

Addameer Prisoner Support and Human Rights Association



In the case of
The Palestinian People
VS.
Military Courts



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Introduction

Over 72 years, Israel, as the Occupying Power, has established a full apartheid apparatus to suppress, control and delegitimize the Palestinian people. The military regime in the occupied Palestinian territory exercises legislative, executive and judicial powers that have been a forceful tool in carrying out the Israeli occupation's racist and unjust policies. As part of the military judicial system, Israeli military courts prosecute Palestinian civilians based on Israeli military orders issued by the Israeli military commander in the West Bank (and previously for Gaza), who acts as the supreme law-making power in the occupied territory. These military orders have criminalized the exercise of many fundamental rights by Palestinians, as guaranteed under international human rights and international humanitarian law.

Since their establishment, Israeli military courts have asserted an extra-territorial jurisdiction, purporting to assume jurisdiction over Palestinians, or indeed individuals of any other nationality, deemed to have committed a crime that constitutes a risk or threat to the security of the Israeli occupation, wherever the act occurred. They have also asserted an expanded personal jurisdiction and a broadened subject-matter jurisdiction, in which they assume jurisdiction over crimes beyond those permitted under international humanitarian law.¹

While the military courts are presented as dealing primarily with security-related offences, in fact the majority of cases before Israeli military courts relate to freedom of opinion, association, and student union activities, which are all fundamental rights protected under many international law conventions and treaties, or indeed to traffic violations. In this way, the powers exercised by Israeli military legislators and military courts to assert

1 Weill, Sharon, "The Judicial Arm of the Occupation: the Israeli Military Courts in the Occupied Territories", *International Review of the Red Cross*: June 2007, V.89, No. 866. Available at: http://www.artistes-contre-le-mur.org/doss_articles/The_judicial_arm_of_the_occupation_Sharon_Weill_IRRC_2007.pdf [Accessed on 24 February 2021]



control over Palestinian territory and deny the Palestinian people the right to self-determination.

According to principles of international humanitarian law, an Occupying Power is expected to maintain the application of the laws already in effect in the occupied territory, except in cases that threaten the Occupying Power's security.² Since 1948, Israel has used military orders and pre-existing British Mandate era Emergency Regulations to impose control over Palestinians and criminalize most areas of Palestinian life through arrest, charge, and prosecution. Furthermore, international humanitarian law principles emphasize the importance of apolitical military courts.³

On the contrary, the Israeli occupation has entrenched a racist judicial system that tries Palestinians based on Israeli military orders that restrict all basic Palestinian individual and collective rights. Over the years, the Israeli occupation authorities have tightened these restrictions by amending military orders and issuing new ones. Within the framework of Israeli military courts, hundreds of thousands of Palestinians have been tried and convicted with disproportionate prison sentences and excessive fines, which further burden the detainees and their families, notwithstanding the brutal detention conditions.

In the context of occupied territories, and in particular of an ongoing prolonged occupation, make for an unusual situation in relation to military courts. The longer the occupation lasts, not only are more restrictions imposed on the population, but the enforcement of Israeli law in the occupied territory becomes increasingly "normalized", with Israel continuously imposing its

2 International Committee of the Red Cross (ICRC), *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, 12 August 1949, 75 UNTS 287, Art.64. Available at: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/INTRO/380> [Accessed on 4 January 2021]

3 International Committee of the Red Cross (ICRC), *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, 12 August 1949, 75 UNTS 287, Art.66. Available at: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/INTRO/380> [Accessed on 4 January 2021]

own domestic and civil law through the military court system. Consequently, both the Occupying Power and the international community must give more weight to human rights law, including political, civil, social, cultural, and economic rights, contradictory to what the Israeli occupation pursues.⁴

The functioning of the Israeli military courts give rise to serious violations international law, including human rights law, humanitarian law, and criminal law, of such as the war crime of intentionally denying Palestinian prisoners their right to a fair and regular trial under Article 8(2)(a)(6) of the Rome Statute of the International Criminal Court (“ICC”). Moreover, it also expands the territorial, personal, and subject-matter jurisdiction of Israel deep into the fabric of Palestinian life.

Through our work, Addameer Prisoner Support and Human Rights Association has witnessed firsthand the Israeli military judicial system’s integral role in sustaining and feeding into the primary goal of establishing a comprehensive Israeli apartheid apparatus which requires further detailed international consideration. Lawyers, detainees and former detainees report a wide range of fair trial violations before Israeli military courts. The Israeli military authorities through the exercise of executive, legislative and judicial powers effectively enforce control over the Palestinian territory, suppress any form of Palestinian resistance against the occupation’s policies, and dissuade the Palestinian people from their right to self-determination.

History of the Israeli Military Courts

The detailed plan to enact martial law in the occupied Palestinian territory, backed by military courts, was drawn up in 1963,⁵ four years prior to the actual occupation in 1967, as part of the plan for occupation. As the Israeli

4 Ben-Natan, Smadar, “The Application of Israeli Law in the Military Courts of the Occupied Palestinian Territories”, Jerusalem Van Leer Institute: 2014 (45-74).

5 Yesh Din, *Backyard Proceedings: The Implementation of Due Process Rights in the Military Courts in the Occupied Territories* (Tel Aviv: Yesh Din- Volunteer for Human Rights, 2007), p.36.



army entered the West Bank, Gaza Strip and Jerusalem, each military unit was accompanied by a legal consultant, two military judges, two military prosecutors, and administrative staff.⁶

On 7 June 1967, the Israeli military commander issued three proclamations: the first declared the commander's executive, security and public order authority over the occupied Palestinian territory;⁷ the second related to the establishment of a military judicial system complementary to the occupation,⁸ and the third focused on the implementation of the security provisions order relating to the judicial procedures taken before military courts.⁹ Later, these provisions were amended into Military Order No. 378, which established military courts, defined their jurisdiction, and set out the applicable criminal code, defining "security offense" and regulating detainees' rights under military law.

In the beginning, Israeli military courts were established in the occupied Palestinian cities of Ramallah, Nablus, Jericho, Hebron, and Jerusalem, and Gaza. On 28 June 1967, the military court in Jerusalem disbanded after the Israeli occupation declared its illegal annexation of Jerusalem, implementing and enforcing Israeli domestic law in the Jerusalem area. Moreover, after the Israeli Occupation Forces withdrew from the Gaza Strip, the Israeli military court there was closed. Since then, Palestinian detainees, captured by the Israeli Occupation Forces from the Gaza strip, have been tried before Israeli domestic courts, particularly in the civil District Court in the Southern region "Ber Sheva". For the first 22 years of the occupation, Israeli military courts

6 Yesh Din, *Backyard Proceedings: The Implementation of Due Process Rights in the Military Courts in the Occupied Territories* (Tel Aviv: Yesh Din- Volunteer for Human Rights, 2007), p.36.

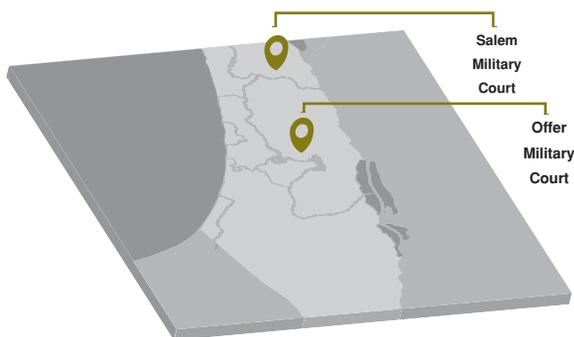
7 Proclamation No. 1 Regarding Regulation of Administration and Law (West Bank Area), 7 June 1967.

8 Proclamation No. 2 Regarding Administrative and Judiciary Procedures (West Bank Area) 5727-1967

9 Proclamation No. 3 Regarding Entry into Force of the Order Concerning Security Provisions (West Bank Area) (No. 3) 5727-1967

were limited to first instance courts. There were no military courts of appeal until 1989.

Currently, there are two Israeli military courts of first instance, one located in Ofer military base near the town of Beitunya in Ramallah, and the other in Salem military base near the city of Jenin. Each court has both an adult court and a youth court. There is one military court of appeal located in Ofer military court. Each of the two courts of first instance also operates satellite courtrooms inside detention centers belonging to the Israeli General Intelligence Service “*Shabak*” in Israel, in Al-Jalameh, Petah Tikva, Ashkelon, and Al-Mascobiyeh. These military courts hear applications to extend the detention of Palestinians during their interrogation process.



It is important to note that the transfer of Palestinian detainees to prisons, interrogation centers, and detention facilities inside the Israeli Occupying Power constitutes a violation of Article 76 of the Fourth Geneva Convention and a war crime in violation of the Rome Statute of the International Criminal Court.¹⁰

¹⁰ International Committee of the Red Cross (ICRC), *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, 12 August 1949, 75 UNTS 287, Art.76. Available at: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/INTRO/380> [Accessed on 4 January 2021]



Israeli Military Courts' Jurisdiction

Initially, Israel, as an Occupying Power, recognized the application of the Fourth Geneva Convention Relative to the Protection of Civilians in Times of War (“Fourth Geneva Convention”) on the occupied Palestinian territory. But, immediately after, the Israelis rejected the application of the Convention and the laws of occupation, while continuing to act upon the humanitarian provisions of the convention, without specifying what they are.¹¹

Since its establishment, the Israeli occupation authorities have issued over 1800 military orders. These military orders have served to regulate and criminalize many aspects of Palestinians’ daily lives, including public health, education, and land and property law. Furthermore, Israeli military orders have criminalized many forms of political and cultural expression, association, movement, nonviolent protest, traffic offenses, and any other acts that might be considered opposing the occupation and its policies. No one is exempt from the Israeli occupation’s various forms of arbitrary arrests and detentions, including women, children, the elderly, and human rights defenders: it is estimated that every family in the West Bank has had at least one member arrested, tried and/or imprisoned by the Israeli military authorities.

Such practices violate Article 64 of the Fourth Geneva Convention, which emphasizes that priority goes to the occupied people’s pre-existing domestic laws, as they should remain in force along with the domestic justice system. Article 64 entails that the legislative powers of the Occupying Power must be limited to its responsibilities under the Fourth Geneva Convention and the implementation of the safeguards set under the Convention for the protection of the Occupied people.¹² The Commentary of 1958 further explains that these

11 Luigi Daniele, “*Enforcing Illegality: Israel’s Military Justice in the West Bank*”, QIL, Zoom-in 44 (2017), p. 24

12 International Committee of the Red Cross (ICRC), *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, 12 August 1949, 75 UNTS 287, Art.64, available at: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/INTRO/380> [accessed on 4 January 2021]

legislative powers under Article 64 “must not under any circumstances serve as a means of oppressing the population”.¹³ With that in mind, Israeli military orders serve the sole purpose of maintaining control over the Palestinian people and ensuring the Occupying State’s security.

In terms of legislation applicable within Israel, in 2007, the Israeli Knesset adopted the Emergency Regulations, which state under Article 2(a) that “Israeli courts have jurisdiction to try according to Israeli law any person who is present in Israel and who committed an act in the region, and any Israeli who committed an act in the Palestinian Authority if those acts would have constituted an offense had they occurred in the territory under the jurisdiction of Israeli courts.”¹⁴ Under section 2(c) «this Regulation does not apply to residents of the region or the Palestinian Authority, who are not Israelis.»¹⁵ This establishes in law the already long established practice of trying Israeli settlers, living in the West Bank, or having committed crimes there, not in the Israeli military courts, but in Israeli civil courts.

This practice embodies the discriminatory and racist nature of the Israeli military judicial system. It rejects the principle of territoriality respected in criminal law and further establishes a dual legal system in occupied Palestinian territory based on nationality. So, despite the fact that the personal jurisdiction of Israeli military courts extends to cover all alleged perpetrators responsible for breaking Israeli military law in the occupied Palestinian territory, Israeli

13 International Committee of the Red Cross (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, Art.64. Available at: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=9DA4ED335D627BBFC12563CD0042CB83> [Accessed on 10 February 2021]

14 Law for Amending and Extending the Validity of Emergency Regulations (Judea and Samaria- Jurisdiction in Offenses and Legal Aid), 2007, Art.2(a). Available at: <http://nolegalfrontiers.org/israeli-domestic-legislation/isr19ed2?lang=en> [Accessed on 13 January 2021]

15 Law for Amending and Extending the Validity of Emergency Regulations (Judea and Samaria- Jurisdiction in Offenses and Legal Aid), 2007, Art.2(c). Available at: <http://nolegalfrontiers.org/israeli-domestic-legislation/isr19ed2?lang=en> [Accessed on 13 January 2021]



settlers residing in illegal Israeli settlements built on Palestinian lands are not subjected to these courts' jurisdiction.¹⁶ That means that Israeli settlers who commit crimes in the occupied Palestinian territory are brought before Israeli domestic courts and tried based on Israeli domestic laws alone.¹⁷ Palestinians, however, accused of breaching Israeli military orders, are tried in Israeli military courts in the occupied Palestinian territory, under military orders. It emphasizes the apartheid nature of the Israeli occupation in which "Palestinians living under Israeli rule are treated inferior in rights and status to Jews who live in the same areas".¹⁸

The territorial jurisdiction of Israeli military courts applies to the whole occupied Palestinian territory. In a similar vein, military courts' subject-matter jurisdiction is not restricted to "security offenses" relating to hostilities and violations of the Occupying Power's security. It extends to offenses against public order, including membership in political parties and student movements deemed unlawful under Israeli military orders, freedom of opinion and expression. In addition, offenses also consist of traffic infractions occurring on bypass roads and connecting roads between Palestinian cities, and offenses relating to entering the Green Line¹⁹ without a permit.

According to principle 29 from the Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, states that "the jurisdiction of military tribunals must be restricted solely to specifically military offenses committed by military personnel, to the exclusion of human rights violations, which shall come under the jurisdiction of the ordinary

16 There has been only one case in which Erez military court prosecuted an Israeli settler for transferring Palestinian workers inside Israel without permits.

17 Ben-Natan, Smadar, "The Application of Israeli Law in the Military Courts of the Occupied Palestinian Territories", Jerusalem Van Leer Institute: 2014 (45-74).

18 B'Tselem, "A Regime of Jewish Supremacy from the Jordan River to the Mediterranean Seas: This is Apartheid", 12 January 2021. Available at: https://www.btselem.org/publications/fulltext/202101_this_is_apartheid [Accessed on 23 February 2021]

19 The Green Line: the 1949 Armistice Line, which is internationally accepted as the boundary between Israel and the OPT. The name is derived from the green ink used to draw the line on the map during the peace talks.

domestic courts or, where appropriate, in the case of serious crimes under international law, of an international or internationalized criminal court.”²⁰

By expanding the list of crimes falling under the military courts’ jurisdiction and further broadening each crime’s definition, the Israeli occupation has granted military courts a wide margin of discretion pertaining to the arrest, detention, and prosecution of Palestinians. Such practices stand in contrast with many Palestinians’ fundamental human rights and the rights Palestinians have as an occupied people which are enshrined under international conventions and treaties of which Israel has ratified.



Denying fair trial standards, a continuous war crime

The general principles of international human rights and international humanitarian law guarantee that “no one may be convicted or sentenced, except pursuant to a fair trial affording all essential judicial guarantees.”²¹ In accordance, the Israeli occupation is obligated to respect and ensure Palestinian detainees’ right to fair trial standards. However, Israeli military courts systematically violate this right. The violations of fundamental rights

20 United Nations Human Rights Commission, Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, E/CN.4/2005/102/Add.1, 8 February 2005. Available at: <https://undocs.org/E/CN.4/2005/102/Add.1> [Accessed on 23 February 2021] para. 29.

21 International Committee of the Red Cross, International Humanitarian Law Database, Rule 100 Fair Trial Guarantees. Available at: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule100 [Accessed on 12 January 2021]

involved are so serious as to give rise to the war crime of willfully denying protected persons of their right to a fair trial under Article 8(2)(a)(vi) of the Rome Statute of the ICC.²²

Military courts operate to prosecute Palestinian civilians arrested by the Israeli military and charged with “security violations” and other crimes defined by Israeli military orders. It is important to note that the yearly conviction rates of Palestinians in these military courts is always above 99%.

Right to Know the Nature and Cause of the Charges

The Israeli occupation’s administrative detention policy is a stark violation of the principle of a fair trial, guaranteed by international treaties which Israel has ratified. The Israeli occupation continues to place Palestinians under administrative detention indefinitely without charge based on secret material that can be disclosed to neither the detainees nor their lawyers.



Following the issuance of an administrative detention order, a judicial review of the order must take place within eight days. This review takes place before a military judge who can reduce, cancel, or confirm the order. The detainee then has a right at any time to appeal the decision of the military judge to the Administrative Detention Appeals Court presided over by another military judge. The appeal process is somewhat farcical, given that

22 “Willfully depriving a prisoner of war or other protected person of the rights of fair and regular trial”

the detainees and their lawyers do not have access to the “secret” information on which the orders are based. This leaves the defense in the position of having to guess what may or may not be in the security file. The detainee is not able to confront and cross-examine primary witnesses, and since almost all information presented to the court is classified, the detainee is unable to contest its veracity. Detainees are therefore unable to present a meaningful defense.

Right to an Independent and Impartial Tribunal

Numerous human rights organizations consider prosecuting civilians before military courts an infringement upon the right to a fair trial.²³ The United Nations Working Group on Arbitrary Detention in its opinion, adopted on 4 March 2010, states that “military courts should not have jurisdiction to try civilians, whatever the charges they face. They can no[t] be considered as independent and impartial tribunals for civilians.”²⁴ In addition, according to Human Rights Watch’s report on the trial of civilians by military courts in Lebanon “the structure of the military courts, the lack of required legal background or training for military judges and their direct appointment by the Minister of Defense and subordination to the Minister further undermine the competence, independence, and impartiality of the courts.”²⁵

One cannot overlook the Israeli military courts’ structure in which judges are military officers who do not necessarily have long-term judicial training. This

23 International Commission of Jurists, *The Jurisdiction and Independence of the Military Courts System in Lebanon in Light of International Standards*, May 2018. Page 6. Available at: <https://www.icj.org/wp-content/uploads/2018/05/Lebanon-Memo-re-army-courts-Advocacy-Analysis-Brief-2018-ENG.pdf> [Accessed on 12 January 2021]

24 United Nations Working Group on Arbitrary Detention, “Opinion No. 27/2008 (Egypt),” A/HRC/13/30/Add.1, 4 March 2010. Available at: <http://daccess-ods.un.org/access.nsf/Get?Open&DS=A/HRC/13/30/Add.1&Lang=E> [Accessed on 23 February 2021]

25 Human Rights Watch, “It’s Not the Right Place for Us- The Trial of Civilians by Military Courts in Lebanon”, January 2017. Available at: https://www.hrw.org/sites/default/files/report_pdf/lebanon0117_web_5.pdf [Accessed on 24 February 2021] p.13



structure, can, and has led to bias. Many Israeli military judges are Israeli settlers residing in illegal settlements, built on confiscated Palestinian lands. The Israeli military commander is authorized to assign military judges and prosecutors, who are all military officers and commanders.



Amidst the establishment of Israeli military courts in 1967, military order No. 378, concerning Security Provisions, did not require military judges to have previous judicial experience and legal training. It was enough that the military judge possessed legal qualifications or a background in law, without any further explanation of what that meant.²⁶ In a session with three military judges sitting, only the presiding judge must have judicial expertise, contrary to the two other military judges. This means thousands of Palestinian detainees were tried before Israeli military courts by Israeli commanders and soldiers who are barely illegible to do so, violating fair trial principles. In 2004, military order No. 378 was amended, requiring all military judges to have judicial expertise.²⁷ Nonetheless, the amendment does not affect the core establishment of Israeli military courts as a means to prosecute Palestinians and infringe on their right of fair trial guaranteed under international standards.

In addition, thousands of Palestinian detainees were and are being imprisoned and sentenced to high convictions in political trials that lack any form of

26 Yesh Din, *Backyard Proceedings: The Implementation of Due Process Rights in the Military Courts in the Occupied Territories* (Tel Aviv: Yesh Din- Volunteer for Human Rights, 2007), p.47

27 Military Order Concerning Security Provisions No. 378, 5730-1970, Art.40. Available at: <https://www.scribd.com/document/144678918/Israel-Military-Order-No-378-on-Security-Provisions> [Accessed on 12 January 2021]

impartiality and independence. International judicial precedents concur that guarantees of a fair and public trial include the courts' independence and impartiality, which require the judicial system to not depend on the discretion of any branch of the government, especially the executive branch. Israeli military courts display a significant dependency on the discretion of the Israeli government and intelligence agencies, which has effectively transformed the judicial system into a tool of the occupation to legalize Israeli violations of Palestinian human rights. This impartiality includes approving the extension of detention for interrogation purposes despite the evident marks of torture on prisoners, supporting administrative detention orders without a real cause for arrest, issuing unusually long sentences against Palestinians, and, most importantly, convicting Palestinian detainees based on confessions extracted under duress or torture, instead of finding these confessions inadmissible.

Right to a Public Trial and Proceedings

A right to a public trial in the sense where oral hearings pertaining to the case are open to the members of the public, is also a right protected under international human rights and humanitarian law.²⁸ Palestinian detainees are tried behind closed doors in Israeli military courts, meaning there is no public presence to observe and oversee the legal proceedings. It should be noted that such a violation does not come in accordance with the exceptions granted by law in some circumstances, regarding the nature of the case, such as the protection of minors or for public security. In many cases, Israeli military courts do not allow the detainees' family from attending the hearing session, further imposing restrictions and limits if members were allowed to attend. There is no public access to the court per se. In some cases, observers are allowed to attend hearings, however, only after obtaining advance permits

28 The Universal Declaration on Human Rights, Art.10, the International Covenant on Civil and Political Rights, Art.14(1) and the International Criminal Court Rome Statute, Art.8(2)(a)(iv), and Convention (IV) Relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949, Art.72.



from the court. These policies do not satisfy the right to a public trial.

For a trial to be public, media outlets are allowed access to the court and hearings. In this context, Israeli military courts may grant access and enable Israeli media to cover court sessions in certain cases that concern the Israeli public. At the same time, Palestinian media is denied such access. In doing so, the Israeli occupation authorities direct and promote an Israeli narrative in the media and among the public, thus obscuring the violations committed against Palestinian detainees and deemphasizing the Israeli military courts' racist and apartheid practices. The harsh reality of Palestinian detainees during closed doors trials is concealed from the Palestinian people and the outside world.

Right to Assistance of an Interpreter

In addition to the above violations for fair trial guarantees, Israeli military courts also consistently fail to provide professional and accurate interpretation services to Palestinian detainees. The official language used in these courts is Hebrew, a language most Palestinians from the West Bank do not understand. "Interpretation" is provided in court by an Israeli army soldier dressed in military attire acts as an interpreter. Such services are invariably inadequate. Therefore, the interpreter is neither a professional nor a competent interpreter, a fact that affects the quality of the translation. Translators do not translate everything said during the hearing, including what the military judge says and what the detainees themselves say, which prevent the detainees from comprehending what is going on in the trial session.

In light of the COVID-19 pandemic, Israeli military courts have taken various restrictive measures, purportedly in response to the virus.²⁹ Detainees are no longer brought to court physically, instead appearing remotely from

29 Adalah, Urgent Petition Filed with Israeli Supreme Court Calls for Cancellation of Coronavirus Emergency Regulations Banning Prisoners from Meeting with Lawyers and Family. Available at: <https://www.adalah.org/en/content/view/9929> [Accessed on 12 January 2021]

the place of their detention, more often than not in Israel. The military judge, prosecutor, and defense counsel are themselves physically present at court. Palestinian detainees have objected to this practice as they cannot hear the interpretation properly in many cases, impeding their ability to follow proceedings. While the court provides the detainees with the hearing protocol afterwards, the vast majority of Palestinian detainees are unable to read Hebrew and are therefore unable to comprehend the hearing's particulars. According to the Amnesty International's Fair Trial Manual, interpretation and translation are "vital for the effective exercise of the rights to assistance of counsel".³⁰ Moreover, it explains that the lack of accurate and competent interpretation leads to unequal opportunities between the military prosecutor and the defense before the law and the courts.

Right to Counsel and Effective Assistance of Counsel

The right to a defense and an effective counsel of one's choosing are fundamental rights in the context of trial proceedings. Notwithstanding the entrenched protection of this right, the Israeli occupation violates it in various forms, such as imposing Hebrew as the official language used in Israeli military courts. All legal documents, including court decisions, hearing session notes, submitted evidence, witnesses statements, and all other papers issued by the court, are in Hebrew, with the absence of interpretation or translation. Hence, any legal counsel is expected to be fluent in Hebrew on all levels, reading, writing, and listening. This is essential to adequately represent Palestinian detainees, understand the witnesses' statements and the presented evidence, in addition to formulating questions and counter-questions. This consequently violates and limits the detainees' right to counsel, given that few Palestinian lawyers are fluent in the Hebrew language.

Such practices stand in violation of Article 72 of the Fourth Geneva

30 The Amnesty International Fair Trial Manual, POL 30/002/2014, 9 April 2014, p. 169. Available at: <https://www.amnesty.org/download/Documents/8000/pol300022014en.pdf> [Accessed on 21 January 2021]



Conventions, in regards to the right to defense. The Convention states that the accused person “shall have the right to be assisted by a qualified advocate or counsel of their own choice, ..., and shall enjoy the necessary facilities, unless they freely waive such assistance, be aided by an interpreter, both during preliminary investigation and during the hearing in court.”³¹ The establishment and later development of the procedures adopted in Israeli military courts are based on Israeli law and Israeli domestic courts’ judicial procedures. Therefore, the Israeli occupation authorities does not only impose a foreign legal language on Palestinians but also a whole unfamiliar judicial system and legislation, in grave breach of the general principles and customary law of war, and further preventing many Palestinian lawyers from preparing an effective defense.

Furthermore, Israeli military courts allow the Israeli military prosecutor to request a prohibition order against Palestinian detainees to meet with their lawyers for a total period of 60 days. Therefore, denying detainees to receive legal counsel, especially during the interrogation process. This prohibition order deliberately hinders legal counsel’s ability to prepare a legal defense and conceals the Israeli Occupation Forces’ illegal practices during interrogations, such as using torture and ill-treatment. Court sessions conducted while the prohibition order is still in effect take place in two sessions: in the first session, the lawyer appears in court alone without the detainee; the lawyer must then leave for the second session, when the detainee appears before the court unrepresented, without having spoken with his/her lawyer, and without having received legal advice. Detainees are thus, deprived of their right to counsel during the most sensitive period of detention.

This procedure prohibits defense counsel from attesting to the trial and investigation proceedings. The lawyer is unable to observe the manner by which the detainees are being interrogated during the trial, consequently,

31 International Committee of the Red Cross (ICRC), *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, 12 August 1949, 75 UNTS 287, article 72. Available at: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/INTRO/380> [Accessed on 4 January 2021]

leaving the lawyer with inadequate information about the details of the trial, further resulting in an insufficient legal defense. It is only after the second session ends, which is too late to present an effective council, that defense counsel can follow up on the hearing. Thereby further violating Article 72, which stipulates that the “accused persons shall have the right to present evidence necessary to their defense... They 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 defense.”³²

In addition, Israeli military courts do not provide the legal defense of detainees with the necessary documents and information to prepare for their defense. Lawyers face constant obstacles and banning orders that prevent them from attending interrogations and trials, as many critical documents are claimed confidential and are not disclosed to the defense counsel. These documents are almost always crucial evidence in the case, and concealing them on often spurious and unsubstantiated basis is aimed often at covering up the interrogators’ actions, including torture and ill-treatment, and preventing cases from moving forward promptly.

Palestinian lawyers who represent Palestinians in Israeli military courts face many obstacles that systematically erode the right of Palestinian detainees to legal representation. Defense counsel must contend with military orders, Israeli laws and prison procedures that curtail their ability to provide adequate counsel to their clients. Lawyers’ citizenship or residency status dictates their ability to represent Palestinians. The difficulties faced by Palestinian lawyers from the West Bank in the exercise of their work are mainly related to the arbitrary nature of occupation and impunity. As they are not permitted any special travel privileges in order to reach the detainees. They are subjected to the same travel restrictions as all Palestinians in the occupied Palestinian

32 International Committee of the Red Cross (ICRC), *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, 12 August 1949, 75 UNTS 287, Art.72. Available at: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/INTRO/380> [Accessed on 4 January 2021]



territories. In addition, the Israeli Prison Services often transfer detainees without informing their lawyers in advance.

Freedom from Torture and Inhuman or Degrading Treatment

The Israeli occupation state branches, including the judicial system, consistently provide legal and judicial cover for all acts of torture, cruel and degrading treatment against Palestinian detainees by the Israeli soldiers and intelligence agencies. The Israeli Occupation Forces have systematically put Palestinian detainees under severe physical and psychological pressure from the first moments of the arrest until their detention or release, primarily during the interrogation process, as a means to extract confessions. This includes beatings, physical assault, sleep deprivation for prolonged hours, ban on meeting with their lawyers, cruel journey of the *Bosta*,³³ harsh detention conditions, forcing the detainees into stress positions for long periods, and calling detainee family members with threats to arrest and brutally interrogate them. The vast majority of Palestinians interrogated sign purported “confessions”, often in Hebrew, a language they do not understand.

Where a “confession” has been signed, it is practically impossible to exclude it as evidence, even where it is alleged to have been extracted under duress, including torture or inhuman and degrading treatment. That leads, necessarily, to defendants agreeing to a “plea bargain” for offenses they did not commit. In doing so, Palestinian detainees plead guilty and waive their right to continue with the judicial procedures, including hearing witnesses and examining evidence. Many factors lead Palestinian detainees to seek a plea bargain; they include the lack of faith and trust in Israeli military courts ability to provide a fair trial and a just sentence, to avoid the unfair prolonged military courts judicial procedure (in circumstances where the time to the end

33 Bosta is the prisoners’ transport vehicle cells which consists of metal, narrow double seats with disproportionate measurements that force the prisoners into an angled seating position for lack of appropriate space. Palestinian prisoners face degrading conditions during transport as well as physical strain.

of trial might often be longer than the sentence of detention of a plea bargain), to avoid repeated, and the distressing journeys back and forth from prison in Israel to the court sessions in the West Bank. Notably, 90% of the cases files before Israeli military courts end in a plea bargain between the Israeli military prosecutor and the detainees.



Concluding Remarks

The right to a fair trial guaranteeing an independent and impartial prosecution is a non-derogable right; it is not subject to any limitation or exception, even during an armed conflict or an emergency situation. It constitutes a general principle under international customary law, binding upon all States, even if they are not a State Party to any conventions guaranteeing this right. The Israeli occupation authorities continue to try thousands of Palestinians before Israeli military courts for various criminalized political and cultural rights, resulting in grave breaches of basic human rights and many detainees' fundamental rights. Article II(f) of the Apartheid Convention recognizes as an element of the crime of apartheid the "Persecution of organizations and persons, by depriving them of fundamental rights and freedoms, because they oppose apartheid."

Over a period of five decades, the Israeli military occupation has utilized and reinforced its judicial, executive, and legislative powers to maintain control over the Palestinian people. The Israeli military judicial system has proven to become an inseparable part of the Israeli apartheid apparatus exercising



unjust and illegal practices against Palestinians. The illegality of Israeli military courts goes beyond the serious violations of the right to a fair trial, as the basis of their establishment and jurisdiction itself is a grave breach of international standards and principles. It is also a judicial system inherently bound up with the use of ill treatment and torture against Palestinians, especially during the interrogation process. Consequently, seeking to better the fair trial standards in Israeli military courts is redundant; therefore, all efforts should be put towards ending the trial of Palestinian civilians in Israeli military courts and the abolition of Israeli occupation itself.

In a statement on October 2020, the United Nations Special Rapporteur on the situation of human rights in the Palestinian territory occupied since 1967, Professor S. Michael Lynk, observed that the Israeli occupation's illegal practice of administrative detention, in which Palestinians are deprived of their liberty "without charges, without a trial, without knowing the evidence against her or him, and without a fair judicial review,"³⁴ must end. The Special Rapporteur further described the Israeli system as "a penal system that is ripe for abuse and maltreatment."³⁵ Previously, Professor Lynk clarified that "The laws of occupation are very clear that the occupying power cannot treat the territory as its own, nor can it make claims of sovereignty. Yet this has been Israel's pattern of governing the occupied Palestinian territory for most of its

34 United Nations, Special Rapporteur on the Situation of Human Rights in the oPt Calls for Israel to End Practice of Administrative Detention and Immediately Release Maher Al-Akhras – Press Release. Available at: <https://www.un.org/unispal/document/special-rapporteur-on-the-situation-of-human-rights-in-the-opt-calls-for-israel-to-end-practice-of-administrative-detention-and-immediately-release-maher-al-akhras-press-release/> [Accessed on 4 January 2021]

35 United Nations, Special Rapporteur on the Situation of Human Rights in the oPt Calls for Israel to End Practice of Administrative Detention and Immediately Release Maher Al-Akhras – Press Release. Available at: <https://www.un.org/unispal/document/special-rapporteur-on-the-situation-of-human-rights-in-the-opt-calls-for-israel-to-end-practice-of-administrative-detention-and-immediately-release-maher-al-akhras-press-release/> [Accessed on 4 January 2021]

50 years of rule.”³⁶

In the absence of international accountability, Israel enjoys a culture of impunity that systematically subjects Palestinian detainees to numerous violations of their basic rights under international law and international humanitarian law. Some practices constitute grave violations of the Fourth Geneva Conventions and its additional protocol of 1977, as well as the Rome Statute of the International Criminal Court.

Accountability does not only fall on those who carry out the act directly but also on those who “fail to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.”³⁷ Through the International Criminal Court, a new phase of prosecution and legal accountability against those responsible for heinous crimes is provided, allowing an opportunity to attain justice for Palestinian victims of torture.

Now more than ever is a time for the international community to abide by its responsibilities under international law and uphold its legal and moral commitment to reclaim and foster the protection of Palestinian human rights within the larger framework of the right to self-determination. The international community must end its continuous silence and hold the Israeli occupation accountable for the various grave breaches of international human rights law and humanitarian law to maintain international peace and justice, for the sake of the Palestinian people, including Palestinian political prisoners, quest for liberty, justice, and dignity.

36 Office of the United Nations High Commissioner for Human Rights, Israel Must Face New International Legal Push to End Illegal Occupation of Palestine- Press Release. Available at: <https://www.un.org/unispal/document/israel-must-face-new-international-legal-push-to-end-illegal-occupation-of-palestine-un-expert-says-ohchr-press-release/> [Accessed on 4 January 2021]

37 Rome Statute of the International Criminal Court, Article 28(a)(ii)

ADDAMEER Prisoner Support and Human Rights Association is a Palestinian non-governmental, civil institution that works to support Palestinian political prisoners held in Israeli and Palestinian prisons. in Human Rights. Established in 1992 by a group of activists interested in human rights, the center offers free legal aid to political prisoners, advocates their rights at the national and international level, and works to end torture and other violations of prisoners' rights through monitoring, legal procedures and solidarity campaigns.

Addameer enjoys the support of a volunteer body called "Addama'er", which believes in Addameer's goals and participates in the activities held by the association. They also work in supporting its message.

Addameer is an executive member of the Palestinian Non-Governmental Organization Network (PNGO), the Palestinian Human Rights Organizations Council (PHROC), World Organization Against Torture (OMCT), the International Coalition against torture and many other regional and international coalitions.

Addameer's Vision:

Addameer believes in the importance of building a free and democratic Palestinian society based on justice, equality, rule of law and respect for human rights within the larger framework of the right to self-determination. Addameer's work is based on a belief in the universality of human rights as enshrined in international law.

Addameer's Goals:

- Put an end to torture and other forms of cruel, inhuman and degrading treatment inflicted upon Palestinian prisoners and work on abolish the death penalty;
- Put an end to arbitrary detentions and arrests and guarantee fair, impartial and public trials;
- Support political prisoners and their families by providing them with legal aid and social and moral assistance and undertaking advocacy on their behalf;
- Push for legislations that guarantee human rights and basic freedoms and ensure their implementation on the ground;
- Raise awareness of human rights and rule of law issues in the local community;
- Ensure respect for democratic values in the local community, based on political diversity and freedom of opinion and expression;
- Lobby for international support and solidarity for Palestinians' legitimate rights.



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