

“In Practice”: Interview with Attorney Saher Francis on her Experiences in Representing Palestinians before the Israeli Military Courts

Rasha Shammam

Palestinians arrested by the Israeli military in the West Bank are prosecuted in the Israeli military court system, a jurisdiction created by the State of Israel after its occupation of the West Bank and Gaza Strip in 1967. The military court system is administered by the Israeli Military Advocate General’s Office. Palestinians brought before the military courts are prosecuted for offenses deemed to be crimes against the security of Israel, ranging from specific activities such as stone-throwing to broader activities such as belonging to or being involved in a Palestinian political party deemed illegal by Israel.

In 1993, the Palestinian National Authority was established by the Oslo Agreements, and was granted limited governance in some areas of the West Bank and Gaza Strip. Israel, however, maintained authority over all issues related to its own security in the OPT. It also maintained the right to arrest any person in all areas of the OPT and continued to operate the military courts in certain areas.

Formally, Israel’s “disengagement” from the Gaza Strip in 2005 brought an end to the jurisdiction of the military courts there.¹ Presently there are two Israeli military courts operating in the West Bank: the Ofer Military Court near the city of Ramallah, and the Salem Military Court near the city of Jenin. One military court operates in the south of Israel in the Naqab (Negev), the Ketziot Military Court, which presides over administrative detention cases. A further three Israeli military courts, including the Russian Compound or *Moscobiya* in Jerusalem, operate from within interrogation and detention centers for the purpose of extending the interrogation periods

of Palestinian detainees.

Under international humanitarian law, Israel, as an occupying power, has the right to implement its own laws in areas that it controls through military occupation in order to protect its own security.² However, this right cannot override the occupied population’s right to be treated with humanity and dignity, and in the case of suspected and/or detained persons, the right to a fair trial,³ rights which are being violated on a daily basis.

Israeli Military Order 378, proclaimed in April 1970 and entitled “Concerning Security Provisions”, establishes the jurisdiction of the Israeli military courts and the courts’ procedures, and broadly defines the majority of crimes prosecuted in the military courts.⁴ Israel uses Military Order 378 and the British Defence (Emergency) Regulations of 1945, periodically making amendments to these two instruments, to implement its administration of the Occupation.⁵ Israel argues that this is legal under international humanitarian law since it is protecting its own security.

The vast majority of detained Palestinians brought before the military courts are convicted and sentenced to long periods of imprisonment. Palestinians from the OPT are held in twenty-two Israeli prisons, detention and interrogation centers scattered throughout Israel⁶ and the West Bank.

As of February 2008, the Israel Prison Service (IPS) reported that there were 8,463 Palestinian adults and 300 Palestinian children being held in its facilities.⁷ Lawyers working for Defence for Children International – Palestine report that, based on their number-monitoring during regular visits to the prisons

and interrogation centers and attendance at military courts, there were approximately 327 Palestinian children from the OPT in the custody of both the Israeli military and the IPS in April 2008.⁸ The Addameer Prisoners' Support and Human Rights Association⁹ reported that there were 9,087 adults from the OPT being held in Israeli prisons and detention centers in April 2008.¹⁰ Numerous human rights organizations and private lawyers represent Palestinians in the military courts or otherwise work on prisoners' rights issues.

The following interview was conducted by Rasha Shammass, an Australian lawyer living in the West Bank and International Advocacy Officer for Palestinian Child Detainees at Defence for Children International – Palestine Section.¹¹ Rasha talked to Attorney Sahar Francis, the Director of Addameer, about her experiences "in practice" in representing Palestinian adults and juveniles before the Israeli military courts. Attorney Francis is a prominent Palestinian women lawyer working to defend the rights of Palestinian prisoners. She is a Palestinian citizen of Israel and has been a member of the Israeli Bar Association and a practicing lawyer since 1996.

What was the political climate in Israel and in the OPT when you began appearing in the Israeli military courts?

That was in 1995 and the period directly after the Oslo Agreements. At that time, right before the Palestinian Authority started governing parts of the West Bank and Gaza, Israel arrested thousands of Palestinians, and instituted a closure policy in the prisons: for nine months, Palestinians were banned from visiting their relatives in the military prisons.

I had just finished my law degree at the Faculty of Law, Haifa University, and was

working as a trainee lawyer for the Society of St. Ives in Bethlehem. In the organization we offered legal representation on human rights cases for Palestinians in the West Bank such as land confiscations, denials of freedom of movement and home demolitions. We started receiving requests to visit prisoners from the local community. Many people had relatives in prison, so we started to visit anyone in need of legal advice being held in any of the prisons and interrogation or detention centers, including women and children. Initially we intended to document prison visits and monitor violations, but then we began receiving requests from the prisoners themselves to appear on their behalf in the Israeli military courts. As soon as I received my Bar license in 1996, I started to represent Palestinians being held in administrative detention; that is, being detained without charge or trial.¹² Israel had arrested hundreds of Palestinian activists from Fatah, Hamas, the Popular Front for the Liberation of Palestine (PFLP), the Islamic Jihad, the Democratic Front for the Liberation of Palestine (DFLP), as well as other opponents of the Oslo Agreements, and around 850 Palestinians were being held in administrative detention. The numbers haven't changed much since then: today approximately 786 Palestinians are being held by Israel in administrative detention.¹³

How did you learn this specialized legal representation? Who were your mentors when you first began to appear before the military courts?

For me, it was a self-training exercise, and I think it's like this for all the lawyers who appear in the Israeli military courts. It's all

about teaching yourself, asking questions, researching, watching and learning. I relied a great deal on advice and support from colleagues who were familiar with and experienced in appearing in the jurisdiction. Lawyers from Addameer who had been representing Palestinian political prisoners for some time when I started practicing provided me with a lot of support. Other lawyers helped me through the learning process; Israeli Attorney Leah Tsemel, for example, gave me a lot of advice and assistance.

There was and still is a variety of lawyers at different professional levels appearing before the military courts: Palestinian lawyers from the OPT, Israeli lawyers, and Palestinian lawyers from Israel. The training is an ongoing process. Communicating with the prosecutors is also part of the process, because they can provide vital information such as copies of the Military Court of Appeals' decisions, which are otherwise unavailable.

Can you compare legal representation before the Israeli military courts to that within the regular Israeli criminal system?

The obvious differences have to do with the identity of the defendants, types of crimes prosecuted and the sentences imposed. According to Articles 1 and 7(f) of Military Order 378, the military courts have the jurisdiction to prosecute any crime by any person committed in the entire area of the West Bank. In practice, though, the courts prosecute only Palestinians in the area. A settler who murdered a Palestinian in the West Bank should therefore be prosecuted in the military courts. However, settlers are prosecuted in the regular Israeli criminal courts system, which imposes

considerably less severe criminal penalties.¹⁴

The Fourth Geneva Convention permits the Israeli military courts to exist because of Israel's Occupation of the Palestinian territories. However, the Fourth Geneva Convention requires that such courts make a distinction between civilians and combatants when they appear before the court. The Israeli military courts do not do this. The courts do not distinguish between Palestinian civilians and combatants; Palestinians are identified in a political and criminal context, as one group of people.

The procedure in the military courts is also governed by Military Order 378, which has been in effect since the 1970s. The Israeli Criminal Procedure Law and Evidence Law also apply to the Israeli military courts, and where there are gaps in Military Order 378 regarding any particular issue of procedure, Israeli civil law can be applied.

Technically speaking, the procedure is fairly similar in both jurisdictions but there are some fundamental differences. In sentencing, for example, a criminal court is guided by weighing the objectives and principles of punishment – protection of the community and the type of crime. But in the military courts the starting point is imprisonment and never anything else. This difference is one of ideology: in the principles of sentencing a different ideology applies in the criminal courts as compared to the military courts.

Also fundamental is that judges and prosecutors in the military courts serve within the same unit of the Israeli army and must be serving in the Israeli army. The process of appointing judges is not based on objective criteria, whereas in the Israeli

criminal and civil systems strict procedures apply in the appointment of judges, which occurs only after gaining five years of legal practical experience. Most of the judges in the military courts have no experience in other jurisdictions, including the regular civil or criminal courts, and have less than five years of practical experience; their practical experience is often limited to being prosecutors in the military courts.

When you visit the military courts, you see immediately how they differ from the regular Israeli criminal courts. Visit an Israeli court and watch a criminal prosecution and you will see how the rules are more formal and strictly applied. For example, an indictment in the Israeli criminal court system must include vital details such as the exact date, time and place of the offense, and a detailed description of the elements of the charge. In the military courts, however, charges are vague, and judges don't expect or require from prosecutors much detail beyond what the offense is. An example is a charge of stone-throwing in which the only information provided by the prosecutor in the indictment is the month, year and name of the village or town where the incident is alleged to have taken place, and no other particulars of the offense that could potentially strengthen the case of the defense.

Prosecutors also classify offenses more broadly and we often have legal arguments in court about what the correct charge is. For example, in one of my cases a Palestinian alleged to have fired a weapon at an Israeli military base was charged with attempted murder. The charge sheet did not specify any particulars regarding "intent to murder", any evidence of injury or any

information about the distance from the firing to the base. These are important details that may help the lawyer to argue the case properly. Not mentioning these details can severely harm the defense and result in an automatic conviction, which is what happens in most cases.

The arrest and detention process is also different. In Israel a person accused of criminal offenses must be taken to court within twenty-four hours of his or her arrest, and a public defender may be appointed by the court or a private lawyer may represent the accused. Prior to indictment, an adult accused of criminal offenses can be held for interrogation for up to thirty days without charge,¹⁵ and a juvenile for twenty days.¹⁶ An amendment to the criminal procedure law, enacted on 27 June 2006, created specific criminal procedures in Israeli law that enable the Israeli police and the General Security Services to order that a detainee suspected of committing 'security offenses' may be held before being brought before a court for forty-eight hours and in some instances ninety-six hours from the detention.¹⁷ This law also stipulates that such a detainee may be held for up to thirty-five days without being charged.¹⁸ For suspects who appear before the military courts, the situation is drastically harsher: a Palestinian detainee can be held for eight days after arrest as opposed to twenty-four hours before being brought to court, and can be detained for interrogation, before being indicted, for up to ninety days. This is the case for both juveniles and adults. Moreover, the Military Advisor or the Military Court of Appeals may extend the ninety day period for a further ninety days.¹⁹

In terms of evidence, prosecutions in

the military courts rely very heavily on confessions, which are almost impossible to challenge. Because of the length of the interrogation period and the methods used during interrogation, such as beatings and threats of harm to or arrest of family members, the reality is that a confession is produced in around 90% of adult cases and almost 100% of juvenile cases in the military courts. We once represented a seventeen year old who refused to confess and as a result was held in administrative detention for a year.

In general, the rules of evidence for confessions are the same in both the Israeli military courts and the regular Israeli criminal system: if a confession has been obtained using psychological, physical coercion or torture, and the defense wishes to exclude it as evidence, the burden of establishing the reason why it should be excluded lies with the defense. This is difficult because the defense has to show that the accused's psychological condition had been so severely affected by coercion or torture that the confession is unreliable.

How does Israel decide which crimes constitute a threat to its security and how does it define these offenses?

Under Military Order 378, offenses range from general acts to manslaughter and murder. Section 53 A of the order, for example, is entitled "Throwing an Object". You can see from this broad use of terminology how easily individual acts such as stone-throwing, when they occur in the context of a group demonstration or are committed against the Israeli army, can be interpreted as a crime against the State of Israel.

Another example is Section 68, entitled

"Activity against Public Order," which stipulates that, "Any person who commits any act which disturbs or is likely to disturb the peace or public order shall be guilty of an offence under this order." This offense could mean absolutely anything, and Palestinians carrying out a variety of acts that are not crimes, but political acts that are deemed disturbances of the peace, can be arrested. The charge of "Attempted Murder" which carries a maximum sentence of life imprisonment, is widely used by the Israeli army because it is not properly defined; the specific elements of the crime are not articulated in Military Order 378, and so a wide definition can be applied by the courts. A usual case is one of a Palestinian found in possession of a knife being charged with attempted murder without any real evidence to indicate that he or she actually used or intended to use the weapon to kill.

In your experience, what particular Palestinian political activities are prosecuted as crimes in the military courts?

The British Defence (Emergency) Regulations of 1945 are constantly being amended and used by Israel to create and define certain political activities as crimes, in accordance with the prevailing political situation. For example, during the elections to the Palestinian Authority in 2006, the Israeli military arrested dozens of university students for being members of student political movements that Israel considered to be affiliated with Palestinian political parties. Palestinian parties can be deemed to be illegal pursuant to Section 85(1) A of the regulations, and military orders are issued to name specific parties. Fatah and Hamas, for example, have been declared

illegal political parties. Student movements, such as the Kutla Islamiya, were deemed to be associated with Hamas and its student members were arrested and imprisoned for long periods of time.

Not only students were arrested: in the run-up to the elections, on 25 and 26 September 2005, Israel arrested between 200 and 300 Palestinians and then released them after the elections in order to prevent them from exercising any influence on the campaigns. Israel created many offences during the electoral campaigns that basically made any type of connection to Hamas illegal.

One of my clients, Mr. Ashraf Taqatqa, was arrested and placed under administrative detention at that time. When the detention period expired after four months he was charged with working for an organization declared illegal by Israel and alleged to be associated with Hamas. The organization was Dar al-Aytam, an orphanage located in the village of Beit Fajjar. We couldn't argue that the organization was not illegal because Israel had declared it as such under an amendment to the British Defence (Emergency) Regulations – 1945, and the discretion to do so lies solely with the Israeli government. Support or otherwise for Hamas' military operations had nothing to do with how the court defined the crime and so my client had to plead guilty, and was sentenced to six months' imprisonment. After 11 September 2001, Israel declared two charity organizations – The Jerusalem Foundation and Al-Aqsa Foundation – illegal. The United States and Europe also banned these organizations. If you worked for an organization that was funded by these organizations, such as a

kindergarten or fitness center, you were, according to Israel, committing a crime and could be arrested.

In the case of children, stone-throwing is the most common act defined as a crime against the security of the State of Israel. Children can be sentenced to months in prison for throwing stones. Children as young as ten years of age have been held for hours at Israeli police stations for throwing stones at Israeli military vehicles.

Are there special procedures or laws for juveniles in the Israeli military courts?

Military Order 132 specifically applies to juveniles but, generally speaking, there are no distinct procedural rules for them in the military courts. Their arrest and prosecution is essentially the same as for adults; Military Order 378 governs the prosecution of both. Military Order 132 defines children as persons up to the age of sixteen; in the regular Israeli criminal system it is eighteen. After the age of sixteen, a Palestinian child appearing before a military court is sentenced as an adult and is imprisoned with adults. Israel has a specialized juvenile justice system that deals with Israeli children. However, it does not operate such a system for Palestinian children in the West Bank.

When Israeli juveniles are arrested in Israel, they are dealt with by a specialized police officer and in juvenile courts that are closed to the public in order to safeguard their privacy. Children brought before the Israeli military courts usually appear in court shackled at the ankles. They are placed in the dock to await their hearings with adult detainees. Sometimes there can be up to ten male adult and juvenile detainees in the dock in the courtroom, all

awaiting their hearings. If there are male detainees already in the dock, female child detainees, who are accompanied by a female soldier when in court, are seated on a chair next to the dock. The courtroom is not closed and families of other adult or child detainees may be present, watching the child and the child's proceedings.

All Palestinian children who appear before the Military Courts are imprisoned; no alternatives to incarceration and no rehabilitation programs are considered, as they are in juvenile courts in Israel. Some special sentencing rules apply to juveniles up to the age of sixteen, but these rules do not reflect or uphold international human rights standards for the sentencing of children because they essentially just determine imprisonment periods.

How would you generally compare the outcomes in the two jurisdictions?

The main difference between the prosecution of Palestinians and the prosecution of Israelis is the sentence. Military court judges sentence Palestinians in the military courts, and indeed Palestinian citizens of Israel charged with "security" offences and prosecuted in Israel in the criminal court system, according to an ideology of collective punishment. They are viewed as security risks whatever the charge and whatever the evidence brought before the court. In stark contrast, Jewish Israelis are prosecuted in the criminal system as individuals in accordance with the evidence brought against them.

According to Military Order 132, Palestinian children aged between fourteen and sixteen cannot be given a custodial sentence of more than six months for offences that carry a term of imprisonment

of less than ten years. However, a child can be sentenced as an adult for offences that carry an imprisonment term of over ten years, and it is even possible for a Palestinian child to receive a life sentence.

In 2005 I represented a fourteen-year-old girl from Nablus. She had traveled to Jerusalem alone and was arrested at the Al-Aqsa Mosque in possession of a knife. She did not harm or attempt to harm anyone and just held the knife in her hand, but told Israeli police officers that she wanted to kill a policeman. She was charged with attempted murder and received a sentence of six years' imprisonment.

I also represented a nineteen-year-old who was not technically a juvenile, but I mention her because I would like to compare her case with the case of three Jewish Israeli juveniles who were charged with murdering a Palestinian farmer at around the same time. My client stabbed a policeman who, as a result, received a two-inch deep wound. He was injured but he survived. My client received a very harsh sentence of nineteen years' imprisonment from a military court judge. Close in time to the young woman's arrest, three Jewish Israeli juveniles were riding on a school bus home from school and playing with a wooden stick. They stuck the stick out the window of the bus and struck a Palestinian man as he was riding on his donkey beside the bus. He was killed. The three juveniles each received a two-year prison sentence.

Thus the prosecution of Palestinians in the Israeli military courts, in contrast to prosecutions in the regular Israeli criminal system, is not only about the procedure, but also the length of imprisonment. Judges in the military courts will hand down terms of imprisonment from the perspective that

the accused Palestinian intended to harm or kill a Jew for being a Jew, and will not make the same assumption in the case of a Jewish person. For example, three years ago, a group of settlers planned to place a gas bomb in a car parked near a girls' school in East Jerusalem. The settlers in the Beit Ein case, who were prosecuted in regular Israeli courts, received prison terms of twelve and fifteen years. Palestinians charged with offences in circumstances that are comparable to this case have received sentences of twenty-five to thirty years' imprisonment.

A Palestinian child charged with "involvement" in planning a suicide bomb could receive a custodial sentence of fifteen years or more. "Involvement" could mean anything from talking about the plan but not being part of the act itself, to carrying part of the bomb for someone else in a bag without being aware of its contents.

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Sahar Francis is a Palestinian citizen of Israel who has been practicing law in the West Bank since 1996 and is currently the Director of the Addameer Prisoners' Support and Human Rights Association.

End Notes

- 1 Under the Criminal Procedure (Detainees Suspected of Security Offenses) (Temporary Provision) Law – 2006, individuals from Gaza who are arrested by Israel are now brought before Israeli criminal courts, but Israel has legislated harsher detention laws that in practice apply only to them.
- 2 See Article 5, Fourth Geneva Convention (1949).
- 3 See Article 64, Fourth Geneva Convention (1949).
- 4 The text of the military order is available in English at: <http://www.geocities.com/savepalestinew/iraelmilitaryorders/fulltext/mo0378.htm>
- 5 The text of the Defence (Emergency) Regulations from 1945 is available at: <http://www.geocities.com/savepalestinew/emergencyregs/emergencyregs.htm>.
- 6 It is a violation of Article 76 of the Fourth Geneva Convention (1949) for an occupying force to detain a person outside the occupied territory.
- 7 Statistics obtained from B'Tselem – The Israeli Information Center for Human Rights in the Occupied Territories, 28 February 2008.
- 8 Defence for Children International – Palestine Section, Child Prisoner Statistics, April 2008.
- 9 The Addameer Prisoners' Support and Human Rights Association is a Palestinian non-governmental, civil institution established in 1992 by Palestinian human rights activists. Addameer's activities focus on offering support to Palestinian prisoners, advocating for their rights, and working to end torture through monitoring, legal procedures and solidarity campaigns. For more information, see: www.addameer.org.
- 10 Statistics obtained from Addameer, 6 April 2008.
- 11 Defence for Children International (DCI) – Palestine Section is one of over thirty-five DCI Sections around the world. The International Secretariat of the organization was established in Geneva in 1979. The Palestine Section was established in 1992 in response to the urgent need to protect the rights of Palestinian children in the West Bank and Gaza Strip during the first Intifada. Its main office is located in Ramallah and branch offices are located at Bethlehem and Hebron in the West Bank. Lawyers who work in DCI Palestine's Legal Unit represent Palestinian children in the Israeli military courts and visit them in Israeli prisons. For more information, see: www.dci-pal.org.
- 12 The arbitrary arrest or detention and detention of persons without informing them of the charges they face or without bringing that person to trial within a reasonable period of time is in breach of Article 9 of the International Covenant on Civil and Political Rights (ICCPR). Administrative Detention in the Israeli Military Courts is governed by Military Order 1226 and Chapter E1 of Military Order 378.
- 13 Statistics obtained from Addameer, 6 April 2008.
- 14 See, B'Tselem, "The Dual System of Law in the Occupied Territories," available at: http://www.btselem.org/english/Settler_Violence/Dual_Legal_System.asp, and the testimonies of Palestinian victims of settler violence at: http://www.btselem.org/english/Settler_Violence/Index.asp.
- 15 Section 17(b) of the Criminal Procedure Law (Powers of Arrest) – 1996.
- 16 Section 10(3) of the Juvenile Punishment and Treatment) Law – 1971.
- 17 According to articles 3(1) and 3(2) of the Criminal Procedure (Detainees Suspected of Security Offenses) (Temporary Provision Law) – 2006.
- 18 According to article 4 of the Criminal Procedure (Detainees Suspected of Security Offenses) (Temporary Provision Law) – 2006.
- 19 According to Section 78 of Military Order 378, a Palestinian child can be detained by a low-ranking Israeli soldier or police officer for 96 hours without charge. Afterwards, the child can be held for interrogation for eight days before being brought before a court through a formal detention order issued by a higher ranking military official. A judge of the military court has the power to extend this period of detention for interrogation for up to 90 days. Also under Section 78, a judge of the Military Court of Appeals has the power to extend this 90 day period to a further period of up to three months.