



The Illegality of Arresting and Prosecuting Palestinians in Light of the ICJ's Advisory Opinion

The International Court of Justice (ICJ) issued its advisory opinion on the legality of the Israeli occupation in light of the occupying state committing genocide against the Palestinian people, along with the escalation of arrest campaigns throughout all occupied territories and the increase in crimes committed by the occupation and its settlers against Palestinians. Despite the significance of what the ruling stated regarding the illegality of the Israeli occupation, and that the occupying state is under an obligation to end its unlawful occupation of the Palestinian territory as rapidly as possible, the ruling did not directly address the illegality of the arrest of Palestinians by the occupying state or their trial before unlawful courts. In light of this advisory opinion, how are the arrest and trial of Palestinians under Israeli military orders or criminal laws considered illegal?

Since the beginning of the Israeli military occupation of Palestine in 1967, the occupation authorities began issuing military orders that affected all aspects of Palestinian life. They established a military judicial system that served as a tool to dominate and control the Palestinian people, alongside the legislative authority of the military commander who, through military orders, criminalized every guaranteed basic right. The military judicial system constituted a system of apartheid, as it used its powers imposed by the Israeli occupation to suppress and deter the Palestinian people; in order to solidify the dominance imposed since the occupation of the land and the attempts to deprive the Palestinian population of their right to self-determination.

Extension of Israeli law to the oPt

The Israeli military orders under which Palestinians are tried constitute a restriction on all basic rights, collective and individual, of the Palestinian people. Trials before the military judiciary are flawed due to countless violations of all fair trial guarantees under international law.

In the context of occupied territories, and in particular of an ongoing prolonged occupation, make for an unusual situation in relation to military courts. The longer the occupation lasts, not only are more restrictions imposed on the population, but the enforcement of Israeli law in the occupied territory becomes increasingly “normalized”, with Israel continuously imposing its own domestic and civil law through the military court system. Consequently, both the Occupying Power and the international community must give more weight to human rights law, including

political, civil, social, cultural, and economic rights, contradictory to what the Israeli occupation pursues.¹

Over the years, the occupation authorities seek to impose further restrictions on the Palestinian people by amending military orders and issuing new ones that violate Palestinians' rights. This reinforces an apartheid system by subjecting Palestinians to political trials under military laws imposed on them, in direct violation of the Fourth Geneva Convention, which stipulates the necessity that the occupation should maintain local laws and to try the occupied people according to their laws.

Since the occupation of the Palestinian land, Israel, in its capacity as the occupying power, has issued almost 2,000 military orders governing all aspects of Palestinian political, civil, economic, cultural, and social life. Through these military orders, the occupying state has criminalized activities that are considered fundamental human rights and form the cornerstones of democracy, such as freedom of expression and opinion, political participation, and the formation of political parties.²

Regarding the Israeli laws and military orders imposed on the Palestinians, which affect various aspects of Palestinian life, the ICJ's advisory opinion confirmed that, according to Article (43) of the Hague Convention, the occupying power must respect the laws that were in force in the occupied territory prior to the occupation. The law of occupation should not strip local civil institutions in the occupied territories of their regulatory authority, and any regulatory authority exercised by the occupying power should only be in exceptional cases and on specific grounds.

The ICJ added that the occupation authorities expanded the scope of their legal regulation in the West Bank and have to a large degree substituted the local law that was in force in the Palestinian territory prior to the occupation in 1967. The ICJ stressed that it was not convinced that the extension of Israeli law to the West Bank and East Jerusalem is not justified under any grounds while confirming that the Israeli occupation state has exercised its regulatory authority as an occupying power in violation of Article (43) of the Hague Convention³, and Article (64) of the Fourth Geneva Convention.⁴

¹ Smadar Ben-Natan, "The Application of Israeli Law in Military Courts in the Occupied Palestinian Territory," *Israeli Issues Journal*, No. 59 (2015), 46.

² Sahar Francis, "Israel's Military Justice System as an Annexationist Tool," *Prolonged Occupation and International Law Israel and Palestine*, ed. Nada Kiswanson and Susan Power (LEIDEN | BOSTON: Brill | Nijhoff, 2023), 159.

³ Article 43 of the Hague Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: "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."

⁴ Article 64 of the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War: "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. Subject to the latter consideration and to the necessity for ensuring the effective administration of justice, the tribunals of the occupied territory shall continue to function in respect of all offences covered by the said laws. 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,

Discriminatory legislation and measures

In the context of the apartheid system imposed on Palestinians, the geographic jurisdiction of military courts extends to both the occupied territory and beyond, without specifying the identity of the offender. However, in reality, Israeli settlers are not tried before military courts when they commit violations in the occupied territories⁵, instead, only Palestinians are prosecuted in these courts for the same offenses committed by settlers, further entrenching the apartheid system within the military judicial system.

From a legal standpoint, Israeli settlers are subject to legislation and military orders, but they are also subject to Israeli law and a separate trial policy. Israelis who commit offenses in the West Bank, including settlers, are tried under Israeli law in courts located within the occupying state, while Palestinians are tried under military law in military courts. Even when Israeli settlers kill Palestinians in the occupied territory, they are not tried before military courts.⁶ In an explicit rejection of the principle of territoriality in the application of criminal law, and within the policy of dual justice, the Knesset passed legislation that "Israeli courts have jurisdiction to try, according to Israeli law, any person who is present in Israel and who committed an act in the PA, if those acts would have constituted an offense had they occurred in the territory under the jurisdiction of Israeli courts, and that this regulation does not apply to residents of the region or the PA, who are not Israelis."⁷ This dual justice policy establishes a framework of legal and judicial discrimination based on nationality, whereby military courts apply military law to Palestinians, while Israeli civil courts apply local law to Israelis and settlers, regardless of whether the violations were committed in the occupied territories.⁸

In this context, the Court indicated that there is a broad array of legislation adopted and measures taken by Israel in its capacity as an occupying power subject Palestinians to discrimination and that such as systemic discrimination in treatment cannot be justified, as it is based on race or religion in violation of Articles 2(1) and 26 of the International Covenant on Civil and Political Rights, Article 2(2) of the International Covenant on Economic, Social and Cultural Rights, and Article 2 of the International Convention on the Elimination of All Forms of Racial Discrimination.

The Court also considered that Israel's legislation and measures serve to maintain a near-complete separation in the West Bank and East Jerusalem between the settler and Palestinian

of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them."

⁵ One case was brought before the Erez Military Court against an Israeli accused of transporting Palestinian workers without a permit into the 1948 occupied territory.

⁶ Sahar Francis, "Israel's Military Justice ", 164.

⁷ Article 2(a) of the Emergency Regulations (legal assistance) 2007.

Luigi Daniele, "Enforcing Illegality: Israel's Military Justice in the West Bank," *Questions of International Law* 44 (2017): 29.

⁸ *Ibid.*

communities, and therefore constitute a breach of Article 3 of the International Convention on the Elimination of All Forms of Racial Discrimination.⁹

In the same context, Francesca Albanese, the Special Rapporteur on the situation of human rights in the oPt, had confirmed in her report on arbitrary deprivation of liberty in the oPt that the exclusive jurisdiction of military courts over Palestinians, who are arrested under military orders that solely apply to them and take precedence over Israeli civil law and international law, solidifies the discriminatory legal dualism inherent in apartheid.¹⁰

The Right to Self-Determination

The Israeli occupation authorities utilize arrest and detention as a tool to violate the Palestinians' right to self-determination. Since 1967, and according to documentation collected by Palestinian prisoners' organizations, the Israeli occupation forces have arrested more than one million Palestinians, mostly on the pretext of exercising their basic rights, most notably the right to self-determination and liberation from the occupation. According to Israeli military orders, all Palestinian political organizations are unlawful and banned, and affiliation with any of these organizations is a crime punishable by imprisonment for months and years. The occupation authorities continue to arrest Palestinians and throw them into their prisons on the pretext of joining Palestinian political parties, exercising their right to opinion and expression, participating in union and student work, and resisting the occupation within the framework of their right to self-determination guaranteed by international agreements and treaties.

Thus, the ICJ's advisory opinion found that the unlawful policies and practices of the Israeli occupation aggravated its violation of the Palestinian people's right to self-determination and that as a result of these policies and practices that have extended for decades, the Palestinian people have been deprived of their right to self-determination for a long time. The continuation of these policies and practices undermines the exercise of this right in the future. Therefore, the Court considered that these illegal policies and practices constitute a breach of the occupying state's obligation to respect the Palestinian people's right to self-determination and that this right cannot be subject to circumstances on the part of the occupying power, given its inalienable nature. The Court indicated that the occupying state's violation of this right directly affects the legitimacy of Israel's presence as an occupying power in the oPt.

The ICJ considered that Israel's continued presence in the oPt is unlawful, that its presence constitutes an unlawful act of a continuing nature that entails international responsibility, and that the occupying state of Israel must undertake to repeal all legislation and measures that create or maintain the illegal situation, including those that discriminate against the Palestinian people in the oPt.

⁹ Article 3 of CERD: "States Parties particularly condemn racial segregation and apartheid and undertake to prevent, prohibit, and eradicate all practices of this nature in territories under their jurisdiction."

¹⁰ "Arbitrary deprivation of liberty in the occupied Palestinian territory: the Palestinian experience behind and beyond bars," Report of the Special Rapporteur on the situation of human rights in the occupied Palestinian territory, Francesca Albanese. <https://documents.un.org/doc/undoc/gen/g23/116/61/pdf/g2311661.pdf>

Accordingly, the legal obligation is on Israel to bring an end to its presence in the oPt as rapidly as possible, as well as the obligation to provide full reparation for the damage caused by its internationally wrongful acts. The Court stressed that Israel must remain obligated to comply with its duty to respect the right of the Palestinian people to self-determination and its obligations under international humanitarian law and international human rights law.

At the tenth emergency special session of the United Nations General Assembly on Palestine, the General Assembly adopted a resolution by a majority of 124 members, calling on Israel to end its illegal presence in the oPt within 12 months. The resolution also included that Israel in its capacity as an occupying power should comply without delay with its obligations under international law as stipulated in the ICJ's advisory opinion, including not impeding the Palestinian people from exercising their right to self-determination, mainly their right to an independent and sovereign State over the entirety of the occupied Palestinian territory.¹¹

The illegality of arresting and prosecuting Palestinians

The advisory opinion rendered by the International Court of Justice and the resolution of the United Nations General Assembly confirmed that Israel as an occupying power violates the law by imposing Israeli laws and military orders, implementing an overall discrimination policy against Palestinians through laws, regulations, and policies, and breaching the Palestinian people's right to self-determination. Therefore, the occupation's practice of arresting Palestinians as a tool to prevent them from exercising the right to self-determination is unlawful, and their trial before military courts over many years is also unlawful. Through the arrest of various groups of the Palestinian people, the occupation authorities seek to prevent them from exercising their basic rights, most notably their right to self-determination, and bring an end to the occupation.

Consequently, the occupying state is obligated to fully cease all its arrest campaigns against the Palestinians in the oPt, dismantle its military judicial system imposed on Palestinians, and end its prosecution of Palestinians before military courts under unlawful military orders.

For 30 years, Addameer has emphasized the illegitimacy of military courts in trying Palestinians, highlighted the arbitrary policy of the occupation in detaining Palestinians as an unlawful occupation, and called on international bodies to recognize the illegality of the occupation and its tools, most notably the arrest of Palestinians for exercising their right to self-determination.

In the same context, Michael Lynk, the former Special Rapporteur on the situation of human rights in the oPt, stressed in his 2021 report that Israel must fully comply with its obligations under international law and bring an end to its occupation of the occupied Palestinian territory

¹¹ United Nations, General Assembly adopts resolution demanding an end to the Israeli occupation of Palestine, 18 September 2024.

<https://news.un.org/ar/story/2024/09/1134616>

while urging the international community to pressure the occupation state to fully end its occupation of the oPt.¹²

Francesca Albanese, the current Special Rapporteur on the situation of human rights in the oPt, has pointed out that that 'the widespread and systematic arbitrariness of the occupation's carceral regime is yet another manifestation of Israel's inherently illegal occupation, and that third States have a duty not to contribute or condone Israel's settler-colonial apartheid, which criminalizes Palestinians for reclaiming or refusing to forsake their collective right to exist as a people, and act to realize all conditions that would allow the Palestinian people to realize their rights, including their inalienable right to self-determination.'¹³

In her recommendations, Ms. Albanese added that Israel's system of arbitrarily depriving Palestinians of their liberty in the occupied Palestinian territory, emanating from an irredeemably unlawful occupation, be abolished tout court, because of its inherent incompatibility with international law. She also stressed that the State of Israel, as a first step towards long-term remedies for decades of arbitrary deprivation of liberty of the Palestinian people, must release all Palestinian detainees, especially children, detained for acts devoid of offensiveness under international law. According to Ms. Albanese, third States should not recognize as lawful, aid or assist Israel's occupation given its commission of internationally wrongful acts.¹⁴

As for the competent authorities at the local and international levels, they must acknowledge the illegality of arresting Palestinians in the oPt and trying them before military courts under military orders and discriminatory laws, according to the following:

- **States:** States are responsible for respecting and implementing the ICJ's advisory opinion after it was adopted by a majority by the United Nations General Assembly. This was confirmed by the Court in its ruling. The Court concluded that all States are under an obligation not to recognize as legal the situation arising from Israel's unlawful presence in the oPt and not to render aid or assistance in maintaining the situation created by Israel's continued presence in the oPt. Furthermore, the Court stressed that it is the responsibility of all States to bring an end to any obstacle arising from Israel's unlawful presence in the oPt to the exercise of the Palestinian people's right to self-determination. In addition, all States Parties to the Fourth Geneva Convention are under an obligation to ensure Israel's compliance with international humanitarian law, as stipulated in that Convention.

Among the States' obligations in this regard are recognizing the illegality of the arrest and trial of Palestinians, while demanding the occupying State dismantle its military judicial system, suspend all military orders imposed against the Palestinian people for years, treat

¹² Situation of human rights in the Palestinian territory occupied since 1967, Report of the Special Rapporteur on the situation of human rights in the occupied Palestinian territory, Michael Lynk, 2021
<https://documents.un.org/doc/undoc/gen/n21/299/63/pdf/n2129963.pdf>

¹³ "Arbitrary deprivation of liberty in the occupied Palestinian territory, *ibid.*

¹⁴ *Ibid.*

Palestinian detainees and prisoners as arbitrarily and illegally detained, and immediately release all Palestinian male and female prisoners.

- **The United Nations and international organizations:** The advisory opinion of the International Court of Justice affirmed that international organizations and the United Nations should not recognize the situation resulting from Israel's illegal presence in the occupied Palestinian territories. In this context, international organizations and the United Nations, particularly the Working Group on Arbitrary Detention and the Special Rapporteur on the Independence of Judges and Lawyers, must treat Palestinian prisoners and detainees as arbitrarily detained and unlawfully held. They should demand their release from the illegal occupation prisons and pressure the occupying state to dismantle the illegitimate military judicial system.

The Palestinian people of all forms and lawyers defending prisoners and detainees:

In light of the important advisory opinion of the International Court of Justice and the adoption of a General Assembly resolution declaring the Israeli occupation illegal with the majority of countries voting in favor, it is essential for the Palestinian people in all their forms, as well as for the prisoners and detainees, institutions working in the field of prisoners' rights, and lawyers defending them, to open a broad Palestinian discussion on the necessary mechanisms for dealing with the occupying courts as illegal tribunals. This includes exploring the possibility of ceasing to appear before these courts in order to avoid legitimizing them, ultimately aiming for the complete dismantling of the military judicial system.