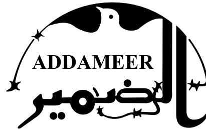
Defending Palestinian Prisoners

A report on the status of defense lawyers in Israeli military courts

Addameer Prisoner Support & Human Rights Association



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Lawyers who represent Palestinians in Israeli military and civil courts face obstacles that systematically erode the right of Palestinian detainees to legal representation. Defense attorneys must contend with military orders, Israeli laws and prison procedures that curtail their ability to provide adequate counsel to their clients. This report describes how, from the moment of detention through the process of appeal, lawyers are prevented from giving adequate counsel to Palestinian defendants.

The right to prompt legal assistance upon arrest and detention is well established internationally.[1] Included in this right are a series of guarantees that protect prisoners. Any person who has been arrested or detained should be allowed access, without delay, to competent counsel.[2] If a prisoner cannot afford to pay for legal representation, he is entitled to be assigned competent counsel.[3] Meetings between lawyers and their clients should be confidential, meaning that they may take place within sight but not within hearing of a guard and without interception or censorship of written or oral communications.[4]

This report is based on interviews with fourteen lawyers who represent Palestinians (five Palestinians with West Bank residency, one Palestinian with Gaza residency, five Israelis and three Palestinians with Israeli citizenship). The lawyers are all defense attorneys. Some are in private practice and some work at Israeli, Palestinian or international NGOs. The interviews were conducted from May-July 2006 in the Occupied Palestinian Territory (OPT) and Israel. This report also includes information from an interview on the Ofer military base with Col. Shaul Gordon, president of the military court of appeals.

By Nancy Glass and Reem Salahi

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1 International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 14(3)(d), U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force March. 23, 1976.

2 Access to a lawyer must be granted no later than 48 hours from the time of arrest or detention. United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Basic Principles on the Role of Lawyers, Sept. 7, 1990, ¶ 7.

3 "Any such persons [arrested, detained or charged] who do not have a lawyer shall, in all cases in which the interests of justice so require, be entitled to have a lawyer of experience and competence commensurate with the nature of the offence assigned to them in order to provide effective legal assistance, without payment by them if they lack sufficient means to pay for such services." Id. ¶ 6.

4 "All arrested, detained or imprisoned persons shall be provided with adequate opportunities, time and facilities to be visited by and to communicate and consult with a lawyer, without delay, interception or censorship and in full confidentiality. Such consultations may be within sight, but not within the hearing, of law enforcement officials." Id. ¶ 8. For a more complete description of the international legal norms guaranteeing right to counsel, see Amnesty International, Fair Trials Manual, available at http://www.amnesty.org/ailib/intcam/fairtrial/fairtria.htm.

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A. Summary

Background

- There are currently approximately 9500 Palestinians held in Israeli prisons.
- At least 786 of the prisoners are administrative detainees, imprisoned without charge or trial.
- Administrative detainees are held on secret evidence, do not have a right to a trial and can be held for six-month periods that can be renewed indefinitely.
- Palestinians detained by the Israeli military can be barred access to a lawyer for 90 days and held without being charged for 188 days.

Prison visits

- In violation of international law, Palestinian political prisoners are transported to Israel from the West Bank.
- Lawyers from the West Bank and Gaza cannot visit their clients in Israeli prisons and interrogation centers because they cannot enter Israel without permission from the Israeli military.
- In violation of Israeli prison ordinances, prisons are open to lawyer visits only a few days each week.
- During prison visits, lawyers must interview their clients through a glass or plastic divider, often within earshot of a prison guard.
- Lawyers must give confidential documents to prison guards if they wish their clients to sign them.

Representation

- Lawyers from the West Bank and Gaza can neither represent clients in Israeli civil courts nor appeal military court decisions to the Israeli High Court.
- Lawyers with Israeli citizenship who are licensed by the Israeli Bar Association cannot open offices in the West Bank and Gaza or travel legally to most cities in the Occupied Palestinian Territory.
- Because it is so difficult for lawyers to visit prisons, the majority of client interviews are conducted at the military courts in the minutes before a prisoner's hearing begins.

Military courts

- Lawyers must arrive at the military courts at 9:30 am and may wait for hours for their sessions to begin, as military court proceedings are unscheduled.
- All court proceedings are conducted in Hebrew; all court documents and military orders are provided in Hebrew without translation.
- Most military court prosecutors have no experience in a civil court system.
- The military is not required to publish the decisions of military judges. In administrative detention hearings, military judges are not required to justify their decisions beyond stating that their approval of a detention order was based on "secret evidence."

"Security" law

- Under current military orders in the Occupied Palestinian Territory, the following activities are defined as threats to the security of Israel: putting up political posters, writing political slogans, participating in demonstrations, and belonging to any political party, amongst many others.

B. Introduction

1. An incarcerated population

More than 650,000 Palestinians have been detained by Israel since 1967.[5] As of 1 December 2007, there were approximately 10,000 Palestinians held in Israeli prisons and detention centers. At least 857 of these political prisoners are administrative detainees and have not been charged or tried. There are 335 child political prisoners aged 18 and younger, and 89 of the prisoners are female.[6]

During periods of increased political tension, the Israeli military is able to detain large numbers of Palestinians because the regulations that govern Israeli military tribunals provide little procedural protection to detainees. Between March and October 2002, for example, Israeli soldiers arrested more than 15,000 Palestinians during mass arrest campaigns around the West Bank. In October 2002, during a period of heightened political tension and violence, more than 1,050 Palestinians were held in administrative detention.[7]

The procedural flexibility of the military courts allows the military prosecutor to process a high volume of cases with relatively few resources. In 2005, according to statistics provided by the Israeli military, the two military courts closed 9,986 cases.[8] Ninety-eight percent of the cases were settled with plea bargains.[9] Of the 167 defendants who went to trial, fifteen were acquitted of all charges.[10] In the same year, the military courts conducted 11,746 hearings to extend the detention of prisoners and levied 14,373,700 NIS (US $3.3 million) in fines against Palestinian political prisoners.

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[5] Addameer, Political Detention, available at http://www.addameer.org/detention/background.html/.

[6] Addameer, Annual Statistics (July 2006) (unpublished report, on file with Addameer, Ramallah).

[7] Addameer, Annual Report 32 (2001-02).

[8] IDF Military Courts Unit, Annual Report (unpublished report, provided to author by IDF Spokespersons Unit). Cases are "closed" when the defendant is convicted, acquitted or reaches a plea bargain with the prosecutor.

[9] Out of 9,986 cases, 3,851 were classified as "serious," i.e. pertaining to "security" crimes. Of the 3,851 defendants charged with "serious" crimes, 3,693 agreed to plea bargains with the prosecution. Of the 6,126 defendants charged with other crimes, 6,126 made plea bargains. Id.

[10] This figure does not include the many defendants who had some charges against them dropped as a result of a plea bargain. In addition to those defendants who were acquitted, all charges against 21 other defendants were dropped after they pled not guilty.

2. Citizenship and Residency

Palestinians from the Occupied Palestinian Territory (OPT) have no formal citizenship. West Bank and Gaza residency cards give Palestinians the right to reside in particular cities or towns in the West Bank or Gaza. Palestinians with Jerusalem IDs have residency cards that grant them the right to live in Occupied East Jerusalem. Palestinians with Israeli citizenship live within Israel and are treated separately from Palestinians living in the OPT.

3. Types of Courts

One of three types of courts may have jurisdiction over Palestinians:

a. Palestinian civil courts

Palestinians with West Bank or Gaza residency who are accused of violating Palestinian law are tried in the courts of the Palestinian Authority. The experiences of lawyers in these courts are not covered by this report.

b. Israeli military courts

Since 1967, Palestinians with West Bank and Gaza residency who are accused of threatening the security of Israel are tried in military tribunals established by the Israeli military.[11] Under Israeli military orders in effect in the West Bank, activities such as attending a demonstration or putting up a political poster are defined as threatening the security of Israel.[12] The two military courts, Ofer and Salem, are located on Israeli military bases in the OPT.[13]

[11] This system changed for Palestinians with Gaza residency after the Israeli withdrawal from Gaza in 2005. See Section C(4) for further information on Gaza.

[12] See Section C(6)(a) for a further description of activities that are criminalized under Israeli military law.

[13] Until the Israeli withdrawal from Gaza in August 2005, Palestinians with Gaza residency were tried in the military court of Erez.

c. Israeli civil courts

Israeli civil courts have jurisdiction over Palestinians who are Israeli citizens.[14] The jurisdiction of the Israeli civil courts also extends to Palestinians with West Bank residency who are accused of any criminal offense, including conducting activities within Israel that constitute a security threat. Since the Israeli military withdrew from Gaza in August 2005 and Erez military court was closed, Palestinians with Gaza residency who are accused of threatening the security of Israel have also been tried in Israeli civil courts. The Israeli parliament, the Knesset, has passed a set of laws that diminish due process protection under Israeli civil law afforded to defendants accused of being security threats.[15]

4. Administrative detention

Administrative detention is a procedure that allows the 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.[16] According to military orders in the West Bank and Israeli law, the Military Commander of the West Bank can order that a prisoner be held for up to six months without being charged. The detention order can be renewed indefinitely, so long as the military court holds periodic hearings to extend the detention order. The judge, prosecution, and Israeli Security Agency (ISA) have access to the charges and evidence. The military prosecutor has discretion to withhold this information from the detainee and his/her lawyer.

It is possible for administrative detention to be combined with regular proceedings in the military courts. For example, a prisoner may be placed in administrative detention for several months, and then charged with an offence by the military tribunal. The prisoner will then stand trial while the detention order against them remains in effect. Alternatively,

[14] See Section C(11)(c) for an exception.

[15] See Section C(11)(b) for more on Israeli laws pertaining to defendants accused of threatening security.

[16] 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. In the military courts, Military Order 1226 (1988) provides for administrative detentions.

a prisoner could be tried and convicted by a military tribunal, complete his/her sentence, and then be placed under administrative detention.

5. Types of Lawyers

A lawyer's citizenship or residency status dictates their ability to represent Palestinian clients.

a. Palestinian lawyers with West Bank residency

Palestinians with West Bank residency are limited to working in the military courts because they cannot represent clients in Israeli civil courts or in the Israeli High Court. They are allowed to work in the military courts of Ofer and Salem, but travel restrictions still make their work difficult because they cannot enter Israel to visit their clients in prisons and interrogation centers. Theoretically, they could apply for travel permits to enter Israel for client visits, but no special allowance is made for lawyers in the permit application process and they are routinely denied access. Faris Abu al-Hasan, a lawyer with West Bank residency, reported that he has applied repeatedly for travel permits to visit clients in Israel but was always turned down for "security reasons." It is the norm for West Bank lawyers to meet their clients for the first time at Ofer or Salem military courts on the day of their court hearing and interview them in the few minutes before their session begins.[17]

Within the West Bank, the travel restrictions that make movement difficult for all Palestinians pose special obstacles for lawyers. Abu al-Hasan lives in Nablus and represents clients in Salem and Ofer. He has to pass through three to five checkpoints on the way to Ofer and one to three checkpoints on the way to Salem. The drive from Nablus to Ofer should take under an hour, but because of the delays at checkpoints, he has to leave his home at 7:00 am to be at the court by 9:30 am. Additionally, the Israeli military periodically closes the roads around Nablus. When this happens, Abu al-Hasan has to walk distances of up to five kilometers on back roads in order to get out of the city and make his appointments at court. On one occasion, he avoided a checkpoint by hiring a donkey to carry him and his files over the hills.

[17] Interviews with lawyers Khalid al-Araj & Mahmoud Rashid al-Halabi in Jerusalem and Nablus (June 2006).

b. Palestinian lawyers with Gaza residency

Although in theory Palestinians with Gaza residency can represent clients in the military courts, in practice it is not possible for them to do so because they must apply to the Israeli authorities for permission to travel to the military courts. Given the current travel restrictions for Palestinians in Gaza, permission is almost certain to be denied.

c. Palestinian lawyers with Jerusalem IDs

Lawyers with Jerusalem IDs may take the same test administered by the Israeli Bar Association for foreign-trained lawyers in order to be licensed to represent clients in the Israeli civil courts.

If a lawyer with a Jerusalem ID is licensed only by the Palestinian Bar, they must apply each year for permission from the Israeli Department of Justice to represent clients in the military courts and to visit interrogation centers and prisons inside Israel. Lawyers who have the Department of Justice certification may then apply to the prison authority for permission to make individual visits to clients in prisons and interrogation centers.

d. Palestinian lawyers with Israeli Citizenship and Jewish Israelis

Lawyers licensed by the Israeli Bar Association may represent clients in the Israeli civil courts, including the Israeli High Court, and may apply for permission to visit Israeli prisons and interrogation centers. In addition to working in the Israeli civil courts, lawyers with Israeli citizenship can also represent clients in the military courts.

Lawyers with Israeli citizenship cannot, however, enter Gaza or regions classified “Area A” in the West Bank. These regions include most Palestinian cities, so Israeli citizens cannot enter much of the West Bank to interview clients, their families and witnesses. Additionally, the Israeli Bar Association prevents Israeli citizens from having offices in the West Bank. For the time being, it is possible for lawyers to enter some cities despite the military orders but it will become practically impossible for them to do so when the separation barrier is completed.

Travel restrictions between Israel and the OPT have curtailed cooperation between Palestinians and Jewish Israelis. Tamar Peleg, a Jewish Israeli based in Tel Aviv, said that when she was able to travel to Gaza, she worked jointly with Palestinian lawyers on issues such as allegations of torture in the Gaza prisons. She said that, as a result, she was able to accomplish more than she could have working alone.

C. Obstacles to Legal Defense

1. Procedures following arrest

In contravention of Article 49 of the Fourth Geneva Convention, prohibiting the transfer of prisoners from occupied territories, the Israeli military moves Palestinian prisoners from the West Bank to facilities inside Israel.[18] Palestinians from the West Bank may be moved between any of three types of facilities:

a. Detention centers

Detention centers are located inside the West Bank, either on Israeli military bases or on illegal Israeli settlements.[19] There are five formal detention centers: Betounia / Ofer[20] (located on the Ofer military base near Ramallah), Salem / Shemron (located on a military base), Huwarra (located on a military base), Qadomim / Kedumim (located close to a settlement near Nablus) and 'Asyoon / Etzion (located on a military base / police station near Bethlehem). In addition to these five detention centers, the Israeli military has transformed civil buildings such as schools and government offices into holding facilities when it makes mass arrests.

b. Interrogation centers

Whereas detention centers are located in the West Bank, Palestinian detainees are interrogated at centers inside Israel. The ISA interrogate Palestinian prisoners in four official interrogation centers:

'Askalan / Shikma (in Southern Israel, near the Gaza Strip), al-Mlabbes / Petakh Tikva (in Northern Israel), al-Masqubiyya / Russian Compound

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[18] Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (entered into force Oct. 21, 1950).

[19] Article 49 of the Fourth Geneva Convention also prohibits the Occupying Power from transferring parts of its own population into the territory it occupies. However, in contravention of Article 49, Israel has established Israeli settlements throughout the Occupied Palestinian Territory, transferring over 450,000 Israeli settlers into the OPT throughout its decades long occupation.

[20] Names of places included in this report are transliterations of the Arabic and Hebrew names for these locations.

(in Jerusalem)[21] and al-Jalameh / Kishon (in northern Israel). The Israeli High Court also confirmed in 2002 that there is a secret detention and interrogation facility in an unknown location. It is known only by its military code name "Facility 1391."[22]

c. Prisons

Like the four interrogation centers, all Israeli prisons are located inside Israel. Prisoners may be transferred to any one of about twenty prisons, which are located around the country, and administered by the Israel Prison Authority (IPA). Within Israeli prison compounds, prisoners sentenced for criminal offenses are kept in separate areas from those political prisoners and detainees who are accused by Israel of posing security threats or who have already been convicted on security charges.

d. Procedure

After an initial period of detainment, detainees from the West Bank are usually moved to interrogation centers inside Israel, where lawyers with West Bank residency are effectively barred from visiting them. These detainees can be held without judicial order for eight days; detentions can be extended for up to 188 days.[23] Detainees may be barred access to a lawyer for up to 90 days. It is the norm for prisoners to be denied access to telephones throughout their interrogation and subsequent detention.

After being interrogated, a detainee may be released, formally charged, or placed under administrative detention. If charged, the detainee is transferred to an Israeli prison to await trial (it is rare for Palestinian detainees to be released on bail). If placed under administrative detention, the detainee is transferred to an Israeli prison/prison camp for

[21] Al Musqubiyya / Russian Compound was transferred to the authority of the Israeli Prison Service.

[22] HaMoked, Annual Report 44 (2004).

[23] According to Israeli Military Order 378, art. 78, a military judge may order that a detention be extended for up to 30 days after the initial eight days. Judicial detention orders may be renewed for up to 90 days (not including the initial eight days). The detention may then again be extended for up to 90 more days if the military prosecutor obtains a request from the Chief Area Legal Advisor and an order from a military appeals court judge.

the period of his/her detention order, which can be indefinitely extended as there is no limit to the number of times an administrative detention order may be renewed.

2. Obstacles during client visits

Lawyers wishing to visit their clients face a myriad of obstacles, described below. The restrictions are so onerous that most lawyers said that they have given up on prison visits and simply interview their clients at court in the five or ten minutes before the hearing begins.

a. Finding the prisoner

"I feel like they're using these procedures to pressure lawyers like me to quit."

Khaled Quzmar

The lawyer's first task is to determine where his/her client has been taken. According to Israeli military orders, the military authorities have a duty to inform families where the detainee is being held without delay and when he/she is moved to a different facility.[24] However, in practice, lawyers reported that the military rarely follows this procedure. Alternately, the military should provide lawyers with access to information on prisoners and detainees in a central database, but this information is sometimes inaccurate. As a last resort, lawyers can threaten to bring a habeas corpus petition to force the authorities to reveal the whereabouts of the prisoner.

b. Barring access to lawyers

"I can't see how it protects the interrogation – it's just because they want to put pressure on the Palestinian detainees."

Sahar Francis

[24] Israeli Military Order 378, Article 78a (b).

Under Israeli civil law and military orders, a detainee accused of being a security threat can be prevented from consulting an attorney. In the military courts, a detainee can be held for fifteen days without access to a lawyer. The initial fifteen days can be extended up to 90 days.[25] By comparison, in the Israeli civil courts, a detainee can be prevented from consulting an attorney up to 21 days.[26]

Theoretically, an order barring access to a lawyer could be applied to a Jewish Israeli prisoner in the civil courts, but according to lawyers who represent both Palestinians and Jewish Israeli defendants, this measure is applied primarily to Palestinians with Israeli citizenship. Gaby Lasky reported, "It's possible to obtain an order to bar access for Israelis, but its use is minimal compared to that against Palestinian detainees, where it is used greatly."

In order to challenge an order barring access to an attorney, the lawyer must appeal directly to the Israeli High Court. 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 with Israeli citizenship or to Israeli non-governmental organizations.

c. Permission to enter the prison

If there is no order barring a detainee from meeting his/her lawyer, and if the lawyer is allowed to enter Israel, he/she may apply to the prison authorities in advance for permission to visit the prison. Timing the visits is difficult because lawyers are 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.[27] Lawyers may not visit on days the prison is closed for visits

[25] First, the interrogator may request an order to bar access for fifteen days. Second, the ISA official responsible for the interrogation center may order that the order to bar access be extended for an additional fifteen days. Third, a military judge has the authority to extend the order for 30 more days. Finally, the legal advisor to the military appeals court may renew the order for another 30 days.

[26] The ISA 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.

[27] 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 am until

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. The prison facilities all follow different schedules, so lawyers have to become familiar with the idiosyncrasies of each prison.

According to Israeli prison regulations, a lawyer who needs to meet urgently with his client can demand access to the prison even on a day when visits are not usually allowed. Israeli Jewish lawyers reported more success with being granted access under special circumstances.

d. Power of attorney paperwork

In addition to submitting his/her application to enter the prison, the lawyer must fax to the prison authority proof of power of attorney from the prisoner's family. Legally, there is no reason that a lawyer should have to present the power of attorney before meeting with his/her client for the first time, but prison authorities have imposed this requirement on lawyers anyway.[28] Procuring the power of attorney paperwork can present the lawyer with additional logistical problems if the family lives in a rural area in the OPT and does not have access to a fax machine or other means to provide a power of attorney.

e. Interviewing the prisoner

Once the lawyer has been granted permission to enter the prison, he/she faces additional difficulties in interviewing his/her client.

The prison authority moves prisoners between facilities without informing lawyers. The lawyer can usually find out whether a prisoner is still at a facility by calling the prison authority the day of the visit, but this places the onus on lawyers to constantly track the whereabouts of their clients. The lawyer may also arrive at the prison only to discover that his/her visit is blocked by an order barring the client from meeting with an attorney. Lawyers are not informed in advance when such an order has

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4:45 pm, 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.

[28] Interview with Eliahu Abram, Legal Director, Public Committee Against Torture in Israel, in Jerusalem (July 2006).

been imposed. 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. Prison regulations require that those prisoners classified as security threats be brought out of their cells only one at a time.[29] Even if the prison has several interview rooms available for lawyers to use, the lawyers have to wait as each lawyer interviews his/her client in turn. Lawyers reported feeling pressured to rush their interviews with their clients so as not to keep their colleagues waiting.

'Security' prisoners are 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. It also compromises the confidentiality of their discussion because prison guards posted in the same room can hear the conversation. Some lawyers reported that the guards will move out of earshot when asked to do so, but they do not do this consistently. Palestinian lawyers reported that soldiers are unlikely to comply when asked to move away.

Another problem caused by the barrier in the interview room is that lawyers have to depend on prison guards to deliver documents to the prisoner, again violating attorney / client privilege. Eliahu Abram, Legal Director of the Public Committee Against Torture in Israel (PCATI), recalled an incident when a PCATI lawyer who wanted her client to sign an affidavit alleging torture was forced to give the document to a prison guard. The lawyer unsuccessfully challenged the guard's authority to take the document—an exchange that Abram said took away the client's confidence in the lawyer's ability to help him.

f. The results

"These tactics are a way of making the lawyer think a thousand times before deciding to visit the prison."

Khaled Quzmar

[29] At some facilities, more than one prisoner may be brought out at a time but when this is the case, lawyers have to conduct the interviews in the same room, making it impossible for them to have a confidential conversation.

Because West Bank lawyers are effectively barred from entering Israel to visit clients in prisons and interrogation centers, they sometimes partner with lawyers who have Israeli citizenship so that the lawyer inside Israel can conduct client interviews and pass along information. The problem with this arrangement is that the lawyer who is representing the client in court is unable to complete a full interview in person and ask follow-up questions. "The lawyer who can visit asks ten questions, but that just opens up more questions [for the lawyer who actually represents the client] and there's no way to get them answered," said Khaled Quzmar, head of the legal unit of Defence for Children International—Palestine Section.

3. Obstacles in military courts

a. Scheduling

"The system was created to prevent lawyers from making beneficial use of their time."

Faris Abu al-Hasan

Scheduling is a perennial problem for lawyers in the military courts. Lawyers must report to Salem or Ofer by 9:30 am, but there is no set schedule for hearings. As a result, lawyers are frequently forced to spend an entire day waiting for their clients' sessions. A fifteen-minute hearing can cost a lawyer an entire day of waiting. Lawyers reported occasionally being kept waiting until 7 pm for their sessions to begin.

Lawyers are forced to wait for hours for their sessions but are penalized if they arrive late to the military court. Faris Abu al-Hasan reported that on occasions when he has been delayed at checkpoints on his way to court, the military court judges have begun proceedings without him and sometimes even sentenced his clients in his absence. Lawyers also risk being fined by the court if they are delayed.

Lawyers theoretically have the right to file a complaint and be reimbursed for hours wasted at the court, but this system is complied with irregularly. Khaled Quzmar, a Palestinian with West Bank residency, reported filing a

request for 5000 NIS (US $1,140) for a day when he arrived at 9:30 am for a hearing that did not begin until 5:30 pm. He was awarded only 500 NIS (US $114), but said that the paperwork to claim this small amount was so onerous that it was not worth his while to be reimbursed. Yael Berda, a Jewish Israeli lawyer, reported being reimbursed 2500 NIS (US $570) for a day she wasted when the military failed to produce two of her clients, but Berda doubted that she would have been compensated had she been Palestinian. "No Palestinian lawyer has gotten that sum," she said.

In general, lawyers reported that scheduling in the military courts depends on their relations with the court officials. "If you're on bad terms with the translator or the judge, you will sit there from 8:00 in the morning until 4:00 in the afternoon and be so tired that you won't remember your name," said Berda.

b. Entering the court

"We are treated like prisoners."

Nasir Sawkat al-Nubani

In addition to the inconvenience of waiting for hours for their court appointments to begin, lawyers listed several other logistical inconveniences at the military courts that make it difficult for them to do their jobs. The road that lawyers have to use to get to their parking area is unpaved, so they have to drive through dust and dirt to get to the court. Lawyers with West Bank residency are not allowed to drive to the military courts. Khaled Quzmar said that every few months he applies for permission to drive his car to Ofer, but is repeatedly turned down on the grounds that he poses a security threat.

When lawyers arrive at the facility, they have to wait for soldiers to unlock the gates for them. The time it takes for lawyers to clear security and be allowed into the court depends on how well they know the soldiers on duty, as well as the soldiers' willingness to leave their post in order to unlock the gate.

Depending on the soldiers for access to the court can result in serious problems for some lawyers. Ehlam Haddad wears Islamic dress and has

on occasion been delayed for twenty minutes while the soldiers ignore her requests to open the gate. When she was new at the court, soldiers approached her and asked to see her ID. They trained their guns on her when she asked for their names and it took the intervention of another soldier to convince them that she was a lawyer. When the same thing happened three days in a row, she became convinced that the soldiers were trying to intimidate her. Haddad has submitted complaints to the court authorities, but they have not resulted in permanent changes—every time there is a new shift of soldiers, she has to repeat the process of convincing them that she is a lawyer.

4. Gaza

"As a lawyer, you are a cow - they treat us like they are trying to milk us. They squeeze everything from us: our dignity, our time - everything."

Jamil Firhan

While all lawyers have to overcome significant logistical obstacles in order to represent their clients, lawyers with Gaza residency are even more restricted in their access to courts and prisons. The situation has changed significantly since Israeli forces unilaterally withdrew from the Gaza Strip in August 2005.

a. Situation prior to withdrawal

Before Israeli soldiers withdrew from Gaza, Palestinians with Gaza residency were tried in the Erez military court, located at Erez military checkpoint at the entrance to the Gaza Strip. Lawyers had to apply for permission to enter Erez; the military granted permission to fewer than ten Palestinian lawyers at a time. Gaza lawyer Jamil Firhan reported that from 2003 to 2005, only two lawyers from Gaza were granted permission to enter Erez.[30]

[30] Col. Shaul Gordon, president of the Israeli Military Court of Appeals, confirmed that only two lawyers from Gaza were working in Erez during this time. However, he stated that this number reflected the low caseload at Erez and claimed that more lawyers would have been given permission to enter had they applied. Interview at Ofer Military Base (Aug. 20, 2006).

Those lawyers who could enter Erez contended with obtrusive security procedures. During searches, which were conducted in public, they had to raise their shirts and were sometimes required to remove their trousers as well.

Erez did not open until 8 am, but lawyers began lining up well before then because the doors closed at 8:30 am and did not reopen until 2 pm. Firhan lives one kilometer from Erez but said that he left his home in Gaza at 5 am because it took so long to pass through checkpoints on the way to the military court.

Trials started at 9:30 am but, as is the case at Ofer and Salem military courts, there was no schedule for hearings, so lawyers could spend an entire day waiting for their clients' sessions. Those who finished their cases early in the day were not allowed to leave until 2:00 pm, when the doors were reopened. The court did not provide lawyers with a waiting room, so they stood outside in the sun or rain. Periodically, the Israeli military sealed off the Gaza Strip, prohibiting entry and exit to Gaza. During these closures, all Gazan lawyers were denied access to Erez, making it difficult for them to provide consistent counsel to their clients.

While the military granted limited permission for lawyers from Gaza to enter Erez, it never granted them permission to visit their clients during their detention at facilities inside Israel. As a result, even those lawyers who were allowed to appear in court would meet their clients for the first time in the minutes before their hearings began.

b. Situation after withdrawal

Erez military court was shut down when Israeli troops withdrew from Gaza. Lawyers from Gaza are now prevented from appearing in any military court or entering any Israeli prison.

Palestinians arrested in Gaza are usually held in 'Askalan / Shikma prison and tried or given detention hearings at the Bir al-Sab'e / Beersheba courthouse (both facilities are inside Israel). If Palestinian detainees wish to be represented in court, they must hire a lawyer with Israeli citizenship. Lawyers from Gaza are reduced to playing the role of messengers between

the families of prisoners and lawyers inside Israel. Because Palestinians cannot leave Gaza and people with Israeli citizenship cannot enter, it is common for lawyers who work together across the divide to know each other only through telephone conversations.

Private lawyers tend not to be interested in working in this limited capacity; as a result, since the withdrawal the only lawyers who are involved with prisoners in Israeli military courts are those who work with non-governmental organizations.

5. Language

"I was once able to acquit someone at Salem. When the judge started to read the decision, the translator had to translate. The judge says 'I have decided to acquit you,' so the translator says 'I have decided to . . . how do you say acquit?' I mean, this guy has worked in the court for three years and he doesn't know how to say 'acquit' in Arabic!"

Gaby Lasky

Language is a fundamental problem in the military courts. All proceedings in both Israeli civil courts and the military courts are conducted in Hebrew. While this does not pose a problem for Jewish Israelis or for Palestinians with Israeli citizenship (who tend to be bilingual), it can be a serious obstacle for lawyers from the West Bank. West Bank lawyers reported that their Hebrew was good enough to handle most of the court proceedings without a translator, but many of them had to pick up Hebrew on the job.

In the military courts, a soldier translates the proceedings into Arabic. Lawyers differed in the degree to which they trusted the official court translators, but they generally agreed that the quality of the translation is uneven. Many of the translators are Druze soldiers whose native language is Arabic and whose Hebrew is sometimes flawed.

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. In any event, it is unlikely that the translation will be

useful to the detainee's family members, who have to sit at the back of the courtroom. 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 reported that they felt 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. Speaking in Hebrew is a source of frustration for some Palestinian lawyers, who resent the fact that the language of the court is conducted on Israeli terms. "I was forced to learn Hebrew, but I don't like it," said Khaled Quzmar.

An additional problem is that 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. "The answers of my client become the answers of the guy who is translating," said Gaby Lasky.

In addition, all confessions, statements, police reports, military codes and judicial rulings are provided in Hebrew without translation, even though Arabic is an official language in Israel. Handwritten police reports can present a serious challenge even for a lawyer who is proficient in spoken Hebrew.

According to previous Israeli court rulings, a prisoner must be interrogated in his native language and his statement written in that language. In practice, however, the detainee's confession or statement is frequently written in Hebrew by a policeman and the detainee signs a statement he/she cannot understand.

6. Charges

a. Charges under military law

The Israeli military orders governing the West Bank criminalize political activities that form the basis of civil society.[31] Putting up political posters, writing political slogans on a wall, belonging to any political party

[31] The Military Commander of the West Bank has the authority to issue orders that govern civilian activity. Military commanders have issued some 1,500 orders since 1967 in the West Bank alone. Military Order 378 established the existing military courts in 1970.

or certain organizations listed in military orders, displaying political symbols and attending a demonstration are all 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. Palestinians can be detained for interacting with such an individual, even after his alleged activities were completed.

Prosecutors in the military courts routinely inflate charges.[32] A defendant who is accused of throwing a stone at a tank or firing a gun a kilometer away from a soldier, for example, will be charged with "trying to kill." 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.

b. Charging detainees in military courts

Prosecutors can wait up to 188 days before charging detainees held by the Israeli military.[33]

In addition to waiting, sometimes for months, for his/her client to be charged, the lawyer also must contend with inflated charges from the military prosecutor. For example, if the detainee is alleged to have shot at a soldier, he/she could be charged with "trying to kill," even though the shot may have been fired from a distance at which it would have been impossible for the soldier to have been harmed.

Charges from the military prosecutor also tend to be vague, making it impossible for the defendant to show that he has an alibi.[34] For example, a detainee may be charged with "throwing stones in late December 2005," with no day, time or place specified. The defendant will therefore not be able to prove that he/she was not in the place where he/she is alleged to have thrown stones.

[32] Interview with Sahar Francis, Director, Addameer Prisoners' Support and Human Rights Association, in Ramallah (July 2006).

[33] See note 22 for an explanation of detention orders and extensions of period of detention.

[34] See note 31.

c. Charges against detainees in administrative detention

Lawyers representing administrative detainees must contend with impossibly vague charges. Administrative detainees are usually charged with something as broad as "being a threat to the security of the area," but the area and the nature of the threat are left undefined.

Defense lawyers can try to petition judges for more information about the charges, but it is unusual for the court to surrender this information. If military judges do release more information about the charges, they tend to do so only after the detainee has already been held in administrative detention for months.

Sahar Francis gave the example of a client who has been held in administrative detention since 2001. For five years, the court did not reveal the grounds of his detention, and Francis did not discover until mid-2006 that her client was being held based on allegedly having said he wanted to participate in a suicide attack. She still could not determine when he allegedly made this statement and under what circumstances. "After five years, is he still a danger? Is he still related to active people outside? To such questions, I never have answers," she said.

7. Evidence

a. Closed evidence against administrative detainees

Defending a prisoner against secret evidence "is like entering a dark room and not knowing where to go or what to do."

Faris Abu al-Hasan

When a detainee is held in administrative detention, the court can order that the evidence against him/her be kept confidential. This procedure is used widely, forcing the lawyer to argue that his/her client is not a threat without knowing why they were detained in the first place.

b. Open evidence

Some evidence against administrative detainees may be open, as is all evidence in regular military tribunals. Even when evidence against a detainee is declassified, however, it can be difficult for the defense attorney to have access to it.

In order to request that parts of an administrative detainee file be declassified, the defense lawyer must describe the document he/she requires and give reasons that it should not be protected. Most of the time it is impossible for the lawyer to know exactly what is in the file, but sometimes he/she can make an educated guess based on other detainees' files. For example, if the lawyer suspects that the closed evidence against his/her client includes a confession that is part of the open evidence in another file, he/she can ask the judge to declassify this part of the client's file.

In administrative detention cases, the military commander has the authority to renew a detention. The military courts have periodic hearings to review the administrative detention order. In these hearings, the defense attorney has an opportunity to argue that some of the evidence in the file should be declassified. Judges have complete discretion over whether to declassify evidence and tend to arrive at inconsistent decisions as to whether the same material may be declassified.

Lawyers also encounter delays in getting access to the open evidence against their clients. For example, it is common for a confession dating from January not to be released by the prosecutor until May. The prosecutor may claim that he did not receive the information in a timely manner from the Police or ISA, but lawyers do not find this excuse convincing. "You have a very good system. Everything is in the computer. It's enough to put the name of the person and you would know all the information about him. But still it takes five months to deliver a confession?" said Sahar Francis.

c. Secret evidence in military trials

Even in regular military tribunals, the military prosecutor has the right to ask permission to bring secret evidence against the detainee. If this

happens, the defense lawyer may contest the prosecutor's request. In any event, it is uncommon for military prosecutors to exercise this right because if they wish to use secret evidence, prosecutors have the option of placing the detainee in administrative detention.

d. Interrogation reports

"I shouldn't have to ask for this material. It should be part of the file because it's evidence."

Gaby Lasky

An ISA officer is obligated to record everything that happens while a detainee is being interrogated. The ISA file is part of the evidence against the detainee, but it is not automatically disclosed to the defense attorneys. Lawyers have a right to require a copy of this report, but many do not bother to do so because it can take up to a month for the military prosecutor to provide this material. Lawyers reported that in practice, this material is rarely helpful, as ISA officers will document insignificant events such as bathroom breaks while omitting other aspects of the interrogation.

e. Allegations of torture

"[The defense of necessity] used to be about the ticking bomb. Now they use it whenever they want, because no judge wants the responsibility of saying, 'You're misusing the idea of a security threat.'"

Yael Berda

In the majority of military tribunals, evidence consists only of statements made by the defendant or other detainees. If a defendant alleges that he was tortured when giving the statement, he can challenge its validity in a hearing known in Hebrew as a Mishbat Zota, "trial within a trial."

In practice, it is highly unusual for a military judge to dismiss evidence on these grounds. The defendant must prove that the methods used

during the interrogation negated his free will. In practice, he may have to prove that he was being tortured at the very moment that he gave his confession. This is difficult for several reasons. First, the courts do not consider isolation – the months that prisoners may be held without access to a lawyer – to be torture. Second, while interrogators do not have the authority to use physical means that infringe upon a suspect's liberty, the Israeli High Court has ruled that the attorney general may determine whether or not to charge interrogators who have invoked the defense of "necessity."[35] Finally, prison and military officials have been reluctant to comply with investigators' requests for the medical records of detainees, making it difficult for lawyers to compile the evidence necessary to make an allegation of torture.[36]

Even if the prisoner is able to prove that he was tortured, the court is not obligated to dismiss the evidence against him if in the court's opinion the confession was ultimately given freely, despite the torture or abuse. Instead, the judge may still admit the evidence but must take the torture into account when determining how much weight to give it.

Although the lawyer may believe that his client has a valid argument that he was tortured, they rarely attempt the "trial within a trial" procedure because it is extremely unlikely to be successful. Lawyers who do persist in making these claims concede that they do so with little hope that their efforts will achieve any positive results.

8. Witnesses

"I say I want to question someone who really knows about the file, or if the military prosecutor wants to testify, then put him under oath. But the judge doesn't even know what I'm talking about."

Eliahu Abram

[35] "The Attorney General can instruct himself regarding the circumstances in which investigators shall not stand trial, if they claim to have acted from a feeling of 'necessity.'" HCJ 5100/94 Public Committee Against Torture in Israeli v. Government of Israel [1999] IsrSC 53(4).

[36] Eliahu Abram reported that lawyers have encountered "complete stonewalling," from military officials in response to their requests for medical documents. While prison authorities do cooperate with defense lawyers, they routinely delay for up to three months before releasing documents.

a. Witnesses in administrative detention hearings

The military prosecutor is usually the only source of information about the evidence in administrative detention cases, but the defense lawyer is prohibited from cross-examining the prosecutor as a witness. Instead, the prosecutor answers all of the defense lawyer's questions without being sworn in and has the right not to answer questions. Mahmoud al-Halabi described a typical examination during a hearing to extend an administrative detention order:

Q. Is any of the evidence open?

A. No.

Q. What is my client accused of?

A. Activities that promote terrorism.

Q. How did he promote terrorism?

A. He's in an organization.

Q. Which organization?

A. That is part of the secret evidence.

Q. Who else is in the organization with him?

A. That is part of the secret evidence.

b. Defense witnesses

It is rare for the defense to bring its own witnesses in administrative detention hearings, in part because witnesses can only testify as to the defendant's family life and moral character, since the charges against him are unknown. Lawyers reported that the court is unlikely to find this type of testimony convincing.

If defense lawyers wish to bring witnesses in regular military tribunals, they must first apply for travel permits from the military in order for the witnesses to have permission to enter the court.

9. Access to the Law

"There's no legal handbook you can buy in a military bookstore. There's almost no access to the laws or jurisprudence of the military courts."

Gaby Lasky

a. The law of the military courts

The decisions of the military judges in Ofer and Salem military courts are governed by military orders and by the decisions of the military appeals court.[37] The military is obligated to publish military orders, but is required to distribute the orders only in civil administration offices around the West Bank. These buildings are not public spaces so visitors must be granted special permission to enter and read the military orders. In practice, many military orders remain unpublished and can be obtained only by contacting the Israeli Ministry of Defense's legal department directly. It has often been the case that lawyers discover new military orders only when they are used for the first time against their clients.

While military orders must at least be published in civil administration offices, the military court is not required to publish the decisions of trial judges. Until recently, the court provided its rulings to four defense attorneys, who in turn made the rulings available to other lawyers. The military now publishes some decisions in a book and on CD-ROM, but this compilation is not comprehensive and is not distributed widely. Additionally, this material is not updated regularly,[38] so there is no way for lawyers to keep informed as to legal developments in the military courts. As a result, lawyers reported relying on word of mouth to find out about new military orders and favorable decisions.

Like all other written material produced by the courts, the military's compilation of orders and decisions is available only in Hebrew, even though Arabic is an official language in Israel.

[37] While the decisions of the appeals court are theoretically binding, the military court judges can ignore precedent if they provide compelling reasons for doing so.

[38] As of August 2006, the military last updated the CD-ROM in May 2005.

b. Judicial decisions on administrative detentions

Military judges are not obligated to describe the grounds for their rulings in decisions on administrative detention orders and extensions. The defense lawyer therefore has no way of knowing why the military judges ruled a certain way. Indeed, lawyers are left with the impression that judges have complete discretion in these rulings and that the outcome of the hearing depends on whether the lawyer is on good terms with court officials.

10. Military Judges

a. Objectivity

"There should be three sides in a trial – defense, prosecution and judge – and each should be independent from one another. Here, both the prosecution and judge have the same role."

Khaled Quzmar

A seven-member committee appoints judges to the military courts.[39] The appointments are approved by the Military Commander of the West Bank, who does not sit on the appointment committee. Although the judiciary of the military courts is not officially appointed by the Military Commander, lawyers raised concerns about the objectivity of military judges.

Additionally, the physical setting of the tribunals contributes to the perception that the judge and prosecution cooperate with each other. The military courts of Ofer and Salem are both located on military bases. Both the prosecutors and judges are in uniform and at 1:00 pm, all judicial proceedings are halted so that the judge, prosecutor, translator and all other soldiers on the base may eat lunch together in the mess hall. "They stop trials for this!" said Gaby Lasky. "In a civil court, in the middle of a trial, could the judge and prosecutor go and eat together?

[39] The committee consists of three generals from the Israeli military (the president of the military tribunal, the military head of personnel and the military coordinator of the West Bank), two military judges (including the president of the military court of appeals), a representative of the Israeli Bar Association and an Israeli civil judge.

This could never happen." Defense lawyers are neither allowed to join the judges and prosecutors for lunch, nor are they provided with their own cafeteria.

b. Training

"I always tell [the military prosecutors]: 'You're getting zero experience. This is not a court of law – it's a circus. Maybe you'll learn how to juggle, but you're not learning anything about law.'"

Yael Berda

The training of the military judges and prosecutors raises further questions as to the independence and professionalism of the military court officials. Most of the prosecutors work in the courts as part of their mandatory military service and have no training or experience in a civil court system. Those prosecutors who stay in the military frequently go on to become judges, putting them in the position of evaluating cases brought by their former colleagues. "This means that many people were brought up in the system and have never appeared in a civil court, but now they're judging their friends and past friends," said Gaby Lasky.

11. Jurisdiction

a. Same act, different jurisdiction

"The distance between [Israeli civil courts in] Jerusalem and [the military court at] Ofer is ten minutes, but there's a world of difference in the law that applies."

Khaled al-Araj

Lawyers who defend Palestinians must contend with inequalities arising from two systems of law operating in Israel and the OPT. Israeli civil law offers greater procedural protection for defendants, but Palestinians with West Bank residency generally do not fall under the jurisdiction of this

law. The inequity of this system is most striking when two people who are involved in the same activity are tried under different court systems.

For example, an Israeli citizen and a Palestinian with West Bank residency might both be arrested for participating in the same demonstration at the same location. The Israeli citizen will often only be given a warning, or on rare occasions, be charged in the Israeli civil courts with being in a military zone, an offense that is usually punishable by fine or suspended sentence for a first offense. The Palestinian, on the other hand, will be charged in the military courts with throwing stones and attacking Israeli soldiers, which carries a maximum sentence of 10 years in prison. In practice, many Palestinians who are charged with throwing stones are usually held in prison for periods between 3 months to 1 year.

Some of the most glaring differences between the law of the military courts and Israeli civil law are in the treatment of juveniles. In the Israeli civil courts, juveniles are tried in separate courts, where they are protected by special procedures. For example, the prosecutor must provide a report from a social worker detailing the likely effect of detention or imprisonment on a juvenile. There are no such procedural protections for Palestinian juveniles in the military courts.

The Israeli prison system has special facilities for juveniles, but the Israeli civil courts define defendants under the age of eighteen as juveniles while the military courts use sixteen as the cutoff age. A seventeen-year-old sentenced by a military tribunal will therefore serve his/her term with adults, while a seventeen-year-old convicted in an Israeli civil court will be sent to a separate juvenile facility.

b. Same jurisdiction, different law

Although Israeli civil courts offer more due process protection to defendants than the military courts do, the Israeli laws governing the treatment of prisoners accused of "threatening security" create additional challenges for lawyers.

While lawyers visiting Israeli citizens accused of criminal offenses are usually allowed to see their clients after waiting for a few minutes, those who represent Israeli citizens accused of security crimes routinely wait

for hours. These differences are the first of a series of inequalities in the treatment of "security" prisoners, who are almost exclusively Palestinians with Israeli citizenship or Palestinians from the OPT. Some of the differences in the two legal regimes within the Israeli civil courts, and between the Israeli civil courts and the military courts, are summarized below:

Differences in Procedural Law by Jurisdiction

	Military courts	Israeli civil courts		Administrative detention	
				Israeli civil courts	**Military courts**
	Palestinians from the West Bank	Israeli citizens accused of criminal offense	Israeli citizen accused of security offense (almost exclusively Palestinians with Israeli citizenship, in addition to Palestinian residents from the Gaza Strip)	Israeli citizens (detention order is for **3 months** and is signed by the Minister of Defence; however, the order may also be for 6 months)	Palestinians from the West Bank and Gaza (detention order is for **6 months** and is signed by military commander)
Maximum days prisoner may be denied access to a lawyer	**90**	**0**	**21**	Detainees can usually have access to lawyers, but they may be denied access while in detention prior to being placed under administrative detention.	
Maximum days prisoner may be detained without appearing before a judge	**8**	**1**	**4**	**48 hours**	**16 days** (8 days allowed by military courts + 8 days after being given an administrative detention order)
Maximum days prisoner may be detained without being charged	**188** (8 days without appearing before a judge + 90 days by judicial order + 90 days by request from the Chief Area Legal Advisor and order from military appeals court judge)	**61** (1 day without appearing before a judge + 30 days by judicial order + 15 days with a request from the Attorney General + 2nd 15-day extension from Attorney General)	**64** (4 days without appearing before a judge + 30 days by judicial order + 15 days with a request from the Attorney General + 2nd 15-day extension from Attorney General) -	Not Applicable	
Time in which trial must be completed	**2 years**	**9 months**	**9 months**	Not Applicable	

c. Same citizenship, different jurisdiction

"If your life is a Palestinian-based life, then [jurisdiction] is going to be different than if your life is an Israeli-based life."

Yael Berda

Israeli citizenship does not guarantee that a defendant will be within the jurisdiction of the Israeli civil courts. Israeli courts have ruled that both Palestinians with Jerusalem IDs and Palestinians with Israeli citizenship can be tried in military courts. According to the "test of most connections" in Israeli law, the Jerusalem Police can extend military jurisdiction to Jerusalem residents if they are accused of either committing an act in the West Bank that constitutes a security threat or of an act that will affect the security of the West Bank. As described above, individuals tried in military tribunals will have significantly reduced due process protection.

12. Plea Bargains

"Deal making is not only preponderant—it's total."

Tamar Peleg

Ninety-eight percent of the cases in the military courts in 2005 were settled with plea bargains.[40] There are several reasons that lawyers seek plea bargains instead of insisting on their clients' right to a trial.

a. The interest of the client

"Our first interest must be the interest of our clients. I cannot fight for the right to a full trial on the back of the freedom of my client."

Gaby Lasky

Although lawyers said they were strongly opposed ideologically to the notion of settling for plea bargains rather than insisting on a full trial,

[40] See note 9.

they conceded that there are some cases in the military courts in which a plea bargain is unavoidable. If the defendant has confessed, for example, and the prosecution has constructed a series of statements from other prisoners supporting the defendant's confession, then a plea bargain may be the best option.

Unlike the Israeli civil courts, in which a trial must be completed within nine months, the military court may take two years to complete a trial. The default in the civil courts is for defendants to be released on bail, but it is highly unusual for military judges to award bail. If the prisoner is being charged with throwing stones and faces a maximum sentence of nine months, it may be in his interest to accept a plea bargain rather than to spend two years in prison waiting to be tried.

Prisoners who maintain their innocence may still choose to accept plea bargains because they have no faith in the military court to weigh the evidence against them fairly. In addition, prisoners may accept plea bargains because appearing for multiple hearings can be a difficult physical ordeal. Prisoners must often submit to repeated strip searches and wait for long periods of time to attend hearings, sometimes taking twenty hours to be transported from the prison to the courthouse. The prisoner will sometimes accept a plea bargain in order to avoid the experience of being brought before the court for multiple hearings.

b. Retaliation

"Usually, if you argue the case and you lose, the sentence will be higher. The court will say, 'You had an opportunity not to waste our time.' They do this even though it contradicts the basic right for any person to prove his/her innocence."

Sahar Francis

Some lawyers reported that they agree to plea bargains in certain cases because they are afraid that if they insist on a full trial, the judge will retaliate by imposing a higher sentence on their client. Unless there is an obvious gap in the evidence or some other extenuating circumstance,

lawyers may sometimes determine that the prisoner is better off accepting a plea bargain rather than risking the possibility of the judge imposing the maximum sentence allowed by military orders.

c. Helping the prosecution

"One thing is for sure: if all lawyers were to conduct normal trials, then the whole military system would get jammed because it's based on the assumption that almost all the files are going to be closed with plea bargains."

Eliahu Abram

From the point of view of the military courts, it is preferable to settle cases with plea bargains because negotiating the agreements requires far fewer resources from the court than would be needed to provide for full trials. As a result, lawyers reported that the families of prisoners are left with the impression that the prosecutor is the only figure in the courtroom with any real power.

The system of plea bargaining is open to abuses. Lawyers reported that some defense attorneys accept far more cases than they can represent. These attorneys simply negotiate plea bargains without examining their clients' files. This arrangement allows them to exploit prisoners by accepting payment from a large number of clients while investing little time in each case.

d. Relationships

"In the military courts, you don't need to have a legal background – all you need is relationships and connections. The lawyer's ability to get a plea bargain depends on whether he knows the judge and prosecutor."

Khaled Quzmar

The prevalence of plea bargains creates an uncomfortable situation for those lawyers who are committed to representing the best interests

of their clients. They reported that the lawyer's ability to get favorable terms for a plea bargain may depend on his relationship with the military prosecutor. Some lawyers said that they felt it was necessary to avoid being too antagonistic toward the prosecution. Other lawyers criticized this attitude as weakening the adversarial nature of the legal process.

13. Appeals

The decisions of the military judges at Ofer and Salem military courts may be appealed to the Military Court of Appeals. In addition, orders barring access to lawyers and extending administrative detentions may be appealed to the High Court. In practice, however, appellate review of decisions regarding prisoners accused of being security threats affords little protection to defendants.

a. Decisions by military tribunals

When lawyers appeal the decisions of military judges at Ofer and Salem, the standard of review requires them to prove a mistake of law in the original ruling or to demonstrate that the military court's sentence was unreasonable. In practice, this is a difficult standard for defense attorneys to meet. There is no immediate right of appeal after the military court of appeal's decision has been passed. The decisions of the military appeals court can, in rare cases, be appealed to the Israeli High Court. It is rare for lawyers to appeal these decisions, however, because in order to do so, they must demonstrate "egregious and extreme" legal error by the lower court or lack of jurisdiction by the military court.

b. Decisions regarding administrative detention

The Israeli High Court has ruled that it has the discretion in its capacity as the High Court of Justice to consider cases involving the extension of administrative detention orders and orders barring access to lawyers. In these appeals, the lawyer asks a panel of High Court judges to review the secret material against the detainee and to assess the lower court's assertion that he/she constitutes a security risk. The High Court judges weigh the secret evidence in a closed session with the prosecutor.

c. The results

"They deal with almost every Palestinian as a ticking bomb case."

Sahar Francis

The Israeli High Court has ruled that a prisoner may be barred access to a lawyer if this measure is "absolutely necessary" for the good of the investigation or to protect security. The High Court justices and the military appeals court therefore have wide discretion in determining that a prisoner was correctly found to be a security threat. In 2005, PCATI filed 182 petitions to appeal orders barring access to lawyers. The High Court did not dismiss a single one of the orders in its responses to these petitions.

Because the success rate of appeals to the Military Court of Appeals and security cases brought to the High Court is so low, lawyers are reluctant to encourage clients to appeal their cases. They say they do not want to give false hope to prisoners and their families or cause their clients to needlessly incur extra expenses.

14. Effect on Lawyers

a. Working in the military courts

Lawyers said they doubted the capacity of the military courts to provide fair trials and reported being highly dissatisfied with their work. Even if they are occasionally able to achieve reduced sentences for their clients or -even more rarely- acquittals, many expressed deep ambivalence about the morality of participating in a court system they consider to be fundamentally unjust:

"I've defended about a thousand cases and I am not happy with the results. I try to do my work well, but the whole process is oppressive."

Khaled al-Araj

"*I learned law to help people, but it's just not possible in the military courts. The courts exist to administer the occupation, not the law. I feel hopeless."*

Khaled Quzmar

"The most frustrating thing is that you have to work within the occupation. You oppose the system, but you have to work within it."

Nasir al-Nubani

"Why should I give these courts legitimacy? Someone might complain that the court is not legitimate, but the complaint doesn't sound believable if lawyers are there working in the courts."

Ehlam Haddad

"The courts are there to defend the occupation, not to defend people."

Tamar Peleg

b. Representing administrative detainees

"I am surprised that anyone can work as a lawyer for administrative detainees without dying of stroke."

Khaled al-Araj

As demoralizing as it is for lawyers to defend Palestinians in the military courts, lawyers who defend administrative detainees face the even greater challenges of secret evidence, vague charges and indeterminate detentions. As Eliahu Abram put it, "You try to make claims about the procedures that were undertaken and it's patently obvious that the judge views the whole thing as completely beside the point. He's just waiting to closet himself up with the representative of the security service to look at the secret evidence and then to approve the administrative detention order." The frustration of this work takes its toll on lawyers and many reported that they have simply stopped accepting administrative detention cases.

Other lawyers said that they oppose representing clients in administrative detention for ideological reasons. The role of the lawyer is so insignificant in these cases, they argued, that it is better not to participate at all. "There is the prosecution, a judge, a lawyer, and a prisoner. It looks legitimate but it is not," said Khaled al-Araj. "These tribunals should be boycotted."

c. Blacklisting

In addition to being professionally dissatisfied with their work, some lawyers who have West Bank residency reported being targeted by Israeli security forces, apparently in retaliation for their work representing Palestinians.

Khaled Quzmar was prevented from crossing the border into Jordan from 1989 until 1996, and again from 2001 until 2003. No reason was given for denying him permission to travel and he is convinced that the bans were imposed on him because of his work in the military courts.

The Military Commander of the West Bank issued an order against Faris Abu al-Hasan in 1999 to prevent him from appearing in military court for six months. The ban was imposed on Abu al-Hasan shortly after PCATI published a report in which the authors thanked him for his legal work.

D. Conclusion

"I'm against the military courts. Let the occupiers do this job for themselves. Why should lawyers go there and try to do things when we know at the beginning what the output is?"

Sahar Francis

Lawyers argued that a general boycott of the military courts would be better in the long term for Palestinian prisoners and detainees. At the same time, they felt that if a boycott is to be effective, it must be organized by the prisoners and detainees themselves. There is currently no movement to organize a boycott. Rather, prisoners ask lawyers to provide them with legal representation, so lawyers feel obligated to do what they can to help. Lawyers find themselves in the unenviable situation of doing the best they can for individual clients even though they feel that by doing so, they give legitimacy to a system they feel is unjust.

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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 Program:** 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 centres; 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.

Contact:

Addameer Prisoner Support and Human Rights Association
Tel: +972 (0)2 296 0446 / 297 0136
Email: info@addameer.ps
Website: www.addameer.info

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