CHILDREN'S RIGHTS WITHIN ISRAELI JURISDICTION—THE CASE OF PALESTINIAN CHILDREN IN THE OCCUPIED PALESTINIAN TERRITORY.

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1. INTRODUCTION

On September 2, 1990, the United Nations Convention on the Rights of the Child (The Convention) entered into force. A year later, the Convention was ratified by Israel. This paper deals, briefly, with three issues related to the said Convention. First, it discusses the applicability of the Convention to the Palestinian territories occupied by Israel since 1967 (the Occupied Territories). Second, it examines the Israeli policy concerning reunification of Palestinian families living in the Occupied Territories and possible implications of this policy for the status and rights of children born to such families. Finally, the paper deals with legal policies and criminal procedures adopted and applied by Israel in relation to children suspected or accused of committing criminal (=security) offences in the Occupied Territories and in the State of Israel.

2. DOES THE CONVENTION APPLY TO THE OCCUPIED TERRITORIES?

Article 2 of the Convention provides as follows: "1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind...." (emphasis added). The question that arises here is whether or not the Convention applies to the Occupied Territories.(1) A possible way to answer this question is to examine whether identical or similar language has been adopted in other regional or international conventions, and if so, how such language was interpreted.

A quick comparison with other conventions and treaties shows that the language used in the Convention concerning applicability is not unique. For example, Article 2, Paragraph 1 of the Covenant on Civil and Political Rights of 1966 reads as follows: "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant..." (emphasis added) Another relevant example where almost identical language has been used is found in Article 1 of the European Convention on Human Rights of 1950(2) which requires States Parties to ensure and respect human rights "within their jurisdiction." This article of the European Convention was interpreted by the European Commission as binding on States Parties "to secure the said rights and freedoms to all persons under their actual authority and responsibility, not only when that authority is exercised within their own territory but also when it is exercised abroad." (3) This decision has been seen by some international experts as a clear and significant recognition of the applicability of human rights law to occupied territories. (4)

Finally, the drafters' intention clearly subjects that the Convention applies not to Israel proper only but to the Occupied Territories as well. The Open-Ended Working Group on the Ques-
tion of a Convention on the Right of the Child set up by the U.N Commission on Human Rights (Hereinafter-"the Working Group"), decided in 1989 to amend the proposed text of then article 4 so that the phrase "in their territory or subject to their jurisdiction.." be replaced by the phrase "within their jurisdiction.." (5) The reason for the deletion of the reference to "territories", as stated by the observer for Finland was "in order to cover every possible situation,.., such as in the European Convention." (6)

Thus, it is reasonable to conclude that the Convention on the Rights of the Child is applicable not only to the State of Israel but also to the Occupied Territories.

3. FAMILY REUNIFICATION

There are three categories of cases in which Palestinian families find themselves torn apart - children separated from their parents, wives from their husbands - and thus, forced to apply to the Israeli authorities for family reunification:

1) Palestinians who fled their homes during the 1967 war and were prevented from returning;
2) Families where Palestinian residents living in the Occupied Territories marry non-residents; and,
3) Cases where former residents of the Occupied Territories lost their residency as a result of military orders enacted by the Israeli authorities since 1967. For example, Palestinians who left the Occupied Territories for a period of six years or more without renewing their travel permits. (6A)

A) Some Facts and Figures

Formal statistical data concerning applications for family reunification submitted by Palestinians in the Occupied Territories, and decisions on such applications are not available. Israel has never published such data. Thus, the only facts and figures available in this regard are those obtained by Israeli Knesset (Parliament) Members or those gathered by Israeli and Palestinian human rights organizations.

In response to a question raised by Knesset Member Yossi Sarid, Defence Minister Yitzhaq Rabin stated that between 1967 and 1987, 85,163 applications for family reunification were submitted of which only 12,863 applications were approved. (7) On the other hand, the Internatinal Committee of the Red Cross reported that out of 140,000 applications for family reunification submitted by Palestinians to the Israeli authorities, only 9000 were granted. (8) Rabin stated also that between 1987 and 1989, 3,266 applications were submitted of which 695 were approved. (9)

On May 13, 1991, Defence Minister Moshe Arens stated in a written answer sent to Knesset Member Abraham Poraz that in the period between June 5, 1990 and March 3, 91, 1,533 applications
for family reunification were submitted to the Israeli authorities in the West Bank of which 277 applications were approved. (10) In the same period, 1,570 applications were submitted to the Israeli authorities in the Gaza Strip of which 348 were approved. (11)

During a survey conducted in 1990 by Al-Haq, a Palestinian human rights organization, 1,643 Palestinian families whose applications for family reunification had been denied were interviewed. The following are some statistical data that emerge from the study: 961 (58.5%) families submitted two to four applications; in 316 Families (19.2%) some of the children had permanent residency while others did not; the total number of applications denied without reasons being given was 1,595 (97%). (12)

Finally, nowadays the Israeli policy concerning family reunion has not changed and the number of Palestinian wives and children who has been granted residency based on family reunion is still small. Instead, the Israeli authorities agreed to allow Palestinian children and wives to stay in the Occupied Territories as visitors whose visiting permits would be extended for six months each time without being asked to leave. However, the agreement which has been reached in June 1990, between Palestinians who petitioned the Israeli Supreme Court seeking family reunion with their spouses and children and the Commander of the West Bank, is not unlimited in time. This agreement was extended in November 1992 to cover Palestinian visitors who entered the Occupied Territories until 31 of August, 1992. Palestinian visitors who entered after the said date are not covered by the said agreement and thus might be deported. (12A)

In light of the above, its clear that the policy adopted by the Israeli authorities concerning reunification of Palestinian families is to restrict the number of approved applications to a minimum. The main reason for such a policy seems to be to prevent any increase of the Palestinian population living in the Occupied Territories. This demographical reason is, usually, seen by Israel as a security reason. (13) A strong indication of the said Israeli policy can be found in Article 11A of the Military Order Concerning I.D. Cards and Registration of Population (Judea and Samaria) (No. 297), 1969. (14) This Order will be discussed below.

B) Article 11A of Military Order 297

According to Article 11A of Military Order 297, a Palestinian child can be registered at the Population Registration Department in the West Bank within the following factual and time limits:

(a) if s/he is born in the West Bank of resident parents and he is below the age of 16; or
(b) if s/he is born outside the West Bank of resident parents and he is below the age of five; or
(c) if s/he is born inside or outside the West Bank of a
resident mother only and he is below the age of five.

If a child does not fall within one of the above mentioned categories he will be denied registration. Such refusal means that the child has lost his/her right of residency, unless a family reunification application is submitted on their behalf and approved. However, the latter possibility, as we have seen above, is not realistic. (15)

Moreover, it seems that Article 11A, in particular category (c), was enacted by the Military Commander of the West Bank on September 13, 1987, to facilitate and to a certain extent, legalized the Israeli practice concerning reunification of Palestinian families. Knowing that many Palestinian families are composed of resident fathers and non-resident mothers (16), the Israeli authorities connected the registration of children born to such families with the status of the mother so that children under five might be registered only if they have been borne to resident mothers.

Furthermore, Palestinian children who have been denied registration and, consequently, have lost their right of residency, might find themselves, in some cases, stateless. For example, the present writer was informed by some clients that as a result of the renunciation of its claims to the West Bank, in August 1988, the Jordanian authorities have refused to provide Palestinian children born within its borders with more than a birth certificate, even if the mother is a Jordanian citizen. If this is true, children born to Palestinian resident fathers and non-resident mothers who are Jordanian citizens, will not be able to obtain either a Jordanian passport nor an Israeli I.D. card. Consequently, such children will be stateless.

C) The Status of Children Born in East Jerusalem

Another clear and strong indication of the said Israeli policy of preventing Palestinian children from becoming residents in areas under Israeli Jurisdiction, is found in Article 12 of the Entrance to Israel Regulations, 1974. (17) This Article provides, inter alia, that where a child is born to parents who have different legal status i.e one is a resident and the other is not, he/she will be granted the status of the father unless the resident parent expresses her refusal in writing. In such a case, the child will have the status of either parent as decided by the Minister of Interior. This Article has been used to minimise the number of Palestinian children registered in the Israeli Population Registration Department. Any Jerusalemite mother (holds an Israeli I.D. Card) who is married to a West-banker and wishes to register her child in the said Department is asked to prove that she and her child are living in Jerusalem. If she faild to do so her request will be denied. (17A)

Although a refusal to register a Palestinian child born to a Jerusalemite mother and to a West Bank or Gazan father in the Israeli Population Registry Department does not render the child stateless, yet Article 12 of the said Regulations indicates
clearly that the Israeli authorities again connect the registration of such a child with the status of the non-resident parent, with the aim of preventing him from becoming an Israeli resident.

D) The Convention on the Rights of the Child

The Israeli policy regarding reunification of Palestinian families outlined above seems to stand in contradiction to certain provisions of the Convention. In particular, Article 10 of the Convention demands that States Parties deal with family reunification "in a positive, humane and expeditious manner. States Parties shall further ensure that the submission of such a request shall entail no adverse consequences for the applicants and for the members of the family." In addition, Article 3 of the Convention provides that in all actions concerning children, the best interests of the child shall be a primary consideration. Also, Article 18 of the Convention provides that "States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for upbringing and development of the child." Further, special attention should be given to Article 7 of the Convention which provides for the right of the child to acquire a nationality. This Article also provides that States Parties shall ensure the implementation of this right, "in particular where the child would otherwise be stateless." Such obligations should be carried out by States Parties with good faith and with a positive approach especially when a State Party is an Occupying Power and deals with reunification of children with parents living in the territory under its occupation. This is so because in such a case the State Party is not requested to grant its nationality to children seeking family reunification but rather to allow them to reside in a territory it occupies. The present Writer suggests that such children have a right to unite with their parents. This right like the right to return to one's (occupied) home land is not conditional on holding the citizenship of the current sovereign. (18A) further, Article 43 of the Hague Regulations (18B) "requires an occupant to maintain normalcy to the extent feasible. No harm to an occupant results from entry of a foreign spouse or children, at least where there are no grounds to anticipate hostile political activity." (18C)

Finally, the fact that most of the applications for family reunification submitted by Palestinians living in the Occupied Territories have been denied without any stated reason, leads to the reasonable conclusion that Israel policy in this regard is harsh, ignoring the interests and rights of Palestinian children to live with their two parents and thus, contradictory to international legal standards and rules, particularly those adopted in the Convention.

4. CHILDREN UNDER ISRAELI JURISDICTION
A) Introduction

This section deals briefly with legal policies and criminal procedural rules adopted and applied by Israel on children under its jurisdiction, suspected or accused of committing an offence. The discussion of this issue shall be through a comparison between policies and rules applicable to children within the Israeli judicial system and those applicable in the Occupied Territories, mainly in the West Bank. The said comparison shall refer to the relevant laws in force in Israel and to military orders enacted by Israel in force in the West Bank. It should be noted here that the orders in force in the Gaza Strip do not differ. Finally, for the purpose of this discussion the term "child" shall mean "every human being below the age of eighteen years." (19)

B) Legal Policies and Rules Applicable to Children in Israel and the West Bank

While in both judicial systems, the Israeli and that applicable in the West Bank, children under the age of 12 years are not criminally responsible (20), Children above that age have been subjected to almost totally different rules and policies. Below are some examples that help to establish this proposition.

1) According to the Israeli Criminal Procedural Act of 1982 (C.P. Act), a minor, as an adult, suspected or accused of committing a criminal offence shall be released from detention if:

a) 90 days have passed since his/her arrest and a formal indictment has not been filed.
b) 60 days have passed after formal indictment has been filed and trial did not take place. c) one year has passed and the trial is not over yet. (21)

The second and the third procedural rules are subject to an exception: a Supreme Court judge can issue an order extending the detention period from time to time upon request by the Legal Advisor, by three months each time. (22) Although many criminal procedure and evidence rules applicable in Israel have been transferred to the legal system of the West Bank, none of the three above-mentioned rules exist in the West Bank. Thus, if a Palestinian child is not released on bail - and this is, as the experience of my colleagues and myself shows, rarerly happens, it is unlikely that s/he be released before the trial is over and s/he is acquitted or sentenced.

2) In Israel there is a clear distinction between minors and adults suspected of committing a criminal offence. While adults can be arrested without a formal detention order issued by a judge for a period of 48 hours, minors aged 14 and above can be arrested without a formal order up to 24 hours which can be extended to 48 hours. Minors under the age of 14 (over 12), however, can be arrested by the police for a period of 12 hours
facilities for children in the West Bank and the Gaza Strip, Article 3 of Military Order No. 132 provides that a child of 12-16 years should be held separately from other detainees unless a Military Commander decides otherwise. From my experience as a lawyer, and as I have been informed by many of my colleagues, it is very rare for such children to be in fact held separately. The exception provided for by Article 3 of the military order is used systematically.

In the light of the foregoing discussion, the question arises whether Israel through its practices as described above, violates its obligations as a State Party to the Convention not to discriminate against children living under its jurisdiction? Article 2 of the Convention demands that States Parties respect and ensure the rights of the child set forth in the Convention "to each child within their jurisdiction without discrimination of any kind." Applying different legal policies and procedural rules to children of the same age found within its jurisdiction, Israel is violating its obligation to treat such children equally. In addition, the Israeli practice contradicts Article 40 of the Convention of which the first paragraph is as follows: "States Parties recognize the right of every child alleged as, accused of or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society." (emphasis added)

5. CONCLUSION.

1. The Convention on the Rights of the Child is applicable to Israel and to the Occupied Territories which have been under Israeli effective control since 1967.

2. As a result of being a State Party to the Convention and of the applicability of the Convention to the Occupied Territories, Israel is obliged to respect and ensure the rights set forth in the Convention to every child whether in Israel or in the West Bank and the Gaza Strip.

3. The Israeli practice concerning the reunification of Palestinian families and regarding Palestinian children living in the Occupied Territories who are suspected or accused of committing an offence, stands in clear violation of international legal standards and rules espicially those Convention.

4. It will be appropriate and desirable if the Committee on the Rights of the Child established under Article 43 of the Convention will use the means available to convince Israel to accept the applicability of the Convention to the Occupied Territories, and to apply the same legal policy and rules to all children under its jurisdiction, including those living in the Occupied Territories.
END NOTES


6. Id. at 147.

6A. For a useful and more detailed discussion, See: Candy Whitteme, The Right To Unite, Occasional Paper No. 8, Al-Haq, 1990, at 2-3. (hereinafter:"The Right To Unite").


8. Quigley, Supra note 4, at 241.

9. Shuqair, Supra note 7, at 6.

10. The writer possesses a photocopy of this document.

11. Id.

12. This information was released by Al-Haq on May 1991, in a press conference announcing a start of an international campaign calling on the International Community to claim and affirm the natural right of Palestinians to be re-united with their families.

12A. The agreement was reached in H.C. 1979/90 Awashra et al. v. Israeli Military Commander in the West Bank (was not published) and extended in H.C. 4494/91; 578/91 and sixty two other petitions. (not yet published).


15. See Supra notes 7-9 and accompanying text.

16. According to the Al-Haq survey, in 55.9% of the cases husbands applied for family reunification for their wives. In addition, most of the cases concerning family reunification submitted to the Israeli High Court of Justice, between 1989-1992, involved Palestinian husbands that their reunification applications for their wives were denied.

17. Published in Kovits Ha-Takanot No. 3201 at 1514 (1974).

17A. This information is based on personal knowledge of the present writer as a lawyer who have represented many Jerusalemite mothers married to WestBankers who have asked to register their children in the Israeli Population Registry Department.

18. This information is based on a personal experience of the present writer as a lawyer who together with his colleague at the Quaker Legal Aid and information Center have handled several cases of this type.

18A. For supporting the argument concerning the right to return, See quigley, Supra note 4, at 235.


18C. See, Quigley, Supra note 4, at 246.


22. See Art. 54 of the C.P. Act.

23. See the Israeli Youth Law (Punishment and Ways of Treatment) of 1977, Art. 10. Laws of the State of Israel, 1971, at 134. (hereinafter: "the Israeli Youth Law").

24. See Military Order Concerning Security Instructions (judea and Samaria) (No.378), 1971, Art. 78(a)

25. See Israeli Youth Law, Art. 10(4).
26. See Military Order No. 378, Art. 78c

27. See Israeli Youth Law, Art. 12(b).

28. See Id. Art. 23(d).

29. See Id. Art. 25(b).

30. See Military Order Concerning the Jurisdiction over Juveniles (The West Bank) (No. 132), 1968, Art. 4.

31. See Id. Art. 5.

32. Israeli Youth Law, Arts 1-3.