BAR HUMAN RIGHTS COMMITTEE OF ENGLAND & WALES

Court Observation and Fact-Finding Report

The Israeli Military Courts in the West Bank of the Occupied Palestinian Territories

Authors & Editors

Authors: **Darryl Hutcheon** (Matrix Chambers), **Natasha Jackson** (Landmark Chambers) & **Sahar T. Sadoughi** (Bar Human Rights Committee)

Foreword: **Michael Ivers** KC (Chair of the Bar Human Rights Committee of England & Wales, Garden Court Chambers)

Editors: **Jodie Blackstock** (Garden Court Chambers, Treasurer & Interim Vice-Chair of Bar Human Rights Committee of England & Wales), **Sahar T. Sadoughi** (Project Officer, Bar Human Rights Committee)

Acknowledgements

The Bar Human Rights Committee of England & Wales wishes to acknowledge the exceptional efforts of the observers, local partners, and institutional partners in their support for the undertaking of this project in the face of numerous obstacles, including. We also thank the **Bar Council** for their valued support for BHRC's participant and all their ongoing support of BHRC's international advocacy.

In particular, BHRC would also like to thank **Funding for Social Change** for its generous support which made this Court Observation and report possible.

Front Cover Image: Ofer Prison Transit Terminal © shutterstock/Nayef Hammouri

Contents

Foreword

Michael J Ivers KC

Chair of Bar Human Rights Committee of England & Wales

As Chair and on behalf of the Bar Human Rights Committee of England and Wales (BHRC), I am delighted to present this report on the Israeli military courts in the West Bank. The Report builds on BHRC's previous work assessing the adherence to the rule of law and international human rights and humanitarian law standards of military courts not only in the context of the Israel-Palestine conflict, but also the US military courts at Guantánamo Bay and the court overseeing conflict between Anglophone and Francophone regions in Cameroon. This work has also previously included trial observations in the military courts of the West Bank such as the trial of Ahed Tamimi in 2018 and a fact-finding mission with the FCDO on the detention and prosecution of children in the military courts.[1] BHRC has been concerned to play a role in drawing attention to military courts due to the risks that fair trial standards are diminished in favour of national security protocols and that the crimes alleged may be far from those usually understood to require military procedure. The findings in this report confirm that those risks are genuine.

The work of this Project began in 2019 but was unfortunately delayed due to the COVID-19 pandemic in 2020. Finally in early 2023, BHRC was able to send Darryl Hutcheon and Natasha Jackson to conduct a thorough and considered mission utilising their expertise as barristers. Unfortunately there were obstructions to the access they could obtain to the courts.

Nevertheless, the observers were able to gain a clear understanding of how the courts operated. The courts seemed to limit fundamental fair trial rights set by international standards, including those on access to families, access to lawyers (including private consultation), participation of defendants in their proceedings, and lack independence and impartiality. These concerns and the conclusions in the report highlight the need for more research into the commission of military courts and their observance of international law.

Since the observations took place, the landscape has undeniably changed. The events of 7 October 2023, subsequent Israeli military invasion in the Gaza Strip, and increased settler violence in the West Bank as well as the consideration of violations of international law before international bodies such as the July 2024 ICJ Advisory Opinion has brought greater attention to the military courts. This Report hopes to add to the breadth of empirical literature on this issue and to engage with future discussions on the commission of these courts and their place in enabling fair trial in the context of occupation and conflict.

1 BHRC, *Hearing Observation Report: Prosecution of Ahed, Nariman and Nour Tamimi in the Israeli Military Court at Ofer in the occupied West Bank, Palestine*, 28 February 2018, at: https://barhumanrights.org.uk/wp-content/uploads/2018/03/Tamimi-trial-observation-final.pdf.

About the Bar Human Rights Committee

The Bar Human Rights Committee of England and Wales ("**BHRC**") is the independent, international human rights arm of the Bar of England and Wales, working to protect the rights of advocates, judges, and human rights defenders around the world. BHRC is concerned with defending the rule of law and internationally recognised legal standards relating to human rights and the right to a fair trial. It is autonomous of the Bar Council.

BHRC aims to:

- Uphold the rule of law and internationally recognised human rights norms and standards;
- Support and protect practising lawyers, judges and human rights defenders who are threatened oroppressed in their work;
- Further interest in and knowledge of human rights and the laws relating to human rights, both within and outside the legal profession; and
- Support and co-operate with other organisations and individuals working for the promotion andprotection of human rights.

As part of its mandate, BHRC undertakes legal observation missions to monitor proceedings where there are concerns as to the proper functioning of due process and fair trial rights. The remit of BHRC extends to all countries of the world, apart from its own jurisdiction of England and Wales. This reflects the Committee's need to maintain its role as an independent but legally qualified observer and critic. BHRC members are primarily barristers called to the Bar of England and Wales, as well as legal academics and law students. Its members include some of the UK's foremost human rights barristers, legal practitioners, and academics. BHRC's Executive Committee and members offer their services pro bono, alongside their independent legal practices, teaching commitments and legal studies. BHRC is also supported by two Project Officers and a Communication, Events and Projects Assistant.

Executive Summary

The focus of this Report is the Israeli military court system which primarily operates in the occupied West Bank.These military courts were established to enforce Israeli military law and are administered by the Israeli military and security apparatus. Each year, they administer the detention, prosecution, conviction and sentencing of thousands of Palestinian adults and hundreds of Palestinian children for alleged violations of Israeli military law.

Over a three-week period in January and February 2023 two observers on behalf of the Bar Human Rights Committee of England and Wales ("**BHRC**") conducted several days of observations of the military courts in action. Their observations and findings are the subject of this report. BHRC has previously conducted observations of specific trials in the military courts and members of BHRC also participated in earlier fact-finding missions on the administration of law in the Occupied Palestinian Territories ("**OPT**").

As the occupier of the West Bank, Israel's actions there are governed by international humanitarian law and international human rights law. The Fourth Geneva Convention ("**GCIV**") is the primary international humanitarian law instrument establishing the duties which apply to states, like Israel, which maintain military occupations (including insofar as they seek to impose penal laws on the local population and to enforce such laws through military courts).[2] As set out further below, various other international humanitarian and human rights law instruments contain standards with apply to the Israeli occupation of the OPT.

The Israeli military courts in the West Bank were established in 1967. Two principal courts are currently in operation: one in the Ofer military base north of Jerusalem and one in the Salem military base near Jenin. There are at least four other "satellite" military courts in the vicinity of Israeli Security Agency facilities in the West Bank and in Israel, but these were not accessible and so were not the focus of the observation. Difficulties in gaining access even to the Ofer and Salem courts were a significant feature of the BHRC observers' experiences.

The methodology behind the 2023 observation was multi-faceted. It included in person observations of proceedings with the aid of interpreters to provide live translation in both Arabic and Hebrew. The observers also conducted interviews and more informal discussed the activities of the military courts with family members of defendants, defence lawyers, NGOs involved in work relating to the military courts, a military court judge and a number of other military personnel who work at the courts and were willing to speak informally. Extensive efforts were made to speak to the President and other judges of the military courts but, with one exception, these approaches were declined or ignored. At times, the observers were also given opportunities to do 'case reviews' with defence counsel and NGO practitioners to better understand the background, parameters and proceedings at military courts. The present report provides a brief overview of the legal and social background of the military courts; identifies, at a framework level, the key legal provisions of both international law against which the proceedings should be assessed, and of Israeli military law, which applies to the courts; and records the observations of the BHRC observers following their visit in early 2023.

2 Geneva Convention relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 (Geneva

Image: Entrance to Ofer Prison © shutterstock/Ehab Arouri

The observers identified several themes in the proceedings at the military courts that are a cause for very serious concern and seem inconsistent with obligations under both international humanitarian law and international human rights law:

- The range of activities criminalised and prosecuted under Israeli military law at the courts appeared to exceed the limits set by IHL. A distinct example was observed in the disproportionate prosecution of traffic offenses and its designation as a security offense under the updated Military Order;
- The courts appeared to lack independence and impartiality;
- Pre-charge and pre-trial detention are almost invariably used, without proper justification;
- The operation of the system in practice revealed a shocking complacency about the ability of defendants to understand and participate in their own cases;
- The courts failed to facilitate the rights of defendants to maintain family links;
- The right to regular and confidential access to legal advice was systematically violated;
- Detainees routinely transferred from the West Bank into Israel in manifest violation of GCIV;
- Nearly all cases were resolved by way of plea bargains despite there being no reason to believe that military court defendants are any more likely to be guilty than defendants in other criminal justice systems (in which plea bargains are much less common).

This report will sit alongside the growing body of work and ongoing legal proceedings at international and domestic institutions which highlight grave concerns about widespread Israeli violations of international humanitarian law, international human rights law, and international criminal law in the treatment of Palestinians in the OPT and in Israel.

Introduction

1. Between 22 January and 9 February 2023, two BHRC members, Darryl Hutcheon (Barrister at Matrix Chambers) and Natasha Jackson (Barrister at Landmark Chambers), attended both Israeli military courts operating in the West Bank to observe proceedings on behalf of the BHRC.
2. There has been relatively limited international scrutiny of the Israeli military courts operating in the OPT since their establishment in 1967.[3] There are currently two such courts in operation, both in the West Bank, located at the Israeli military bases at Ofer, near Jerusalem, and Salem, near Jenin. The Israeli military operates four further 'satellite courts' based in or in the vicinity of Israel Security Agency (also known as 'Shabak' or 'the Shin Bet') interrogation facilities located in both Israel and the OPT.[4] The military courts are not accessible to members of the public (other than family and friends of a defendant who has a listed hearing on that day) or international observers without permission from the President of the Israeli military court. BHRC has itself conducted various trial observation proceedings in the Israeli military courts in the OPT over the course of the past two decades. For example, BHRC attended proceedings related to the prosecution of 17-year-old Ahed Tamimi, along with her mother and cousin, following an altercation involving an Israeli soldier in December 2017.[5]
3. This observation of the military courts was intended to follow the activities of the courts over a set period of time, rather than focusing on a particular case. The primary purpose of these observations was to gather general information about the cases before the courts, court practice and court procedure, with reference to standards established under international humanitarian law ("**IHL**") and international human rights law ("**IHRL**").

3 For examples of some of the most prominent work covering the military courts, see: Save the Children, 'Defenceless: the impact of the Israeli military detention system on Palestinian children'(Save the Children, 2020); Save the Children, 'Isolated: The impact of family separation on Palestinian children in military detention'(Save the Children, 2022); Save the Children, 'Injustice: Palestinian children's experience of the Israeli military detention system'(Save the Children, 2023); B'Tselem, 'Minors in Jeopardy: Violation of the Rights of Palestinian Minors by Israeli Military Courts'(B'Tselem, March 2018); B'Tselem,'Presumed Guilty: Remand in Custody by Military Courts in the West Bank'(B'Tselem, June 2015); United Kingdom: Foreign and Commonwealth Office, 'Human Rights and Democracy: The 2012 Foreign & Commonwealth Office Report – Israel and the Occupied Palestinian Territories'(United Kingdom: Foreign and Commonwealth Office, 15 April 2013); Sharon Weill, 'The judicial arm of the occupation: the Israeli military courts in the occupied territories'(2007) 89 International Review of the Red Cross 866, 395; Nery Ramati, 'The Rulings of the Israeli Military Courts and International Law'(2019) 25 Journal of Conflict and Security Law 1, 149..

4 See para. 55 below.

5 *Hearing Observation Report in the Israeli Military Court* (2018).

Image: Watchtower of Ofer Military Prison © shutterstock/Ryan Rodrick Beiler

Methodology of the BHRC Observation

4. As set out above, to make the observations and gather the information and perspectives which inform this report, BHRC's observers spent three weeks in the OPT and in Israel from 22 January to 9 February 2023.
5. The primary objective of the observers was to spend as much time as possible in the two military court complexes at Ofer and Salem, observing court proceedings and interviewing (or, where appropriate, conducting less formal discussions with) the widest possible range of people who participate in and attend the court's activities, from Palestinian defence lawyers and family members to military judges and court officials.
6. There are eight courtrooms at Ofer, usually with one appearing to be dedicated to detention extension cases and one hearing traffic-related matters (on days where traffic cases were listed to be heard). During the observations, it was sometimes the case that only one public hearing was taking place in the entire court complex; it was rare for more than three courtrooms to be in operation at the same time; and never more than five were used simultaneously. Without access to formal listing information, and where there was more than one hearing taking place at the same time, the observers selected hearings randomly (save that they aimed to observe a diversity of types of proceedings).
7. The observers also spoke to defence lawyers inside and outside the courtrooms (though they did not have access to the designated lawyers' area at the Ofer court). They also spoke (usually in the waiting area) to family members of defendants who had come to court to see their relatives. Where possible, the observers spoke to lawyers and family members who were connected to hearings that were being observed with a view to gaining more information about the circumstances of those cases. Some of the discussions with defence lawyers extended to obtaining the practitioners' reflections on general practices within the military court system as well as their broader reflections on that system.
8. While the formal advanced request to speak to judges in the military courts went unanswered,[6] the observers were able to speak informally to one judge about their experience of the military courts between court hearings. They approached other judges who politely declined requests to discuss the courts. During the observation trip, several further written requests to meet with the President were made on BHRC's behalf but a positive response was never received. Similarly, prosecutors informed the observers that they were not permitted to speak to them without permission, which was not granted, but were sometimes willing to speak informally to give information about the cases under observation. The observers also attempted to speak to 'court staff' (who are members of the Israeli military, police or representatives of the security interrogators) about their roles and impression of the military courts, some of whom were willing to give their views.

6 Formal requests were made in writing and via fax to the Head of the Military Court of Appeals, Judge Tsvika Lekah and to the IDF Spokesperson Brigadier General Kochav on 10 and 12 January 2023 in advance of the observation which was to commence on 21 January 2023 until 11 February 2023. BHRC received correspondence from Judge Lekah on 16 January 2023 limiting the access of the observers to one day at the Ofer and Salem Court, respectively. BHRC was also denied access to conduct interviews with judges, prosecutors and other members of the court in this communication. BHRC sent a letter on 20 January 2023 to both Judge Lekah and Brigadier General Kochav requesting a reason for the limiting of access to the court and to reconsider their position. BHRC also sent a letter to the head of the Israeli Bar Association. In addition, letters were sent to Judge Lekah and Brigadier General Kochav by Baroness Helena Kennedy KC, Director of the International Bar Association Human Rights Institution; Nick Vineall KC, then Chair of the Bar Council, and a representative of the UK FCDO

9. Proceedings in the military courts are conducted in Hebrew. The majority of the court users, however, are Palestinians who speak Arabic as their native and often their only language. Court interpreters, who are understood to be either Israeli citizens performing military service or employed members of the IDF, are tasked with providing translation in court, though often this was performed poorly; see further below. The observers were assisted by real-time translation provided by private interpreters who could speak both Hebrew and Arabic. However, the possibility of effective translation was limited by the overlapping conversations and level of noise and movement in the courtroom.

10. To generally inform the observers' contextual understanding of the court system, meetings were also held, both in Israel and in the West Bank, with individual lawyers, legal organisations and NGOs working within the military courts. To compensate for the restricted access to the courts, the observers were able to spend a significant amount of time across three days conducting 'case file reviews' with lawyers who provided information and paperwork related to military court cases they were instructed on. This exercise, while different in nature to the observations that had been intended, still provided valuable insight into the operation of the system.

11. The observers designed a survey to record information on the cases observed and reviewed, which they attempted to complete for each case. This report draws from those records. In reality, it was very difficult to gather all the information in a given case for a number of reasons. BHRC observers were only allowed to take a pen and notepad into the court complex and so could not record the details of hearings on a laptop or other electronic device or fill out pre-prepared template "surveys" for each case. The courtroom environment was sometimes quite chaotic and loud, which in itself made it difficult for the interpreters to follow exchanges between judges and lawyers/prosecutors. Cases were often overlapping and being conducted simultaneously, so it was sometimes unclear which detainee's case was being heard. Cases were not formally 'called on' and details of the charge or offence were rarely stated clearly or in full; likewise, it was rare for the history of a case to be rehearsed in any detail in the course of a hearing. Sometimes this information could be obtained if the observers were shown a charge sheet by the detainee's lawyer or through a discussion with the prosecutor, but this was often not possible. Often matters were decided through quiet discussions at the bench between lawyers and the judge, which could not be heard from where members of the public were allowed to sit. Where it was possible to speak to the family members connected to a case, it was sometimes difficult to obtain or verify clear details around their relatives' cases (which in part reflects the lack of information which is made available to family members when a relative is arrested and detained in the West Bank).

Conditions Since 7 October 2023

12. BHRC's observations took place prior to the events of 7 October 2023 and the subsequent Israeli military invasion into the Gaza Strip.[7] Those events have had very profound impacts in the West Bank including in the military court system. In particular, as noted in the July 2024 report of the UN High Commissioner for Human Rights, Israeli security forces carried out massarrests and detentions of Palestinians in the West Bank in the months following October 7.[8] Nearly 9,000 Palestinians were arrested in the West Bank between 7 October 2023 and 28 May 2024 and, by the end of June 2024, the number of so-called "security detainees" held by Israel had nearly doubled compared to the level prior to October 7. A very significant number of those arrested were placed in administrative detention. Israel also suspended the International Committee of the Red Cross' access to Palestinian detainees in the West Bank.[9]

13. There has also been a severe escalation in Israeli settler violence against Palestinians in the West Bank, as noted by several domestic and international human rights organisations.[10] These attacks are allegedly not prevented by the Israeli military or security apparatus, a problem which some have suggested has got even worse in the wake of the Hamas attack.[11] The acts of settler violence include but are not limited to the burning of olive groves, wounding or killing unarmed Palestinians, and destroying property through bulldozing or other means.[12]

---

7 The events of 7 October 2023 referred to include the armed incursion into Israeli territory bordering the Gaza strip by Hamas and other armed militant groups resulting in the death of over 1,000 people and the taking hostage of approximately 250 Israeli civilians and soldiers (including 30 children): 'Israel revises death toll from Oct. 7 Hamas assault dropping from 1,400 to 1,200' *Times of Israel* (Jerusalem, 10 Nov 2023) <https://web.archive.org/web/20231111061709/https://www.timesofisrael.com/israel-revises-death-toll-from-oct-7-hamas-assault-dropping-it-from-1400-to-1200/>; 'Israel social security data reveals true picture of Oct 7 deaths' *France24* (Jerusalem, 15 Dec 2023) <https://www.france24.com/en/live-news/20231215-israel-social-security-data-reveals-true-picture-of-oct-7-deaths>.

8 UN Human Rights Office of the High Commissioner, 'Thematic Report: Detention in the context of the escalation of hostilities in Gaza (Oct 2023 – June 2024)'(UN Human Rights Office of the High Commissioner, 31 July 2024) <https://www.ohchr.org/sites/default/files/documents/countries/opt/20240731-Thematic-report-Detention-context-Gaza-hostilities.pdf>, [22-26].

9 Patrick Wintour, 'Red Cross and Foreign Office to discuss plan to visit Palestinians in Israeli detention' *The Guardian* (16 May 2024) <https://www.theguardian.com/world/article/2024/may/16/red-cross-uk-foreign-office-palestinians-in-israeli-detention>; Jeremy Sharon, 'High Court orders gov't to justify ban on Red Crossvisits for Palestinian prisoners' *The Times of Israel* (27 Aug 2024) <https://www.timesofisrael.com/high-court-orders-govt-to-justify-ban-on-red-cross-visits-for-palestinian-prisoners #:~:text=Following%20the%20October%207%20onslaught,and%20detainees%20held%20by%20Israel>.

10 Human Rights Watch, 'West Bank: Israel Responsible for Rising Settler Violence' (Human Rights Watch, Jerusalem, 17 Apr 2024) < https://www.hrw.org/news/2024/04/17/west-bank-israel-responsible-rising-settler-violence>accessed; European Civil Protection and Humanitarian Aid Operations, 'Supporting Palestinian communities affected by settler violence in the West Bank' (European Commission, 16 Apr 2024) < https://civil-protection-humanitarian-aid.ec.europa.eu/news-stories/stories/supporting-palestinian-communities-affected-settler-violence-west-bank_en>; UN Office for the Coordination of Humanitarian Affairs, 'Hostilities in theGaza Strip and Israel: Flash Update #108' (United Nations OCHA, 2 Feb 2024)<https://reliefweb.int/report/occupied-palestinian-territory/hostilities-gaza-strip-and-israel-flash-update-108-enarhe>.

11 International Crisis Group, 'Stemming Israeli Settler Violence at its Root' (International Crisis Group, 6 Sept 2024) < https://www.crisisgroup.org/middle-east-north-africa/east-mediterranean-mena-israelpalestine/246-stemming-israeli-settler-violence>; B'Tselem, 'Settler Violence = State Violence' (B'Tselem, Interactive Updates) <https://www.btselem.org/settler_violence_updates_list>; Amnesty International, 'State-backed deadly rampage by Israeli settlers underscores urgent need to dismantle apartheid' (Amnesty International, 22 April 2024) < https://www.amnesty.org/en/latest/news/2024/04/state-backed-deadly-rampage-by-israeli-settlers-underscores-urgent-need-to-dismantle-apartheid/>; B'Tselem, 'Israel soldiers killed a Palestinian girl, 13, at home in Qaryut after entering the village following a settler attack' (B'Tselem, Settler Violence = State Violence, 29 Oct 2024) <https://www.btselem.org/firearms/20241029_the_killing_of_bana_labum_in_qaryut> ; Yesh Din, 'Israeli settler violence against Palestinians in the West Bank under the guise of war' (Yesh Din, Settler Violence, 28 Nov 2023) < https://www.yesh-din.org/en/israeli-settler-violence-against-palestinians-in-the-west-bank-under-the-guise-of-war/>.

12 Judith Sudilovsky, 'Settler violence spiking in the West Bank as country focuses on Gaza – NGOs, activists' *The Jerusalem Post* (Jerusalem, 1 Nov 2023) <https://www.jpost.com/israel-news/article-771247>; B'Tselem, 'Lechathila Farm – Military assists settlers take over Wadi al-Qalt community land' (B'Tselem, Settler Violence = State Violence, 13 Oct 2024) < https://www.btselem.org/settler_violence/202409_lechathila_farm__military_assists_settlers_take_over_wadi_al_qalt_community_land>.

14. Furthermore, three significant reports and opinions have commented on the military court system. Firstly, on 3 July 2024, two UN Special Rapporteurs denounced the long-running failures of the Israeli state to comply with IHL and IHRL in the West Bank military courts.[13] A particularly concerning development, which was referred to in the Special Rapporteurs' statement, was the move by the Israeli Defence Forces to transfer responsibility for dozens of by-laws from the military to pro-settler civilservants under the direction of the Finance Minister Bezalel Smotrich.

15. Secondly, on 19 July 2024 the ICJ provided its Advisory Opinion regarding Israeli occupation in the OPT.[14] During the Advisory Opinion proceedings, states were given leave to provide oral and written submissions. Several states, including the State of Palestine and South Africa, submitted that there were several practices at the military courts that could constitute serious violations of IHL and IHRL.[15] Among those practices mentioned were the use of administrative detention of children; the transportation of Palestinians from the West Bank to Israel; and the alleged use of torture of defendants.[16]

16. Those submissions were accepted and the court found that the violations were made out.[17] The overall majority conclusion of the Advisory Opinion was that the occupation of the OPT by Israel was unlawful and in violation of provisions of IHL, IHRL and two *jus cogens* norms (the right to self-determination, and the prohibition of the use of force for the annexation of territory).[18] UNGA adopted the ICJ Advisory Opinion on 18 September 2024.[19]

17. Thirdly, the *ad hoc* Conciliation Commission appointed by the Committee for the Elimination of Racial Discrimination, which is responsible for the enforcement of the ICERD, in the matter of *Palestine v Israel*, reported on 22 August 2024.[20] The report concluded that Israel is responsible for discriminatory policies and practices in the West Bank which violate Article 3 ICERD (*"States Parties particularly condemn racial segregation and apartheid and undertake to prevent, prohibit and eradicate all practices of this nature..."*). The Report made several recommendations relevant to the military courts, including *"revise and rescind, as appropriate, all military orders that are or may be perceived to be discriminatory, or that have the potential to lead to discrimination against Palestinians" and "end the practice of administrative detention of and differentiated treatment between Israeli and Palestinian minors."* [21]

18. While this report focusses on the observations made during the February 2023 BHRC visit, we acknowledge the subsequent and continued deterioration in procedural safeguards before the courts documented by these important bodies and institutions.

---

13 United Nations Human Rights Office of the High Commissioner, 'Israel: UN Experts condemn decades of unfair trials for Palestinians in the occupied West Bank' (Geneva, United Nations, 3 July 2024) <https://www.ohchr.org/en/press-releases/2024/07/israel-un-experts-condemn-decades-unfair-trials-palestinians-occupied-west>; Peter Beaumont, 'IDF transfers powers in occupied West Bank to pro-settler civil servants' *The Guardian* (Jerusalem, 20 Jun 2024) <https://www.theguardian.com/world/article/2024/jun/20/idf-transfers-powers-in-occupied-west-bank-to-pro-settler-civil-servants>.

14 *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem* (Advisory Opinion) 19 July 2024 <https://www.icj-cij.org/case/186/advisory-opinions>.

15 *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian territory, Including East Jerusalem* (Written Statement of State of Palestine) 24 July 2023 <https://www.icj-cij.org/sites/default/files/case-related/186/186-20230724-wri-12-00-en.pdf>; *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian territory, Including East Jerusalem* (Written Statement of Republic of South Africa) 25 July 2023 <https://www.icj-cij.org/sites/default/files/case-related/186/186-20230725-wri-14-00-en.pdf> .

16 As summarised in the decision of the court, ICJ Advisory Opinion 2024, [134-141]:Extension of Israeli law; *Id.* [148-154]: Violence against Palestinians; *Id.* [223-229]: Discriminatory legislation and measures.

17 Ibid.

18 ICJ Advisory Opinion 2024, 73-77

19 Resolution adopted by the General Assembly on 18 September 2024, Advisory opinion of the ICJ on the legal consequences arising from Israel's policies and practices in OPT, including East Jerusalem, and from the illegality of Israel's continued presence in OPT – General Assembly 10th Emergency Special Session – Resolution (A/RES/ES-10/24)

20 *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem* (Advisory Opinion) 19 July 2024 <https://www.icj-cij.org/case/186/advisory-opinions>; Report of the Ad Hoc Conciliation Commission (case *State of Palestine v. Israel*) – Committee on the Elimination of Racial Discrimination (CERD/C/113/3), published August 2024.

21 CERD Report State of Palestine v Israel.

Legal and Social Background

Image: West Bank Barrier © shutterstock/Tupungato

19. The West Bank, including East Jerusalem, has been under Israeli military occupation and subject to governance by Israeli military law since 1967. Since military law was imposed, over 200 Israeli settlements have been established on the occupied West Bank; these are illegal under international humanitarian law.[22] Israel applies two entirely distinct legal regimes to those in the West Bank on the basis of nationality and ethnicity.[23] The 750,000 Israeli settlers living in the West Bank are not subjected to Israeli military legislation, nor do the Israeli military courts assume jurisdiction over them; rather, they are governed by Israeli domestic law only and, insofar as they are prosecuted for crimes committed in the West Bank, they are prosecuted in the civilian criminal courts in Israel.[24] By contrast, the approximately 2.8 million Palestinian residents of the West Bank *are* subject to Israeli military legislation and prosecuted in the military courts. Sometimes Palestinian citizens of Israel, living in Israel, are also prosecuted in the courts. Moreover, and as noted in research by the Association for Civil Rights in Israel:

> ***"As a general rule, the military legislation [Palestinians] are subject to is far more severe than the Israeli legislation applied to settlers, and this discrimination touches upon almost every aspect of life".***[25]

20. The Interim Agreement on the West Bank and Gaza Strip, commonly referred to as "Oslo II" or the "Oslo II Accords", was signed in 1995 and divided the Occupied West Bank into three administrative zones: Area A, where civil and security matters are administered by the Palestinian Authority ("**PA**"); Area B, where the PA administers civil matters and shares security control with Israel; and Area C, where Israel has full control of civil and security matters. The military courts accept and exercise jurisdiction over activities which take place not only in Areas B and C but also over security and auto theft offences which take place in Area A and even, in certain circumstances, over activities which take place outside the West Bank. Palestinians living in Areas A and B of the West Bank (excluding East Jerusalem) are also, pursuant to the Oslo II arrangements, governed by laws enforceable in the Palestinian courts in relation to matters over which the Israeli military does not assume jurisdiction.

21. Alleged infringements of Israeli military law by Palestinians are prosecuted in the military courts. Estimates from the UN and data from the Israeli military authorities suggest more than 800,000 Palestinian civilians have been imprisoned under military law since the start of the occupation in 1967, of which 38,000 – 55,000 were children.[26]

22. Since its establishment, human rights observers and practitioners (both locally and internationally) have repeatedly raised concerns about the military court system and its legality under international law, giving rise to a body of literature on the subject.[27] As noted above, however, there has been

---

22 Article 49 Geneva Convention IV provides that the Occupying Power shall not deport or transfer its own civilian population into the territory it occupies, and prohibits individual or mass forcible transfers, as well as deportations of protected persons from occupied territory. The ICJ advisory opinion in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (July 2004) confirmed that the Israeli settlements in the OPT are in breach of international law: see [120]-[121]. See, to the same effect, the ICJ's more recent advisory opinion on the Israeli occupation of the OPT (19 July 2024) at [119] and [155].

23 Omar Shakir and Lama Fakih, 'Does Israel's Treatment of Palestinians Rise to the Level of Apartheid' *The Los Angeles Times* (Human Rights Watch, 5 Dec 2023) <https://www.hrw.org/news/2023/12/05/does-israels-treatment-palestinians-rise-level-apartheid>; B'Tselem, 'Not a "vibrant democracy". This is apartheid' (B'Tselem, Oct 2022) <https://www.btselem.org/publications/202210_not_a_vibrant_democracy_this_is_apartheid>; CERD Report *State of Palestine v Israel*.

24 ICJ Advisory Opinion 2024, [136].

25 The Association for Civil Rights in Israel, One Rule, *Two Legal Systems: Israel's Regime of Laws in the West Bank* (October 2014), 7.

26 Military Court Watch, Annual Report 'Monitoring the treatment of children held in Israeli military detention' (Oct 2022)<http://www.militarycourtwatch.org/files/server/MCW%20ANNUAL%20REPORT%20(2022).pdf>.

27 By way of example, see the Report of the UN Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967 (28 Aug 2023)<https://documents.un.org/doc/undoc/gen/g23/116/61/pdf/g2311661.pdf>; the Report of the UN Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967 (20 Oct 2023)<https://documents.un.org/doc/undoc/gen/n23/315/25/pdf/n2331525.pdf>; Military Court Watch, *Annual Report* (2022); Save the Children, *Defenceless* Report (2020); B'Tselem, *Presumed Guilty* Report (2015); UNICEF, 'Children in Israeli Military Detention: Observations and Recommendations' (UNICEF, February 2013)<https://www.un.org/unispal/document/auto-insert-208566/>; US State Department, Country Reports on Human Rights Practices - Israel and The Occupied Territories (2016)<https://il.usembassy.gov/wp-content/uploads/sites/33/2017/04/265712.pdf>; B'Tselem, 'No Minor Matter: Violation of the Rights of Palestinian Minors Arrested by Israel on Suspicion of Stone Throwing' (B'Tselem, July 2011). For an academic perspective, see in particular: Weill (2007), 395. It should be noted that this article pre-dates the introduction of Military Order 1651, discussed below.

relatively limited international monitoring in the form of in-depth observation of proceedings in the military courts. BHRC's observation in early 2023 represented the first extended trial observation in the military courts by UK lawyers since a delegation of UK lawyers, funded by the United Kingdom Foreign & Commonwealth Office, visited Israel and the West Bank between 10 and 17 September 2011. The observation in 2011 by UK lawyers undertook an evaluative analysis of Israeli military law and practice as they affected Palestinian children in the West Bank vis-a-vis standards of international law and children's rights. Their report raised extensive concerns about the legal regime and practices observed.[28]

23. The work of Military Court Watch ("MCW"), a non-profit organisation based in the OPT, offers an invaluable resource concerning the design and operation of the court system.[29] It was founded by international and local lawyers and publishes observations, statistics and reports in relation to the military courts, as well as translated copies and summaries of Military Orders, regulations and court decisions. The core of MCW's work focuses on the treatment of children in the military court system.

Overview of Military Courts and International Humanitarian Law

24. As the military power which has occupied the OPT for more than half a century,[30] Israel's obligations are primarily set out in the Fourth Geneva Convention (**"GCIV"**), Additional Protocol 1 to the Geneva Conventions (**"AP1"**)[31] and the Regulations Annexed to the Hague Regulations No. IV (**"Hague IV"**), together with customary international humanitarian law. In its recent Advisory Opinion on the Israeli occupation of the OPT the International Court of Justice reiterated at [96] that Hague IV and "a great many of the rules of (*GCIV*)" constitute customary international law. These instruments apply to the Israeli occupation of the OPT.[32]

25. Under IHL, a territory is treated as under occupation where it is actually placed under the authority of a hostile foreign army without consent: see e.g. Article 42 Hague IV. It is among the core general principles of the law of occupation that an occupying power does not acquire sovereign rights over the occupied territory, and that occupation is a temporary situation to respond to military necessity: see the ICJ Advisory Opinion (19 July 2024) at [105].[33]

---

28 United Kingdom: Foreign and Commonwealth Office, 'Children in Military Custody' (United Kingdom: Foreign and Commonwealth Office, June 2012) <https://www.childreninmilitarycustody.org.uk/wp-content/uploads/2012/03/Children_in_Military_Custody_Full_Report.pdf>.

29 Military Court Watch, 'Our Work' (Military Court Watch) <https://www.militarycourtwatch.org/page.php?id=42jDypmw2Fa3804AqAPKblOpDY>.

30 Israel "withdrew" unilaterally from the Gaza Strip in 2005 by withdrawing its military forces and dismantling the 22 settlements on the territory and maintains that it is no longer occupying the territory. The Gaza Strip is still, however, widely recognised as being under Israeli occupation due to the continued blockade and authority exercised over the territory. See, *e.g.*, ICRC, 'What does the law say about the responsibilities of the Occupying Power in the occupied Palestinian territory?' (28 March 2023)< https://www.icrc.org/en/document/ihl-occupying-power-responsibilities-occupied-palestinian-territories>; In ICJ Advisory Opinion 2024, the International Court of Justice has now ruled that Israel continues to occupy the Gaza Strip notwithstanding the withdrawal of its military presence and that this conclusion applies" even *more so since 7 October 2023*": [92-94].

31 Many articles of AP1, including those regulating hostilities and guaranteeing rights, are widely recognised to constitute customary international law.

32 See *inter alia* the ICJ The Wall Opinion 2004 and ICJ Advisory Opinion 2024. See also, *e.g.*, ICRC, 'What does the law say about the responsibilities of the Occupying Power in the occupied Palestinian territory?'(ICRC, 26 Jul 2024). Israel is a signatory to GCIV. The Israel Supreme Court has confirmed that Hague IV and certain so-called "humanitarian provisions" of GCIV reflect customary IHL and therefore bind the Israeli military authorities in the West Bank: *Beit Sourik Village Council v The Government of Israel* HCJ 2056/04, 20 June 2004; For its part the Israeli government has contested the de jure applicability of GCIV to the Occupied Territories but accepts the *de facto* application of 'humanitarian provisions' of the Convention. Israel has not ratified AP1. The State of Palestine has ratified both GCIV and API, by decision dated 4 May 1989 and notified by the Permanent Observer of Palestine to the Office of the United Nations on 21 June 1989: International Review of the Red Cross, 'Palestine and the Geneva Conventions' (International Review of the Red Cross (ICRC), March 1990, No.274)<https://international-review.icrc.org/sites/default/files/S0020860400075215a.pdf>.

33 ICRC, 'Occupation and international humanitarian law' (ICRC, 8 April 2004) <https://www.icrc.org/en/doc/resources/documents/misc/634kfc.htm>; Philip Spoerri, "The Law of Occupation", in Andrew Clapham and Paola Gaeta (eds), The Oxford Handbook of International Law in Armed Conflict (Oxford University Press 2014), 182-205; ICJ Advisory Opinion 2024, [105].

Image: Israeli separation wall near Kalandia © shutterstock/Ryan Rodrick Beiler

26. GCIV provides for the protection of civilians placed under military occupation by a foreign power. Article 64(1) GCIV, reaffirming Article 43 Hague IV, places a general obligation on an occupying power, such as Israel, to respect the law in force prior to the occupation, reflecting the principle that the occupied population should be judged according to their own regular legal system and not subject to foreign legal regimes.[34] Article 64(2) GCIV permits law-making by the occupying power only on an exceptional basis and on specific enumerated grounds:

> ***"The Occupying Power may… subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfil its obligations under [GCIV], to maintain the orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them."***

27. The ICRC Commentary of 1958 explains that the powers to legislate under Article 64 GCIV "*must not under any circumstances serve as a means of oppressing the population.*"[35]

28. Insofar as the occupying power imposes military legislation in the occupied territory, GCIV provides *inter alia* that any such legislation: (i) must be published and brought to the knowledge of the inhabitants in their own language, and (ii) must not be retroactive.[36] GCIV also provides that the maximum sentence of imprisonment for an offence committed against the occupying power must be "*proportionate to the offence committed.*"[37]

29. The authority to establish military courts for the enforcement of the occupying force's laws is delineated in Article 66 GCIV, which sets out multiple distinct criteria that must be fulfilled for cases to be tried, namely, that:

> ***"in case of a breach of the penal provisions promulgated by it by virtue of the second paragraph of Article 64, the Occupying Power may hand over the accused to its properly constituted, non-political military courts, on condition that the said courts sit in the occupied country…"***

30. Article 71 GCIV provides for the right to a fair trial for members of the occupied population accused of offences contrary to military legislation. Requirements include that there be a "*regular trial*" before a sentence is pronounced, for the persons prosecuted to be "*promptly informed, in writing, in a language which they understand, of the particulars of the charges preferred against them*", and for cases to be brought to trial "*as rapidly as possible*". Article 72 GCIV provides for the right of accused persons to present evidence necessary for their defence, and to have the assistance of a qualified lawyer "*of their own choice*", who can "*visit them freely*" and "*enjoy the necessary facilities for preparing the defence*".[38] GCIV further stipulates that, unless the entitlement is freely waived, the accused shall be aided by aninterpreter "*both during preliminary investigation and during the hearing in court.*"[39]

---

34 GCIV Article 64(1).

35 ICRC, 'Commentary of 1958, Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)'12 August 1949, 75 UNTS 287, Article 64 <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=9DA4ED335D627BBFC12563CD0042CB83>.

36 GCIV Article 65

37 See GCIV Article 68: This provision applies to offences which do not "*constitute an attempt on the life or limb of members of the occupying forces in administration, nor a grave collective danger, nor seriously damage the property of the occupying forces or administration or the installations used by them*".

38 GCIV Article 72.

39 GCIV Article 72.

31. AP1, the key provisions of which are widely recognised to constitute customary international law, incorporates key provisions of IHL concerning the right to a fair trial.[40] Article 75(4) AP1 provides that no sentence may be passed on a person found guilty of a penal offence related to the armed conflict *"except pursuant to a conviction pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure"*. This guarantee is to be understood as incorporating fair trial rights as they are defined in IHRL (see below). Article 75(4)(a)-(j) AP1 particularises numerous specific guarantees in this regard, which include core principles such as the presumption of innocence; the entitlement of the accused to be informed without delay of the particulars of the offence alleged; and the right not to be compelled to testify against oneself. Furthermore, Article 69 GCIV provides that the period during which an accused person is under arrest and awaiting trial or punishment must be deducted from any sentence.

32. Wilfully depriving a person of a right to a fair trial constitutes a war crime under Article 8(2)(a)(vi) of the Rome Statute of the International Criminal Court (**"Rome Statute"**).

33. The transfer or deportation of civilians from the occupied territory to outside of the territory is strictly prohibited (Article 49 GCIV). GCIV further mandates that those accused of offences should be detained in the occupied country and must remain there for the duration of any sentence passed (Article 76 GCIV). The transfer or detention of a member of the occupied population outside of the occupied territory constitutes a grave violation of GCIV (Article 149 GCIV) and constitutes a war crime contrary to Article 8(2)(a)(vii) of the Rome Statute.

34. While administrative detention (or "internment"), i.e. deprivation of liberty on security grounds but without any criminal investigation or charge, is used frequently in the OPT and its review falls under the jurisdiction of the military courts, the practice is not the focus of this report. It should be noted, however, that the use of administrative detention is a highly controversial aspect of the military court's activities, with many observers alleging that administrative detention is used extensively in circumstances where there are no "imperative security reasons" (as required by Article 78 GCIV) for its use.[41]

Overview of Military Courts and International Human Rights Law

35. The requirements of IHRL continue to apply, and indeed are particularly important, in situations of occupation.

36. The ICJ Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (July 2004) confirmed that, in addition to GCIV, the main IHRL instruments governing the right to liberty and the right to a fair trial apply to the OPT, namely, the International Covenant on Civil and Political Rights ("ICCPR"), the International Covenant on Economic, Social and Cultural Rights ("ICESCR") and the Convention on the Rights of the Child ("**CRC**").[42]

37. It follows that the protections and guarantees provided under the IHRL legal framework apply as a matter of law to proceedings in the West Bank military courts.

38. Article 2 ICCPR provides generally that the rights protected under it must be afforded without distinction of any kind, such as race or national origin. Article 26 ICCPR goes on to provide that all persons must be entitled without any discrimination to the equal protection of the law. The International Convention on

---

40 Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law Volume I: Rules* (ICRC, Cambridge University Press 2005).

41 Andrew Clapham, Paola Gaeta and Marco Sassoli (eds), The 1949 Geneva Conventions: A Commentary (Oxford University Press 2015), 1332-1333; B'Tselem, 'Administrative Detention' <https://www.btselem.org/administrative_detention>; Weill (2007), 396 (footnote 4).

42 See th ICJ *Wall Opinion* 2004, [102]-[113]. Although not the focus of this report, Israel is also a signatory to the Convention on the Elimination of All Forms of Racial Discrimination (**"ICERD"**) and the Convention Against Torture (**"CAT"**), which provide relevant and applicable protections to the civilian population.

the Elimination of all Forms of Racial Discrimination ("**ICERD"**), which will be discussed further below, echoes this framework and is applicable to acts by Israel in the OPT.[43]

39. The key ICCPR provision governing the right to liberty s Article 9 ICCPR. It provides *inter alia* in Article 9(1) that "*no one shall be subjected to arbitrary arrest or detention*" and that "*anyone arrested or detained on a criminal charge… shall be entitled to trial within a reasonable time or to release*" (Article 9(3)); further that, "*it shall not be the general rule that persons awaiting trial shall be detained in custody*" (*ibid.*).[44]

40. Articles 14 and 15 ICCPR govern the right to a fair trial in courts and tribunals including military courts.[45] They stipulate specific safeguards which together guarantee the right to a fair trial:

a. A person charged must: be informed of the charge promptly in a language they understand; have adequate time and facilities to prepare their defence and communicate with a lawyer of their choosing; be tried without undue delay; be able to defend themselves at trial with legal assistance; be able to examine witnesses against them (Article 14(3)(a)-(e)).

b. An entitlement to a hearing before a "*competent, independent and impartial tribunal established by law*" (Article 14(1)).

c. An entitlement to a public hearing: the press and public can only be excluded for reasons of morality, public order or national security, when required to protect the interest of private lives, or to the extent strictly necessary to avoid prejudice to the interests of justice (Article 14(1)).

d. A requirement that a person on trial has "*the free assistance of an interpreter*" if needed (Article 14(3)(f)).

e. A prohibition on retroactivity in respect of both convicting and sentencing for criminal offences (Article 15), such that criminal penalties may not be applied to acts which took place prior to the introduction of the relevant rule. Article 4 of the ICCPR permits states to derogate from certain rights contained in the Treaty under very exceptional circumstances and subject to safeguards specified in the Article, including a requirement to notify t

UN Secretary-General of the intention to derogate and to supply reasons (Article 4(3).[46] Article 15 cannot be the subject of a derogation (Article 4(2)). Moreover Article 4 ICCPR does not permit state parties under any circumstances to invoke the derogation provisions to justify acting in violation of international humanitarian law or peremptory norms of international law, for instance through arbitrary deprivations of liberty or by deviating from fundamental fair trial principles.[47]

41. Children (i.e. persons under the age of 18) enjoy further specific protections under IHRL instruments. The ICCPR stipulates that any trial procedure must take account of their age and the desirability of

---

43 ICJ Advisory Opinion 2024, [101]

44 ICCPR Articles 9(1) and 9(3).

45 General Comment No. 32 on Article 14 ICCPR explains that the provisions of Article 14 ICCPR apply to all courts and tribunals, including military courts. Paragraph 22 states that: *"While the Covenant does not prohibit the trial of civilians in military or special courts, it requires that such trials are in full conformity with the requirements of article 14 and that its guarantees cannot be limited or modified because of the military or special character of the court concerned. The Committee also notes that the trial of civilians in military or special courts may raise serious problems as far as the equitable, impartial and independent administration of justice is concerned. Therefore, it is important to take all necessary measures to ensure that such trials take place under conditions which genuinely afford the full guarantees stipulated in article 14. …"* The contents of Articles 14 and 15 ICCPR are also widely recognised to constitute customary international law: see Jelena Pejic, "Conflict Classification and the Law Applicable to Detention and the Use of Force", in Elizabeth Wilmhurst (ed.), *International Law and the Classification of Conflicts* (Oxford University Press 2012); Patrick Robinson, 'The Right to a Fair Trial in International Law: With Specific Reference to the Work of the ICTY' (2009) 3 Berkeley Journal of International Law, 5-7 (observing that it is "beyond dispute" that Article 14 ICCPR reflects customary international law and further concluding that it represents a peremptory norm of international law).

46 Article 4 ICCPR provides that in exceptional circumstances involving a *"public emergency which threatens the life of the nation and the existence of which is officially proclaimed"*, state parties may derogate from certain obligations under the ICCPR to the extent strictly required by the exigencies of the situation, though not in a way which violates other international law obligations or involves discrimination inter alia on grounds of race, colour, language or religion. A state party availing itself of the derogation must immediately inform the other state parties of its derogation.

47 See General Comment no.29 on Article 4 ICCPR, [11] and [16].

promoting rehabilitation (Article 14(3)(g)). This requirement is mirrored in the UNCRC, the primary IHRL convention concerned with the rights of children, including children detained and/or charged with a crime.[48] The provisions of UNCRC governing detention and the right to a fair trial mirror, in significant part, the ICCPR.[49] It stipulates that the detention of a child *"shall be used only as a measure of last resort and for the shortest appropriate period of time."*[50]

42. More generally, the CRC requires that the best interests of the child be *"a primary consideration"* in any decision-making concerning them.[51] It also specifically mandates that State parties respect the rules of IHL which are relevant to a child and that they *"take all feasible measures to ensure protection and care of children who are affected by an armed conflict."*[52]

Background to Israeli Military Law

43. Israel declared martial law in the OPT on 7 June 1967.[53] The Israeli Military Commander issued three proclamations asserting the Israeli military's executive, security, public order and judicial authority over the Palestinian territory.[54] The third Proclamation provided for military courts and stated, in Article 35, that the court would follow the provisions of GCIV. Article 35 was quickly repealed. The initial Proclamations were later amended into Military Order 378, which from then on provided for the military courts, and set out their jurisdiction and the criminal penal code which they would enforce.

44. Since 1967, the Israeli military authorities have enacted over 2,500 military orders in the OPT, which regulate all aspects of Palestinian life. This includes but is not limited to: public health, education, land and property ownership, political and cultural expression, association, free movement, non-violent protest and traffic matters.[55] Breaches of these orders constitute criminal offences under the purview of the Israeli military courts. By way of some specific examples, numerous military orders address and restrict Palestinian access to water resources in the OPT;[56] make provision for the control of land transactions;[57] and regulate planning and administration of local roads.[58]

48 Both Israel and Palestine have ratified the CRC. See CRC Article 14(3)(g).

49 See CRC Article 40(2).

50 See CRC Article 37(b).

51 See CRC Article 3(1).

52 See CRC Articles 38(1) and 38(4).

53 Human Rights Watch, 'Born Without Civil Rights: Israel's Use of Draconian Military Orders to Repress Palestinians in the West Bank' (Human Rights Watch, 17 Dec 2019) <https://www.hrw.org/report/2019/12/17/born-without-civil-rights/israels-use-draconian-military-orders-repress>.

54 Proclamation No. 1 Regarding Regulation of Administration and Law (West Bank Area), 7 June 1967; Proclamation No. 2 Regarding Administrative and Judiciary Procedures (West Bank Area) 5727-1967; and Proclamation No. 3 Regarding Entry into Force of the Order Concerning Security Provisions (West Bank Area) (No. 3) 5727-1967.

55 Addameer, 'In the case of the Palestinian People vs. Military Courts' (Addameer, 1 Mar 2021) < https://www.addameer.org/node/4318>, 9; UN SR Palestinian Territories, Report (Aug 2023) A/HR/53/59, [32-35].

56 Military Order 9, which the Israeli-court appointed the Water Officer the *"absolute authority of all issues related to water"*; Military Order 158, which placed all wells, springs and water projects under the full direct command of the Israeli military commander, and permitted the confiscation of any new installations or water resources built without a permit; and Military Order 291 rendered all pre-1967 land and water-related arrangements invalid: see Amnesty International, 'Troubled Waters – Palestinians Denied Fair Access to Water' (Amnesty International, 2009)<https://www.amnesty.org/en/documents/mde15/027/2009/en/>. See also Military Order of 7 June 1997, which provides that all water resources that have been occupied again are the property of the state of Israel.

57 Military orders permit the forced purchase of Palestinian-owned land and restrict rights of remedy and review on land transactions: see e.g. Military Order 811 and Military Order 847, which allow land to be purchased from Palestinians without consent through using "powers of attorney". See also Military Order 25: Land Transaction Order (Judea and Samaria) (making it a criminal offence to conduct business transactions involving land and property without a permit from the military authorities) and Military Order 58 (giving control over 'absentee property' to the Israeli military and limiting the review and voiding of transactions relating to land owned by Palestinians).

58 Military Order 418 abolished the pre-occupation regime, pursuant to which roads were under the control of a planning commission and subject to a public consultation process and replaced it with a commission operated by the Israeli military, with powers to suspend all other plans and municipal permits.

45. The Military Orders are not widely announced, distributed, or made accessible. While it appears that military orders are now published on a government website in Arabic, it is unclear whether Palestinian residents of the OPT are easily able to access the website in light of blocks which are placed on access to certain official sites. While orders are published in civil administration offices in the OPT the public do not have free access to those places. Israel has historically breached, and may be continuing to breach, Article 65 GCIV, which provides that the penal provisions enacted by an occupying power shall not come into force before they have been published and brought to the knowledge of the inhabitants in their own language.[59]

46. Military Order 1651 ("**MO 1651**") entered into effect in May 2010 and consolidated various pre-existing Israeli Military Orders. MO 1651 effectively serves as the Israeli criminal code for Palestinians in the West Bank. In the years since the introduction of MO 1651, it has been amended on numerous occasions by further military orders.[60] MO 1651 identifies a wide range of criminal offences and the maximum sentences they attract.

47. Among the vast number of other Israeli military orders which apply in the West Bank, two in particular are noted:

- Military Order 101 of 1967 titled: "Order Regarding Prohibition of Incitement and Hostile Propaganda Actions" remains in force to this day.[61] The order prohibits gatherings of 10 or more people involving a speech or discussion about a political subject, "*or which may be construed as political*", unless advance permission has been granted. Similar rules restrict the ability of Palestinians to attend vigils or processions involving 10 or more persons, again wherever the event is "*political*" or "*may be construed as political*". Breach of these restrictions is punishable by a sentence of imprisonment of up to 10 years.
- Military Order 1310 titled: "Order Concerning Traffic (Judea and Samaria)" is, together with regulations lead down by the head of the Israeli Civil Administration, the principal source of the traffic offences for which Palestinians are tried in the military courts.[62]

48. In addition to the military orders enacted by Israel since 1967, Palestinians are also prosecuted in the military courts for breaches of the British Defense (Emergency) Regulations 1945 ("**DER 1945**"), which were enacted by the British Mandate government in Palestine in 1945. Israel asserts that the regulations were in force in 1967, and as such form part of the law of the OPT which it is entitled as an occupying power to enforce. This is not withstanding that the DER 1945 were repealed by the British authorities on the end of the Mandate.[63]

49. Indictments in the military courts are filed on the basis of a broad range of offences, which are divided into five distinct categories:

- **Hostile Terrorist Activity**, also known as "security offences". It is understood that, in practice, security offences are often charged in combination with non-security criminal offences, increasing the length of sentence that can be sought under the indictment. Security offences include:
  i. Crimes relating to military equipment and weapons, including possession, carrying and manufacturing of weapons and trading offences (sections 230 and 232-234), as well as *being a member of a group* in which one or more members carries, holds or manufactures a weapon without a permit (an offence punishable by life imprisonment) (section 231).

---

59 See para 28 above

60 The Israeli military does not translate Military Orders into English as a matter of course. Our understanding is that there is no consolidated English language version of the MO 1651 or other record which reflects all changes to date. The references in this report reflect the observers' understanding of the provisions of MO 1651 as they stood at the time of the BHRC's observations

61 Israeli Military Order No 101, *Order Regarding Prohibition of Incitement and Hostile Propaganda Actions* (27 August 1967)

62 Israeli Military Order No 1310, *Order Concerning Traffic* (Judea and Samaria) (5752-1992)

63 Martha Roadstrum Moffett, 'Perpetual Emergency: A legal analysis of Israel's use of the British Defence (Emergency) Regulations, 1945 in the Occupied Territories' (Al-Haq 1989) <https://www.alhaq.org/cached_uploads/download/2021/03/24/perpetual-emergency-pdf-1616579593.pdf>; B'Tselem, 'Defense (Emergency) Regulations' <https://www.btselem.org/legal_documents/emergency_regulations>.

ii. A very broadly drawn category of offences described as "offences against the authorities of the region" (Article C MO 1651). This includes offences such as insulting or offending the honour of a soldier (section 215(D), punishable by one year of imprisonment); assault of a soldier (section 215(B), punishable by ten years' imprisonment); and an offence of "*committing an act or omission which entail harm, damage, disturbance or danger to the security of the region or the security of the IDF* (section 222(A), punishable by life imprisonment).

iii. Some offences under Military Order 101 (see above).

iv. Espionage or contact with an enemy or "*hostile organisation*" (see below) (sections 239-240 MO 1651). Crimes in this category are punishable by a range of maximum sentences up to, in the case of people who transfer "classified information" intending to harm the security of the region, life imprisonment; Membership offences connected to "*hostile organizations*" (sections 238 and 251 MO 1651): see further below.

- **Disturbances of public order and the peace.** This category includes offences such as stone-throwing (charged under section 212 MO 1651) and incitement to violence. It is understood that this category includes section 212 MO 1651, which provides that the offence of 'throwing of objects', 'including a stone', which is often charged against Palestinian children throwing stones at checkpoints, carries (i) a sentence of up to ten years imprisonment for throwing "in a manner that harms or may harm traffic" or throwing "at a person or property with the intention to harm"; and (ii) a sentence of up to 20 years' imprisonment for throwing at a moving vehicle with intention to damage it (or harm the person travelling in it).
- **"Classic", non-security, criminal offences**, including theft, bribery and trading in stolen goods. Many of these wide-ranging offences are contained at Chapter G of MO 1651, and cover crimes such as murder and manslaughter (which can attract life sentences), assault (attracting sentences of between five and ten years), property damage (arson attracts a sentence of 10 years, for example) and coercive threats to reputation (attracting sentences of up to a year).
- **Illegal presence in Israel**. This includes the offence of leaving the OPT without a permit, under which Palestinians who live in the West Bank and enter Israel without a permit are charged.
- **Traffic offences** including offences under MO 1310. Most traffic offences prosecuted in the military courts attract fines for violation. Estimates suggest that over USD $3m was collected in 2017 for traffic offences committed in Area C.[64]

50. The provisions regulating "*hostile organisations*" have, in practice, been used by Israel to proscribe and outlaw a number of political parties and civil society organisations; see further below regarding the 'designation' of Palestinian NGOs working in the field of civil and political rights.[65] A "*hostile organisation*" is defined under section 238 MO 1651 to be "*a person or any group of persons whose aim is to harm public security, IDF forces or the public order in Israel or in a held region*", or an "*unlawful association*" as-defined in Regulation 84 DER 1945. Section 238 is broadly cast to prohibit "*any contact with a person who can reasonably be assumed to be operating on behalf of a hostile organisation or in its service, regardless of whether the contact is conducted with the hostile organisation alone or with a body in which the hostile organisation participates or takes part in its decisions.*" Section 251 further penalises any person who engages in actions related to the "*incitement and support of hostile organisation[s]*". As defined, such persons are prohibited from attempting to influence public opinion "*in a manner which may harm public peace or public order*"; from carrying out any action or possessing

64 Jacob Magid, 'Israeli police give traffic tickets to Palestinians but no one is collecting' The Times of Israel (27 Nov 2018) <https://www.timesofisrael.com/israeli-police-give-traffic-tickets-to-palestinians-but-no-ones-collecting/>.

65 See also OHCHR, 'Mandates of the Special Rapporteur' Ref.: OL ISR 6/2022 (5 May 2022) <https://www.ohchr.org/sites/default/files/documents/issues/terrorism/sr/cfis/cfi-gs-impact-ct-measures/subm-global-study-impact-cso-addameer-dci-p-pngo-upwc-pwc.pdf>.

any object with the intention of attempting so to influence public opinion; from publishing "*words of praise, sympathy or support for a hostile organisation, its actions or objectives*"; and from identifying with a "hostile organisation" through displaying a flag, symbol, slogan or playing an anthem in a public place. All of these offences are punishable by 10 years imprisonment.

51. According to the most recently published statistics available,[66] there were 7,474 Israeli military indictments submitted to the military courts of first instance in 2021. The majority of these indictments were in relation to violations of Israeli traffic law, enacted in the West Bank. The following figures represent the official Israeli military statistics for 2021 breaking down by type of case and the number of indictments in each category:

1. Hostile Terrorist Activity ("security offences") (2,094, up from 1,728 in 2021).
2. Illegal presence in Israel (695, down from 734 in 2021).
3. Classic criminal offences, including theft and bribery (261, down from 465 in 2021).
4. Disturbances of the peace (312, down from 331 in 2021).

52. While it has not been possible to obtain data for indictments relating to *traffic* offences in 2022, the data was available for 2021. These show that, out of 7,474 Israeli military indictments submitted to the military courts of first instance that year, well over half (4,216) related to violations of Israeli traffic law in the West Bank.[67]

53. MO 1651 also sets out rules of evidence, practice and procedure governing proceedings in the military courts. This includes section 86, which provides that in relation to the law of evidence, the military court will act in accordance with the rules which are applied in civil cases which take place in the Israeli courts. This must be read alongside section 88, under the heading *"general provision regarding procedure"*, which provides that the military court is authorised *"in all matters of trial procedure not determined in this order"* to follow whatever procedure *"appears to it most appropriate for ensuring a fair trial"*. Sections 265 and 266 provide expressly for pre-trial and post-sentencing imprisonment in Israel; as set out at above, the detention of individuals outside the occupied territory is in direct violation of the protections set out under GCIV.

66 Israeli Military Prosecutor Yearly Report 2022, 8.

67 IDF Freedom of Information Report for 2021, 86.

Operation of the Military Courts

54. The Israeli military court system operates two courts of first instance in the West Bank. The Ofer court is located in the Israeli military base at Ofer, near Jerusalem, governing the south of the West Bank, and the Salem court is located at the Israeli military base in Salem, governing the North of the West Bank. A Military Court of Appeals was established in 1989, which is also located in Ofer, alongside the Military Court for Administrative Detention and the Military Court of Appeals regarding Administrative Detention. A juvenile court for trying youth offences was first established in 2009 under MO 1651[68]; prior to this, minors were prosecuted in the regular adult military court system. The juvenile court uses the same courtrooms, facilities and staff as the adult military courts.

55. Beyond these two courts the Israeli military also operates 'satellite courts' based in the Israel Security Agency interrogation facilities.[69] Those courts hear applications by Israel to extend the detention of Palestinians subject to interrogation who have been transferred into Israel, in breach of GCIV.

56. As set out above, the Israeli military courts assume jurisdiction over Palestinian civilians exclusively. Settlers living in the West Bank are not prosecuted in the military courts.

57. In 2012, the Israeli military courts discontinued their previous practice of publishing annual reports containing detailed information and statistics about the operation of the Israeli military courts. This means that the 'official' picture as to trends and outcomes in the military courts is now obscure (even though some headline data continue to be published in the annual reports of the IDF and the military prosecutor, as referred to above).

58. The conviction rate in the military courts is believed to be above 99%; in 2011 Israeli media reported that an internal IDF document had recorded a 99.7% conviction rate for the year 2010.[70] Almost all convictions result from lawyers entering into a 'plea bargain' on behalf of their clients, which involves a guilty plea being entered in exchange for sentence agreed with the prosecution, to negate the risk of a heavier sentence if convicted at trial.[71] The practical reality of this is that very few trials ever actually take place in the military courts. The high frequency of plea bargains in the courts is a source of particular concern and is explored further in the observations set out below.

59. Those detained by the Israeli authorities under military law are in principle entitled to legal representation of their choosing, including from members of the Palestinian Bar – see e.g. sections 56 and 76 of MO 1651. In practice, legal representation is funded in various different ways; in "security cases" or cases otherwise involving political prisoners, lawyers are paid by the Palestinian Authority, or by Palestinian and international NGOs, to represent those accused or charged with offences. A relatively small proportion of those who are detained and prosecuted in the military court system pay privately for legal representation.

60. Lawyers and advocates acting on behalf of Palestinian prisoners have raised complaints of systematic harassment, intimidation and reprisals by the occupying regime amounting to threats to physical

---

68 There is also a juvenile military court in Salem.

69 At Al-Jalameh, Petah Tikva, Ashkelon and Al-Mascobiyeh. See Israeli Military Yearly Report 2022 (available in Hebrew) <https://www.idf.il/media/enpkuhi4/חוברת-יתנש-2021-2.pdf>, 84.

70 Chaim Levinson, 'Nearly 100% of all Military Court Cases in West Bank End in Conviction, Haaretz Learns' *Haaretz* (29 November 2011) <https://www.haaretz.com/2011-11-29/ty-article/nearly-100-of-all-military-court-cases-in-west-bank-end-in-conviction-haaretz-learns/0000017f-e7c4-da9b-a1ff-efef7ad70000>.

71 Beyond the statistics contained in the Israeli military reports identified above, the extremely high conviction rate, and the extremely high proportion of convictions which result from plea bargains, has been extensively documented over many years. UK FCO, *Children in Military Custody* Report (2012), [80] (noting statistical evidence indicating that between 97 and 98% of cases in the military courts ended in a plea bargain); B'Tselem, *Presumed Guilty* Report (2015), 57-58 (indicating that, between 2005-2010, between 97.5-98.5% of charges were resolved, presumably by way of plea bargains, before a trial took place); Neta Ziv, 'Navigating the Judicial Terrain Under Israeli Occupation: Palestinian and Israeli Lawyers in the Military Courts' (2018) 42 Fordham International Law Journal 729, 753 (referring to a conviction rate of over 99%).

security and liberty.[72] On 19 October 2021, the Israeli Defence Minister announced the 'designation' of six leading Palestinian civil society organisations as 'terrorist' "*hostile organisations*", outlawing those organisations and opening their affiliates to criminal charges. The designated organisations included Addameer Prisoner Support and Human Rights Association ("**Addameer**"), Al-Haq Law in the Service of Man ("**Al-Haq**") and Defense for Children International ("**DCI**"), each prominent organisations providing legal representation to prisoners in the military courts. It was widely reported that, on 18 August 2022, the Israel Defence Forces ("**IDF**") raided and sealed the doorways of the offices of the designated organisations and left behind Military Orders closing the offices under Article 319 of the Emergency Regulations 1945.[73] As a result of the designation, lawyers no longer represent individuals in the courts on behalf of those organisations.

72 OHCHR, 'Submission from Addameer Prisoner Support and Human Rights Association to UN Special Rapporteur on the Independence of Judges and Lawyers' (Addameer April 2022) <https://www.ohchr.org/sites/default/files/2022-04/addameer-reply-questionnaire-protection-lawyers_0.pdf>.

73 See, for example, Human Rights Watch, 'Joint Statement: Over 150 Organizations Demand International Community Stand Against Raids and Closure of 7 Palestinian Organizations' (22 August 2022).

Image: Israeli military checkpoint between Bethlehem and Jerusalem © shutterstock/Ryan Rodrick Beiler

Background and Obstacles to the Observations

61. As set out above, the purpose of this observation was not to observe at a particular pre-identified trial or hearing, but rather to attend proceedings over the course of three weeks, in order to gain an overall impression of how the military court system operates through courtroom observations for a specified period.

Political Context to Visit and Observation

62. The BHRC visit to the West Bank took place at a time of heightened tension and violence in the territory, in part following longer-term trends in the region, but in part also connected to the formation in Israel of what was commonly described as "*the most right wing government in Israeli history*" in late December 2022.[74] On 26 January 2023, during the observations, the Israel Border Police and the Israeli army conducted a violent armed raid on the refugee camp at Jenin, in the North of the West Bank. A total of 10 Palestinians were killed and at least 50 were injured as a result of the raid. The following day, there was an attack on an Israeli settlement in East Jerusalem by a Palestinian gunman, killing seven people. Further incidents at checkpoints and settlements were reported for the duration of the observers' visit. The observers attended a small number of hearings which involved individuals who had been arrested in connection with allegations of planning or engaging in violence in response to the violence at Jenin.

63. The main practical impact of this escalating tension was that the observers were not able to access the Salem court from the West Bank due to security in the region. Instead they accessed the court from the Israeli side of the border. More generally, the observers were mindful to observe whether the escalating tensions had visible implications to the operation of or attitudes within the courts.

Facilitation and access

64. The Israeli military authorities were made aware of the BHRC's project well in advance of the observers' arrival and a formal request was made in advance of the visit that they be granted access to one of the courts for 12 days (four days per week) during the observation period, but this was refused (on 16 January 2023) and only one day of access to each court was pre-authorised before the observations began. The observers were then required to apply for access one day at a time, and often found out the evening before or the morning of the intended observation day whether they were going to be allowed in. In several instances requests went unanswered. While ultimately the observers *were* granted permission to attend the courts on seven days, this was little more than half of the access that had initially been requested.[75]

74 For examples of this characterisation of the government, see e.g. Freedom House, 'Country Report 2023' (Freedom House, 2023) <https://freedomhouse.org/country/israel/freedom-world/2023>; Patrick Kingsley, 'Amid Violent Surge, Netanyahu Juggles Competing Goals. But for How Long?' *The New York Times* (Jerusalem, 31 January 2024) <https://www.nytimes.com/2023/01/31/world/middleeast/netanyahu-israel-palestine.html>; Ines Eisele, 'Israel at war: what role does its War Cabinet play?' *Deutsche Welle* (16 April 2024) <https://www.dw.com/en/israel-at-war-what-role-does-its-war-cabinet-play/a-68842532accessed>.

75 See note 6.

65. Although there were no serious issues encountered when entering the court complexes at Ofer or Salem when access had been permitted, there were numerous instances of judges or court staff objecting to the observers' presence in the courtrooms or trying to restrict access to hearings that were not private. Two occasions were recorded where the observers were able to successfully challenge their removal from the courtroom through querying the basis upon which the observers were being denied access and explaining that they had permission to be there. However, there were at least five occasions where access was not allowed, without explanation, to observe proceedings that appeared not to be private. The observers were also told on several occasions that their interpreters were not permitted to talk, which prevented them from being able to follow the proceedings. The Appendix to this Report identifies the number and range of hearings which the observers were ultimately able to attend.

Impressions of the Military Courts

66. The military courts at both Salem and Ofer appear to be designed to offer a hostile and unpleasant environment. Both courts are located significantly out of town, meaning that they are hard to access by public transport. The Ofer court is located behind a checkpoint that public cars cannot cross, so visiting family members necessarily have to walk the kilometre from the checkpoint to the court entrance with no shelter from the weather.[76] There is no way to access the Ofer court by public bus from Ramallah, and collective taxi services run sporadically to the main road near the access checkpoint. The Salem court is even harder to access, being located at a remote location in the far-North of the West Bank around 30km from Jenin.[77]

67. The fact that the courts are located on military bases means that access can be restricted and only two pre-authorised family members are permitted to attend court for each detainee (unless a particular hearing is not an "open" hearing, as can be the case in various circumstances). Even when inside the base, family members are only permitted to attend the court hearings for their own family member and cannot sit in court for any other proceedings.

68. The access to the court at Ofer is through an entrance covered in dangling barbed wire and guarded by watchtowers. Visitors to the court must pass through multiple identity and security checks. Family members then have to wait in a dishevelled holding area outside the entrance to the court, sometimes for hours, before they are permitted to pass security and enter the court facilities.

69. The main waiting areas at Ofer are uncovered outdoor pens with some rusty metal chairs, which are freezing in winter and can become too hot to sit on in summer. During the BHRC visit in January – February, temperatures reached below 2 degrees and there was sometimes torrential rain. There is a prefab indoor waiting area at the Ofer court, but this also has no heating or air conditioning or anywhere comfortable to sit. Israeli flags fly in the waiting areas, which can be inhospitable and evocative for the occupied Palestinian population. Family members must sometimes wait for several hours until their relative's hearing is called on.

70. Members of the public are not allowed to take food or possessions onto the military bases, so the only option at the Ofer court is to purchase expensive food or drink from the very limited selection on offer

76 Since 2022, the military court administration discontinued a taxi service which previously transported family members (for a fee) from the checkpoint to the court, meaning that visitors (including elderly or disabled relatives) now have no option but to walk the full distance to the court. A substantial number of Palestinian lawyers working at the courts went on strike to protest the Israeli military's continued refusal to offer any transportation assistance to relatives attending hearings at the Ofer Court: Amira Hass, 'Israeli Army Moves Forward With Cases Against Palestinians, Despite Lack of Legal representation' (Haaretz,19 June 2023) <Israeli Army Moves Forward With Cases Against Palestinians, Despite Lack of Legal Representation - Israel News - Haaretz.com>.

77 Due to the escalating political situation in the North of the West Bank at the time of BHRC's visit, the observers were required to stay in Nazareth, Israel while conducting observations in the Salem court. They therefore accessed the court from the Israeli side of the border only. In sum the observers (i) only had access to the "West Bank side" of the court facilities at Ofer and (ii) only had access to the "Israeli side" of the court facilities at Salem.

at the café attached to the indoor waiting area. The only toilets available were portaloos, which did not appear to be cleaned.

71. The courtrooms at Ofer are housed in prefab buildings and were usually heated. The size and exact layout of different courtrooms varied, though each had the basic structure of a judicial bench at the front of the room; a space for the dock, lawyers and courtroom staff in the middle of the room; and a viewing area for observers at the back of the room. The smaller and more cramped courtrooms paradoxically appeared to be the ones which were most in use. The seating for observers in those courtrooms was very limited and sometimes oversubscribed.

72. Many of these features – including the presence of Israeli flags and a lack of comfortable, sheltered waiting areas – were also present in the court complex at Salem, though, because they were required to enter the court complex from the Israeli side, the BHRC observers did not obtain a full picture of the entry and waiting facilities on the Palestinian side.

73. All judges, prosecutors and the majority of court staff wear military uniforms and at least some of the courtrooms have Israeli flags flying. Detainees (including child detainees) are brought into the courtrooms by prison guards wearing wrist and ankle shackles, sometimes individually and sometimes in groups. While sometimes the detainees appearing in the Ofer court are detained at the Ofer base, those appearing have often been brought to the courtroom after long and uncomfortable journeys via several different prisons.[78]

74. As noted above, it often appears chaotic in the courtrooms, with lots of people moving around and talking at the same time. The courtrooms themselves act as access points between the 'family' side and the 'lawyers' side' of the courts, so lawyers and guards are frequently passing through even when they are not involved in the cases being heard, creating constant "through-traffic". Defence lawyers would often discuss case developments and negotiate settlement with the prosecution while in the courtroom and during other cases being heard.

75. As explained above, court proceedings take place in Hebrew despite the fact that almost all defendants are Palestinians who do not speak Hebrew well or at all. Although it has not been possible to confirm this through formal channels, it is understood that interpreters are not qualified and do not require training to perform this role. Court documents are also, primarily, provided in Hebrew only and will not be provided in Arabic as a matter of course.

Preparation of the Report

76. During the write up for the report, the authors collated their notes and amassed research on the legal background of the Courts including providing a framework outline of relevant elements of IHL and IHRL.

77. After preparing a final draft of this report, the draft was shared with a select number of lawyers with experience working in the military courts and, where appropriate, the draft was amended to incorporate their clarifications and/or corrections as to the accuracy of our descriptions of the law and procedures. The observations and conclusions remain our own.

78 There has been extensive reporting on the IDF practice of transporting detainees during very long journeys between prisons (and/or between prisons and courts) in "bosta" vehicles, in which a detainee must sit in an extremely cramped vehicle cell with arms and legs shackled and no proper ventilation: see e.g. Addameer, 'Administrative Detention Order Appeal for HRD Salah Hammouri Following Punitive Transfer to Hadarim Prison'(Addameer, 7 August 2022) <https://www.addameer.org/news/4854#_ftn1>.

Observations at the Israeli Military Courts in the West Bank

78. This part of the report identifies key themes which arose during the observations of the military courts. and considers, the extent to which the proceedings observed in the military courts complied with international fair trial standards as well as with wider requirements of IHL and IHRL.

79. The nature of these observations means that what was inevitably obtained is several "snapshots" of the functioning of the courts. The fact that the observers were denied access to the courts on several days when permission had been sought to attend, and that in some instances they were blocked from entering courts or told to leave courts in which public hearings were taking place, [79] represented further restrictions on the observers' ability to achieve a fully representative impression of the range of hearings which take place in the military courts. These observations should be understood therefore not as a comprehensive account of the issues which arise in the military courts but as an account of some significant recurring themes in cases which were observed or reviewed.

I. Israeli military law appears to go beyond the boundaries set by international humanitarian law

Article 64 GCIV

The Occupying Power may... subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfil its obligations under the present Convention, to maintain the orderly government of the territory and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them.

Article 66 GCIV

In case of a breach of the penal provisions promulgated by it by virtue of [Article 64 as quoted above], the Occupying Power may hand over the accused to its properly constituted, non-political military courts, on condition that the said courts sit in the occupied country.

80. As set out above, Article 64 GCIV provides that the Occupying Power may only introduce laws which pursue one of the objectives identified in the provision (in particular, fulfilling GCIV obligations, maintaining order and security in the territory) and then only if they are *essential* to the fulfilment of those objectives. It has been said that "*to prevent abuse of security measures, the proportionality of such measures to the exigencies of the occupied territory should be stringently assessed*".[80]

81. In this context Article 64 GCIV should be read in connection with general IHRL fair trial requirements. The UN Human Rights Committee ("**UN HRC**"), the independent expert body established under the ICCPR to monitor the implementation of the treaty, has stated that:

79 See paras 64-65 above.

80 Clapham, Gaeta, and Sassoli (2015), 1425.

"... trials of civilians by military or special courts should be exceptional, i.e. limited to cases where the State party can show that resorting to such trials is necessary and justified by objective and serious reasons, and where with regard to the specific class of individuals and offences at issue the regular civilian courts are unable to undertake the trials".[81]

82. As set out in the Background section above, the Israeli military orders create criminal prohibitions in relation to a very wide range of civilian activities. The forum for determining whether violations of any of these prohibitions has taken place, and if so, what the punishment should be, is the military courts. The result is that the single biggest category of offences which comes before the Israeli military courts (according to the Israeli military's own categorisation of offences) appears to be traffic offences. The courts also deal with "classic" criminal offences such as assault, theft and bribery, and a further significant element of the courts' caseload relates to offences connected with entering Israel without a permit.

83. The authors witnessed examples of cases falling into each of the five categories. For example, a hearing was observed relating to a long-running case relating to a single charge of speeding. The matter was nevertheless conducted, as with any other matter in the courts, by an Israeli military judge and an Israeli military prosecutor, in Hebrew. Nothing which was said at the hearing indicated that the case involved any unusual detail which meant that it gave rise to security or public order concerns.

84. Offences relating to traffic misdemeanours and run-of-the-mill criminality should not in this context constitute prohibitions which it is essential for Israel to enact to fulfil the objectives identified in Article 64 GCIV as set out above; the same could arguably also be said for some of the other criminal offences which come before the military courts. Insofar as the military courts prosecute and sentence Palestinian defendants in relation to such offences, they appear to be operating in violation of Article 64 GCIV. Given that those kinds of matters represent a very substantial share of the court's caseload, this represents a fundamental problem with the Israeli military court system.

81 General Comment No. 32, Article 14 (2007), [22].

Image: Ofer Military Prison © shutterstock/Ryan Rodrick Beiler

II. The Courts are not independent or impartial

Article 14 ICCPR

*… **in the determination of any criminal charges against him or of his rights and obligations in law, everyone shall be entitled to a fair and public hearing before a competent, independent and impartial tribunal established by law.***

Article 66 GCIV

… the Occupying Power may hand over the accused to its properly constituted, non-political military courts…

Article 75(4) AP1

No sentence may be passed and no penalty may be executed… except pursuant to a conviction pronounced by an impartial and regularly constituted court…

Article 8(2) Rome Statute

"War crimes" means… (a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts… (vi) Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial…

85. The UN HRC has confirmed that the guarantees of Article 14 ICCPR apply regardless of whether the court is "*ordinary or specialized, civilian, or military… While the Covenant does not prohibit the trial of civilians in military or special courts, it requires that such trials are in full conformity with the requirements of article 14*".[82] Wilfully depriving a person of the right to a fair and regular trial constitutes a "grave breach" of GCIV as defined in Article 147 GCIV.

86. Within the military court system, both the judiciary and prosecution are appointed by the IDF and are in active or reserve military duty: see sections 11-12 and 75, MO 1651. Many judges previously served as military prosecutors. It is understood from our conversations with practitioners that some of the military court judges live in Israeli settlements in the West Bank which are widely recognised to be illegal under IHL.

87. Beyond prosecutors and judges, those who work in administrative roles in the court, such as interpreters and court clerks, are also Israeli military officers in regular or reserve service. The court's prosecutors, interpreters and administrative staff dress in full military uniform while executing their duties. The authors observed several occasions on which prosecutors or other military officials working in the courts bowed to or even saluted the judge when entering or leaving the court room. As military officials, those who judge or work in the courts are subject to military discipline and dependent on superiors for promotion.

88. IHL courts and other authoritative bodies have repeatedly concluded that military courts are unlikely to meet IHL fair trial requirements when used to try civilians.[83] As the UN HRC has observed:[84]

82 General Comment No. 32, Article 14 (2007), [22].

83 See also, by way of analogy, the decision of the European Court of Human Rights ("ECtHR") in Sahiner v Turkey (App No. 29279/95, Judgment of 25 September 2001), in which the ECtHR found at [41] that the respondent state had violated the applicant's criminal fair trial rights because he had been tried before a military court which lacked independence and impartiality. The ECtHR identified various reasons why military judges may lack the necessary independence and impartiality to secure compliance with IHRL fair trial standards.

84 General Comment No. 13, Article 14 (Administration of Justice) (1984), [4].

"[Military courts] could present serious problems as far as the equitable, independent and impartial administration of justice is concerned... While the Covenant does not prohibit such categories of courts nevertheless the conditions which it lays down clearly indicate that the trying of civilians should be very exceptional."

89. In the case of the Israeli military courts in the West Bank this structural issue is compounded by practical realities which were observed during military court hearings. In many hearings, judges and military prosecutors were observed discussing matters relating to cases out of the earshot of the defendant and their representative (or others present in court). While some of these discussions may have related to anodyne matters, there was no way of knowing what was being discussed and it added to the perception that judges and prosecutors collaborate in a way which is not transparent, and which exclude defendants and their representatives.

90. On one occasion the observers witnessed a hearing at which the accused's lawyer was not present, when the prosecutor and the judge proceeded to discuss the case at length without any attempt being made to explain what was happening to the accused. It was also a striking feature of the observations that, in hearings involving a contested issue (for example, as to whether a defendant should be released or instead further remanded in custody), it was almost invariably the case that Judges would decide in favour of the prosecution rather than in favour of the defence.

91. These features indicate that the courts appear not to meet the IHRL and IHL requirements for criminal charges to be determined by an independent and impartial tribunal (which requires not only that tribunals are but that they are *seen to be* impartial).

III. Presumptive use of pre-trial detention

Article 9(3) ICCPR
Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and should occasion arise, for execution of the judgement.

Article 37(b) UNCRC
The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time...

92. The UN HRC has elaborated on Article 9(3) ICCPR as follows:

"Detention pending trial must be based on an individualised determination that it is reasonable and necessary taking into account all the circumstances, for such purposes as to prevent flight, interference with evidence or the recurrence of crime..."[85]

93. The UN HRC's jurisprudence has repeatedly emphasised that pre-trial detention must be the exception, only applicable where "*the likelihood exists that the accused would abscond or tamper with evidence, influence witnesses or flee from the jurisdiction*".[86]

85 General comment No. 35: Article 9 (Liberty and security of person), UN Doc. CCPR/C/GC/35 (2014), [38].

86 See the cases discussed in Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights:* Cases Materials and Commentary (3rd Edition, Oxford University Press 2013), [11.64-11.69].

94. In practice, and from our observations, pre-trial detention is the presumptive norm in the military courts, seemingly for all categories of offences except traffic offences. This was recognised, for example, in a 2015 report by the Israeli human rights organisation B'Tselem:

95. "With the exception of individuals tried for traffic violations, remanding Palestinian defendants in custody for the duration of the proceedings is the rule rather than the exception"[87]

96. While MO 1651 makes provision for detention in the course of criminal investigation or pending trial (see Chapter C, Article C) it does not set out particular conditions which must be met in order for a detainee to be remanded in custody and it does not expressly require the court to consider alternatives to detention. B'TSELEM report that military court judges purport to follow the Israeli Law of Arrests (i.e. the law which is applicable in criminal cases in the Israeli civilian courts) which provides that judges may only remand in custody if there is (i) prima facie evidence of guilt; (ii) the presence of one of the express grounds for detention enumerated in the law (for example, a concern that the defendant is a flight risk); and (iii) an absence of applicable alternatives to detention (for example, release under bail conditions).[88]

97. The BHRC observations confirmed that defendants are ordered to be remanded in custody in the vast majority of (non-traffic) cases. Almost every hearing observed ended with an order for a defendant to remain in custody. These included hearings involving child defendants (on the relatively few occasions when the observers were permitted to attend such a hearing). By contrast, excluding hearings which involved the approval of a plea bargain (and thus the end of the criminal process), *one* hearing was witnessed which resulted in an order for a defendant to be released pending further investigation and/or trial (in a case where an indictment had been issued and no 'security offence' was charged[89]).

98. In many of the hearings where the defendant was ultimately ordered to be remanded in custody, the decision was made without any significant objection by the defendant's legal representatives; sometimes they even expressly acquiesced in the decision, for example, with a view to gaining time to be able to review materials disclosed by the prosecution. Those representing Palestinians in the courts explained that this reflected the futility of seeking to oppose remand in custody in all but the most exceptional cases; this reality inverts the presumption, which is supposed to apply, i.e. that release *on bail* is the norm.

99. The practice of judges in explaining their decisions to order remand in custody is highly variable. In numerous instances judges either (i) did not ostensibly or audibly give any reasons in explanation of those orders or (ii) gave reasons which appeared simply to approve further detention on the basis that there was prima facie evidence against the defendant, or to allow for a plea negotiation to be pursued, or to allow for a military commander to make a decision about whether to place the accused in administrative detention, without considering whether there was any specific reason which required the particular defendant to be remanded in custody (for example, because of an imminent danger that the person would re-offend or seek to interfere with evidence).

100. The presumptive use of detention against criminal suspects represents an apparent violation of the requirements of IHRL, which requires that the general rule is in favour of release, not in favour of detention, and that orders for pre-trial detention are based on individualised assessments of risk rather than on inflexible practices based on the nature of the offence or the strength of the evidence against a defendant.

87 B'Tselem, Presumed Guilty Report (2015), 6.

88 See note 16.

89 The charge related solely to the criminal offence of entering Israel without a permit.

IV. Defendants unable to participate in proceedings

Article 14(3) ICCPR

In the determination of any criminal charge against him, everyone shall be entitled… (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him; (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing… (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court…

Article 71 GCIV

Accused persons… shall be promptly informed, in writing, in a language they understand, of the particulars of the charges preferred against them…

Article 72 GCIV

Accused persons shall, unless they freely waive such assistance, be aided by an interpreter, both during preliminary investigation and during the hearing in court. They shall have the right at any time to object to the interpreter and to ask for his replacement…

101. It is a basic and fundamental aspect of fair process and fair trial rights that an accused person is enabled to participate properly at all stages of the criminal and court process. As the IHRL and IHL standards cited above make clear, an essential feature of this requirement in the context of the Israeli military court system (a system which is administered by Israeli Hebrew speakers, but in which almost all of the defendants do not speak Hebrew) is that documents are translated, and hearings are interpreted into Arabic.

102. In numerous respects, the nature of the process in the military courts clearly fails to meet these requirements. There are several aspects of the procedure which contribute to this failure.

103. As was clear during the observations the proceedings in the military courts are often chaotic and disorganised. The noise and commotion makes it very difficult for an accused (as well as for family members and other observers) to follow what is happening in their hearing. This difficulty is further compounded by the fact that, as outlined above, (i) several defendants (with no connection to one another) are often in the dock at once; and (ii) lawyers/family members of defendants whose hearings are not yet underway seek to communicate with them while the hearing of a different accused person is ongoing.

104. These issues in turn reflect wider practices maintained by the Israeli authorities, for example, the prohibition on family members visiting accused persons in detention while they are under investigation; the fact that family members may not be able to visit detainees in any event if they are being held unlawfully at a detention centre in Israeli territory; and the fact that legal representatives often have no opportunity to speak to their clients until they are in court and imminently preparing to conduct the client's hearing, which was a notable feature in the clear majority of cases observed.

105. Of note, during the brief observation period, we saw that a culture plainly prevails in which Judges do not take care to ensure that accused persons can hear and follow what is going on. Often discussions between Judges, the investigator/prosecutor and the accused's legal representative take place quietly at the front of the courtroom (without it being possible for the accused or anyone else to hear what is going on).

106. There is a lamentable failure to ensure that documents and hearings are translated into Arabic for the benefit of the accused.[90] Some discrete issues can be noted in this respect:

a. The general standard of interpretation which is made available to accused persons attending hearings in the Israeli military courts is shockingly poor. In most hearings observed, there were significant periods within the hearing where the interpreter did not interpret anything which was said; in some there did not appear to be any interpretation for the full duration of the hearing. In these circumstances it was left to the accused's lawyer either to "live translate" the hearing to the accused as it happened, or to offer a rushed summary of what had happened once the hearing was finished. Interpreters are often visibly disinterested in the proceedings, scrolling on their personal mobile phones or engaging in conversations with other members of court staff rather than focusing on and translating exchanges between judges and lawyers/investigators.

b. It is also common to see interpreters cease their interpretation in order to carry out some other function, for example, instructing family members to move or doing some other tasks at the instruction of the judge. There were some exceptions where focused interpretation was provided throughout a particular hearing, but this was a small minority of the hearings which were observed.

c. At the Salem court there were two judges who spoke fluent Arabic and who would address defendants directly in Arabic, but again this often took the form of providing a "summary" of where the hearing had got to after an exchange between the judge and the representatives which had not been interpreted.

d. BHRC observed several hearings at which the prosecution laid the indictment (i.e. the charges) against the accused. In each instance it appeared to be the case that the indictment was provided only in the Hebrew language and not in Arabic, again in apparent defiance of the requirements of MO 1651.[91] For clarity, it can be noted that it was not always possible for us to ascertain whether this was the case.

107. The observers saw several hearings at which an accused attended the hearing by video, sometimes with the assistance of court and prison video-link technology, and sometimes by simply making a video phone call to their lawyer who would offer some explanation of what was happening and would occasionally pass on questions from a judge for the accused to answer. It was understood from the lawyers representing that some of these defendants were appearing from places of detention within Israel. The practice of conducting some hearings by video, involving applications to extend detention during interrogation, had initially developed during the COVID-19 pandemic. It was also understood that it was now almost always (if not always) done because the accused person had elected to attend the hearing remotely, but it is again important to see this in context; the journey for a detainee to be transported from their place of detention to the court could take as long as two or three days (as detainees would be transited through multiple detention sites en route). This meant that individuals had to weigh up whether to endure long *bosta* transits (described above) while knowing that the outcome of the hearing (for example an order extending their detention) is essentially a foregone conclusion. In any event it seemed clear that this form of attendance made it even more difficult for the accused to follow or to participate meaningfully in the hearing.

90 This is in spite of provisions in MO 1651 which purport to require the court to appoint a translator to translate what is being said during the hearing and decisions of the court: section 116(A) of MO 1651.

91 The authors understand that, following the decision of the Israeli Supreme Court in *Khaled el-Arej v Head of the Central Command* (Petition 2775/11), MO 1651 was amended to provide expressly that indictments should be translated into Arabic.

Article 17(1) ICCPR
No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence…

Article 25 GCIV
All persons in the territory of a Party to the conflict, or in a territory occupied by it, shall be enabled to give news of a strictly personal nature to their families, wherever they may be, and to receive news from them…

V. Family attendance at hearings

108. The obligation in Article 25 GCIV prevents an occupying power from hampering the transmission of family news and positively requires them to ensure that no obstacles and delays are in the way beyond what inevitably follows from the situation of conflict.[92]

109. As set out above, family members are generally not allowed to visit Palestinian detainees who are being held during the investigation stage and there remain strict limits on family visits in prison even after a suspect has been charged. [93] This means that hearings in the military court might be the only feasible opportunity for a family member to see and communicate with a detained relative.

110. The authors have described in section D the various obstacles and challenges which face the two family members who are entitled to attend court hearings, from reaching the court to the conditions in which they must wait at court. This section is focused on the treatment of family members during interactions with their detained relative in and around the hearing.

111. Once inside the hearing room, the observers saw how military court staff strictly control any interaction between the accused and their relatives. Relatives are required to sit in the back row of the court's public gallery, which depending on the size of the particular courtroom, can mean that they are several metres away from their loved one. On a few occasions court officials asked family members (who were already sitting in the back row) to move to the side of the court furthest from the dock where the accused was standing. Attempts by relatives and the accused to communicate are often strictly controlled; the observers attended several hearings in which court staff angrily berated relatives for trying to converse with the accused, and on at least a couple of occasions, relatives were forcibly removed from the hearing room for failing to heed an instruction not to speak to the accused. On some occasions the hearing finished and the accused or the relatives were led out of the hearing room without any opportunity being given for a conversation between the two. More commonly an opportunity was offered to relatives and the accused to have a very quick conversation at the end of the hearing.

112. In the Salem court, for example, the practice appeared to be to allow relatives to speak with the accused (for between 30 seconds and a minute) from a significant distance and with multiple Israeli military officials standing in the way. There was a striking failure to afford any privacy to family members while having these conversations (which they often used to share information about how they had been treated or why they had been detained, or to share sensitive family information, for example updates on the health of an unwell relative). Relatives are not given any opportunity to speak to their loved one outside of the court room. Any physical contact between relatives and accused is also strictly prohibited.

113. The observers raised some of these concerns with a security official (one of the few who was willing to speak to them) at the Salem court, who was unrepentant; he described his attitude as "*if you want to see your family, don't be in prison*".

92 Clapham, Gaeta, and Sassoli (2015), 1100.

93 For example, only first-degree family members are allowed to visit detainees, and relatives with any criminal record are generally prohibited from visits. The latter rule captures a significant share of the Palestinian (male) population.

114. The treatment of family members attending hearings in the military courts may be, or may form part of, a breach by Israel of the relevant provisions of IHL and IHRL cited above.

VI. Restrictions present on access to lawyers and on privacy of lawyer-client communications

Article 14(3) ICCPR

In the determination of any criminal charge against him, everyone shall be entitled: (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing… (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.

Article 72 GCIV

Accused persons shall have the right… to be assisted by a qualified advocate or counsel of their own choice, who shall be able to visit them freely and shall enjoy the necessary facilities for preparing the defence…

115. MO 1651 enacts a complex regime regarding access to legal representation for those arrested under Israeli military orders in the West Bank. While there is provision for the right of detainees to meet and consult with lawyers in private (albeit "*in a manner which permits supervision of the arrestee's movements and behaviour*") (see section 56), this "right" is subject to numerous restrictions, including (i) administrative powers for police officers to delay a person's access to a lawyer (see e.g. section 56(D)-(E)) (ii) powers for military court judges to prevent a suspect from speaking to a lawyer (see e.g. sections 57(A)-(C)) (iii) a prohibition on detainees who are the subject of "combat arrests" from meeting lawyers for the first two days after arrest (see section 33(D)) and (iv) a separate and much more restrictive regime for persons detained in connection with various specified offences including various security offences (see sections 58 and 59 and the DER 1945).[94]

116. Discussions with legal practitioners at the courts revealed that restrictions on access to lawyers, including by way of renewable military court orders permitting access to lawyers to be withheld during an investigation, are common. While it was often not possible to ascertain whether a given case observed had involved restrictions on access to lawyers at an earlier stage of the proceedings, it appeared that such restrictions had been in place in several of the cases for which hearings were observed (through conversations with the lawyers acting in those cases). Of these, restrictions had ranged from orders preventing access to a lawyer for the first 10 days of an investigation to an order depriving the accused of access to a lawyer for approximately 40 days. It did not appear that these cases involved the kind of highly exceptional circumstances which would ordinarily be understood to be needed before a state body could legitimately withhold a suspect's access to legal advice and representation. It is understood that, in many cases in which restrictions are applied, detainees have given confessions (often in circumstances where they allege that violent or other inappropriate interrogation techniques have been used) before having any contact with a lawyer.

94 The first annex includes the main offences. The first section of the annex refers to the crimes listed in MO 1651 e.g., attack against the body including killing, crimes related to arms, crimes related to property, complicity with others, military information, not preventing someone from committing a crime, interring without a permit if done with an intention to affect the security of the area. The second part is related to crimes included in the security regulations of 1945, including membership in illegal organization, giving shelter, crimes related to weapons, and military training.

117. Other concerning practices when it comes to instructing and communicating with lawyers were identified.

118. First, practitioners working at the court informed us that the typical way in which Palestinians in Israeli military detention communicate with lawyers is by phone calls which are carried out using a phone belonging to an Israeli official (for example, the person interrogating the accused), and in the presence and the earshot of the Israeli official. Plainly this is completely at odds with the IHRL and IHL requirements for suspects to have access to free and private communications with lawyers.

119. Second, there appears to be no scope for lawyers to communicate privately (for example, in a consultation room) with an accused either prior to or after the hearing (at least where the accused is remanded in custody, as is almost always the case). This means that lawyers have no option but to conduct conversations with their client, including about sensitive aspects of a case (for example, about the strength of the evidence against the accused or about the advisability of a guilty plea), in the middle of a courtroom and in earshot of judges, prosecutors and all others present. The perversity of this arrangement was especially clear in hearings at the Salem court involving the two Arabic-speaking judges referred to above; on several occasions lawyers were observed conducting sensitive conversations with clients about their case in a way which was obviously audible to (and heard by) those judges. This again plainly does not comply with the legal requirement for criminal suspects to have access to free and private consultations with lawyers.

VII. Transfer and detention of Palestinians in Israel

Article 49 GCIV
Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power... are prohibited, regardless of their motive.

Article 76 GCIV
Protected persons accused of offences shall be detained in the occupied country, and if convicted they shall serve their sentences therein...

Article 8(2) Rome Statute
"War crimes" means... (a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts... (vii) Unlawful deportation or transfer or unlawful confinement ...

120. Israeli authorities continue to maintain the practice of transferring detainees resident in (and arrested in) the West Bank to places of detention which are within Israeli territory (in the sense of the territory demarcated as forming part of the territory of Israel under the 1949 Armistice Lines). This is a clear violation of IHL and represents a war crime under the definition in the Rome Statute. Violating the prohibition on deportation and transfer of protected persons constitutes a "grave breach" of GCIV as defined in Article 147 GCIV.

121. The history of this practice in the case of Palestinians detained in the West Bank is well-documented. In 2012, a report published by a delegation of British lawyers who had studied Israel's practice of detaining Palestinian children in military custody found that child prisoners were being transferred into Israel in clear violation of Article 76 GCIV.[95] More recent data reflects the continued prevalence of the practice in the case of child detainees. The data, collated by Military Court Watch, indicates that, since 2017, a majority of all children in Israeli military detention have at some point been transferredinto Israel in the

95 UK FCO, *Children in Military Custody* Report (2012), 27.

course of their time in detention.[96] The figures for recent years are especially high: 75% in 2020; 64% in 2021; 67% in 2022; 65% in 2023; and down to 50% in 2024.[97] As well as being unlawful, the practice gives rise to further practical challenges (and potential rights violations), for example in that relatives living in the West Bank can only visit relatives detained in Israel if they apply for and are granted a permit to enter Israel to do so.[98]

122. The BHRC observations confirmed that Israeli authorities continue regularly to transfer detainees into detention centres in Israel. The accused's current or previous place(s) of detention could only be ascertained in some of the cases observed or reviewed; within that cohort, there were found to be detainees, including children, who either were presently, or since their arrest had been, detained in Israeli detention or interrogation centres including Al-Moscobiya; Ramleh (also known as Ayalon); Demon (a women-only detention facility); Ashqelon; Hasharon; Shatta; Kishon/Al-Jalameh; and Megiddo. These included cases in which:

a. A 19-year-old man had been arrested at Jalazone refugee camp near to the Beit El checkpoint in January 2023 and had since been detained at Al-Moscobiya and then at Ashqelon. His detention had repeatedly been renewed by the military court in Ofer since his arrest.

b. A 21-year-old woman had been detained for approximately three months at Hasharon and at Demon. In the course of this period the military court had repeatedly made orders for the continuation of her detention.

c. A young man was brought to the court from his place of detention at Megiddo prison. The Judge adjourned the hearing and ordered the continuation of the man's detention which would mean him returning to Megiddo.

d. A young man attended the court at Salem for the first hearing since his arrest approximately 72 hours previously on 2 February 2023. He was being detained at Al-Jalameh in Israel. The Judge extended his detention.

e. Three men attended the court at Salem for a hearing to determine their continued detention as they continued to be investigated for offences of carrying weapons without a permit and stone-throwing. The Judge extended detention in the knowledge that the defendants were being detained in, and would be returned for further detention to, Al-Jalameh.

123. Thus, it continues to be common for judges to remand detainees in custody in full knowledge that they are being detained in Israel and will be transferred out of the West Bank following the hearing. The observers did not see a single instance of a Judge seeking clarity or expressing concern about the lawfulness or the appropriateness of extending the detention of a person who was currently detained in Israel. [99]

96 Military Court Watch, 'Statistics – Palestinian 'security' prisoners in Israeli detention' (Military Court Watch, Table "Percentage of child detainees unlawfully transferred to Israel – Annual averages) <https://www.militarycourtwatch.org/page.php?id=J5V0bQevz8a19020AWwFbv7lxv2>.

97 Ibid.

98 This was explained to BHRC observers by lawyers and family members attending the courts. See also: Addameer, 'Restrictions on Family Visits' (Addameer, July 2017) <https://www.addameer.org/key_issues/family_visit>.

99 HCJ 253/88 Sajdiya v. Minister of Defense (Judgment of November 8, 1988). HaMoKed, 'The Interpretation of the Geneva Convention by the Justices of the Supreme Court: HCJ 253/88 Sajdiya v. Minister of Defense (Judgment of November 8, 1988)' (HaMoKed, Court Watch, 1 Apr 2011) <https://www.hamoked.org/document.php?dID=Documents1520>.

VIII. Overwhelming majority of cases end in plea bargains

124. As noted in Section C above, almost all cases in the military courts result in plea bargains negotiated by the prosecutor and the defendant's representative.

125. The observations confirmed the prevalence of plea bargains as overwhelmingly the most common way in which cases in the military courts are resolved. Dozens of hearings were observed in which a plea bargain or potential plea bargain was discussed, including numerous hearings at which judges were asked to and did approve a plea bargain, bringing an end to the proceedings. The overriding significance of the plea-bargaining process appears to condition the behaviour of the military court judges, who regularly discuss the state of the negotiations with prosecution and defence, and on numerous occasions encouraged the defendant to accept a plea bargain. For example, in one hearing in the Salem court (a rare example of a case which had progressed to the stage at which witnesses were going to start giving evidence), one of the judges[100] ended the hearing by addressing the defendant, telling him that the period until the next hearing was his last chance to enter into a plea bargain because otherwise the case would progress to the defence evidence and the chance would be lost. A substantial number of hearings were also observed in which the hearing was adjourned to allow for plea deal negotiations to take place.

126. As noted above, the observers sought to understand the very high rate of plea bargains through discussions with lawyers working at the courts and an informal conversation with a judge of the military court in Ofer. The lawyers working at the courts attributed the high rate of plea bargains to a number of factors, including (i) the very poor prospects of avoiding a "guilty" finding because of the anti-Palestinian biases in the system; (ii) the exceptionally high maximum sentences which are in place even for relatively minor offences, which make it extremely risky to take one's chances and fight a case until trial; and (iii) the lack of any real prospect of obtaining bail, meaning that a person has no real prospect of being released before trial in any event. A further factor is that confessions are often obtained from suspects early in the investigation stage, often before the accused has been given the opportunity to consult with a lawyer and in a context in which suspects often allege that Israeli interrogators deploy torture, violence or other inappropriate methods as a way of procuring confessions. A contrary explanation was advanced by a military court judge, who gave the view that the high rate of plea bargaining, and convictions reflected the fact that charges were only brought against defendants where there was good evidence and a strong case against them. This view was not supported by the BHRC observations.

127. This explanation was not supported by the BHRC observations. The very high frequency of plea bargains in the military courts appears to reflect clear differences between the Israeli military court system and the criminal justice system envisaged by IHRL standards, which is characterised by a presumption of innocence, proper fair trial rights and genuine prospects of being acquitted if the prosecution fails to establish sufficient evidence to support a conviction.

128. One particular practice which has a significant influence on the plea bargaining process is the tendency for military prosecutors to "load up" indictments, including a large number of (sometimes poorly defined) charges spreading over periods of several years and in some cases having little ostensible connection with one another. By way of some of the more extreme examples observed:

i. In one plea bargain approval hearing at Ofer court, a young male defendant was charged on a single indictment with (i) providing services to unlawful organisations, in particular Hamas; (ii) hanging a Hamas flag; (iii) throwing stones at soldiers from 20m "*during 2021*", which was said to be obstructing the public order; and (iv) entering Israel without a permit by jumping over a wall

100 Three judges were sitting in this case because the charge in issue carried a potential penalty of more than 10 years' imprisonment: see Chapter A, section 17 of MO 1651.

"*during Ramadan 2021*". The charges in many cases appeared to be formulated generically (to an extent that would make it difficult to mount a specific defence against the charge) and had little ostensible relationship with one another. At the hearing the judge approved a plea bargain which incorporated different penalties for each charge.

ii. In another plea bargain approval hearing at Salem court, a young male defendant faced multiple charges, including (i) an arms possession charge dating back to 2018, relating to a photograph taken with an M16 rifle; (ii) throwing an explosive device and stones at soldiers in May 2021; (iii) partnering with a named individual in June 2021 with a view to attacking a settlement; and (iv) attacking a watchtower in June 2021. The judge again approved the plea bargain.

129. Other concerning practices in the context of plea bargains were observed. For example, in one case in the Salem court, a plea deal was approved on behalf of a young male defendant for 12 months' imprisonment and a penalty fine for a charge of throwing stones at a security forces vehicle from 30m distance. The Judge approved the plea deal but was then informed by the defendant that the charge had been incorrectly recorded. The deal was still approved, without any apparent reconsideration of whether the sentence remained appropriate in light of the new charge sheet.

130. This tactic seems deeply unfair and oppressive, especially having regard to (i) the severe penalties which can be imposed under Israeli military laws even for relatively minor offences; (ii) the obvious restrictions on the ability of defendants in the military courts to properly prepare a defence (for example, because of the limits on their ability to discuss their cases with their lawyers) and (iii) the particular difficulties involved in mounting a defence against a charge which relates to events which took place several years before the prosecution commences.

Conclusions

131. The conclusions in this report are based on seven days of court observations in the Israeli military courts at Ofer and Salem in the occupied West Bank, together with further information obtained from reviewing lawyers' case files, speaking to lawyers, practitioners, court officials and other experts on the workings of the military courts, and independent research in early 2023.

132. The report identifies eight fundamental concerns relating to the operations of the Israeli military courts, in the context of their obligations under IHL and IHRL, namely that:

- The range of activities which are criminalised under Israeli military law, and prosecuted in the military courts, appears to exceed the limits set by IHL;
- The courts appear to lack independence and impartiality;
- Pre-charge and pre-trial detention are almost invariably used, without proper justification;
- The operation of the system in practice reveals a shocking complacency about the ability of defendants to understand and participate in their own proceedings;
- The courts fail to facilitate the rights of defendants to maintain family links;
- The right to regular and confidential access to legal advice is systematically violated;
- Detainees are routinely transferred from the West Bank into Israel in manifest violation of GCIV;
- Nearly all cases are resolved by way of plea bargains despite there being no reason to believe that military court defendants are any more likely to be guilty than defendants in other criminal justice systems (in which plea bargains are much less common).

133. The overall impression of the observers is that these proceedings cannot fully provide a fair trial. These observations relating to procedure by no means capture the full range of concerns that BHRC, and other human rights lawyers and practitioners, have in relation to the Israeli military court system. In principle, the very existence in 2023, and now in 2024, of a military court system established in 1967 reflects the continuation of the exceptionally oppressive Israeli occupation of Palestinian territory. More specifically, evidence suggests that arrests and detentions under Israeli military laws in the West Bank often involve Palestinians (including very young Palestinians) facing unwarranted violence, torture, and other reprehensible interrogation techniques, as well as other human rights violations.[101] When speaking to family members and others about particular cases while at the courts, BHRC observers heard many ostensibly credible accounts of violence being used against Palestinians in the course of arrests and interrogations. Such practices are deeply concerning and further re-enforce the illegitimacy of the military court system in the West Bank.

---

101 By way of example, BHRC notes the recent report of Save the Children documenting physical, emotional and sexual abuse suffered by Palestinian children in the Israeli military detention system, see: Save the Children, 'Stripped, Beaten and Blindfolded: New Research Reveals Ongoing Violence and Abuse of Palestinian Children Detained by Israeli Military' (Save the Children, 10 July 2023) <https://www.savethechildren.net/news/stripped-beaten-and-blindfolded-new-research-reveals-ongoing-violence-and-abuse-palestinian#>.

Image: Jasmine flowers with barbed wire fence © shutterstock/Nayef Hammouri

Appendix I Observations and Timeline

BHRC members observed proceedings on four days at the Ofer Military Court and on three days at the Salem Military Court. In a relatively small number of instances, observers were unable to ascertain even very basic details of a hearing which were observed.[102]

Among the hearings where the authors were able to ascertain the nature of the hearing, they observed:

- 22 "extension of investigative detention" hearings, i.e. hearings at which the investigator sought an order from the court allowing for the continued detention of an individual pending further investigation (pre-charge) or for preparation of indictment;
- 7 "indictment" hearings, i.e. hearings at which the prosecution would present the indictment (charge sheet) following the conclusion of the investigation stage of the proceedings. These hearings always resulted in an order for the defendant to be remanded in custody pending further steps in the proceedings;
- 13 post-indictment hearings at which plea deals were approved;
- 31 other "post-indictment" hearings. In the majority of these hearings the case was adjourned (and the defendant returned to detention) to allow either for further plea deal negotiation or for a further hearing at which the court would formally decide whether to approve the plea deal. Only two of these hearings were for the purposes of a witness giving evidence (and in one of these two instances the relevant witness did not turn up and the matter was adjourned with the defendant remanded in custody);
- 7 (open) hearings relating to administrative detention, comprising 4 hearings at which extension of detention was sought to give the military commander opportunity to decide whether to order administrative detention, 2 hearings at which the court was asked to approve a commander's order for administrative detention, and 1 hearing where the accused appeared in court on criminal charges while being held in administrative detention in parallel;
- 1 hearing involving an appeal against a conviction and sentence;
- 1 hearing involving a judicial review of a military commander's decision regarding the status of land, historically used by Palestinian farmers but since confiscated by the Israeli state, in the West Bank. This is an unusual specific jurisdiction conferred on the military court by Military Order 172;
- 1 "arbitration" aimed towards entering a settlement deal.

102 The observers have explained reasons why it was sometimes very difficult to follow particular hearings; see in particular the Background and Obstacles to the Court section as well as the Methodology section above

Among the hearings where authors were able to ascertain the nature of the allegation which was the subject of the investigation or indictment (and using the five-fold classification set out above, save that security and public order offences are grouped together in light of the difficulty in establishing whether particular indictments were charged as security offences or not): they observed:[103]

- **Security and public order offences:** 59 hearings. The vast majority of these hearings fell into one of four categories: (i) allegations/charges relating to throwing stones; (ii) allegations/charges relating to throwing Molotov cocktails or other explosives; (iii) allegations relating to trade, possession in or firing of weapons; and (iv) allegations/charges relating to a person's alleged connection with or support for a "foreign agent" or a proscribed organisation. There were also hearings involving allegations/charges of conspiracy to carry out violence, evading a checkpoint, assaulting an Israeli soldier and attempting to murder an Israeli soldier.
- **"Classic" non-security criminal offences:** 6 hearings, including 4 hearings involving allegations/charges of theft, a hearing relating to an allegation of kidnapping and a hearing relating to an allegation of spousal domestic assault.
- **Illegal presence in Israel:** 16 hearings. This encompasses (i) 12 hearings involving allegations/charges relating to entering Israel without a permit and/or to facilitating others so to enter; (ii) 3 hearings about allegations of driving in Israel without a permit to do so; and (iii) one hearing relating to an allegation that a person had travelled unlawfully from the Gaza Strip to the West Bank.
- **Traffic offences:** 2 hearings. One involved an allegation of drink driving and the other related to a speeding allegation.

103 Note that in some instances a single case involved allegations/charges falling into more than one category. That means that some cases are counted more than once in the list which follows.

BAR HUMAN RIGHTS
COMMITTEE OF
ENGLAND & WALES

Bar Human Rights Committee of England and Wales (BHRC)
57-60 Lincoln's Inn Fields, London WC2A 3LJ

coordination@barhumanrights.org.uk | www.barhumanrights.org.uk