the ‘natives.’”¹⁴⁹ Therefore, the MJA, just like the Penal Code and the criminal legal system as a whole, makes no reference to committing war crimes – neither as an offense in its own right, nor as aggravated circumstances for “normal” offenses. This stands in contrast to the situation in Western countries that have enacted laws for the punishment of war criminals and perpetrators of other international crimes.

Israeli courts prosecute, among others, members of the security forces who commit offenses against Palestinians and their property in the Occupied Palestinian Territories. The defendants are judged for their responsibility for offenses codified in domestic Israeli law and especially offenses from the MJA and the Penal Code.

Neither the indictments, the prosecution’s considerations and arguments, nor the judgments express the array of considerations related to the State’s duty to defend the Palestinian population in the Occupied Palestinian Territories against grave breaches of war crimes in general, and in particular, of the Fourth Geneva Convention. The Israeli legal system treats offenses against Palestinians as if they were merely a domestic Israeli affair. The offenses listed in the indictments are generally ordinary criminal offenses that do not carry the extra weight that comes from the State’s special obligation toward the population of an occupied territory; nor do the petitions for sentencing heard in the Courts-Martial, or the considerations for sentencing described in the judgments, address the exceeding gravity of offenses against protected persons. A recent amendment of the law considerably shortens the length of the criminal records of soldiers sentenced to certain prison sentences.

Many of the incidents that lead to soldiers being tried for their actions or inactions in the Occupied Palestinian Territories fail to meet the conditions that turn a criminal offense,

149 Quoted in Zvi Inbar, “Military Justice Act Draft Law, 5709-1949.” *Law and the Military* 8 (1988), p. 139.

grave as it may be, into an international crime or a war crime. However, certain cases could be considered as such. Almost completely absent from the collection of Court-Martial decisions rendered since the beginning of the second Intifada in September 2000 are terms such as “laws of war,” “Geneva Conventions,” “Rome Statute” and “war crime.” Punishment is guided by other considerations, especially the quality of the defendant’s military service and the effect on the IDF’s image of the offense of which the defendant was convicted. The relevant international law is not present in the Courts-Martial.

To a large extent, the circumstances of armed conflict serve the military justice system as extenuating circumstances as to the criminality of actions, whether they constitute “normal” criminal offenses or offenses that could amount to war crimes. In certain cases, the Courts-Martial specify the circumstances of combat in which a defendant committed a criminal offense against civilians as considerations for leniency in the sentencing of a convicted defendant. In many other cases, no criminal investigations are opened in the first place, or no indictments are filed, out of consideration for the operational circumstances that surrounded the incidents under investigation.¹⁵⁰

As international criminal law develops, the principle of universal jurisdiction for international crimes expands, and the ICC in the Hague establishes its activity, it should be remembered that the principle of complementarity provides protection against criminal prosecution and judgment for people allegedly involved in committing international crimes, as long as the law enforcement system in their country fulfills its role. The international system grants priority to the mother country and its legal proceedings. A legal system fulfilling its duty and perceived as such by external observers is therefore of paramount interest to anyone who wishes to defend Israelis against foreign legal intervention.

Israel’s current position that the offenses provided by Israeli law suffice to fulfill Israel’s duty to punish those involved in war crimes and other serious crimes under international law is a problematic position. Only a few states in the world still take this minimalist approach.

According to comments by former Supreme Court Chief Justice Dorit Beinisch, Israel’s policy upholds its duties “when the indictment expresses the criminality of the act attributed to the defendant and the sentence imposed in cases of conviction reflects the aggravated circumstances of committing the offense against protected persons

150 On this matter see **Alleged Investigation** (*supra* note 142), pp. 32-44; **Exceptions** (*supra* note 97), pp. 21-25.

under the laws of war.”¹⁵¹ As Chapter 3 of this report shows, even though the charges usually fit the conduct attributed to the defendants, they do not address the special gravity that derives from committing offenses – whether grave or not – against protected persons under international law. Likewise, the sentences imposed on convicted defendants usually do not reflect the aforementioned aggravated circumstances.

When the **Crime of Genocide (Prevention and Punishment) Law** was enacted in 1950, members of Knesset saw fit to honor the vote by standing up in recognition of the practical and educational importance of the act of legislation. Legislation that criminalizes and punishes international crimes – the crimes denounced by all the nations of the world – has a moral and educational role beyond punishing criminals and protecting victims. We believe that the situation presented by this report regarding the Military Prosecution’s directives and the Courts-Martial’s practices requires the State of Israel to change its attitude toward offenses committed by Israelis against the population that is under military occupation in the Occupied Palestinian Territories.

As noted, few states in the democratic world take a similar approach to Israel’s that the existing law is sufficient. Yesh Din’s position is that **considering the practice of the Courts-Martial and the shortage of material offenses in Israeli domestic law, special offenses of war crimes should be incorporated through legislation into Israel’s legal system.**

As the writing of this document came to a close, the Turkel Commission published its report, entitled “Examination and Investigation in Israel of Complaints and Claims of Violations of Laws of Warfare pursuant to the Rules of International Law.” The Commission conducted a thorough examination of the law in Israel as compared to the laws of other countries and the standards of international law. In its conclusions the Commission listed 18 recommendations, many of which are highly significant, for the amendment and improvement of Israel’s law enforcement mechanisms.

The Commission’s first recommendation concerns the need to enact legislation that adopts the international norms related to war crimes and include them in domestic law:

The Ministry of Justice should initiate legislation wherever there is a deficiency regarding international prohibitions that do not have a ‘regular’ equivalent in the Israeli Penal Code, and rectify that deficiency through Israeli criminal legislation. Furthermore, the Commission sees importance in the explicit adoption of the international norms relating

151 HCJ 3292/07, Section 10 (supra note 76).

to war crimes into Israeli domestic legislation.

From the trend reflected in the survey of the six countries it appears that the accepted approach is to incorporate the international criminal offenses into domestic legislation.

The Concord Center researchers who reviewed the provisions of Israeli law and compared them with the criminal offenses set forth in the Rome Statute reached a similar conclusion:

[...] In order to correct Israeli legislation so that it meets international norms it requires three changes: 1. Adding specific crimes that are not currently defined as such in Israeli legislation; 2. Adding the context of international crime to offenses that already exist in Israeli legislation in order to adjust them to the framework of crime against humanity or war crime; 3. Adjusting the general and introductory part of the Penal Code to the principles of the Rome Statute.¹⁵²

As mentioned in the brief review in Chapter 1, throughout the world there already are several models of legislation that adopt international crimes – all or a group of them – into domestic law. The Concord study suggests legislating a separate codex from the Penal Code and the MJA in which international crimes are adopted into Israeli law.

Legislating a separate codex, as was done in the case of Germany, which until 2002 relied on provisions from its regular criminal code (like Israel today), will help resolve tensions between unique principles of international criminal law and the principles of Israeli law, enable the adaptation of terms from international law to the domestic law,¹⁵³ increase the public visibility of the crimes, and serve as an educational and informational tool for the population of the State of Israel and members of the security forces.

In the coming months Yesh Din, along with other partners, will draft a bill which, if enacted into law, will position Israel as an equal member of the family of nations who have committed to do everything possible to eradicate war crimes and protect their victims.

152 The Concord study (supra note 9), p. 199.

153 Klaus Kress, "The German Model," in Morten Bergsmo et al. (Eds.), *Importing Core International Crimes into National Law* (Oslo: FICHL, 2010), pp. 19-20.

APPENDIXES

APPENDIX I: CONVICTION AND SENTENCING CLAUSES IN CASES IN WHICH DEFENDANTS WERE CONVICTED OF HARMING BOUND DETAINEES, BY DEFENDANT, 2000-2012¹⁵⁴

	Court-Martial file	Summary of the offense	Conviction of defendant	Sentence
1.	Staff/46/06	An officer held wire cutters to a bound and blindfolded detainee's pants and threatened the latter that if he did not answer his questions he would cut his penis	Exceeding authority; improper behavior	Two months of military work, four-month suspended prison sentence
2.	Center/240/02	16 year-old handcuffed and beaten during search of his personal effects	Exceeding authority to the point of risking life or health; disgraceful behavior	One month prison, three- month suspended prison sentence, demotion from corporal to private
3.	Center/500/02	The defendant put his feet on two bound and blindfolded detainees, pulled one of their beards and threw his helmet at the other's head	Assault causing real injury; disgraceful behavior	Three months in prison, four- month suspended prison sentence
4.	Center/92/03	The defendant kicked a bound and blindfolded detainee twice	Assault	28 days in prison, four- month suspended prison sentence
5.	Center/365/03	The defendants beat three detainees who lay bound on the ground. One of the defendants hit one of the detainees in the head with the butt of his rifle and poured water on him. In another case they beat other detainees.	Aggravated assault	4.5 months in prison, four-month suspended prison sentence, demotion from corporal to private
6.	Center/366/03		Aggravated abuse (two counts)	Nine months in prison, four-month suspended prison sentence, demotion from corporal to private

154 Source: Yesh Din study based on indictments and judgments provided by the IDF Spokesman.

	Court-Martial file	Summary of the offense	Conviction of defendant	Sentence
7.	Center/376/03	The four? defendants beat two bound and blindfolded detainees on the head, back and stomach while taking them to the Israel Police	Aggravated assault	170 days in prison, five-month suspended prison sentence, demotion from corporal to private
8.	Center/386/03		Aggravated abuse; improper behavior	Seven months in prison, four-month suspended prison sentence, demotion from corporal to private
9.	Center/387/03		Abuse	Four months in prison, three-month suspended prison sentence, demotion from sergeant to private
10.	Center/454/03		Improper behavior	Four-month suspended prison sentence, demotion from staff sergeant to sergeant
11.	Center/222/03 A Appeals/146/08	Military police beat two minor detainees who were bound and blindfolded while travelling, including with gun barrels	Aggravated abuse in tandem	[After appeal] Seven months in prison, five-month suspended prison sentence, demotion from corporal to private
12.	Center/222/03 B Appeals/146/08		Aggravated abuse in tandem	[After appeal] Ten months in prison, four-month suspended prison sentence, demotion from corporal to private
13.	Center/300/04	Assault of Palestinians going through the checkpoint that the defendant commanded several times and breaking the windshields of Palestinian-owned cars. In at least one case the defendants beat a handcuffed man	Assault; damaging property while exceeding authority; improper behavior	Six months in prison, 12-month suspended prison sentence, demotion from corporal to private
14.	Center/526/04	Beating five bound and blindfolded detainees with slaps and fists	Improper behavior	Two-month suspended prison sentence
15.	Center/526/04 A		Assault	45 days in prison, six-month suspended prison sentence, demotion from corporal to private
16.	Center/526/04 B		Disgraceful behavior	Two-month suspended prison sentence
17.	Center/526/04 c		Abuse	Three-month suspended prison sentence

	Court-Martial file	Summary of the offense	Conviction of defendant	Sentence
18.	Center/472/05	The defendant punched a bound and blindfolded detainee in the face and then kicked him in the face	Abuse; improper behavior	45 days in prison, five-month suspended prison sentence, demotion from sergeant to private
19.	Center/471/05	Beating three boys whose hands were tied behind their backs, one of whom was bleeding after being beaten by somebody else. Slapping a Palestinian on another occasion	Abuse; improper behavior	Three months in prison, four-month suspended prison sentence, demotion from corporal to private
20.	Center/274/06	The defendants beat a bound and blindfolded detainee until he fell to the ground	Abuse	120 days in prison, four-month suspended prison sentence, demotion from corporal to private
21.	North/176/07	The defendant struck a bound and blindfolded detainee in the head once	Assault	Three-month suspended prison sentence; demotion by a single rank to private
22.	Center/712/07 A	A series of acts of degradation and abuse of 13 bound detainees: hard blows to the detainees' heads and shoulders, leading them in circles, force-feeding some of the detainees with snacks and beating one of them	Exceeding authority (three counts); improper behavior	Four-month suspended prison sentence; NIS 1,800 fine; demotion from staff sergeant to sergeant
23.	Center/712/07 B		Exceeding authority (three counts); improper behavior	Four-month suspended prison sentence; NIS 1,800 fine; demotion from staff sergeant to sergeant
24.	Center/712/07 C		Exceeding authority (three counts)	Four-month suspended prison sentence; NIS 1,800 fine; demotion from staff sergeant to sergeant
25.	Center/712/07 D		Exceeding authority (three counts)	Four-month suspended prison sentence; NIS 1,800 fine; demotion by one rank to sergeant
26.	South/08/08	The defendant kicked a bound and blindfolded detainee in the back	Abuse	90 days in prison, 90-day suspended prison sentence, demotion to rank of private
27.	South/14/08	Leading a bound and blindfolded detainee and deliberately making him walk into an iron pole and hit himself in the head. Was also convicted of attempting to obstruct the investigation	Abuse	4.5 months in prison, 4.5-month suspended prison sentence, demotion to rank of private

	Court-Martial file	Summary of the offense	Conviction of defendant	Sentence
28.	Center/329/08	Hitting a bound and blindfolded detainee in the head a few times with his finger, filming it and distributing the video	Disgraceful behavior	20 days in prison, four-month suspended prison sentence, demotion to rank of private
29.	Center/330/08	Punching a bound and blindfolded detainee who was on his knees in the stomach, with another person filming the act	Disgraceful behavior	21 days of military work, 45-day suspended prison sentence, demotion to rank of private
30.	Center/106/08 A	The defendants beat two 16.5 year old detainees who were handcuffed and blindfolded. One of the defendants, among other things, put a hot air blower against one of the detainees' heads	Abuse in tandem; improper behavior	5.5 months in prison, five-month suspended prison sentence, demotion by a single rank to sergeant [after appeal: demotion to private]
31.	Center/106/08 B		Abuse in tandem; improper behavior	Five months in prison; five-month suspended prison sentence; demotion by a single rank to sergeant [after appeal: demotion to private]
32.	Center/106/08 C		Assault; improper behavior	65 days in prison, five-month suspended prison sentence, demotion by a single rank to sergeant [after appeal: demotion to private]
33.	Center/562/08	Hitting a bound detainee on the back of his head and pushing him into a vehicle	Improper behavior	45 days in prison, 90-day suspended prison sentence, demotion to the rank of private
34.	Center/580/10	Photographing a handcuffed and blindfolded detainee while aiming a loaded and cocked gun at his body	Abuse; disgraceful behavior	Five months in prison, five-month suspended prison sentence
35.	Center/581/10		Illegal use of a weapon; abuse; disgraceful behavior	Three months in prison, four-monthsuspended prison sentence, demotion to rank of private
36.	Center/582/10		Illegal use of a weapon; abuse; disgraceful behavior	Three months in prison, four-month suspended prison sentence, demotion to rank of private
37.	North/292/11	Beating a bound and blindfolded detainee with a gun	Abuse; improper behavior	Two-month suspended prison sentence, demotion to rank of private

	Court-Martial file	Summary of the offense	Conviction of defendant	Sentence
38.	Center/399/11	Punching a bound and blindfolded detainee	Assault; improper behavior	45 days in prison, three-month suspended prison sentence, demotion to rank of private
39.	Staff/255/12	Kicking and threatening a bound and blindfolded detainee	Assault; improper behavior	14 days in prison, three-month suspended prison sentence; demotion to rank of private

APPENDIX II: COMPLAINTS, INVESTIGATIONS AND INDICTMENTS IN THE MILITARY JUSTICE SYSTEM, 2000-2012¹⁵⁵

Year	Notices (complaints) given	Criminal investigations opened	Indictments served	Indictments served as percentage of notices
2012	240	103	0	0.0%
2011	252	153	2	0.8%
2010	197	145	4	2.0%
"2009	415	236	8	1.9%
2008	432	323	20	4.6%
2007	477	351	10	2.1%
2006	323	152	9	2.8%
2005	292	155	5	1.7%
2004	469	189	12	2.6%
2003	236	146	16	6.8%
2002	194	155	23	11.9%
2001	90	82	7	7.8%
2000	21	16	1	4.8%
Total	3,638	2,206	117	3.2%

155 The source of the data as to the number of notices given to the MPCID: a letter from Captain Tal Bernstein, Deputy Provost Marshal General, to Atty. Hoshea Gottlieb, Secretary of the Turkel Commission, April 17, 2011 (the letter is available on the Turkel Commission website); IDF Spokesman's response to Yesh Din queries, October 5, 2011, April 1, 2012, January 23, 2013; the source of the data on investigation files and indictments: Yesh Din research based on indictments and judgments that the IDF spokesman provided to the organization.

The family of nations considers war crimes to be among the worst crimes, and it includes them in the group of “international crimes” – offenses that violate the common values of the entire international community, to which all countries and all people are committed: genocide, war crimes, crimes against humanity and others. Throughout the world special laws are enacted to criminalize such offenses and punish their perpetrators. Israel, too, has enacted clear laws to prohibit and punish the crime of genocide. However, the Israeli legal system does not contain legislation forbidding war crimes and setting corresponding punishments. This report outlines the need for Israeli legislation on that subject.

The report reviews the existing provisions of Israeli law, presents international models of legal systems that criminalize war crimes, and examines the Israeli military prosecution’s policy and the sentences levied by the courts-martial in cases in which soldiers are charged with crimes that may amount to war crimes. Two test cases included in the report show how the existing legal status in Israel leads people accused of war crimes to be convicted of minor offenses, sentenced to light punishments and in many cases granted a significant shortening of their criminal record.

As international criminal law develops, the principle of universal jurisdiction for international crimes expands and the International Criminal Court in the Hague establishes its activity, it should be remembered that the “principle of complementarity” provides protection from criminal prosecution and judgment to those allegedly involved in committing international crimes, as long as the law enforcement system in their country fulfills its role. As such, the international system gives priority to the mother country and its legal proceedings. Therefore, a legal system fulfilling its duty and perceived to be doing so by external observers is of paramount interest to anyone who wishes to defend Israelis against foreign legal intervention.

Yesh Din - Volunteers for Human Rights was founded in March 2005 and since then its volunteers have been working to achieve long-term structural improvement to the human rights situation in the Occupied Palestinian Territories (OPT). The organization works through collecting and disseminating credible and current information about systematic violations of human right in the OPT; providing direct legal services to victims of such violations; exerting public and legal pressure on the state authorities to stop such violations; and raising public awareness of human rights violations in the territories. In order to achieve its goals effectively, Yesh Din operates according to a unique model in the field of human rights in Israel: the organization is operated and administered by volunteers and assisted on a daily basis by a professional team of lawyers, human rights experts and strategic and communications consultants.

