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Backyard Proceedings

The Implementation of Due Process Rights in the
Military Courts in the Occupied Territories

Summary of Findings and Recommendations



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Introduction

Since the occupation of the Palestinian Territories in 1967, and to this day, Palestinian citizens charged with security-related and other criminal offenses are tried by the Israeli Defense Forces (IDF) in the military court system in the Occupied Territories. More than 150,000 Palestinians have been prosecuted in these courts since 1990, and about half the prisoners currently being held in Israel were sent to prison by the military courts.

Nonetheless, the military judicial system in the Occupied Territories (OT) has acted under a veil of almost complete darkness until now. Few studies and publications have examined its activities, and it is subject to very lax internal supervision. Yesh Din's report, **Backyard Proceedings**, aims to fill this void.

The report examines one particular aspect of what takes place in the military courts: the extent to which due process rights are observed in the military courts at the trial level, or at the first instance. Due process rights in criminal law constitute an essential part of an assortment, or "bundle of rights," granted to all defendants, suspects and detainees, and generally known as the right to a fair trial. Due process rights ensure that every defendant standing trial - in any court - is granted the means to defend against the charges brought against him. These means include, *inter alia*, the rights to understand the charges brought against him, to present a full defense, to have the effective assistance of counsel, to interrogate witnesses, and several other rights regarded as 'procedural' rights, relevant to the establishment of conditions for a fair trial. In their absence, there can be no just trial, and, likewise, their violation increases the risk of miscarriage of justice.



Based on over 800 courtroom observations conducted by Yesh Din volunteers in the Samaria and Judea military courts serving the West Bank, data received from the IDF, interviews of military court personnel and defense attorneys, and additional research, the report uncovers a series of severe shortcomings and failures in the implementation of due process rights in the military judicial system operating in the OT.

The Military Judicial System in the Occupied Territories: Background and Structure

The authority of an Occupying Power to establish military courts in the occupied territory in which it may prosecute local residents is based on the provisions of Article 66 of the Fourth Geneva Convention and encompasses offenses in matters of security and public order. Other articles of the Fourth Geneva Convention, as well as those of other treaties constituting the law of armed conflict, the law of belligerent occupation and international human rights law, set forth the minimum standards that will ensure the existence of due process in these courts.

The military regulations enacted by the IDF in the Occupied Territories grant the courts extra-territorial jurisdiction that enables them to try any person - resident or non-resident of the OT - for any offense, whether committed in the OT or not. The judges there are military officers in regular or reserve service; the prosecutors are officers of the Military Advocate General, some of them not yet certified lawyers by the Israeli Bar Association; the defense attorneys consist of a few dozen lawyers, Israeli and Palestinian; and, the defendants are Palestinian citizens - both minors and adults. Israeli citizens are not tried in these courts, though the military courts are granted full jurisdiction over them.

Tens of thousands of proceedings take place in the military courts every year, in which thousands of indictments, covering a vast range of issues, are filed: ranging from distinct security-related offenses, to regular criminal offenses, and even traffic violations. In the years 2002-2006 the Military Prosecution filed more than 43,000 indictments to the courts, about a third of which were for security-related offenses (HTA - Hostile Terrorist Activity). Even so, only five percent of the indictments filed during that time charged the defendant with murder (one percent) or attempted murder (four percent).

The military judicial system currently operates in two first instance courts, together with a military court of appeals, as well as an administrative detention court operating in the Ofer military base near Ramallah and in Ketzi'ot prison in Southern Israel. The bulk of the military court system's activities take place in the two military courts of the first instance - the Samaria Military Court, located in the Salem military base in the northern West Bank, and the Judea Military Court, located in the Ofer military base near Ramallah. These courts also operate four courtrooms dedicated to detention hearings, constituting 'branches' of the courts within the boundaries of Israel in: Jalame junction, Petach-Tikva, Jerusalem and Ashkelon.

Due Process Rights in the Military Courts

Presumption of Innocence

The presumption of innocence is the principle stating that a person is presumed innocent until proven guilty beyond any reasonable doubt. From the outset, the adjudication of civilians suspected of involvement in actions against the IDF and/or the State of Israel by an Israeli military court is problematic in this regard. Military officers sitting in judgment cannot dissociate themselves from their identity, both as Israelis and as Military personnel, when adjudicating those perceived to be their enemies - persons allegedly involved in activities of militant Palestinian organizations.

Security Legislation remains silent regarding the presumption of innocence in military courts. Nevertheless, data provided by the Military Courts Unit itself provides a clear indication of the extent to which the presumption of innocence is followed: of 9,123 cases concluded in the military courts in the year 2006, only in 23 cases - which constitute **0.29%** of the rulings - was the defendant found to be entirely not guilty.

Further indications of the presumption of innocence in the military courts can be found in data relating to the release of detainees from custody (prior to the filing of an indictment): in 118 detention hearings in which Yesh Din observers were present, only one person was released. Each of these detention hearings, in which a suspect's detention was extended by 10.2 days on average, lasted an average of only **three minutes and four seconds**. Thus, the detention of suspects brought before the military courts is almost always extended, in hearings that are concluded in a matter of minutes. Hearings to authorize "arrest until the end of proceedings" (a detention that may extend for more than a year or even two) took even less time: **one minute and 54 seconds**, on average. In each of the latter hearings, where Yesh Din observers were present, the court granted the prosecution's motion to extend the suspect's arrest until the end of proceedings. Less than two minutes are required to send a person to detention until the conclusion of criminal proceedings. According to the IDF's data, by the end of 2006, **two thirds** of the defendants whose cases were still under deliberation in the military courts were held in detention.

Recommendations:

1. The appointment of reservists without judicial background to the position of Judges of the military courts must cease, and instead the IDF should appoint former judges, now in reserve service, as legislated for the IDF courts-martial.
2. The number of military judges presiding over detention proceedings, as well as the facilities where these hearings are held, should be modified such that defendants have sufficient opportunity to defend themselves against motions to extend their detention.

The Right to a Public Trial

The principle of holding a public trial is one of the fundamental principles on which the bundle of due process rights stands. In the absence of a public trial there can be no public scrutiny, and without public scrutiny concerns about miscarriage of justice grow. However, the right to a public trial is not absolute and all legal systems, including international law, acknowledge that in certain cases - limited in their nature - it may be restricted in favor of other interests, chiefly the protection of minors, national security, or cases in which the court deems a restriction of publicity will serve the interests of justice.

Although Security Legislation stipulates that sessions in military courts are public, severe restrictions are imposed on those wishing to enter the courts: **the families of the defendants and detainees are allowed to send only two representatives to the proceedings concerning their relatives.** Other members of the public who wish to watch the proceedings taking place in the military courts in the OT are required to submit an application in advance in order to secure the permission of a junior officer in the Military Courts Unit, who holds discretion to decide on the application. In fact, some of the detention hearings are held in the military courts' branches located within the borders of Israel. Due to the closure policy imposed on Palestinian residents of the OT, these hearings are completely inaccessible to Palestinians – even when they are family members of detainees and Palestinian defense attorneys. What is more, verdicts of the military courts are not published.

The *de facto* restrictions on the presence of the public in the military courts, combined with the lack of publicity of their verdicts, creates a legal system operating outside the public view and, therefore, substantially lacking public scrutiny.

Recommendations:

1. Immediately close the branches of the Military Courts that are located within the State of Israel, and hold all Military Court deliberations within the OT.
2. Lift all restrictions on the presence of family members of defendants and detainees whose cases are brought before the Courts.
3. Regulate by procedure the entrance of an audience (not restricted to family members of the accused) to the Military Court hearings, without any need for prior approval whatsoever.
4. Adapt the Military Courtrooms' conditions and security arrangements to a larger audience.
5. Publish the judgments of the Military Courts, and translate them into Arabic and English.

The Right to Be Notified of the Charges

International law presents two main requirements regarding a defendant's right to be notified of the charges brought against him: the defendant must be informed of the details of the charges against him immediately and in a language he understands. Israeli Security Legislation on this matter ignores both these requirements.

Indictments are provided to defendants held in detention and to their attorneys only on the occasion of "arrest until the end of proceedings" hearing - after the indictment has already been filed to the court - and are always provided in Hebrew only - a language typically neither spoken nor understood by the defendants and some of their attorneys. As a result, some attorneys are forced to seek someone in the courtroom to translate, for their clients and themselves, the charges against which they are to present a defense.

Special concern arises from the policy customary in the Samaria Court in recent years: demanding that the defendant respond at once to the prosecution's motion to arrest until the end of proceedings, while denying motions for continuance to study the evidence. Thus the defense attorney is required to respond to the prosecution's motion without any knowledge as to the contents of the case against his client, and defense attorneys who do not read Hebrew are forced to rely on a rushed translation, by a chance person in the courtroom, of the principal issues in the detailed charge sheet.

The implication of the findings on this issue is that many defendants are not fully aware of the nature of the charges brought against them nor are they familiar with the details. This is especially true regarding defendants whose defense attorneys are not proficient in the Hebrew language. Hundreds of defendants are thus held under arrest until the end of proceedings, although a serious and comprehensive hearing regarding the fulfillment of conditions warranting such detention has not taken place.

Recommendations:

1. The Samaria Court must cease from demanding a response to the request to detain the accused until the end of proceedings on the same day on which an indictment is received. Instead, the Court should postpone the deliberations to a date that will enable the defense attorney to study the indictment and investigation file and argue against detention until the end of proceedings, in accordance with his considered opinion and his client's desires.
2. All indictments served in the Military Courts must be translated into Arabic.
3. The indictment, translated into Arabic, must be sent immediately upon its completion, and at least 72 hours before the hearing on detention until the end of proceedings, both to the defendant (in the place in which he is detained or to his home) and to his attorney.

The Right to Counsel and the Effective Assistance of Counsel

Although the right to counsel and the right to effective assistance thereof are usually regarded as different rights, they are nonetheless interconnected: there is no point in hiring a defense attorney if the conditions that would enable him to adequately and effectively prepare his client's defense do not exist.

Yesh Din's observations in the military courtrooms show that the majority of defendants and detainees are represented by counsel. As a rule, the Military Commander - who is bound, in certain cases, to provide funding to destitute defendants for defense counsel - relies to a great extent on Palestinian associations providing a similar 'public defender' type service to detainees and defendants in the military courts, but without financial contributions by the IDF.

Severe restrictions are imposed on a lawyer's ability to provide his clients with an effective defense: Palestinian lawyers are unable, in most cases, to visit clients incarcerated in Israel; Israeli lawyers and those who are residents of East Jerusalem, who do have access to detention facilities in Israel, are frequently harassed when arriving at detention facilities and regularly experience conditions that discourage them from visiting their clients in preparing their defense and raise cause for concern regarding the violation of attorney-client privilege.

According to an estimate of a former military prosecutor, GSS (General Security Service or 'Shin Bet') investigators issue orders denying attorney-client meetings to about sixty percent of GSS-interrogated suspects, which may remain in effect for up to a month from the time of arrest; detention extensions are granted in many cases based on confidential material disclosed to the judge alone; and, after the filing of indictments, case material photocopied by the defense attorneys is almost entirely in Hebrew, a language not spoken by a large portion of them. In cases where GSS investigation material exists, a formal request occasionally yields the material's disclosure, and only after delay. All lawyers - both Israeli and Palestinian - are denied open access to current regulations and rulings, upon which they are to base their defense arguments and make practical considerations regarding the choices available to their clients and advise them accordingly.

Thus, even though the requirement that defendants are represented by counsel is formally satisfied, it is not substantially satisfied: the defendants and detainees brought to detention hearings in the military courts are unable to provide themselves, by proxy of their lawyers, the optimal legal defense to which they are entitled.

Recommendations:

1. The IDF is to move Palestinian detainees and defendants to detention and incarceration facilities located within the boundaries of the West Bank, as required by international law.

2. Alternatively, and as long as the policy denying Palestinian civilians entry to Israel is in effect, the IDF must provide Palestinian lawyers with entry permits that will allow them to reach the locations in Israel where their clients, Palestinian detainees and defendants, are held. Denying such permits must be the exception rather than the rule, and must be done only in rare instances in which such denial cannot be avoided.
3. The IPS must amend its regulations so as to reduce the waiting time of attorneys at detention facilities to the minimum required.
4. Concerns regarding the use of listening devices in privileged attorney-client communications must be removed by disposing of the telephone receivers through which these conversations are currently conducted, and an alternative means of enabling communication must be found, e.g. a mesh-screen.
5. Palestinian lawyers must be allowed to appoint agents to photocopy case material at the prosecution offices in the military courts.
6. The number of photocopy machines available to lawyers for the purpose of photocopying case material is to be increased, and the elimination of payment for photocopying should be considered.
7. Indictments and case material must be routinely translated into Arabic.
8. The military prosecution is to be instructed to permanently make GSS interrogation documents, together with the rest of the case material, available to defense counsel upon the filing of an indictment.
9. All judgments of the Military Courts, both at the first instance and appellate levels, must be published on a regular basis and made available. Such publication must appear, at the very least, in Arabic and Hebrew, and responsibility for its execution must be assigned to the MCU and not the Military Advocate General, which supervises the prosecutors. The Security Legislation must be published on a regular basis with any amendments and updates, in Arabic and Hebrew, and in a way that is accessible to defense attorneys as well as the general public.

The Right to be Tried without Undue Delay

International law standards require that a defendant stand trial “promptly”, “without undue delay” and within a reasonable time. The military courts are far from satisfying these requirements.

Security Legislation allows the detention of a suspect for eight days before bringing him before a judge and allows the judge to repeatedly extend a suspect’s detention to an accumulative period of ninety days, and twice as long with the authorization of a military appellate judge. Security Legislation imposes no limitation as to the period a person may be held in detention from the time the

investigation is completed to the time of filing an indictment, nor does it limit the period a person may be held in detention from the time an indictment is filed until proceedings in the matter commence. The only stipulation regarding detention after the filing of an indictment is that the trial must be concluded within two years from the time the indictment is filed (in contrast to a period of nine months in Israeli domestic courts); here, the right is also granted to a military appellate judge to extend the defendant's detention for as long as the trial is pending.

The result is prolonged legal proceedings. Yesh Din observers documented the period of time between the hearings in which they were present and the next scheduled hearing in the case: the average time between the "arrest until the end of proceedings" hearing and the arraignment (the first session of trial) was **61 days**; the average time between the arraignment and the next session of trial was **51 days** in average for defendants held in detention and **71 days** for defendants not held in detention; and, the average time between each session in the 'post-arraignment' stages of the trial (reminder conferences, evidentiary hearings, handing down the verdict, etc.) for defendants held in detention was **52 days**.

At the end of 2006, approximately 1,800 detainees were held in arrest until the end of proceedings for periods of up to one year, and **189 detainees for periods longer than one year**. The figures for the previous five years are even bleaker: at the end of 2001, **231** detainees were held in arrest until the end of proceedings for periods of **over one year (of these, 85 were held for more than two years)**; and at the end of 2004, **671** detainees were held in such detention for more than one year (of those, **78 were held for more than two years**).

Recommendations:

1. The Order Concerning Security Provisions is to be amended so as to significantly reduce periods of time allowed for detention during investigation and after the filing of indictments.
2. The Order Concerning Security Provisions must be amended such that it determines the maximum amount of time a person may remain in detention until the conclusion of the interrogation, the maximum time until the indictment is filed, the maximum time from the indictment until his arraignment, and the maximum time between court hearings.
3. Additional personnel must be immediately allocated to the Military Prosecution and the Military Courts in order to avoid prolonging the legal process, on the one hand, and pressure on defendants to accept a plea bargain with the Prosecution on the other.

The Right to Present Evidence and Witnesses

The proceedings of a trial from beginning to end - including the presentation of arguments, interrogation of witnesses, examination of evidence and presentation of closing argument - scarcely exist in the military courts. In 2006, for example, of the 9,123 cases concluded that year, only **130 cases - 1.42% of the cases concluded that year** - were concluded after a full evidentiary stage consisting of the presentation of evidence and interrogation of witnesses. Instead, the military courts operate on a plea-bargain basis: according to the Chief Military Prosecutor, about **95% of the cases in the military courts conclude in plea-bargains**.

The parties in the military courts are driven toward plea-bargains for a variety of reasons: Interrogation methods customary in the GSS, which, according to reports published by human rights organizations, include threats and physical measures, combined with the prohibition imposed on many detainees to consult their lawyer and receive legal advice during their interrogation, bring many of the defendants to court after confessing to actions attributed to them or after being incriminated by others; the considerable case load in the courts brings all parties involved - defense attorneys, prosecutors and judges - to view plea-bargains as the fast and efficient way to finish their work on a case; defense attorneys feel that conducting a full trial, including the summoning of witnesses and submission of evidence, usually brings along a penalty far more severe, a sort of 'punishment' inflicted by the court on a defendant who did not have the good sense to reach a plea-bargain; additionally, Palestinian defendants and their families tend to lack trust in the military judiciary system and thus prefer to reach a plea-bargain rather than leave the verdict in the hands of the judge.

As a consequence, **plea-bargains have in effect replaced full legal proceedings** in the military courts.

Interpretation

Despite the fact that the military courts in the Occupied Territories are designed to try Arabic-speaking civilians, proceedings in the courts are all conducted in Hebrew. In order to interpret the deliberations in the courtrooms to Arabic and to interpret the defendants' words to Hebrew, the Military Courts Unit maintains a staff of interpreters, most of which are soldiers in compulsory service.

According to Yesh Din's observers, many of the interpreters - If not the majority - seem to make an effort to perform their job properly. The IDF's choice to use cheap labor, composed mainly of soldiers in compulsory service and lacking any professional background, either as interpreters in general or specifically as legal interpreters, and thus learning their profession as they go, results in the interpretation being extremely unsatisfactory in both quality and scope. Yesh Din observers classified the scope of interpretation as provided by the interpreters in the courtrooms during hundreds of sessions. **In 35% of the sessions the observer's impression was that the translation was "partial or sloppy" and in another five percent there was no interpretation at all.**

Copies of a document, entitled "Standing Orders for Interpreters," signed by the Court's NCO, are posted on the Samaria courtrooms' walls. The document specifies the interpreters' duties before, during and after a day of court sessions. The 12 articles of the document describe at length the interpreters' functions regarding order in the courtroom - entry of detainees into court procedures, change of personnel between interpreters, courtroom cleanliness etc. - yet **there isn't a single reference to their duties relating to the interpretation work itself**. The fact that the Military Courts Unit does not even have any written procedures and instructions relating to the interpretation of proceedings and translation of various documents (as admitted by the IDF Spokesperson) illustrates the contempt with which the military authorities view their obligation to ensure that a defendant brought to trial or a detainee brought to a detention hearing fully understand what transpires during proceedings concerning their matter.

Recommendations:

1. The Military Courts Unit must set clear professional procedures for interpretation in the courtrooms.
2. The use of regular soldiers as interpreters must cease, and professional interpreters must be employed, as is customary in courtrooms in the State of Israel.
3. Until regular soldiers functioning as interpreters are replaced by professional interpreters, the functions of attendant and interpreter are to be clearly separated, and no further soldiers enlisted for the purpose of serving as interpreters shall serve in this capacity until they have undergone a comprehensive professional course, as soon as possible after their enlistment.

Minors

Security Legislation regards Palestinians as minors only **until the age of 16**. Palestinians aged 16-18 are deemed adults and are tried accordingly. Moreover, according to these regulations, the sentence of a person who was a minor at the time of the offense shall be determined **according to his age at the time of sentencing - and not according to his age the time of committing the offense**.

The Military Courts Unit has no data regarding the number of minors tried there. However, in the years 2001-2006 minors (under 18 years of age) constituted **four to six percent** of all internees detained and imprisoned by the IDF and IPS, and one may assume that the volume of court activity in matters concerning them was similar.

International human rights law grants special protections to minors standing trial and emphasizes the need for special treatment, rehabilitative penalties,

showing respect regarding their privacy, and thorough and continued training of officials coming in contact with them - judges, prosecutors, police officers and the like. The IDF has refrained from establishing a special juvenile court - as exists in Israel, for example - in the OT, and **minors stand trial in the ordinary military courts, under the same framework of legal proceedings as adults**; those prosecuting and judging them have no training in dealing with minors. Military courts have no 'closed door' policy while deliberating matters concerning minors, although Security Legislation allows such a policy.

Yesh Din observers were present in 48 sessions concerning the matters of minors. **Of these, the fact of a detainee or defendant being a minor was mentioned in only 13 sessions.** This occurred, in nearly all cases, when the court included the defendant's age in explaining its considerations regarding a proposed plea-bargain.

Recommendations:

1. Security Legislation is to be amended to the effect that a person is defined a minor until he is 18 years of age.
2. Articles 4 and 5 of the Order Concerning Jurisdiction of Minor Offenders are to be amended so that the determining date relating to the penalizing of minors shall be the time of committing the offense and not the time of sentencing.
3. The closing of courtroom doors during sessions in the matter of minors must be strictly observed.
4. Special juvenile courts are to be established, in which prosecutors and judges specially trained in juvenile matters and proceedings will serve.
5. Until the establishment of a juvenile court, absolute separation must exist between adults and minors in the courtrooms of the military courts.

The full report is available to download on Yesh Din's Website
www.yesh-din.org/eng