



## **Addameer Prisoner Support and Human Rights Association**

**Presumed Guilty: Failures of the Israeli Military Court System**

*An International Law Perspective*

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**Addameer Prisoner Support and Human Rights Association (Addameer)** is a Palestinian non-governmental, civil institution that focuses on human rights issues. Established in 1992 by a group of activists interested in human rights, the center offers support to Palestinian prisoners and detainees, advocates for the rights of political prisoners, and works to end torture through monitoring, legal procedures and solidarity campaigns.

Addameer (Arabic for conscience) 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. To this end, Addameer's work comprises four main program areas, namely: legal aid, research and documentation, advocacy, and the Training and Awareness Program.

- **Legal Aid:** Addameer provides free legal counseling and representation to hundreds of Palestinian detainees and their families on an annual basis. Services include legal defense before mainly Israeli but recently also Palestinian courts; regular visits to prisons, detention and interrogation centers; submission of petitions against the extension of the detention period, trials and punishments imposed on detainees; and, submission of complaints against cases of torture, ill-treatment and other violations.
- **Research and Documentation:** Addameer documents violations committed against Palestinian detainees and monitors their detention conditions through regular lawyers' visits to Israeli prisons. In 2007, Addameer started documenting violations committed in Palestinian Authority prisons against political prisoners as well. The research and documentation unit also compiles monthly statistics and lists of detainees, which, combined with the information gathered through the unit's visits, and the information gathered through Addameer's legal work, provides the basis for the publication of the association's research papers and reports.
- **Advocacy and Lobbying:** Addameer regularly publishes public statements and urgent appeals on behalf of detainees, submits alternative and shadow reports to the United Nations and other international forums, and briefs international delegations as well as the media on the situation of Palestinian prisoners. The advocacy and lobbying unit also works towards building local, Arab and international solidarity campaigns to oppose torture and arbitrary detention while supporting the rights of Palestinian prisoners.
- **Training and Awareness:** In 2007, Addameer established its Training and Awareness Unit to raise local awareness regarding prisoners' rights by working on three levels: First, by training Palestinian lawyers on the laws and procedures used in Israeli military courts to improve their efficiency; Second, by increasing the prisoners' own knowledge; and, third, by reviving grassroots human rights activism and volunteerism and working closely with community activists to increase their knowledge of civil and political rights from an international humanitarian law and international human rights perspective.

Addameer is a member of the Executive Committee of the Palestinian NGO Network, the Palestinian Council of Human Rights Organizations, and works closely with international human rights organizations such as Amnesty International, Human Rights Watch, OMCT and FIDH to provide regular information on the situation of Palestinian political prisoners and detainees.

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## **EXECUTIVE SUMMARY**

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Since the Israeli occupation of Palestinian territory in 1967, Palestinians have been charged with offenses under Israeli military law and tried in military courts. Over the last 42 years, an estimated 700,000 Palestinians have been detained under Israeli military orders in the occupied Palestinian territory (OPT),<sup>1</sup> which constitutes approximately 20 percent of the total Palestinian population in the OPT, and as much as 40 percent of the total male Palestinian population.

There are currently at least 7,390 Palestinians in Israeli prisons, of which 32 are women and 340 are children.<sup>2</sup>

The main function of the Israeli military court system is to prosecute Palestinians who are arrested by the Israeli military and charged with security violations (as defined by Israel<sup>3</sup>) and other crimes. However, the military orders enforced through the military courts also criminalize a wide array of other types of activities, including “certain forms of political and cultural expression, association, movement and nonviolent protest, even certain traffic offenses – anything deemed to threaten Israeli security or to adversely affect the maintenance of order and control of the territories.”<sup>4</sup>

Not all Palestinians who are arrested are prosecuted in the military courts; some are released, others are administratively detained without trial. Of those who are charged, approximately 90 percent are convicted,<sup>5</sup> and of these convictions, the vast majority are the result of plea bargains.<sup>6</sup>

The Israeli military court system has operated since its 1967 inception with frightening impunity. As an Occupying Power, Israel has the right under international humanitarian law to establish military courts in the OPT. However, applicable international human rights and humanitarian law restrict the jurisdiction of such courts, and guarantee certain fundamental fair trial rights. Moreover, it is questionable whether the use of military courts to try civilians can ever satisfy the requirements under international human rights law to a trial before an independent and impartial tribunal.

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<sup>1</sup> See *Human Rights Situation in Palestine and Other Occupied Arab Territories: Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian territories occupied since 1967*, John Dugard, A/HRC/7/17, 21 January 2008 (available at: <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=47baaa262>)

<sup>2</sup> As of 1 October 2009.

<sup>3</sup> Addameer defines as “political prisoners” those prisoners detained in relation with the occupation, as opposed to detainees suspected or convicted of crimes/offenses unrelated to the occupation, as adopted in the Report of the UN Fact Finding Mission on the Gaza Conflict, A/HRC/12/48, 15 September 2009, para. 1434 (available at: [http://www2.ohchr.org/english/bodies/hrcouncil/specialsession/9/docs/UNFFMGC\\_Report.pdf](http://www2.ohchr.org/english/bodies/hrcouncil/specialsession/9/docs/UNFFMGC_Report.pdf))

<sup>4</sup> Lisa Hajjar, *Courting Conflict: The Israeli Military Court System in the West Bank and Gaza*, University of California Press, London, 2005, p. 3.

<sup>5</sup> Official Report of the Work of the Military Courts in the West Bank, 2007 (Hebrew) (Military Courts Report 2007).

<sup>6</sup> See *infra*, pp. 17-19. Of the 7,563 cases concluded in the military courts in 2007, full evidentiary trials (in which witnesses were questioned, evidence was examined and closing statements were delivered) were conducted in only 93 – or 1.22 percent – of them.

## **ARREST AND DETENTION**

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More than 700,000 Palestinians have been detained by the Israeli military since the occupation of Palestinian territory in 1967. While arrests can occur at any time and in any place, Palestinians are most commonly arrested at checkpoints, off the street, at border crossings and from homes in the middle of the night.

Upon arrest, detainees are usually cuffed with plastic handcuffs and blindfolded. They are typically not informed of the reason for their arrest, nor are they told where they will be taken.

Physical abuse and humiliation of detainees by Israeli forces during arrest remains common. Once bound and blindfolded, the detainee may be kept waiting, standing or kneeling, for long periods of time before being thrown on the floor of a military jeep, sometimes face down, for transfer to an interrogation center. During the transfer, which can take up to several hours, Israeli soldiers often abuse detainees. Cases of beatings, kicking, insults, threats and deliberate humiliation have been reported.<sup>7</sup>

Palestinian detainees from the West Bank are usually taken to one of eight interrogation and detention centers after arrest: Huwwara (near Nablus), Etzion (near Bethlehem), Salem (near Jenin), Ofer (near Ramallah), Ashkelon (inside Israel), Kishon (inside Israel), Moskobiyyeh (West Jerusalem, Israel), and Petah Tikva (inside Israel). Palestinians from East Jerusalem are typically taken to one of the above locations, or to Moskobiyyeh, depending on the location of the alleged offense. Detainees from the Gaza Strip are taken to Ashkelon or Ketziot, both of which are inside Israel.<sup>8</sup>

Despite some increase in the use of Arabic during interrogations,<sup>9</sup> Palestinian detainees held for interrogation are routinely made to sign confessions written in Hebrew, a language few of them understand. These confessions then serve as the primary evidence against the detainees when they are prosecuted before the military courts.

In the vast majority of cases, Palestinians remain in detention until the conclusion of legal proceedings.

## **THE MILITARY COURT SYSTEM**

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Once the interrogation period is over, Palestinian detainees from the West Bank are processed for trial, sentencing and imprisonment in one of two Israeli military courts currently operational

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<sup>7</sup> See Addameer Report: *Violations Against Palestinian Prisoners & Detainees in Israeli Prisons and Detention Centers* (December 2007) (available at: [http://addameer.info/wp-content/images/violations\\_against\\_palestinian\\_prisoners.pdf](http://addameer.info/wp-content/images/violations_against_palestinian_prisoners.pdf))

<sup>8</sup> See *Absolute Prohibition: The Torture and Ill-Treatment of Palestinian Detainees*, Hamoked and B'Tselem, May 2007; "Ticking Bombs" *Testimonies of Torture Victims in Israel*, Public Committee against Torture in Israel, May 2007.

<sup>9</sup> See *infra*, note 62.

in the OPT<sup>10</sup>: Salem (Military Court of Samaria), near Jenin in the northern West Bank, and Ofer (Military Court of Judea), in the central West Bank near Ramallah.<sup>11</sup> Both military courts are located inside Israeli military bases.

Appeals to decisions by the first instance military courts are made to the Military Court of Appeals in Ofer. The appeals court is presided over by one judge, or by a panel of three judges, depending on the severity of the charges. In general, the Military Court of Appeals serves as the highest judicial body in the adjudication of offenses under military law. In rare cases, however, petitions regarding a decision of the military courts on issues of jurisdiction and reasonableness can be filed with the Israeli High Court of Justice.<sup>12</sup>

The two first instance military courts and the Military Court of Administrative Detainees, which is located in Ofer military base near Ramallah, all conduct extension of detention hearings inside interrogation and detention facilities inside Israel. This arrangement operates in clear violation of Article 66 of the Fourth Geneva Convention, which requires courts operated by an Occupying Power to be within occupied territory.<sup>13</sup>

### ***The Participants: Judges, Prosecutors, Defense Attorneys and Defendants***

The military court system is headed by the Presiding Judge of the Military Court of Appeals, who is a military officer with the rank of Colonel. The Order Concerning Security Provisions states that judges in the military courts are to be Israeli Occupying Forces (IOF) officers of the rank of Captain or higher, who are in regular or reserve service and who have at least five years of “legal experience” for a court of first instance, and seven years of “legal experience” for the appeals court.<sup>14</sup> In practice, most of the judges in the military courts are lawyers and former military prosecutors who do not have long term judicial training.

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<sup>10</sup> “Since the first five military courts were established in 1967 in Hebron, Nablus, Jenin, Jericho and Ramallah, the number of courts has been reduced or enlarged according to security and political considerations. Despite the high volume of cases before the military courts since the second intifada, only two courts of first instance and one court of appeals operate today.” Sharon Weill, “The judicial arm of the occupation: the Israeli military courts in the occupied territories,” *International Review of the Red Cross*, Vol. 89, No. 866, June 2007, p. 396, citing Order Concerning Establishment of Military Courts (No. 3), 7 June 1967, published in Collection of Proclamations, Orders and Appointments of the Military Commander in the West Bank Region, Israeli Defense Forces No. 1, p. 25, 396.

<sup>11</sup> Palestinian detainees from Gaza are tried in Israeli domestic courts.

<sup>12</sup> Weill, *supra* note 10, p. 26.

<sup>13</sup> Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949 (GCIV), Art. 66: “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. Courts of appeal shall preferably sit in the occupied country.”

<sup>14</sup> Order Concerning Security Provisions (Judea and Samaria) (No. 378) 5727-1967 (hereinafter Military Order 378), Section 3B. According to Yesh Din, at the end of 2006, there were 14 regular Army judges and about 140 reservist judges in the military courts in the OPT. Yesh Din, *Backyard Proceedings: The Implementation of Due Process Rights in the Military Courts in the Occupied Territories*, December 2007, p. 40 (available at: <http://www.yesh-din.org/site/images/BackyardProceedingsENG.pdf>)

The prosecutors are IOF officers in regular or reserve military service with the Military Advocate General's Corps, appointed to the position by the Area Commander<sup>15</sup>; some of them are not yet certified as attorneys under the Israeli Bar Association.<sup>16</sup>

The defense attorneys include a few dozen Israeli and Palestinian lawyers, some of whom have a private legal practice and some of whom work for Palestinian non-governmental organizations such as Addameer, Nadi al-Asir ("The Prisoner's Club") and DCI-Palestine. The Order Concerning Defense Attorneys stipulates very little regarding requirements for defense counsel in the military courts, requiring only that they be attorneys registered in the Israel Bar Association, or Palestinian attorneys registered according to law and Security Legislation.<sup>17</sup>

The defendants – both minors as young as 12 and adults – are all Palestinian. Although the jurisdiction of military courts in the OPT formally extends to Israeli residents in the OPT (i.e., settlers), in practice Israelis are never tried before one of these courts for offenses committed in the OPT, and appear instead before ordinary criminal courts inside Israel.

### ***Location of Israeli Prisons***

All but one of the 17 prisons where Israel detains Palestinian prisoners are located inside Israel,<sup>18</sup> in direct contravention of Article 76 of the Fourth Geneva Convention, which states that an Occupying Power must detain residents of occupied territory in prisons inside the occupied territory.<sup>19</sup>

In addition to illegality under international law, the practical consequence of this system is that many prisoners have difficulty meeting with Palestinian defense counsel, and do not receive family visits as their attorneys and relatives are denied permits to enter Israel on "security grounds". Israeli military orders, based on security claims, have severely curtailed the ability of many Palestinians to visit detained relatives in Israeli custody. For example, on 21 June 1996, Israeli occupying authorities issued regulations related to prison visits stipulating that only first degree relatives (parents, spouses, siblings and children) may visit prisoners. These categories have been further restricted in that male first degree relatives will not be permitted to visit if they are between the ages of 16 and 35.<sup>20</sup> In addition, since the Hamas takeover of Gaza in 2007, relatives who reside in Gaza have been prevented from visiting prisoners and detainees in Israeli jails.

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<sup>15</sup> Military Order 378, Section II(8).

<sup>16</sup> *Id.*

<sup>17</sup> Order Concerning Defense Attorneys in a Military Court (Judea and Samaria) (No. 400) 5730-1970, Section 1.

<sup>18</sup> The primary prisons where Palestinian detainees are held include: Shatta, Gilboa, Damon, Megiddo, Rimonim, HaSharon, Hadarim, Ramleh (comprising Nitzan and Ayalon), Magen, Ashkelon, Beersheba (comprising Eshel and Ohal Keidar), Nafha, Ramon, Ofer, and Ketziot.

<sup>19</sup> Conversely, Art. 49 of the Fourth Geneva Convention provides that the Occupying Power must not transfer parts of its own civilian population into the occupied territories as settlers.

<sup>20</sup> Males between those ages can apply for a special permit only once a year if they are the brother of the detainee and biannually if they are the son of the detainee.

### *Crimes Charged Before the Military Courts*<sup>21</sup>

Military courts serve indictments based on a broad range of offenses divided into five separate categories: “Hostile Terrorist Activity” (HTA); disturbance of public order; “classic” criminal offenses; illegal presence in Israel; and, traffic offenses committed in the OPT.

The HTA category includes involvement in what Israel terms “terror attacks”, military training, weapons offenses and weapon trading, as well as offenses related to membership in “illegal associations” – associations deemed illegal by the Israeli military commander. According to Yesh Din, from 2002 to 2006, offenses in this category accounted for one third of the indictments filed in the military courts.

Disturbance of public order includes offenses such as stone throwing and incitement to violence. The “classic” criminal offenses category includes crimes such as theft, robbery and trading in stolen goods. Illegal presence in Israel includes the offense of “leaving the Area without permission,” with which Palestinians who enter Israel without permits, usually in search of work, are charged.<sup>22</sup> The last category includes traffic offenses committed in the OPT.

In general, the number of indictments filed in the military courts for traffic offenses ranks slightly greater than those in the HTA category.<sup>23</sup> Furthermore, contrary to common perception, indictments for intentionally causing death and attempting to intentionally cause death together typically constitute only about five percent of indictments before the military courts.<sup>24</sup>

## **MILITARY COURT JURISDICTION**

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The primary sources granting authority to Israel to establish military courts in the OPT that can prosecute civilian residents are Article 43 of the Regulations annexed to the 1907 Hague

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<sup>21</sup> See Yesh Din, Military Courts Project FAQ (available at: <http://www.yesh-din.org/site/index.php?page=militarycourts5&lang=en>)

<sup>22</sup> According to Yesh Din, the use of the term “Area” and “Areas” (such as “the security of the Area”) is common in orders and other military documents referring to the OPT. For example, the West Bank is called “The Judea and Samaria Area” and, prior to the pullout of Israeli forces in 2005, the Gaza Strip was referred to as “the Gaza Strip Area.” By comparison, under Israeli military law, the term “Region” remains defined as the entire West Bank, just as it was first defined by Article 1 of Proclamation No. 2 in 1967. [Military Proclamation No. 7 Concerning the Application of the Interim Agreement (West Bank)(1995), published in CPOA, No. 164, p. 1923.] According to Weill, the retention of the meaning it had prior to the Oslo peace process carries the legal implication that every provision that uses the term “Region” is still in force over the whole Region, including area A, which is supposed to be under the sole authority of the PA. See Weill, *supra* note 10, p. 403

<sup>23</sup> Yesh Din, *Backyard Proceedings*, *supra* note 14, p. 42. According to Yesh Din, from 2000-2006, there were a total of 14,139 HTA indictments, and 14,619 traffic indictments. *Id.*

<sup>24</sup> *Id.*, p. 44.

Convention No. IV Respecting the Laws and Customs of War on Land<sup>25</sup> and Articles 64 and 66 of the Fourth Geneva Convention of 1949.<sup>26</sup>

However, a close scrutiny of the way the military court system operates shows broad noncompliance with the requirements of international law. This includes the extensive jurisdiction of the military courts, which was expanded by orders of the Military Commander well beyond the scope of security and public order offenses; over the years, the IOF have given the military courts the power to also adjudicate offenses that were under the jurisdiction of the courts that existed in the OPT before 1967, as well as offenses committed *outside* the OPT. Moreover, international law did not foresee that belligerent seizure of the type that Israel maintains in the OPT would last more than 40 years. During this time, the exceptional judicial arrangement of adjudicating civilians by a military tribunal has become a permanent and widely debilitating condition.

### ***Jurisdiction***

On 7 June 1967, the first day the Israeli military government began to operate in the West Bank, three proclamations and a number of military orders were issued. Proclamation No. 2<sup>27</sup> “declared the takeover of all of the powers related to ‘government, legislation, appointment and administration’ by the commander of the IDF or his agents”.<sup>28</sup> The Military Commander further declared in the Proclamation that “anyone committing a breach of public order, security or any provision or order issued by the Military Commander would be punished to the full extent of the law”.<sup>29</sup> Acting on the authority granted to him under Proclamation No. 2, the area commander issued Proclamation No. 3 and the annexed Order Concerning Security Provisions, which was replaced in 1970 by a new order entitled Order Concerning Security Provisions (Judea and Samaria) (No. 378) 5727-1967. Military Order 378 established the military courts, defined their jurisdiction, and sets out the applicable criminal code.<sup>30</sup>

### ***Territorial, Subject Matter and Personal Jurisdiction***

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<sup>25</sup> Regulations Annexed to the 1907 Hague Convention No. IV, Art. 43: “The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.”

<sup>26</sup> GCIV, Art. 64: “The penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention [...] The Occupying Power may, however, 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.” For the text of Article 66, see note 13.

<sup>27</sup> Proclamation Concerning Administrative and Judiciary Procedures (West Bank Area) (No. 2), 5727-1967.

<sup>28</sup> Yesh Din, *Backyard Proceedings*, *supra* note 14, p. 36.

<sup>29</sup> *Id.*

<sup>30</sup> As of 1 October 2009, there are at least 1,644 Israeli military orders currently in force in the West Bank, governing a wide variety of offenses (ranging from traffic offenses to serious security-related crimes). Before Israel’s withdrawal from the Gaza Strip in September 2005, some 1,400 military orders applied to Gaza as well.

Military Order 378 provides the military courts with broad personal, territorial and subject matter based jurisdiction. Under the Order, the military courts have jurisdiction to try:

“Anyone accused of committing an act outside the occupied territory which would have been considered an offense had it been committed within the occupied territory, provided that the action ‘harmed, or was intended to harm, security in the Area or public order’” (an example of personal and territorial jurisdiction)

“[anyone] who committed an offense in Area A<sup>31</sup> of the Palestinian Authority which harmed, or was intended to harm, security in the Area” (also personal and territorial jurisdiction), and

“any offence defined in Security Legislation or under any law, subject to Security Legislation, including the jurisdiction given to local courts” (Palestinian courts applying a combination of Ottoman, Jordanian and Palestinian law) (an example of subject matter jurisdiction)

In other words, the jurisdiction of the military courts is not restricted to offenses that were *prima facie* committed within the OPT itself, but also includes offenses committed *anywhere* else.

It should be noted that the jurisdiction of the military courts, as set forth in Military Order 378, is far broader than the powers granted to military courts in the Fourth Geneva Convention: Article 66 of the Fourth Convention states that military courts are to try cases involving violations of criminal security legislation only, but Section 7(b) of Military Order 378 also gives the military courts jurisdiction to hear offenses totally unrelated to those matters.<sup>32</sup>

### ***Jurisdictional Issues***

Military Order 378 therefore provides the military courts with broad, extra-territorial jurisdiction that permits the courts to try both residents and non-residents of the OPT for virtually any offense, regardless of whether the alleged offense was committed in the OPT or not. As mentioned above, although the military courts are granted full jurisdiction over Israeli citizens resident in the West Bank (i.e., Israeli settlers), they are not tried in these courts, and instead appear before Israeli civilian courts.<sup>33</sup>

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<sup>31</sup> Since the Oslo Accords in 1993, the West Bank has been divided into three areas: Area A (the autonomous territories), which was placed under full Palestinian civil and military control (effective in urban areas only), except for foreign affairs; Area B (the occupied territories), which was placed under mixed Palestinian-Israeli control, with PA civil control and joint Israeli-Palestinian military control; and, Area C (including Israeli settlements, military bases and the areas connecting them with the Green Line and with each other), which retained full Israeli civil and military control. In practice, however, these distinctions have little application in the Israeli military courts.

<sup>32</sup> Yesh Din, *Backyard Proceedings*, *supra* note 14, p. 46. It should also be noted that Article 64 of GCIV remains silent on the extraterritorial jurisdiction of military courts, which indicates that it is appropriate to interpret the provision according to general provisions of criminal jurisdiction and the principle of territoriality, which defines the right of a state to regulate behavior and enact criminal legislation only within its territories. In addition, as Weill explains, Article 154 of the Fourth Geneva Convention explicitly states that the provisions of the Convention are supplementary to the Hague Regulations. Article 64 should consequently be read as not contradicting Article 42 of the 1907 Hague Regulations, which asserts that ‘The occupation extends only to the territory where such authority has been established and can be exercised.’” See Weill, *supra* note 10, p. 411.

<sup>33</sup> *Id.*, p. 12

In addition, although international law establishes a “combatant” status category, and provides that an individual meeting the combatant status criteria<sup>34</sup> cannot be charged with mere participation in hostilities, no recognition of this status or its protections can be found in Israeli military orders. Military Order 378 does not establish any procedure to determine an individual’s combatant status under international law, nor does it even recognize the possibility that a Palestinian could meet the criteria.<sup>35</sup> The practical effect of this omission is the criminalization of all forms of Palestinian resistance to the Israeli occupation, and the labeling of such activities as “terrorism”.

Moreover, while international human rights law does not prohibit the trial of civilians by military courts, the UN Human Rights Committee has stated that a state of emergency does not justify revocation of fundamental fair trial principles<sup>36</sup> and that military courts are not exempt from upholding these provisions.<sup>37</sup> They further held that resort to military tribunals should be exceptional and limited to cases where regular civilian courts are unable to undertake trials with regard to the specific class of individuals and offenses.<sup>38</sup>

### ***Offenses under Military Order 378***

Military Order 378 outlines a series of offenses, including:

*“The sentence of one who carries out damage to an IDF facility is life imprisonment or another punishment to be ordered by the court”<sup>39</sup>*

*“A person shall not commit an act or omission which includes harm, damage, disturbance or danger to the security of the region”.* This offense is punishable by life imprisonment or another punishment to be ordered by the court<sup>40</sup>

*“A person shall not be a member of a group in which one or more members committed, while members of the group, or are committing a violation of this article”.* This offense is punishable by life imprisonment or another punishment to be ordered by the courts<sup>41</sup>

*‘Throwing something, including a rock:*

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<sup>34</sup> Under Art. 4 of the Third Geneva Convention, members of organized resistance movements are granted combatant status (and are entitled to POW status when captured) if they fulfill the following conditions: “(a) that of being commanded by a person responsible for his subordinates; (b) that of having a fixed distinctive sign recognisable at a distance; (c) that of carrying arms openly; (d) that of conducting their operations in accordance with the laws and customs of war.” Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949 (GCIII).

<sup>35</sup> Under Art. 5 of the Third Geneva Convention, failure to determine this question leads to the automatic presumption of POW status for the accused.

<sup>36</sup> UN Human Rights Committee, General Comment 29, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001), p. 5 para 11.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*, p. 6, para. 22.

<sup>39</sup> Military Order 378, Chapter C, Art. 51(b).

<sup>40</sup> *Id.*, Art. 53(a)(4).

<sup>41</sup> *Id.*, Art. 53(a)(6).

- (1) *in a manner that harms or is liable to harm movement in a public passage – ten years imprisonment;*
- (2) *at a person or property, with the intent to hurt the person or property – ten years imprisonment;*
- (3) *at a moving vehicle, with the intention to harm it, or the person traveling in it – twenty years imprisonment.*<sup>42</sup>

The practical implication of these and other broadly-defined offenses under the Military Orders is the criminalization of many aspects of Palestinian civic life. For example, the political parties that comprise the Palestine Liberation Organization (PLO) are still considered “illegal organizations” even though Israel has been engaged in peace negotiations with the PLO since 1993.<sup>43</sup> Carrying a Palestinian flag is also a crime in itself under Israeli military regulations. Removing the rubbish left in the middle of the road by Israeli soldiers after they have left is another crime. Firing in the air during a wedding as a form of celebration has been judged to constitute a danger to Israel’s national security, even if it occurs in Palestinian Authority-controlled areas (Area A). A student of a Hamas Koranic school can be sentenced to 14 months’ imprisonment for his participation in class. Participation in a demonstration is deemed a disruption of public order. Pouring coffee for a member of a declared illegal association can be seen as support for a terrorist organization. Palestinian national security forces are an “illegal association”.

Because of this expansion of jurisdiction, cases that should be heard before a civil court (Palestinian or Israeli) are in many instances dealt with under the Israeli military system – a system that has less independence and impartiality and does not effectively safeguard the individual rights of the accused.<sup>44</sup>

## **FAIR TRIAL GUARANTEES**

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The practice of trying civilians in military courts, while not expressly prohibited by international standards, raises significant fair trial issues.<sup>45</sup> Everyone is entitled to a fair and public hearing by an independent and impartial tribunal,<sup>46</sup> though there is no single definition of the exact elements of a fair trial under international law.<sup>47</sup>

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<sup>42</sup> Military Order 378, Chapter C, Art. 53(a). According to DCI-Palestine, this is the charge most commonly made against children as young as 12 years, including cases of throwing stones against the Wall.

<sup>43</sup> On 30 January 1986, the PLO was declared a terrorist organization under the Prevention of Terror Ordinance. As a result, all parties who were a part of the PLO were included in this designation, which remains in force to this day.

<sup>44</sup> Weill, *supra* note 10, p. 419.

<sup>45</sup> Human Rights Committee, General Comment 13, U.N. Doc. CCPR/C/21/Rev.1/Add.6, April 12, 1984, para. 4; Lebanon: UN Doc. CCPR/C/79/Add.77, April 1997, at para. 13; Inter-American Commission, Report on the Situation of Human Rights in Colombia, OEA/Ser.L/V/II.53 doc.22, 30 June 1981, at p. 222; OEA/Ser.L/V/II.84, doc 39, 1993, p. 108; Report on the Situation of Human Rights in Chile, OEA/Ser.L/V/II.66, doc.A, 1985, p.183.

<sup>46</sup> ICCPR Art.14(1); AmCHR Art.8(1); AfCHPR Art.7(1) and 26; ECHR Art.6(1); ArCHR, Art.7. Human Rights Committee, General Comment 13, *supra* note 45 (The rights relating to a fair trial apply to all courts and tribunals which determine criminal charges, whether ordinary or specialized, including military or special courts).

<sup>47</sup> See for example, ICCPR, Arts. 9, 14 and 15; GCIV, Arts. 66, 71-73; GCIII Arts. 84 and 99-105.

Evidence gathered by Addameer and other Palestinian and Israeli non-governmental organizations regarding the compliance of military courts with basic fair trial rights indicates that they are systematically denied to Palestinians prosecuted in these courts. Some examples of fair trial deficiencies include:

### ***The Right to Prompt Notice of Criminal Charges***<sup>48</sup>

Military Order 378 provides that the substance of the charge must be conveyed to the accused before his trial.<sup>49</sup> Although international law further requires that the charge be given to the accused without delay, and in a language he or she understands, there is no such requirement in Israeli military orders. In practice, information on charges against the accused are often not disclosed by the prosecution until the day of the first hearing in the accused's case, which is typically to determine whether the accused remains in detention until the end of the proceedings.

### ***The Right to Prepare an Effective Defense***<sup>50</sup>

Although Military Order 378 provides the accused with the right to legal counsel, it contains no related provisions to ensure that the counsel may prepare an effective defense.<sup>51</sup> Lawyers acting as defense counsel before the military courts highlight many obstacles preventing an effective defense, including: difficulties in meeting with their clients in detention facilities inside Israel;<sup>52</sup>

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<sup>48</sup> GCIV, Art. 71; GCIII, Art. 105; ICCPR, Art. 14(3)(a); UN Basic Principles on the Role of Lawyers, Principle 5; ECHR Art.6(3)(a); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Art. 75(4)(a), which states that “[a]ny person who has been accused of a criminal offence in connection with an international armed conflict must ‘be informed without delay of the particulars of the offence alleged against him’”.

<sup>49</sup> Military Order 378, Section 21(a).

<sup>50</sup> GCIV, Art. 72; GCIII, Arts. 99 and 105; International Covenant on Civil and Political Rights International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976 (ICCPR), Art. 14(3)(b); Convention for the Protection of Human Rights and Fundamental Freedoms, *entered into force* Sept. 3, 1953 (ECHR), Art.6(3)(c), *Golder v. The United Kingdom* (ECtHR 1975). The lawyer provided must be competent. *Artico v. Italy* (ECtHR 1980).

<sup>51</sup> Military Order 378, Section 8.

<sup>52</sup> Such difficulties include the travel restrictions on Palestinians, which mean that only Israeli lawyers and residents of East Jerusalem can visit prison facilities inside Israel. Moreover, lawyers are frequently allowed to enter the prisons only on certain days, even though the prison regulations state that, in the absence of an order barring access, lawyers should be allowed to visit every day.

Attorney visits to Israeli prisons are regulated by Israeli law, rather than military regulations. Article 45(c) of the Israeli Prison Ordinance requires prison directors to allow attorney visits requested by the prisoner or attorney during normal working hours “as promptly as possible”. Israeli Prison Superintendent Regulation 04.34.00 § 6 states that attorney visits shall be allowed from 8 a.m. until 4:45 p.m., Sunday through Thursday. Regulation 03.02.00 § 14(24)(4) states that attorneys are entitled to visit their clients during working hours every day except Saturdays and holidays. Lawyers often may not visit on days the prison is closed for visits conducted by the International Committee of the Red Cross, family visits, and court proceedings that take place in the prison rather than the military courts. They are also frequently in the position of having to track the whereabouts of their clients, as the Israeli prison authority frequently moves prisoners between facilities without notifying lawyers. Further, if there is a “security situation” at the prison, lawyers may wait for hours while the facility is closed to all visitors. Even under normal circumstances, lawyers reported routinely waiting at the prison for hours for the prisoner to be brought for the interview. See Addameer, *Defending Palestinian Prisoners: A report on the status of defense lawyers in Israeli courts*, April 2008 (available at: [http://addameer.info/wp-content/images/violations\\_against\\_palestinian\\_prisoners.pdf](http://addameer.info/wp-content/images/violations_against_palestinian_prisoners.pdf))

the lack of proper facilities to take confidential instructions;<sup>53</sup> court documents written in Hebrew; and the provision of incomplete prosecution material. In practice, these lawyers face restrictions so onerous that they are commonly forced to interview their clients in the five to ten minutes before a hearing in the military court.<sup>54</sup>

Under Israeli civil law and military orders, a detainee accused of being a security threat can be prevented from consulting an attorney altogether for varying periods of time.<sup>55</sup> In the military courts, a detainee can be held for up to 90 days without access to a lawyer. By comparison, in the Israeli civil courts, a detainee charged with a security offense can be prevented from consulting an attorney up to 21 days.<sup>56</sup> To challenge an order barring access to an attorney, the detainee's lawyer must appeal directly to the Israeli High Court.<sup>57</sup> However, Palestinian lawyers from the West Bank do not have the right to appear in the High Court, so this option is available only to lawyers who hold membership in the Israeli Bar Association (which can include Palestinians holding an East Jerusalem ID) or to Israeli non-governmental organizations. Detainees held in administrative detention usually have the possibility to receive visits from lawyers, albeit with the same difficulties as described above, and access may be denied while detained prior to being placed under administrative detention orders.

### *The Right to Trial without Undue Delay*<sup>58</sup>

As of October 2009, a Palestinian facing charges in the military courts can be held in custody for eight days before being brought before a judge. An Israeli citizen, however, can be held in custody for only a maximum of 24 hours before being brought before a judge.<sup>59</sup>

A Palestinian can be held without charge, by order of a military judge, for an initial period of up to 90 days. This period can be extended for another period of up to 90 days by request of the Chief Area Legal Advisor for the OPT, via an order from the military court of appeals. By comparison, an Israeli citizen can be held without indictment for an initial period of 30 days, which can be extended three times in 15 day increments on the authority of the Attorney General.<sup>60</sup>

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<sup>53</sup> International law and jurisprudence holds that communications between a suspect and his or her lawyer should be confidential. *S v. Switzerland* (EtCHR 1991). The right to counsel includes the right to consultations with counsel which are unsupervised by the authorities of places of detention. This right applies both to personal visits and to correspondence between a detained person and counsel. *Schönenberger and Durmaz v. Switzerland* (EtCHR 1988). However, security prisoners are often required to sit behind a thick plastic window and talk to their lawyers through a telephone or holes in the plastic barrier. The arrangement makes it difficult for the lawyer and his/her client to hear each other, and it compromises the confidentiality of their discussion because prison guards posted in the same room can hear the conversation. Lawyers also frequently have to depend on prison guards to deliver documents to the prisoner, again violating attorney-client privilege. See Addameer, *Defending Palestinian Prisoners*, supra note 52.

<sup>54</sup> See Addameer, *Defending Palestinian Prisoners*, supra note 52.

<sup>55</sup> See Appendix 1.

<sup>56</sup> The Israeli Security Agency officer investigating the case may order that a detainee be denied access to an attorney for up to ten days. This period may be extended for up to an additional eleven days by a district court judge.

<sup>57</sup> See Addameer, *Defending Palestinian Prisoners*, supra note 52, p. 13.

<sup>58</sup> GCIV, Art. 71; para 2; GCIII, Art. 103; ICCPR, Art. 14(3)(c).

<sup>59</sup> An Israeli citizen accused of a security offense (almost always Palestinians with Israeli citizenship) can be held for four days before going before a judge.

<sup>60</sup> Israeli citizens under administrative detention may be detained for up to 48 hours without going before a judge.

Detention from the end of the investigation until indictment is limited to five days for Israeli citizens, while Palestinians before the military courts can be detained for 10 days.

Trials for Palestinians before the military courts must be completed within two years, while the limit for detainees before Israeli civilian courts is nine months. If proceedings have not concluded within this time frame, a judge of the Military Appeal Court can extend the detention of a Palestinian in the military courts by six month periods. Israeli Supreme Court judges can only extend the detention of an Israeli civilian in this situation by 90 days.

### ***The Right to Interpretation and Translation***<sup>61</sup>

Language is a fundamental problem in the military courts. Israeli jurisprudence provides that a prisoner must be interrogated in his native language and that his statement also be written in that language.<sup>62</sup> In practice, however, the detainee's confession or statement is frequently written in Hebrew by a policeman, requiring the detainee to sign a statement he/she cannot understand.

Moreover, all proceedings in the military courts are conducted in Hebrew. All confessions, statements, police reports, military codes and judicial rulings are provided in Hebrew without translation. There is no official Arabic version of the court proceedings, so when the detainee responds in Arabic to questions, the original version of his/her testimony is not recorded.

While military court proceedings provide a soldier who translates the proceedings into Arabic, consensus among Addameer counsel and affiliated lawyers generally provides that the quality of the official translation is uneven.<sup>63</sup> Many of the translators are Druze soldiers whose native language is Arabic and whose Hebrew is sometimes flawed. What's more, the translator frequently speaks in a low voice while the judge speaks over him, so even if the translation is accurate, the detainee may have trouble hearing it.<sup>64</sup> Most importantly, no time is allowed for translation, as the translator usually translates at the same time the judge, prosecutor or the client's lawyer speak, making it impossible to translate all of what is mentioned in court. As a result, the detainees and their families are frequently unable to understand the proceedings. Irrespective of the quality of the court translation, many West Bank lawyers report that they feel

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<sup>61</sup> Everyone must be provided with interpretation and translation if s/he cannot understand or speak the language used in court. ICCPR Art. 14(3)(f); ECHR Art.6(3)(a); American Convention Art. 8(2). However, not all documents have to be fully translated. *Luedicke v. Germany* (ECHR 1978). Although, in practice, the right to an interpreter has generally included the right of an accused to have relevant documents translated free of charge, both the European Court of Human Rights and the Human Rights Committee have found in some circumstances that oral translations of court documents is enough to guarantee this right. Under the Geneva Conventions, the accused has the right at any time to object to the interpreter and to ask for his replacement. GCIV, Art. 72.

<sup>62</sup> A 2006 Israeli High Court decision held that confessions should be in the defendant's mother language. Since then, some, but not all, military court detention facilities have adopted this policy. For example, in Kishon, Moskobiyyeh, Ashkelon and Petah Tikva, many confessions from Palestinian detainees are taken in Arabic. It is the experience of Addameer attorneys, however, that all of the detention facilities have the capability of taking a confession from a detainee in Arabic, but may do so only when it is to the interrogator's advantage.

<sup>63</sup> Addameer, *Defending Palestinian Prisoners*, *supra* note 52.

<sup>64</sup> *Id.*

compelled to speak in Hebrew rather than rely on court translators because they are convinced that the military judges are less likely to take them seriously if they speak in Arabic.<sup>65</sup>

### *Privilege against Self-Incrimination*<sup>66</sup>

International law provides the accused with protection against self-incrimination, including statements or confessions obtained through compulsion. However, the use of compulsion, coercion and torture against Palestinian detainees – which effectively operates in direct violation of this right – is an ongoing problem.<sup>67</sup>

### *The Right to a Presumption of Innocence*<sup>68</sup>

Neither Military Order 378 nor any other orders comprising the Security Legislation include an explicit provision regarding the presumption of innocence, other than the provision in Military Order 378 that states the application of Israeli evidence law<sup>69</sup> to proceedings in the military courts.<sup>70</sup> Nonetheless, the exceedingly low rate of acquittals in the military courts, the practice of denying bail to the vast majority of pre-trial detainees, and the uncorrected prosecutorial reversal of the burden of proof against the accused all serve to indicate a strong presumption of guilt built into the military court system.

According to Yesh Din, in 2006, full acquittals were obtained in just 23 of the 9,123 – or 0.29 percent – cases in the military courts. Of those who were charged in 2007, approximately 90 percent were convicted. Of these convictions, approximately 98 percent are the result of plea bargains.<sup>71</sup>

Moreover, under well-established standards of international law, the burden of proof rests on the prosecution to prove their case and any doubt should benefit the accused.<sup>72</sup> A reverse onus of

<sup>65</sup> *Id.*

<sup>66</sup> ICCPR Art. 14(3)(g) (the accused is “not to be compelled to testify against himself or to confess guilt.”); PROTOCOL I, Art. 75(4)(f) (In international conflicts, “no one shall be compelled to testify against himself or to confess guilt”); GCIII, Art. 99 (“No moral or physical coercion may be exerted on a prisoner of war in order to induce him to admit himself guilty of the act of which he is accused”); PROTOCOL II, Article 6(2)(f) (In non-international conflicts, “no one shall be compelled to testify against himself or to confess guilt”).

<sup>67</sup> See Addameer Report: *Violations Against Palestinian Prisoners & Detainees*, supra note 7; see also, *Absolute Prohibition: The Torture and Ill-Treatment of Palestinian Detainees*, Hamoked and B’Tselem, May 2007; “*Ticking Bombs*” *Testimonies of Torture Victims in Israel*, Public Committee against Torture in Israel, May 2007.

<sup>68</sup> ICCPR Article 14(b); ECHR Art.6(2); American Convention on Human Rights, O.A.S.Treaty Series No. 36, 1144 U.N.T.S. 123, entered into force July 18, 1978, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992) (ArCHR), Art.7; Under the Geneva Conventions, in both international and non-international conflicts, “anyone charged with an offence is presumed innocent until proved guilty according to law.” Protocol I, Art. 75(4)(d); Protocol II, Art. 6(2)(d); UDHR, Art. 11(1) (“[e]veryone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence”).

<sup>69</sup> Evidence Ordinance (New Version), 5731 – 1971.

<sup>70</sup> Military Order 378, Chapter B, Section B – Adjudication Procedures, Article 9.

<sup>71</sup> Military Courts Report 2007, supra note 5.

<sup>72</sup> Barbera, Messegue and Jabardo v. Spain (ECtHR 1988). Further, the Human Rights Committee has stated that the right to a presumption of innocence places that the burden of proof on the prosecution and gives the accused the

proof provision, in which the presumption is of guilt and the accused must prove his or her innocence, is incompatible with the right to fair trial and the presumption of innocence. This right applies at all stages of proceedings until judgment.

However, the military court system routinely operates in direct opposition to international standards. The onus of proof is often transferred to the defendant by way of prosecutorial strategy to inflate charges levied against the defendant. For example, a defendant who is accused of throwing a stone at a tank or firing a gun a kilometer away from a soldier could be charged with “trying to kill”, even though any action may have been done at a distance at which it would have been impossible for harm to have come to the soldier. This charge places the burden on the defendant to prove that his act could not have harmed the soldier and therefore did not constitute attempted murder.

Furthermore, as a result of the investigation methods used by the ISA<sup>73</sup> and the prohibition imposed on many detainees against consulting an attorney during their investigation, many defendants come to court after admitting to the offenses attributed to them or having been incriminated by others. The heavy caseload in the courts leads all the parties – defense attorneys, prosecutors and judges – to then seek plea bargains as a quick way to conclude the processing of a file. Attorneys who represent clients in the military courts feel that conducting a full proof trial, including summoning witnesses and submitting evidence, usually leads to a much harsher sentence; a sort of “punishment” imposed by the court on a defendant who did not reach a plea bargain.<sup>74</sup>

Added to all the above is the widespread lack of trust in the military justice system on the part of the Palestinian defendants and their families, which frequently manifests itself in a preference to reach a plea bargain rather than leaving the verdict to the judge.

### ***The Right to Call and Examine Witnesses***<sup>75</sup>

Military Order 378 establishes that summoning witnesses is the prerogative of the Court, which is “permitted” to do so at the request of either the prosecution or the defense.<sup>76</sup> The court may also call witnesses on its own initiative “if it deems that such a summons is useful in clarifying a question that has bearing on the trial.”<sup>77</sup> Military Order 378 also provides that witnesses appearing before the military court will be subject to examination, cross-examination and redirect.<sup>78</sup> However, in practice, this right is rarely exercised as very few full evidentiary

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benefit of doubt. Human Rights Committee, General Comment No. 13, *supra* note 45, at para. 7. According to the Committee, “no guilt can be presumed until the charge has been proved beyond reasonable doubt.”

<sup>73</sup> Including threats, torture and ill-treatment. See Addameer Report: *Violations Against Palestinian Prisoners & Detainees*, *supra* note 7.

<sup>74</sup> See Addameer, *Defending Palestinian Prisoners*, *supra* note 52.

<sup>75</sup> GCIV, Art. 72; ICCPR, Art. 14(3)(e), ECHR, Art.6(3)(d). Reliance on hearsay evidence is not necessarily a breach of this rule so long as it is kept within strict limits and there is a good reason for it: e.g., illness, death, threats or to protect the vulnerable. *Doorson v. The Netherlands* (ECtHR 1996); *Van Mechelen v. Netherlands* (ECtHR 1997). The court may take measures to protect witnesses or victims, so long as any restrictions on the rights of the defence are counter-balanced. *S.N. v. Sweden* (ECtHR 2002); *Rowe and Davis v. UK* (ECtHR 2000).

<sup>76</sup> Military Order 378, Chapter B, Section B – Adjudication Procedures, Art. 16(a)

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*, Art. 18

hearings are heard by the military courts. According to the Military Courts 2007 Annual Report, of the 7,563 cases concluded in the courts in 2007, full evidentiary trials were conducted in only 93, or 1.22% of cases.

### *The Right to an Independent and Impartial Judiciary*<sup>79</sup>

It is questionable whether the use of military courts to try civilians can ever satisfy the requirements under international human rights law to a trial before an independent and impartial tribunal.<sup>80</sup> The main issues in assessing the independence and impartiality of military courts are whether the judges, who are often serving members of the military, have had appropriate training or qualifications in law and whether, in exercising their duties as judges, they are subordinate to or independent of their superiors.

West Bank military orders require military court judges to act impartially and to ensure the fair enforcement of the law.<sup>81</sup> Section 7A of the Order Concerning Security Provisions further provides that, “In matters of judging, there is no authority over anyone who holds the power to judge, except the authority of the law and the Security Legislation.”

In practice, however, most judicial appointees are attorneys, “many of whom were formerly posted to the Military Advocate General’s Corps or serve their reserve duty therein, and there can be no certainty as to their expertise in the area of criminal law, in general, and in matters concerning security offenses, in particular court.”<sup>82</sup> Military court judges are appointed to their positions with the primary measurement of their qualifications being the period of time since their certification as attorneys.<sup>83</sup> “Some judges regard their role as complimentary to the role of prosecutors and tend to fill it accordingly; they emphasize the need for close coordination of military and legal measures to maintain Israeli security, order and control. Others are motivated by the requirements of judicial independence and demonstrate this by maintaining a degree of distance from the prosecution and (judicial) skepticism toward prosecution evidence.”<sup>84</sup>

<sup>79</sup> In the determination of any charge, everyone is entitled to an independent and impartial court: ICCPR Art.14(1); AmCHR Art.8(1); African (Banjul) Charter for Human and People’s Rights, adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), *entered into force* Oct. 21, 1986 (AfCHPR) Art.7(1) and 26; ECHR Art.6(1). The right to trial by an independent and impartial tribunal is so fundamental that the Human Rights Committee has stated that it “is an absolute right that may suffer no exception”. *González del Río v. Peru*, (263/1987), 28 October 1992, Report of the HRC, vol. II, (A/48/40), 1993, at 20.

<sup>80</sup> Human Rights Committee, General Comment 32, CCPR/C/GC/32/CRP.1/Rev.3, 28 November 2006, p. 6 para 22.

<sup>81</sup> Hajjar, *supra* note 4, p. 275 n. 10, citing a West Bank military order concerning the judiciary: “In matters of adjudication, a person possessing judicial jurisdiction is subject to no authority save the authority of the law and the security legislation.”

<sup>82</sup> Yesh Din, *Backyard Proceedings*, *supra* note 14, p. 48.

<sup>83</sup> Order Concerning Security Provisions, Section 3B. Persons appointed as judges in the military courts shall be Israel Defense Forces officers holding at least the rank of Captain, in the regular army or the reserves, who have at least five years of “legal experience”. An officer holding at least the rank of Lieutenant Colonel may be appointed as presiding judge of a court of first instance.

Order Concerning Security Provisions, Section 3B(4). A judge in the military court of appeals must hold the rank of Lieutenant Colonel and must have at least seven years of “legal experience”, including a term (of undefined length) as a military judge. An exception may be made to this rule if the Committee for the Appointment of Military Judges is convinced that the candidate, “in his service in the IDF, was engaged in a legal profession that makes him suitable for this position.”

<sup>84</sup> Hajjar, *supra* note 4, pp. 97-98.

Regardless of the individual commitment to fair and impartial adjudication on the part of the judges, the military court system caseload makes it impossible to give the necessary time and objectivity to each case before the military courts. According to Yesh Din, there are 14 full time judges in the military courts. In 2007, there were 8,768 new files opened in the military courts, and 7,563 files were closed.<sup>85</sup> According to one military appeals court judge's estimate, to properly close all the files in 2007 would have required 27,502 working hours. However, the actual hours devoted to these cases fell short by 40 percent, or about 11,000 hours.<sup>86</sup>

Moreover, as mentioned, only 93 files were fully heard in 2007 – a mere 1.22 percent of cases concluded before the court that year.<sup>87</sup>

Military court prosecutors, on the other hand, have even less latitude and discretion than judges; their work is overseen and directed by their superiors in the military hierarchy, and their mandate is defined by directives that emanate from the military establishment.<sup>88</sup>

This role confusion is compounded by a widespread perception that military solidarity and Jewish Israeli national cohesion fortify a tendency for judges and prosecutors to identify with soldiers and to trust or prefer their evidence or testimonies over that provided by Palestinians.<sup>89</sup>

### ***Discriminatory Sentencing***

In addition to the discrimination seen in detention periods and access to counsel discussed above, the disproportionate trend can also be observed in sentencing differences between the military and civilian courts. As the maximum allowable sentences in civilian courts are considerably less severe than those permitted in the military courts, there are often significant differences in sentences passed for identical crimes committed by Israelis and Palestinians. For example, a Palestinian convicted of manslaughter by a military court is subject to a maximum sentence of life imprisonment, while an Israeli convicted of the same offense in a civilian court and sentenced to life imprisonment is imprisoned for a maximum of 20 years in most cases, and, occasionally, at the most, 25 years.

The difference in sentencing structures is reinforced by regulations in the two penal systems regarding the early release of prisoners. Under the Israeli penal code, criminal prisoners may be released after serving one-half of their sentences, whereas Palestinians judged under military rule are only allowed to appeal for probation after two-thirds of the sentence has been served. It should be noted, however, that Palestinian detainees are rarely released early.

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<sup>85</sup> Military Courts Report 2007, *supra* note 5.

<sup>86</sup> *Id.*

<sup>87</sup> Of the 93 files heard, the defendant was found guilty in 79, or about 85 percent of the time. *Id.*

<sup>88</sup> Hajjar, *supra* note 4, p. 98.

<sup>89</sup> *Id.*, p. 113

## **USE OF THE MILITARY COURTS FOR POLITICAL PURPOSES**

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As discussed, international law requires military courts in occupied territories to operate in a “non-political” manner.<sup>90</sup> However, the military orders that govern the West Bank, and the military courts that enforce them, criminalize political activities that form the very foundation of Palestinian civil society in clear breach of international law.

### ***Charges under Military Law***

Putting up political posters, writing political slogans on a wall, belonging to any political party or certain organizations listed in military orders, displaying political symbols and attending a demonstration are all activities that are prosecuted as crimes that endanger the security of Israel. The offense of “threatening the security of the state” is an umbrella charge that can include socializing with an individual who has been classified as a security threat, even after that individual’s alleged activities were completed.

### ***Arrest and Detention of Political Leaders***

Although international law and Israeli courts have held that the government cannot detain someone for their political opinions, there have been a number of reported cases of administrative detention levied by Israel for political purposes. For example, administrative detention has been used to put pressure on individuals to collaborate in some way. Detention has also been used against a number of political leaders during the First Intifada and, more recently, against people who were active against the Annexation Wall. Similarly, during the Oslo Peace Process years, release from administrative detention was often made contingent on the detainee first signing a statement supporting the Accords.

In practice, Palestinian political leaders are routinely arrested and detained as part of an ongoing Israeli effort to suppress Palestinian political processes; as many as one-third of Palestinian legislators have been detained at the same time by Israel.

In the most recent incident, on 19 March 2009, political leaders from a number of parties were taken into custody. Among those arrested were: Palestinian Legislative Council members Ayman Daraghmeh from Jenin, Azzam Salhab and Nizar Ramadan from Hebron and Khaled Tafish<sup>91</sup> from Bethlehem, all of whom are part of the Change and Reform electoral bloc; Nasser Shaer, former Deputy Prime Minister and Minister of Education, and Mazen Ar-Rimawi, Head of the Change and Reform Deputies’ office in Ramallah. Also arrested were Adnan Asfour and Rafat Nasif, both political leaders affiliated with Hamas. Most of the individuals detained in the March sweep have been held in Israeli detention since 2006<sup>92</sup> and were only recently released.

These latest arrests are merely a continuation of Israel’s broad policies to levy collective punishment on the Palestinian people and to stifle their civic efforts, in particular the Hamas

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<sup>90</sup> GCIV, Art 66.

<sup>91</sup> See Appendix 6.

<sup>92</sup> Before the January 2006 elections, 450 activists and others who were supposed to be elected as parliament members or municipality members were arrested. See Appendix 4.

movement, following the capture of an Israeli soldier on 25 June 2006. Four days after the soldier was captured at the Kerem Shalom Crossing on the Gaza Strip border, Israeli forces seized dozens of leaders and activists associated with the Change and Reform bloc in coordinated raids across the West Bank.<sup>93</sup> As of 1 October 2009, there are 25 PLC members detained by Israel.

## ADMINISTRATIVE DETENTION

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Administrative detention is a procedure that allows the Israeli military to hold prisoners indefinitely on secret evidence without charging them or allowing them to stand trial. Both Palestinians from the OPT and Israeli citizens can be held as administrative detainees.<sup>94</sup>

While international law permits administrative detention during armed conflict, such detention is only permitted under very specific and narrowly defined circumstances: There must be a public emergency that threatens the life of the nation, and detention can only be ordered on an individual, case-by-case basis without discrimination of any kind.<sup>95</sup> A protected person may be interned or placed in assigned residence only if “the security of the Detaining Power makes it absolutely necessary”<sup>96</sup> or, in occupied territory, for “imperative reasons of security”.<sup>97</sup>

However, in practice, the use of administrative detention by Israel is frequently not for these intended security purposes. Tellingly, Israel has claimed to be under a continuous state of emergency sufficient to justify use of administrative detention since its inception in 1948. In addition, administrative detention is frequently used – in direct contravention to international law – for collective and criminal punishment rather than for the prevention of future threat.<sup>98</sup> Vague and expansive definitions of “security” in the laws further enable this practice.

Military Order 1591<sup>99</sup> provides Israeli military commanders with the authority to detain Palestinians without charge or trial for up to six months if they have “reasonable grounds to presume that the security of the area or public security require the detention”. No definition of “security of the area” or “public security” is given, and the initial six month period can be extended by additional six-month periods indefinitely.

Administrative detention orders are issued either at the time of arrest or at some later date and are often based on “secret evidence” collected by the Israeli Security Agency (ISA).<sup>100</sup> In the

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<sup>93</sup> *Id.*

<sup>94</sup> The Emergency Powers Law of 1979 allows the Israeli Minister of Defense to order prisoners who are within the jurisdiction of the Israeli civil courts to be held as administrative detainees.

<sup>95</sup> ICCPR, Art. 9.

<sup>96</sup> GCIV, Art. 42.

<sup>97</sup> *Id.*, Art. 78.

<sup>98</sup> For example, security detention orders are regularly issued against individuals suspected of committing an offense after an unsuccessful criminal investigation or a failure to obtain a confession in interrogation. See Appendix 5.

<sup>99</sup> Formerly known as Military Order 1226 (1988). Israeli military and civil laws related to administrative detention orders are based on the British Mandate Emergency Law (1945).

<sup>100</sup> Formerly known as the General Security Service (GSS).

vast majority of administrative detention cases, neither the detainee nor his lawyer is ever given access to the “secret evidence”.

A Palestinian detainee subjected to an administrative detention order must be brought before a military court in a closed hearing within eight days of his or her arrest, where a single military judge can uphold, shorten or cancel the detention order. The detainee can appeal the decision to the Military Appeals Court, but the reasons for detention are often not disclosed at the appeals level either.

By comparison, administrative detention under Israeli domestic law<sup>101</sup> requires a detainee to be brought before a judge within 48 hours, and orders can be given only up to three month periods.

Of significant concern is the often automatic and categorical, rather than individual, imposition and extension of administrative detention by Israel. Detention proceedings typically follow a common formula comprising the threat the individual poses and an automatic number of months of detention.

And, on the rare occasions where judges order that an individual be released, commanders can simply issue a new detention order citing “new” evidence, thus keeping the detainee in administrative detention. While there may actually be “new” evidence in some cases, the process nonetheless remains somewhat suspect given the frequency with which it happens.<sup>102</sup>

For example, in 2007, 3059 administrative detention orders were issued.<sup>103</sup> Of these, 793 files were new administrative detention orders; 1,204 renewal orders were confirmed by the judge as drafted, and 732 were confirmed by the judge, but for a shorter length of time than requested in the order.<sup>104</sup> Just 165 new orders, or about 5.4 percent of all administrative detention orders, were cancelled altogether – 137 orders were cancelled by the judge, and 28 were cancelled by the military governor himself before the judicial review.<sup>105</sup>

Overall, 64 percent of the administrative detention files were confirmed by the judges for the same periods as those signed for by the military governor. This marks a 12 percent increase over the same figures in 2006.<sup>106</sup>

The 2007 figures regarding appeals to administrative detention orders further underline the automatic nature of the imposition of detention, and the impossibility faced by Palestinian detainees who try to fight their detention. In 2007, detainees submitted 2,368 appeals to administrative detention orders, of which the courts accepted 329, or about 1.38 percent.<sup>107</sup> By

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<sup>101</sup> Emergency Powers Law (Detention) 1979.

<sup>102</sup> 14,198 extensions of detention were granted in 2007 alone. Military Courts Report 2007, *supra* note 5.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> Note that this doesn't mean the detainee was released; it could mean simply that the court reduced one extension of administrative detention time period. The individual's detention could then simply be extended for another six months after the shortened detention period was over.

comparison, the prosecution submitted appeals in 241 cases in 2007, of which court accepted 162, or about 67 percent.

Thus, in practice, Palestinians can be detained for months, if not years, under administrative detention orders, without ever being informed about the reasons or length of their detention. Detainees are routinely informed of the extension of their detention on the day that the former order expires. Under the existing administrative detention procedures, Palestinians have no effective means by which to challenge their administrative detention.

There are currently at least 335 Palestinians from the West Bank and East Jerusalem being detained in administrative detention, of which two are women and one is a child under the age of 18.

### ***Gazan “Unlawful Combatants”***

Palestinians residing in Gaza are also subjected to indefinite detention by Israel under The Incarceration of Unlawful Combatants Law (Unlawful Combatants Law).<sup>108</sup> Passed in 2002, the Unlawful Combatants Law defines an “unlawful combatant” as a person who takes part in hostile activity against Israel, either directly or indirectly, or belongs to a force engaged in hostile activity against the State of Israel, and who is not entitled to prisoner of war status under IHL.<sup>109</sup>

The law carries with it a presumption that, as long as hostilities continue, the release of an individual will harm national security unless proven otherwise.<sup>110</sup> It is thus the detainee who must prove that he or she is not a threat. This practice patently violates the accused’s right to a presumption of innocence in any criminal proceeding, and results in a system of indefinite detention justified by mere speculation and stacked heavily against the detainee.

While Israeli judges have called for the transfer of cases brought under the Unlawful Combatants Law to ordinary criminal courts whenever possible, this may not be a practical or viable solution – under Article 9(b) of the Unlawful Combatants Law, security authorities may issue an order for the detention of an unlawful combatant even if criminal proceedings have been initiated against him under the provisions of any criminal law.

As of 1 October 2009, nine Palestinians are being held as illegal or unlawful combatants under the Unlawful Combatants Law.

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<sup>108</sup> Incarceration of Unlawful Combatants Law, 5762-2002, 1 (Isr.).

<sup>109</sup> *Id.*, p. 1. Israel and the United States are the only two countries to recognize “unlawful combatant” as a legal category, as the International Committee of the Red Cross and almost all other states have rejected it. See Knut Dormann, “The legal situation of ‘unlawful/unprivileged combatants’”, *International Review of the Red Cross*, Vol. 845, N. 849 (March 2003). The practical effect of the unlawful combatant designation is to place detainees beyond the protection of international humanitarian law, as well as the ordinary protections of human rights law and criminal law.

<sup>110</sup> Incarceration of Unlawful Combatants Law, *supra* note 108, para 7.

## PROSECUTION OF MINORS

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Approximately 700 Palestinian children (under 18) from the West Bank are prosecuted every year through Israeli military courts after being arrested, interrogated and detained by the Israeli army. According to DCI-Palestine, more than 6,500 Palestinian children have been detained since 2000.<sup>111</sup> One Palestinian child is currently being held under administrative detention orders, and 340 Palestinian children are currently detained in Israeli prisons.

Article 76 of the Fourth Geneva Convention requires that “in the treatment of protected persons who are accused or have been convicted of offences, proper regard must be paid to the special treatment due to minors.”<sup>112</sup> The UN Convention on the Rights of the Child (CRC), to which Israel is a State Party,<sup>113</sup> further requires that one fundamental principle of sentencing minors is that the deprivation of liberty, if used at all, should only be used as a measure of last resort and for the shortest appropriate period of time.<sup>114</sup> Article 40 of the CRC also provides a detailed list of the rights of children “alleged as, accused of, or recognized as having infringed the penal law”, nearly identical to provisions in international human rights law regarding adult defendants. A central tenet of the requirements of international law regarding criminal procedures for minors is to separate them from adults, mainly during detention,<sup>115</sup> and there is a well-established emphasis on rehabilitation as the goal of criminal proceedings and punishments for minors.

However, in practice before the military court system, there are no special interrogation procedures for children detained by the Israeli military, nor are there provisions for an attorney or a family member to be present when a child gives a confession.<sup>116</sup> Many children even serve time in the same prisons and detention facilities as adults.<sup>117</sup>

On 29 July 2009, Military Order 1644 was issued, establishing a separate military court for Palestinian children and ending nearly a half-century Israeli practice of trying children as young as 12 years of age in the same military courts as adults. However noteworthy at first glance, the order fails to correct many of the fair trial deficiencies in the military courts relating to children (including insufficient provisions regarding qualifications for the judges, no added protections during interrogations, and discretionary language granting the prosecutor broad authority to suspend protections for children), which indicate that Military Order 1644 will do little to improve the protection of Palestinian children before the Israeli military legal system.<sup>118</sup>

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<sup>111</sup> See DCI-Palestine, *Palestinian child prisoners: The systematic and institutionalized ill-treatment and torture of Palestinian children by Israeli authorities*, June 2009, p. 8 (available at: <http://www.dci-pal.org/english/publ/research/CPReport.pdf>)

<sup>112</sup> “Protected persons” comprise persons who are in the power of a party to a conflict – including an occupying power – of which they are not nationals.

<sup>113</sup> The UN Convention on the Rights of the Child (CRC) was signed by the State of Israel on 3 July 1990 and ratified on 4 August 1991.

<sup>114</sup> CRC, Art. 37(b).

<sup>115</sup> *Id.*

<sup>116</sup> See DCI-Palestine, Semi-Annual Report 2007.

<sup>117</sup> See Appendix 11.

<sup>118</sup> For more on Military Order 1644, see Addameer’s statement, “Addameer Contends that New Juvenile Court Fails to Bring Israeli Military Court System into Compliance with International Legal Standards”, 3 November 2009 (available at: <http://addameer.info/?p=1413>)

Furthermore, the CRC defines a “child” as “every human being below the age of eighteen years”.<sup>119</sup> The United Nations Committee on the Rights of the Child’s General Comment 10: Children’s Rights in Juvenile Justice calls on signatory states parties to the CRC to define the threshold for legal majority as no lower than 18. However, according to Israeli Military Order 132, Palestinian children age 16 and older are treated as adults and are tried and sentenced by Israeli military courts as adults. By comparison, juvenile legislation defines Israeli children as age 18 or younger.

What’s more, Israeli a Palestinian child’s sentence is decided on the basis of the child’s age at the time of sentencing, not at the time when the alleged offense was committed. Thus, a child who is accused of committing an offense when he or she is 15 will be punished as an adult if he or she has a birthday while awaiting sentencing.

## CONCLUSION

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Addameer Prisoner Support and Human Rights Association believes that the Israeli military courts and the practice of administrative detention in the Occupied Territory contravene international legal standards and fundamental human rights.

The safeguards set forth in the four Geneva Conventions of 1949 and their Additional Protocols, as well as a variety of international human rights agreements, include guarantees of a fair trial for people charged with criminal offences.<sup>120</sup> Fair trial rights under international humanitarian law must be respected in all circumstances – there can be no derogation from the relevant provisions. Denial of the right to a fair trial can amount to a war crime in certain circumstances, which means that those responsible must be tried by the state where they are found or be extradited to another state for trial, or transferred to an international criminal court.<sup>121</sup>

Sufficient evidence regarding the compliance of military courts with basic fair trial rights indicates that they are systematically denied to Palestinians prosecuted in these courts. Israeli government officials and members of the military may therefore be committing grave breaches of the Fourth Geneva Convention by “willfully depriving a protected person of the rights of fair and regular trial”.<sup>122</sup>

Furthermore, the military courts operate well beyond their prescribed jurisdiction, levying criminal charges against every aspect of Palestinian life.

In light of the statements above, Addameer recommends that:

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<sup>119</sup> CRC, Art. 1. Article 1 defines a child as everyone aged less than 18, unless majority is attained earlier under national law. The age of majority is determined by states, but must not deviate greatly from international norms. Rule 11(a) of the UN Rules for the Protection of Juveniles Deprived of their Liberty also defines a juvenile as “every person under the age of 18”.

<sup>120</sup> GCIV, Arts. 64, 66.

<sup>121</sup> Amnesty International, Fair Trials Manual. (available at: [http://www.amnestyusa.org/international\\_justice/fair\\_trials/manual](http://www.amnestyusa.org/international_justice/fair_trials/manual)), at Ch. 32.1.

<sup>122</sup> GCIV, Art. 147.

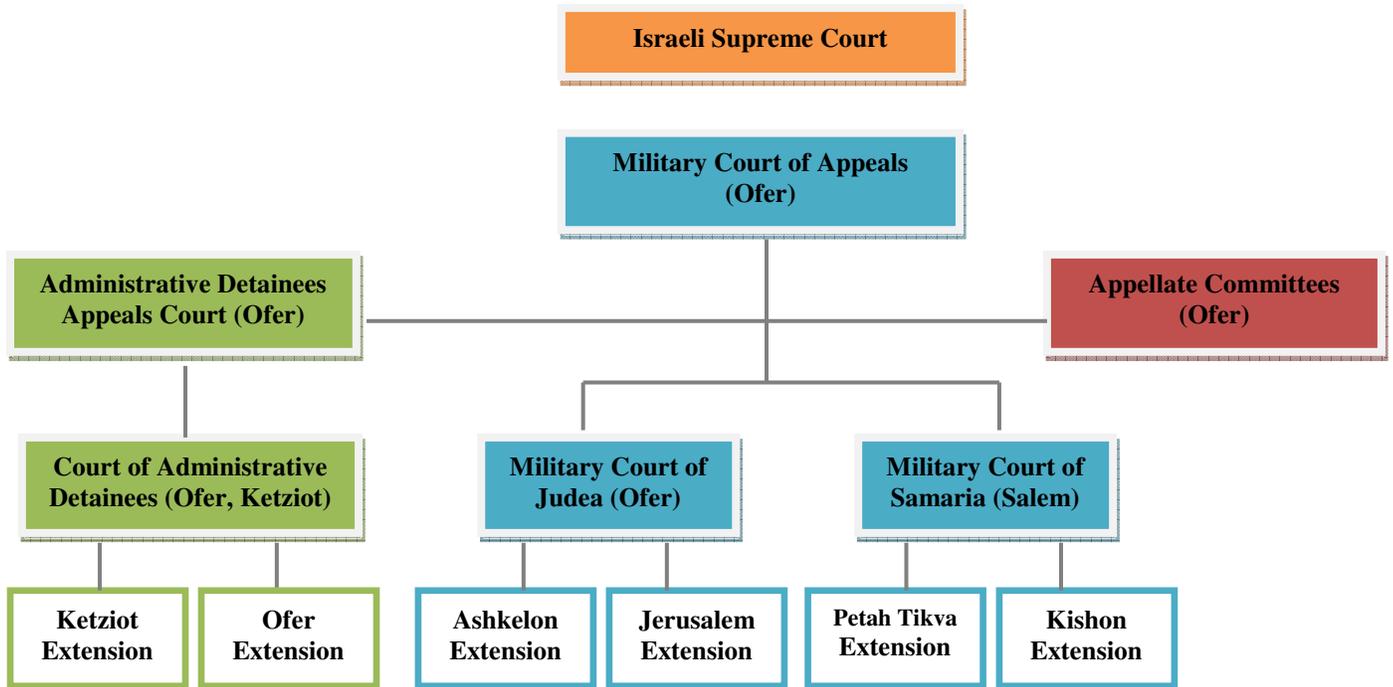
- Although granted jurisdiction over civilians in certain circumstances under international law, military courts are by nature special and purely functional courts designed to maintain discipline in the military and police and ought therefore to apply exclusively to those forces<sup>123</sup>
- Given the prolonged nature of Israel's occupation of Palestinian territories, and the extent to which military court jurisdiction pervades almost all aspects of Palestinian life, it is clear that the military court system does not provide an adequate justice framework. Jurisdiction of the military courts in the occupied Palestinian territory must be restricted to the security and safety of the Occupying Power, and should not extend to civilians in such a broad and ever-increasing manner.
- Administrative detention should never be used as a collective or punitive measure. As the most severe control measure permitted under international humanitarian law, administrative detention must only be used with the strict application of all necessary safeguards.
- Every child, without exception whatsoever, has the right to benefit from the standards provided in the Convention on the Rights of the Child. Addameer urges the international community to demand that Israel abide by international law and treat those under the age of 18 as children. In addition Addameer calls on the international community to insist that the Israeli occupation forces stop at once further arrests of Palestinian juveniles in the occupied Palestinian territory.

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<sup>123</sup> Annual Report of the Inter-American Commission, 1993, OEA/Ser.L/V/II.85 doc.9 rev.1994, at 507, (Peru); SH Liaquat Hussain & Ors v. The Federation of Pakistan (Supreme Court of Pakistan, 28/10/99).

**APPENDIX 1: Chart: Structure of the Military Court System 2009<sup>124</sup>**

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<sup>124</sup> Chart content is based on a chart from Yesh Din, *Backyard Proceedings*, *supra* note 14, p. 40.

**APPENDIX 2: Chart: Length of Detention & Access to Counsel, Judiciary<sup>125</sup>**

	<b>Israeli Domestic Law</b>	<b>Military Orders</b>
<b>Detention until access to counsel</b>	Up to 21 days (10 days on order from investigating ISA officer, +11 by district court judge)	Up to 90 days (15 days on request from interrogator, +15 ISA official in charge of interrogation center order, +30 military appeals judge + 30 legal advisor to military courts)
<b>Detention until brought before a judge</b>	24 hours	8 days
<b>Total period of detention authorized by a judge</b>	30 days (up to 75 on the authority of the Attorney General)	90 days (up to 180 days on the authority of a judge of the Military Appeal Court)
<b>Detention from the end of investigation until indictment</b>	5 days	10 days
<b>Detention from filing of indictment until arraignment</b>	30 days	2 years
<b>Detention from arraignment until end of proceedings</b>	9 months	
<b>Judge's approval of extension of detention if proceedings have not concluded</b>	90 days (Supreme Court judge)	6 months (judge of the Military Appeal Court)

<sup>125</sup> The chart on this page is from Yesh Din, *Backyard Proceedings*, *supra* note 14, p. 128.

### **APPENDIX 3: Case Study: Retroactive Application of Criminal Liability**

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#### **Abd Al-Karim Hawarin**

**Date of birth:** 30 June 1970

**Place of residence:** Dahriyyeh, near Hebron

**Date of arrest:** 6 November 2008

Abd Al-Karim Hawarin, a long time member and deputy manager of the Charitable Committee of Dahriyyeh, a philanthropic organization that, among other activities, distributed funds to children who lost one of their parents, was arrested by Israeli soldiers on 6 November 2008.

On 16 December 2008, more than a month later, the Israeli Military Commander of OPT signed an order pursuant to his authority under the Security Regulations of 1945 declaring the Charitable Committee of Dahriyyeh to be an illegal organization, because it “affects the security of the Area, of Israel, the safety of the public and of the public order”. The order made no further findings about the Committee.

Following his arrest, Abd Al-Karim was interrogated in Ashkelon interrogation center for 80 days before an administrative detention order was issued to detain him from 21 January 2009 to 21 May 2009. A week after his detention order was issued, Israeli military prosecutors submitted a charge sheet against him, cancelling the detention order and transferring Abd Al-Karim to the criminal prosecution system.

In the charge sheet, prosecutors charged Abd Al-Karim with three offenses: (1) Being a member of and active in an illegal organization; (2) Acting in a position of official responsibility in an illegal organization; and (3) Entering money to the Area without a permit. The prosecution baldly stated in the charge sheet that the Charitable Committee of Dahriyyeh, in which Abd Al-Karim had been active from 2002 through May 2008, was affiliated with Hamas.

Even though the Committee was not declared an illegal organization until a month after Abd Al-Karim’s arrest, and even though the declaration established no link between the Committee and Hamas or between Abd Al-Karim and Hamas that would support the charge sheet’s allegations, these facts did not seem to prevent the prosecution from charging Abd Al-Karim with retroactive criminal liability, or from assuming facts without proving them.

Abd Al-Karim’s trial commenced with these illegalities uncorrected. Fearing that he would only be placed back in administrative detention, whether he was convicted or not, Abd Al-Karim took a plea bargain in which prosecutors agreed to release him from detention, to not use administrative detention against him for this file, and to drop the charge alleging a connection to Hamas.

Abd Al-Karim, who had committed no crime and had none proven against him, was sentenced to time already served, and was released.

## **APPENDIX 4: Case Study: Military Court Prosecution as a Political Leverage Tool**

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### **Wael Abd Ar-Rahman**

**Date of birth:** 15 February 1960

**Place of residence:** Jerusalem

**Occupation:** Member of the Palestinian Legislative Council, Change and Reform Party

**Date of arrest:** 29 June 2006

**Place of detention:** Ketziot

Wael Abd Ar-Rahman was first arrested in September 2005, in a sweep that detained 450 Palestinian political leaders shortly before the January 2006 parliamentary elections. Placed under administrative detention orders, Wael was released soon after when the court in the order review hearing found that the material in the “secret file” against him was not enough to justify his continued detention. In January 2006, shortly after his release, Wael was elected Member of Palestinian Legislative Council under the banner of the Reform and Change Party.

On 25 June 2006, an Israeli soldier named Gilad Shalit was captured at the Kerem Shalom Crossing on the Gaza Strip border, sparking a widespread Israeli crackdown against organizations alleged to have ties with Hamas. Four days after Shalit was captured, Israeli forces seized dozens of leaders and activists associated with the Change and Reform bloc in coordinated raids across the West Bank.

Wael was one of the dozens of Palestinian elected officials arrested that day. Taken to Ofer detention center for interrogation, Wael freely acknowledged his election to the PLC and membership in the Reform and Change Party, for as of Wael’s arrest in June 2006, it was no crime to merely be a member of the Reform and Change Party. It was not until the first week of May 2007, almost a year following his arrest, that the party was declared an illegal association.

In July 2006, military prosecutors charged Wael with three offenses based solely on his membership in and activities in support of the Reform and Change Party, which they alleged was affiliated with Hamas. No charges were filed alleging Wael had any individual or direct connection to Hamas.

Throughout the trial and subsequent appeal, the politics underpinning Wael’s arrest were evident at every turn. For example, the trial court decided to release Wael for the duration of the proceedings, after finding that as he had served in the PLC as a Reform and Change member for six months before his arrest, he did not suddenly pose a security threat upon his arrest. However, the prosecution appealed this decision, and the appeals court overturned the trial court and remanded him to custody. According to Addameer attorney Sahar Francis, Wael’s defense counsel, the feeling in the courtroom that day was that the appeals court’s justifications for remanding Wael had nothing to do with the legal arguments recognized at the trial court level.

During the trial, the prosecution built their case on Wael's interrogation acknowledgement, confessions of other PLC members who were arrested, and the testimony of and report by a General Security Services representative on the relationship between the Reform and Change Party and Hamas. However, they provided no proof regarding any individual association by Wael with Hamas.

In Wael's defense, Addameer argued that as the Reform and Change Party had not been declared an illegal association, or a Hamas-affiliated association during the time in question, the prosecution could not simply proceed on the assumption that every member of the Reform and Change bloc was therefore a member of Hamas. This must be proven, but it was not. All of the prosecution's PLC members who acted as witnesses testified that while some members were affiliated with Hamas, there were many, including Wael, in the party who did not belong to any political party beforehand. Even some Christians served as part of the Reform and Change Party in Gaza – individuals who would be entirely unlikely to ally themselves with Hamas in any way. In fact, Addameer proved, Reform and Change had formed many coalitions throughout the OPT. Even the ISA officer testified in support of this point on cross, when he admitted that it would not be accurate to say that every person in the Reform and Change Party was Hamas.

Wael was acquitted of membership charges before the trial court, but was found guilty of being active in and supporting an illegal organization because of some high profile Hamas activists involved with Reform and Change Party. He was sentenced to 22 months detention, but, as he had already spent 23 months in prison, he was due for immediate release.

Both the prosecution and defense appealed aspects of this judgment. Wael, who had already spent nearly two years in detention, was again remanded to custody by the appeals court until the end of proceedings. The appeals court summarily determined, without requiring the prosecution to so prove, that every Reform and Change member is a member of Hamas. They found in a syllogism based on speculation and innuendo that because there was a general belief that Hamas won the 2006 elections, and because Reform and Change won the most PLC members, therefore, everyone who was elected under Reform and Change is Hamas.

The appeals court found Wael guilty of all charges, and increased his sentence from 22 to 42 months in prison. Wael's plea for early release after serving two-thirds of his sentence was rejected, and was eventually released on 2 November 2009.

## APPENDIX 5: Case Study: Administrative Detention Used When Criminal Prosecutions Fail

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### Majeda Akram Nimer Fidda

**Date of birth:** 14 August 1960

**Place of residence:** Nablus

**Occupation:** Member of the Nablus Municipality Council, Change and Reform Party

**Date of arrest:** 6 August 2008

**Place of detention:** Hasharon prison

**Expected end of administrative detention order:** 30 November 2009



Majeda Fidda was arrested from her family home in Nablus a few minutes past midnight on 6 August 2008 when Israeli soldiers stormed her house for the second time in less than a month. Majeda was taken into custody and the soldiers confiscated her personal laptop computer.

Majeda was taken first to Huwwara provisional detention centre located in the outskirts of Nablus. Later transferred to Sheve Shamron settlement in near Jenin, she was transferred that same night *back* to Huwwara provisional detention centre where she was interrogated for a two hour period. During this second transfer, she was left to wait for long hours on the street, under the surveillance of a female soldier. After the questioning in Huwwara, she was transferred to Hasharon prison where she remained in detention throughout her trial.

Following her interrogation at Huwwara, a list of charges was issued against Majeda. Among the charges were allegations of membership in the Change and Reform Party, a political association alleged in the charge sheet to be an illegal party. In fact, Majeda was a member of the Change and Reform Party, having run successfully under their banner in Nablus municipal elections in 2005. However, the Israeli authorities had not declared the Change and Reform bloc an “illegal party” at the time of the elections, and did not do so until 2007, almost two years after these municipal elections took place. At the time of Majeda’s election, Israel had voiced no opposition to the participation of the Change and Reform Party, giving rise to the impression that it did not then constitute an “unauthorized association”, of which both membership and activity in which constitute a criminal offense under military regulations.

The legal procedures in Majeda’s criminal trial lasted for five months, ending on 31 December 2008 when she was acquitted of all charges. However, instead of releasing Majeda, the Israeli authorities immediately issued an administrative detention order against her, for a term of six months beginning on 6 January 2009 and ending 5 July 2009. On 12 January 2009, in the judicial review of the administrative detention order, the judge refused to confirm the order and instead referred her for further interrogation until 3 February 2009.

The prosecution appealed the judge’s decision and the date for the appeal hearing was set for 1 February 2009. At the hearing, the appeal judge transferred Majeda’s file to the Judge of First Instance who reduced the administrative detention order until 12 February 2009. Both the prosecution and defense appealed against this decision. However, the appeal hearing accepted

the arguments of the prosecution and the order was subsequently extended until 31 March 2009, so that an interrogation could be conducted.

On 31 March 2009, instead of being released, Majeda's administrative detention order was renewed for a further six months, until 30 September 2009. During the judicial review of the renewed order on 5 April 2009, the judge reduced the order to three months, setting Majeda's release for 30 June 2009. The prosecution appealed his decision demanding further extension, and the defense appealed the renewal of the administrative detention order. On 26 April 2009, the appeals court confirmed the three month detention period and rejected both the prosecution's and the defense's pleas.

On 29 June, Majeda was informed that her detention without charge or trial would be extended for an additional four months. Shortened on appeal to three months, the order was nonetheless renewed again on 30 September 2009 for two months. Majeda's current detention order is set to expire on 30 November 2009.

Majeda's current detention marks her third encounter with Israeli soldiers and the military courts. She was arrested and placed under administrative detention in Hasharon prison from 3 March 2005 until 2 September 2005. Then, on the night of 22 July 2008, just weeks before her last arrest, Israeli soldiers stormed Majeda's home during her absence and proceeded with an unlawful search and seizure. Among the items confiscated by the soldiers were two desktop computers and files related to her work at the municipality of Nablus.

### **Professional Life**

During Majeda's term as Council Member, she created a new department at the municipality dealing specifically with environmental issues. She initiated an ambitious project called "Green Nablus", a tree and flower planting campaign. As a result, many parks and green spaces in Nablus and surrounding villages were created. Majeda also took part in a municipal recycling course organized in Brussels in cooperation with various Belgian municipalities.

Majeda holds an MSc degree in Pharmacology from Moscow University in Russia. Prior to her work in the municipality, she worked as a pharmacist for several years. In 2004, she launched a media and documentation project aiming at informing press agencies of local events in Nablus. However, her 2005 arrest was a major setback to the project effectively leading to its end.

### **Majeda's Family**

With the exception of her sister Arwa who holds a Jerusalem identity card, Majeda's whole family – her four other sisters and both parents – are denied permits to visit her in prison under the premise that there are no familial ties between them. Since her imprisonment, her father, aged 74, has suffered from depression and does not eat sufficiently. He has seen Majeda only once in court before her case was referred to administrative detention. As judicial reviews of administrative detention orders are closed to the public, only Majeda's lawyer will be permitted to accompany her before the court for the duration of her detention.

## **Prison Conditions**

Majeda is detained in Section 12 of Hasharon prison, one of Israel's largest facilities, together with approximately 32 other Palestinian female prisoners. The building which now constitutes the prison complex once served as the headquarters of the British Mounted Police during the British Mandate in Palestine and, as such, was never designed for the incarceration of women.

Majeda suffers from the harsh detention conditions. She complains of overcrowding, humidity, lack of natural sunlight and adequate ventilation, and poor hygiene standards.<sup>126</sup> Majeda and the other female prisoners are allowed only three hours of daily recreation time. She currently shares a room in Section 12 with one other prisoner, a room that is reportedly very small, only 2 meters long and 2.5 meters wide. It includes a small bathroom, two bunk beds and three small closets. The lighting is very weak, forcing Majeda to buy a lamp in the prison canteen at her own expense. As a result of the poor detention conditions, her health has drastically deteriorated in recent months. Majeda now suffers from constant back pain and high blood pressure. While she receives some medical treatment, as a pharmacologist, she says that the treatment is inadequate and includes neither legitimate follow-up nor specialized gender sensitive care. As a result, she fears to trust the doctor's recommendations and does not take the medication she is prescribed. Majeda also complains of the solitude she faces in prison, given that she does not receive regular family visits.

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<sup>126</sup> Detailed information on Palestinian prisoners' detention conditions in Israeli prisons is available at: [www.aseerat.ps](http://www.aseerat.ps)

## APPENDIX 6: Case Study: Use of the Military Courts for Politically Motivated Detention

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### Khaled Ibrahim Tafish Dweib

**Date of birth:** 20 July 1964

**Place of residence:** Bethlehem, Za'atara

**Occupation:** Member of the Palestinian Legislative Council, Change and Reform Party

**Date of arrest:** 19 March 2009

**Place of detention:** Ofer

**Number of arrests:** Arrested three times since 2002, held twice in administrative detention; spent nearly five years in prison.

**Expected end of administrative detention order:** 17 March 2010



### Administrative Detention

*“I read the confidential material attached. Out of fear for the safety of the source of information and Shin Bet’s work methods I cannot disclose any confidential information known to me”*

– Military Judge, Judicial Review, 1 April 2009

Palestinian Legislative Council (PLC) member Khaled Tafish was arrested in the morning of 19 March 2009 in a raid carried out by the Israeli Occupying Forces across West Bank towns, just a few hours after the collapse of Egyptian-mediated prisoner exchange talks between the Israeli government and Hamas. Nine other political leaders, including three PLC members – all of whom are members of the Change and Reform bloc – were arrested that same night. Following his arrest, Mr. Tafish was transferred to Etzyon detention centre, in the south of the West Bank, where he was subjected to two weeks of interrogation related to his political activities. On 31 March 2009, an administrative detention order was issued against him. Mr. Tafish’s administrative detention was confirmed at the judicial review of the order on 1 April 2009 for a six month period starting from the moment of his arrest. The military judge justified the court’s decision by stating that, as an active member of Hamas, Mr. Tafish “poses a real danger” to the “security of the region and its people”.

On 18 September 2009, Mr. Tafish’s administrative detention orders were renewed for a further six months. Following an unsuccessful petition to the Israeli High Court after this renewal, Mr. Tafish’s expected release date is now set for 17 March 2010.

The other PLC members simultaneously arrested with Mr. Tafish include Ayman Daraghme from Jenin, and Azzam Salhab and Nizar Ramadan from Hebron. Addameer argues that their detention is politically motivated and is aimed at pressuring the Hamas leadership in Gaza to release a captured Israeli soldier.

Mr. Tafish was arrested twice before this latest imprisonment. His first arrest was on 29 April 2002 during the Israeli invasion of Bethlehem. He was subsequently subjected to 70 days of harsh interrogation in the Moskobiyya (Russian compound) interrogation center, located in West Jerusalem. He was then sentenced to four and a half years of imprisonment, which he spent in

Ashkelon, Nafha and Ketziot (Negev) prisons. While still detained, he ran for the 2006 parliamentary elections as a Reform and Change Party candidate, and was elected to the PLC on 25 January 2006. His second arrest occurred on 11 November 2007. He was then placed under administrative detention for a six month period, reduced following an appeal hearing to four months. Mr. Tafish was released from administrative detention on 17 March 2008.

### **Professional Life**

With nearly one third of Palestinian legislators in Israeli detention and a geographic division between the West Bank and Gaza Strip, the Palestinian Legislative Council has not been able to reconvene since mid-2007. Mr. Tafish therefore concentrated most of his efforts as PLC member on community and social development work. Through his office in Bethlehem, he worked to address individual complaints and grievances by providing advice and information on governmental services and by liaising with different ministries on behalf of individual constituents. Today, following his imprisonment for the third time, most of the office's work is suspended as it requires his approval and follow-up.

Before he was elected to the PLC, Mr. Tafish worked as Imam of the mosque in Bethlehem. He holds a BA degree in Shari'a Law from Al Quds University.

### **The Tafish Family**

The Tafish family consists of six children. The eldest, Duha, is a first year pharmacology student at Al Quds University, and the youngest is in the second grade. Mr. Tafish's wife, Umm Mus'ab says that her husband's absence from their home is very painful and has had a detrimental effect on the children in particular, despite the family's previous experience of coping with his imprisonment. "The role of the father is always very important", she says. "His absence only adds to my responsibilities, making me the mother and the father at the same time". She is afraid that her husband's arrest will affect the children's results in school, especially their oldest son Mus'ab, who is supposed to take his final high school exam (*Tawjihi*) at the end of the year. "This is a very sensitive and important period for the future of one's education" Umm Mus'ab said. "Now is the time when he is in particular need of his father at his side".

Before his arrest, Mr. Tafish began building a new house for his family; however the construction was not fully completed. Previous engagements and obligations are now left without follow-up. A month after Mr. Tafish's arrest, the family was still unable to get a permit to visit him in prison. They have submitted a request through the International Committee of the Red Cross and are now awaiting a reply. From past experiences however, Umm Mus'ab has always been denied the permit, usually for so-called "security reasons" and would only get the right to visit her husband once or twice a year. Sometimes, the Israeli authorities would refuse her the permit claiming that there are no family ties between her and her husband. In the past, the children have had to take turns visiting their father as the prison administration only allows three minors to visit at the same time. In addition to humiliation and fear these trips to see their father cause, they also mean missing an entire school day. Mr. Tafish's family describes him as an educated and well-read person. His personal library counts more than 1,000 books on religion,

history and literature. On a personal level, he is a quiet, but social person, with a huge interest in social issues and genuine willingness to help others.

## APPENDIX 7: Case Study: Administrative Detention of Palestinian Children

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### Salwa Salah

**Date of birth:** 10 November 1991

**Place of residence:** Bethlehem

**Occupation:** Student

**Date of arrest:** 5 June 2008

**Date of release:** 1 January 2009



On Thursday 5 June 2008, at around 2 a.m., Salwa Salah, then 16, was preparing to go to sleep in her home in Bethlehem when the family suddenly heard a loud banging on the door. Salwa's mother opened the door and was faced with soldiers and the Israeli Security Agency (ISA). The soldiers interrogated Salwa's mother and questioned her about her husband, son and daughter as well as about troubles in the neighborhood. Then a female soldier told Salwa to get dressed. After finishing interrogating Salwa and her mother, the female soldier handcuffed Salwa, blindfolded her and forcefully took her to the military jeep.

### Sara Siureh

**Age at arrest:** 17

**Place of residence:** Bethlehem

**Occupation:** Housewife

**Date of arrest:** 5 June 2008

**Date of release:** 1 January 2009

Only a half hour earlier that same night, a similar scene occurred at Salwa's cousin Sara's house nearby in Bethlehem. Sara and her new husband were suddenly startled to hear a loud banging on the door. Sara's husband opened the door and was confronted with soldiers and the Israeli Security Agency. They stormed into the house and a female soldier shouted at Sara to get dressed. Sara too, was handcuffed, blindfolded and dragged out to the military jeep.

**Salwa and Sara's case marks the first administrative detention of Palestinian girls under the age of 18.** Following their arrest, Salwa and Sara were taken briefly to Telmond Prison and then to Ofer Prison where they were interrogated for one hour. During the interrogation, they were allegedly asked about their occupation and activities as well as relations with political groups. The girls did not confess to anything. After one hour the girls were taken back to Telmond prison where they spent a couple of days. They were then taken to Damon prison where they would be detained for the next seven months.

On 12 June 2008, Salwa and Sara were issued with military administrative detention orders. The orders against Salwa had been set for four months, while the orders against Sara were for five months. A military court tasked to review the orders confirmed them on June 18<sup>th</sup>. An appeal hearing also confirmed the orders on July 16<sup>th</sup> although Sara's sentence was reduced from five to four months. Both girls were due to be released on 4 October 2008.

On 5 October 2008, both girls were issued with a second administrative detention order. On 6 October 2008, a judicial review of the order took place. Eyal Noon, the military judge presiding over the review, upheld the orders for a further three months from 4 October 2008 until 3 January 2009, claiming that the girls were still “dangerous” to the public, even though the military prosecutor had provided no information supporting this allegation since the girls’ arrest.

On 2 November 2008, the Military Judge at Ofer Military Court rejected the appeal by Addameer Attorney Mahmoud Hassan to reduce Salwa and Sara’s administrative detention orders, effectively prolonging their detention until 3 January 2009.

Both girls were informed of their release only on the morning of January 1<sup>st</sup>. The news was both a shock and a pleasant surprise to them and their families, who had been living a nightmare for months. As they were informed too late, neither Sara’s nor Salwa’s parents were able to welcome their daughters at the Al-Jalameh checkpoint. Instead, their uncle and cousins who lived in the area came to meet them, while both girls’ parents waited for them at the entry to Bethlehem city.

Beginning with their arrest, Salwa’s and Sara’s human rights were consistently violated. In addition to the soldiers’ use of excessive force during the arrests, the girls also reported that during a transfer from Damon to Ramleh prison on 15 July, they suffered extremely abusive behavior from the female police officer escorting them. In particular, the officer pushed them forcefully with her hands and shouted at them. When they arrived at Ramleh prison, Salwa and Sara were searched according to the existing procedure: they were asked to strip totally naked while a female officer searched their hair, body and mouth with gloves. They felt the search was humiliating.

Additionally, throughout the length of their detention, they were held with adult Palestinian female prisoners in Damon prison. Such an arrangement is blatantly in opposition to international law. The UN Convention on the Rights of the Child provides that anyone below the age of 18 is considered a child. Although such a definition is used by Israel in relation to its own citizens, it is not applied to Palestinians; As per military orders in use in the occupied Palestinian territory, any Palestinian above the age of 16 is considered an adult. Thus, **all Palestinian girls between the ages of 16 to 18** are detained together with adult Palestinian women. As a result, they neither benefit from preferential treatment in terms of detention conditions or more frequent access to family visits, as is also required by international law, nor do they receive access to formal education, whether vocational training or the continuation of their schooling education<sup>127</sup>. By comparison, Israeli Prison Service regulations allow Israeli juvenile offenders to complete formal education from grade 8 to 12 by providing them access to adequately trained teachers and a specially designed curriculum for them by the Ministry of Education<sup>128</sup>.

This breach of international law mostly affected Salwa Salah, who wished to continue her education while in prison. At the time of their arrest, Salwa had just successfully completed the

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<sup>127</sup> UN Rules for the Protection of Juveniles Deprived of their Liberty (1990), E. 39.

<sup>128</sup> Fact Sheet 3: Denying Chances for a Better Future – Palestinian Female Prisoners’ Right to Education, August 2008, Fact Sheet Series: Behind the Bars: Palestinian Women in Israeli Prisons (available at: [www.aseerat.ps](http://www.aseerat.ps))

11<sup>th</sup> grade and was accepted to the final year of secondary schooling, commonly known as *Tawjihi*. Due to her imprisonment and the lack of access to formal education in prison based on the Palestinian curriculum, she was unable to prepare for the final matriculation exam while in detention, although she had requested to have access to a mathematics teacher. Now, after her release, Salwa is back at school, determined to finish high school on time with her classmates. She has been studying really hard, her father says, taking additional courses after class to catch up on the classes she missed while in prison. She is doing well, full of life again, although prison has left some physical scars: strong headaches and constant stomachaches due to the prison's poor nutrition. But the doctors say that with time, an appropriate nutrition and normal life, her health condition will improve.

### **An account from Salwa's mother on visiting her at Damon Prison:**

*"Once the security check at Tarqumiya checkpoint ended we proceeded to board an Israeli-plated bus on the Israeli side of the Green Line. This bus was followed and led by an Israeli police escort. It made me feel like I was a criminal. When I saw Salwa, she asked me to bring her basic items such as clothes, pajamas, underwear, t-shirts and toilet paper. The prison administration, however, only allowed me to bring one towel and a pair of shoes and slippers.*



Salwa's Grandmother holding a picture of Salwa. Source: Christian Minelli

*My first visit to see Salwa was very emotional and difficult. It was the first time I saw my daughter in prison and I felt so helpless; I knew I couldn't do anything to help her. I really wished that I was behind that glass barrier instead of her. She was crying and begging me to help her get out and come home. She kept saying that no charges were filed against her and that she was in prison for no reason. She wanted to go back to school and was really upset about missing her classes. She told me she misses her friends and all of us and dreams of being outside. I started crying also but tried not to let Salwa see me. She told me that the conditions in Damon Prison are really harsh. The toilets are inside the rooms, separated only by a wall. The showers though are located outside, beside the recreation area. This makes it really hard for the girls to maintain their privacy. In the beginning of the visit I was very happy and excited to see Salwa. Towards the end however, I felt myself choking up inside because I knew I had to leave my daughter behind in this miserable place. I was so upset that I started to cry. After 30 minutes, the prison guards began shouting at us to leave the building immediately, as if we were animals.*

*The last time I tried to visit Salwa I took my two younger daughters, Samia and Shaima with me. We traveled on the bus for 5 hours until we reached Damon prison. When we got off the bus the prison officer informed me that Salwa was not in the prison but had been taken to the military court that day. He said that she would be there a long time so there was no point in waiting. I went home, exhausted and depressed. My other children cry themselves to sleep every night because they are so worried about their sister. They still don't really understand why she is in prison. I feel so helpless because I myself do not know why she is being detained. I don't know what will happen next time or if she will be transferred to another prison. We are just waiting for news."*

## APPENDIX 8: Case Study: Administrative Detention of Palestinian Children

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### Hamdi Tamri

**Date of birth:** 20 August 1992

**Age at arrest:** 16

**Place of residence:** Bethlehem

**Occupation:** 11th grade student

**Date of arrest:** 18 December 2008

**Place of detention:** Ofer Prison

**Postal address:**

Ofer Prison, Givat Ze'ev

P.O. Box 3007, via Israel



**Expected end of current administrative detention order:** 14 December 2009

**Number of order renewals:** Two

At 2:00 am on 18 December 2008, Hamdi was woken up by a loud banging on the family home's front door. The Israeli soldiers had come to arrest him **again**, just one month after his release from prison. Hamdi was only 16.

Hamdi was tied and blindfolded by a group of five to six soldiers, and was taken to Etzion Detention center in a military jeep. On 21 December 2008, three days after his arrest, he was transferred to Ofer for interrogation. According to DCI/Palestine Section,<sup>129</sup> while under interrogation, he was questioned about the display of flags on the family house roof, the people he had encountered since the moment of his release and his political activities. Hamdi maintained that he was not involved in any activities and had only met with relatives and neighbors.

On 28 December 2008, in the Administrative Detainees Court in Ofer, Hamdi was informed that a four month administrative detention order was issued against him based on 'secret evidence' and that he would be held without charge or trial. Hamdi was neither accompanied by a lawyer, nor by his family, whose presence is banned in the Administrative Detainees Court. The administrative detention order was confirmed at the judicial review for a period lasting until 15 April 2009. An appeal hearing also confirmed the order. On 15 April, however, Hamdi was not released. Instead, a second administrative detention order was issued against him for a period of four months, and was set to expire on 14 August 2009. Again, however, on 14 August 2009, a third administrative detention order was issued against Hamdi. The order was confirmed six days later, on 20 August 2009 at the Administrative Detainees Court in Ofer. It was the date of his 17th birthday.

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<sup>129</sup> For more information about Hamdi's arrest, please refer to DCI –Palestine's urgent appeal on 22 April 2009, "Hamdi al-Ta'mari receives third administrative detention order"

## **BACKGROUND**

Hamdi's arrest came only one month after he was released, on 13 November 2008, from nearly four months of administrative detention. Hamdi experienced imprisonment for the first time at the age of 15. On 25 July 2005, the Israeli army arrested him from his home in the early hours of the morning. According to DCI / Palestine Section, soldiers tied his feet and hands and ordered him to lie on the floor while they pointed rifles at him. He was then repeatedly beaten, slapped and kicked. Blindfolded, he was taken in a military jeep to Ofer Detention for interrogation. During the transfer, both physical and verbal abuse, including insults, continued. Hamdi was then interrogated about his political affiliations. He was informed a few days later that an administrative detention order was issued against him for a three month period.

At the judicial review, this earlier administrative detention order was confirmed just as the recent orders have been, set for a four month period from 14 August until 13 December 2008. However, an appeal hearing reduced the order to three months.

## **PERSONAL INFORMATION**

On 12 March 2008, Hamdi's family learned of the killing of Hamdi's father by the Israeli Occupying Forces along with three other people in what seems to have been an extra-judicial execution, also known as targeted assassination. Only a few months later, on 6 June 2008, the Tamri home was demolished in Bethlehem as a punitive measure against Hamdi's father's alleged activities. The soldiers gave the family only one hour to gather some of their belongings before they executed the demolition order. Both events had a huge impact on the mental well-being of all the children in the family and were reflected in the subsequent deterioration of their educational achievements. Hamdi's mother relates that, before the murder of his father and the loss of their family home, Hamdi had been an outstanding student, and was very active in extra-curricular, especially musical activities. He volunteered with the school's radio station as a host and used to sing at school events and parties. The family had a number of recordings of his performances, but these were all destroyed during the house demolition. However, following these devastating events, his grades dropped, and he became noticeably more introverted.

When Hamdi was first arrested in July 2008, one of the soldiers told him that his father was killed because "he was a terrorist and that they were going to kill all terrorists".<sup>130</sup>

Hamdi's older brother Shehadeh, aged 19, was also arrested following their father's assassination. He spent nine months in Ketziot prison under administrative detention between 15 May 2008 and 22 February 2009. After Shehadeh was released, he enrolled in the faculty of law at Palestine Technical University in Bethlehem.

## **HAMDI'S DETENTION CONDITIONS**

Hamdi's family reports that since the moment of his arrest on 25 April 2008, they have been unable to send him even a change of personal clothes. The three times that his brothers tried to bring him a bag of clothes, the prison administration refused the entry of the parcel stating that

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<sup>130</sup> *Id.*

Hamdi needs to submit an application first. However, he has reportedly applied at least three times, but never received a response.

Hamdi's mother, 43, is prevented from visiting her son in prison for 'security' reasons. She has given up on the idea of applying for permits as she was routinely denied the right to visit her older son, Shehadeh during the nine months he was held as an administrative detainee. Hamdi's family argues that his arrest was related to the killing of his father. Although both brothers were detained during the same time period, they were not allowed to be held in the same facility. Although Shehadeh applied for Hamdi's transfer to Ketziot prison in the Negev, the prison administration declined stating that Hamdi was still a child and there were no juvenile facilities in Ketziot. The justification provided seems to be just an excuse to separate the brothers as minors have been detained in Ketziot prison before.

Currently, only Hamdi's siblings Abbas, aged 10 and Aya, aged 12, are able to take part in the ICRC family visit program, as all other members of the family are denied permits on the premise of 'security'. These include Hamdi's 19 year-old brother Shehadeh, his 18 year-old sister Mariam, who studies at Bethlehem University, his twin Bisan, and younger brother Ali, a 9th grade student. From the moment of Hamdi's arrest, Aya and Abbas have only been able to visit their brother three times.

## **ACT NOW!**

Here is how you can help Hamdi:

- Send Hamdi letters of support to his postal address in prison
- Write to the Israeli government, military and legal authorities and demand that Hamdi be released immediately and that her administrative detention not be renewed.
- Write to your own elected representatives urging them to pressure Israel to release Hamdi and to put an end to such an unjust, arbitrary and cruel system of incarceration without trial.

For more information about Addameer's campaign to **Stop Administrative Detention** and how you can get involved, please visit our website at: [www.addameer.info](http://www.addameer.info)

## APPENDIX 9: Case Study: Administrative Detention Used as Political Leverage Tool

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### Anees Abu Al-‘Anein

**Date of birth:** 6 January 1975

**Place of residence:** Al Yamoun village, Jenin District.

**Date of arrest:** 13 February 2006

**Date of release:** 15 December 2007, deported to Gaza two months later

Anees Abu Al-‘Anein was arrested on 13 February 2006. Originally from Gaza, Anees lived with his wife and three children in Al Yamoun village in Jenin District. Anees’s brother, who had remained in Gaza, was wanted by Israeli security authorities, and Anees had come under suspicion based solely on the familial relationship they maintained. Denying any personal involvement in criminal activity, Anees made no confession while under interrogation. Unable to charge him criminally, a six month administrative detention order was issued against Anees. Addameer believes that by detaining Anees, Israeli security authorities intended to use him as a lever against his brother.

However, one month after Anees was taken into detention, his brother was assassinated in Gaza.

Nonetheless, Anees remained in administrative detention for the next eighteen months. Due to be released finally on 20 August 2007, the order against him was again renewed, this time until 19 November 2007. On 27 August 2007, Anees was brought before a judge for a review of the renewed order. At this point, Anees requested an extension of the hearing because he wanted to secure representation from Addameer. The court delayed the hearing until 18 September 2007. On the 18<sup>th</sup>, a lawyer from Addameer went as scheduled to represent Anees at Ketziot. However, by 12:30 p.m., the judge still had not appeared for the scheduled morning hearing, and Anees’s lawyer had to leave because he had another hearing scheduled for that afternoon in district court in Beer Sheva. The hearing was again rescheduled, this time for 29 October 2007, more than five weeks later.

At the much delayed hearing on the 29 October 2007, the judge decided to cancel the order against Anees, noting to the court officer that it was unacceptable for the detention order to be signed two months after the renewed detention period began. The judge also noted that the secret material alleged that Anees was involved in planning for military activity with a dangerous motive, given his connection to his brother. He further observed that the initiative and planning for such activity was clearly done by someone else, and that given the change in the circumstances following his brother’s death, it was unlikely that Anees would continue on in this planning alone.

However, the prosecution appealed the judge’s decision, and requested Anees be kept in custody pending the appeal. On 12 November 2007, court accepted the prosecution’s appeal, accepting their renewed argument that Anees was dangerous and should be in administrative detention.

On 13 November 2006, Addameer appealed Anees’s continued detention to the High Court. The hearing was held the next day, only five days before the end of the detention order against Anees

was set to expire. The security services came to the High Court hearing armed with the secret evidence file. The judges reviewed the file, and held that they were convinced based on its contents that Anees was involved in military activity and was dangerous, and rejected the petition. At the same time, the prosecution declared they would seek to renew the administrative detention order against Anees on 19 November 2007 for three months.

The review hearing for the renewed order was held on 12 December 2007 with the same judge who had originally ordered Anees's release the previous October. The judge was shocked to learn that Anees remained under administrative detention orders, and repeated his earlier finding that Anees's alleged activities were related to specific circumstances that no longer existed, and that any other allegations against Anees were very general assumptions. Noting that Anees had been held for nearly two years without any new material to show his intentions or activities, the judge again cancelled the order. He gave the prosecution 72 hours to appeal but they did not, and Anees was finally released to return to his home near Jenin.

Two months later, Anees was re-arrested and deported directly to Gaza without a hearing.

## APPENDIX 10: Case Study: Indefinite Detention under the ‘Unlawful Combatants Law’

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### Muhammed Abu Aoun

**Date of birth:** 26 September 1972

**Place of residence:** Gaza

**Date of arrest:** 16 October 2003

**Place of detention:** Ketziot

Muhammed Abu Aoun, a married man living in Gaza with his wife and three children, was convicted before the military courts and sentenced in 2003 to serve five and a half years in prison and to pay a fine of 15,000 NIS. Muhammed served his time without incident, and his family paid the fine on 21 January 2009, the day before Muhammed was finally due for release.

Unluckily for Muhammed, however, his anticipated release date, 22 January 2009, fell during the three weeks of Israeli aggression under “Operation Cast Lead”. Without informing Muhammed’s counsel or family as to their intent to detain him further, Israeli security authorities denied Muhammed’s release on the 22<sup>nd</sup>. Instead, they issued a detention order under the auspices of the Incarceration of Unlawful Combatants Law of 2002, alleging that Muhammed would pose a security risk if released during the ongoing armed conflict.

Israeli authorities released no evidence to support the suspicion on which they justified Muhammed’s continued detention. On 24 February 2009, weeks after the ceasefire ending Operation Cast Lead, the review hearing for Muhammed’s detention order was held. Israeli authorities argued that although Muhammed had been in prison for five and a half years, they suspected that if he were released, he would contact terror groups, and was a threat to security. The order was confirmed.

Under the law, the authorities must renew the orders detaining Muhammed without trial every six months subject to district court judicial review, and Muhammed’s counsel can appeal the order before the High Court. Nonetheless, in reality, the detention he is now subject to is of indefinite duration.

Muhammed was not involved in any activity while in prison that would warrant further suspicion. The continued speculation of the Israeli security service that he would immediately go back to active criminal activity is unfounded – but, under the Unlawful Combatant Law, mere speculation is enough. No comparable weight is given to the argument that Muhammed served his time in prison and now deserves to be free and back with his family.

Muhammed remains in detention in Ketziot, with no anticipated release date.

## APPENDIX 11: Case Study: Prosecution of Minors before the Military Courts

### The Al Aroub Children

**Ages as of arrest:** 16

**Place of residence:** Aroub Refugee Camp, Hebron

**Date of arrest:** 30 October 2008

On the 30th October 2008, at 10:15 a.m., the Israeli army stormed the campus of the Palestine Technical College in Aroub Refugee Camp, Hebron, and arrested students from some of the classrooms. The students were blindfolded, shackled and then repeatedly beaten, slapped and punched all over the body. They were then taken to Gush Etzion military detention centre. At 9:00 p.m., two of the boys were released; however, eight of them remained in detention in Ofer Prison. None of the boys were older than 16.



Source: [www.maanimages.com](http://www.maanimages.com)

Hatem is a teacher in the Palestine Technical College. He told Addameer that on the 30th October 2008 at approximately 10:15 a.m. the Israeli Occupation Forces arrived at the college in four military jeeps. Hatem was the only teacher present in the playground area at that time. One of the soldiers shouted at him, “*Where are the boys that threw stones?*” There had been an allegation that stones had been thrown at an Israeli civilian car by a person who came from the Refugee Camp and who had been wearing a black jacket. Hatem told the soldier that the typical school day is from 8:00 a.m. to 2:30 p.m. so all of the children were inside their classes. The soldier then pushed Hatem to the ground and ordered the other soldiers to search the college. Around ten soldiers entered the college. They kicked open the doors and entered one of the classrooms where the children were taking their practical classes. They closed the door, and one of the soldiers started beating a physically disabled student that was sitting in the first row. The soldiers started yelling at the boys and then pushed one of the students, MD. One of the soldiers grabbed MD and shouted, “*You are the boy that threw the stones!*” MD was arrested along with six other boys from that room. The soldiers then entered the other classrooms and began randomly arresting students. They specifically targeted those who were wearing black jackets. The soldiers then took all of the boys to the playground area and prevented the teachers from talking with them.

The soldiers subsequently started to beat one of the students, RB, by slapping his face and kicking him on his head. Hatem tried to help him, but the soldiers threatened to open fire. They then fired stun grenades and live bullets into the playground area. The soldiers continued to beat some of the other detained students. Hatem states that he could hear the students screaming from the beatings, however, he was prevented from doing anything to help them. The director of the college called an ambulance, but it was delayed because the soldiers were blocking the entrance of the Camp. The soldiers then blindfolded and shackled 19 students and forced them to sit at the base of the military tower at the entrance of the Refugee Camp. After fifteen minutes, the soldiers released nine students and took the rest into custody.

**Testimony from RB, one of the 16 year-old students arrested on 30 October 2008, taken by Addameer Attorney Firas Sabbah on 3 November 2008 at Gush Etzion Military Detention Centre:**

*My name is RB. I was born on the 26th of October 1992. I'm a 10th grade student at the Palestine Technical College where I study agriculture. On the 30th October 2008, as usual, I went to school. I was supposed to have an exam that day. At around 10:30 I was terrified when I saw soldiers entering the classroom. They started randomly arresting my classmates. Then the soldier told me to get out of the class. I was taken to the playground area of the school. When the soldier saw me looking at him he grabbed my head and slapped me on the face. He told me to keep my face to the ground. After that he made all of us stand in one row and we were forced to walk one after the other towards the military tower. I lost my place in the row and the soldier hit me on my legs and kicked me. Another soldier beat me until we reached the gate of the Refugee Camp. After that, the soldier laughed in my face and when I looked back he slapped me and beat me so hard on the chest that I felt it was difficult to breathe. I fell to the ground where I continued to be beaten. After about three hours I was blindfolded and shackled and pushed into the military jeep. My blindfold slipped in the process of getting into the jeep so I was beaten again.*

On 6 November 2008, the eight children were brought to Ofer military court. They had been detained for eight days with adults in an adult facility.<sup>131</sup> All eight boys were charged with throwing stones at a moving vehicle, even though the sole evidence against them were the testimonies of three Israeli soldiers.

Addameer Attorney Mahmoud Hassan argued in their defense that detaining these children with adults in an adult facility is a direct violation of international law.<sup>132</sup> Less than two weeks previously, Adv. Hassan had successfully used a similar argument to secure the release of two 14 year-old boys who were arrested from their homes in Beit Ummar on the 9 October 2008. Each boy in that case was released with a bail of 8,000 NIS (Approx \$2,111). According to Addameer's experience, this marked a landmark decision, in that it was the first time that a military judge agreed to release children under the recognition that it is illegal for them to be detained with adults. On this occasion, however, the military judge rejected Adv. Hassan's argument and ordered that the eight boys were to be detained until the end of their trial. Adv. Hassan appealed this decision and called for the boys to be released on bail. The appeal was successful, and all eight were released on bail for the duration of the trial, which is now underway.

While securing the boys' release on bail marks a small victory for them, and for the rule of law in the military courts, it cannot overshadow the ease with which Palestinian children are

<sup>131</sup> According to Israel Military Law, a Palestinian can be detained for up to eight days without the Israeli military informing the detainee of the reason for his/her arrest and without being brought before a judge.

<sup>132</sup> Article 37(c) of the UN Convention on the Rights of the Child stipulates that "Every child deprived of liberty shall be separated from adults, unless it is contrary to the child's best interest to do so."

subjected to ill-treatment and months of detention and stressful trials, often, as is the case here, based on no evidence at all.

On 4 June 2009, the first witnesses were heard in the trial against the eight boys. None of the eight confessed while under interrogation in Ofer, and there is no external evidence in the file against them; there have been no complaints submitted from any of the Israeli civilians in the cars allegedly subjected to stone throwing on 30 October 2008. The prosecution's entire case thus rests on the statements of three Israeli soldiers who claimed to witness the children throwing the stones. However, these statements are tenuous at best, and are replete with alarming inconsistencies. For example, in the statements the soldiers speak only in generalities and they do not identify specific children or on what basis they arrested the eight boys; all they do say is that there was a stone throwing incident and they arrested these children. In addition, the three soldiers all claim in their statements to not have entered the school when carrying out the arrests. However, in their statements to Addameer, the school's teachers and the school manager all said the soldiers entered the school and arrested the eight boys there.

Even more indicative of the capricious nature of the selection and arrest of the eight boys, one of the three soldiers confirmed under cross examination in court on 4 June 2009, "*I don't know how many I arrested, I don't know who was throwing stones, but I'm sure that I arrested the ones who were throwing stones*".

The trial of the eight accused children is currently underway.