

Mandates of the Special Rapporteur on the independence of judges and lawyers and the Special Rapporteur on the situation of human rights in the Palestinian territory occupied since 1967

Ref.: AL ISR 11/2024

(Please use this reference in your reply)

7 June 2024

Excellency,

We have the honour to address you in our capacities as Special Rapporteur on the independence of judges and lawyers and Special Rapporteur on the situation of human rights in the Palestinian territory occupied since 1967, pursuant to Human Rights Council resolutions 53/12 and 1993/2A.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning the Israeli military forces' exercise of legislative, executive, and judicial powers in the occupied West Bank, of the occupied Palestinian territory, since 1967. As part of the military judicial system, Israeli military courts prosecute Palestinian civilians based on Israeli military orders issued by the Israeli military commander in the occupied West Bank (and previously for occupied Gaza) violating due process guarantees and the right to fair trial, as established under international human rights law and international humanitarian law.

While the following allegations of violations of international law are reported to be widespread and systematic since 1967, on 13 October 2023, an amendment to the Unlawful Combatants Law, was passed, entitled "Emergency Regulations" (Final Deadlines for Dealing with Unlawful Combatants during War or Military Operations for the Year 2023), and on 18 December 2023, the "Detention of Unlawful Combatants Law (Amendment No. 4 and Temporary Order – Iron Swords) 5784-2023 (2023 amendment law)", was passed, further amending the Detention of Unlawful Combatants Law. These amendments have further exacerbated the violations of due process guarantees and the right to a fair trial for Palestinians.

The human rights violations described in these allegations have already been brought to the attention of Your Excellency's government and that of the international community by the mandate of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967 in reports A/72/556, A/HRC/48/87, and A/HRC/53/29. Other Special Procedures mandate holders have also already addressed related concerns to Your Excellency's government, most recently in JUA ISR 9/2024 on 22 November 2023. Unfortunately, concerns persist.

According to the information received:

On 7 June 1967, the Israeli military commander issued three proclamations concerning the military's executive, security, public order, and judicial authority in the occupied West Bank:

His Excellency
Mr. Israel Katz
Minister for Foreign Affairs of the State of Israel

1. Proclamation No. 1 Regarding Regulation of Administration and Law (West Bank Area), 7 June 1967, declaring the commander's executive, security and public order authority over the occupied Palestinian territory.
2. Proclamation No. 2 Regarding Administrative and Judiciary Procedures (West Bank Area) 5727-1967, establishing a military judicial system complementary to the occupation.
3. Proclamation No. 3 Regarding Entry into Force of the Order Concerning Security Provisions (West Bank Area) (No. 3) 5727-1967 focused on the implementation of the security provisions order relating to the judicial procedures taken before military courts.

These provisions were later amended into Military Order No. 378, which established military courts, defined their jurisdiction, and set out the applicable criminal code, defining "security offense" and regulating detainees' rights under military law.

For the first 22 years of the occupation, Israeli military courts were limited to first instance courts. There were no military courts of appeal until 1989. Currently, there are two Israeli military courts of first instance, one located in Ofer military base near the town of Beitunya in Ramallah, and the other in Salem military base near the city of Jenin. Each court has both an adult court and a youth court. There is one military court of appeal located in Ofer military court. Each of the two courts of first instance also operates satellite courtrooms inside detention centers belonging to the Israeli General Intelligence Service "Shabak" in Israel, in Al-Jalameh, Petah Tikva, Ashkelon, and Al-Mascobiyyeh. These military courts hear applications to extend the detention of Palestinians during their interrogation process.

Structure and procedure of the military court – how judges and prosecutors are appointed

Military courts operate to prosecute Palestinian civilians arrested by the Israeli military who are charged with "security violations" and other crimes defined by Israeli military orders. The yearly conviction rates of Palestinians in these military courts are consistently above 99%.

The judges in these courts are military personnel, as stipulated in article 4 of Military Order No. 378: "*Convening of Courts*: Every military court shall be convened by a court president, who is an officer in the Israeli military, holding the rank of captain or a more senior grade, and possessing legal qualifications, and two magistrates who are also officers. The court shall be established by the Military Commander, who will also appoint the president and the two magistrates"¹.

¹ Israel Military Order No. 378, Order Concerning Security Provisions

The prosecution service is also appointed by the Military Commander, as stipulated in article 8: “*Prosecutor and Defence*: Every case for the prosecution which is to be tried before a military court shall be conducted by a military prosecutor appointed by the Area Commander.”²

As it relates to appeal, article 43 provides that “There can be no appeal against a judgment on jurisdictional grounds, however, the convicted person may apply to the Area Commander or the Military Commander, as the case may be, in order to appeal or make a petition in connection with the finding of guilt or the sentence.”³

The Order establishes vague procedural instructions and broad powers to the military forces for the conduct of the proceedings. In article 9, the Order provides: “*Evidence*: Military courts shall conduct themselves in accordance with the same laws of evidence which apply in cases in which soldiers are tried. However, military courts may diverge from the laws of evidence in special circumstances which must be recorded if they deem it to be in the interests of justice to do so”⁴. Article 10 provides: “*General Procedural Provisions*: A military court may, with regard to procedural matters not laid down by this order, adopt any course which it deems to be best calculated to ensure that justice is done”⁵. As it relates to sentences, article 41 provides that “The conviction and sentence passed by the military court shall not be valid until it has been confirmed by the Area Commander”.

Thus, the functions of police, investigator, prosecutor, and judge are vested in the same hierarchical institution.

The information further suggests that the military officers assigned as judges are not required to have long-term judicial training. It was only in 2004, that Military Order No. 378 was amended, requiring all military judges to have some judicial expertise. According to the information, many Israeli military judges are Israeli settlers residing in illegal settlements, built on unlawfully appropriated Palestinian lands.

Military orders and the violations of Palestinian human rights

Since its establishment, the Israeli occupation officials have issued over 1800 military orders. The information explains that these military orders have served to regulate and criminalize many aspects of Palestinians’ daily lives, including public health, education, and land and property law. Furthermore, Israeli military orders have reportedly criminalized many forms of political and cultural expression, association, movement, nonviolent protest, traffic offenses, and any other acts that might be considered methods for opposing the occupation and its policies.

² Ibid.
³ Ibid.
⁴ Ibid.
⁵ Ibid.

As noted in her 2023 report to the Human Rights Council, the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, Francesca Albanese, indicated that “Deprivation of liberty is regulated by emergency regulations and, inter alia, Israel Defense Forces Order No. 101 of 1967 (on incitement and hostile propaganda), and Order No. 1651 of 2009 (on security). These orders set out offences under two main categories: security offences, deemed as threatening the Israeli military presence in occupied territory; and public order offences, including unauthorized demonstrations and traffic disturbances. Both types of offence carry severe sentences”.⁶

Further, the information indicates that activities such as membership in political parties and student movements are deemed unlawful under Israeli military orders, as well as offenses related to freedom of opinion and expression; and are considered offenses against public order. In addition, offenses also include traffic infractions occurring on settler bypass roads and connecting roads between Palestinian cities and relating to entering the Green Line without a permit.

The territorial jurisdiction of Israeli military courts applies to the whole occupied Palestinian territory. Sentences include imprisonment (articles 17, 38, and 40), fines and compensation (articles 45, 47, 48 and 49), hard labour (article 47), and even the death penalty (articles 27, 47 and 51)⁷.

Discriminatory application of the Military Order No. 378

The system created reportedly rejects the principle of territoriality respected in criminal law and further establishes a discrimination-based dual legal system in occupied Palestinian territory based on nationality.

In terms of legislation applicable within Israel, in 2007, the Israeli Knesset adopted the Emergency Regulations, which state under article 2(a) that “Israeli courts have jurisdiction to try according to Israeli law any person who is present in Israel and who committed an act in the region, and any Israeli who committed an act in the Palestinian Authority if those acts would have constituted an offense had they occurred in the territory under the jurisdiction of Israeli courts.” Under section 2(c) “this Regulation does not apply to residents of the region or the Palestinian Authority, who are not Israelis.”⁸

The information suggests that this established in law the already long-established practice of trying Israeli settlers, living in the occupied West Bank, or having committed crimes there, not in the Israeli military courts, but in Israeli civil courts, which reportedly provide all the guarantees of due process for Israeli citizens.

⁶ A/HRC/53/59, para 32.

⁷ Israel Military Order No. 378, Order Concerning Security Provisions

⁸ Law for Amending and Extending the Validity of Emergency Regulations (Judea and Samaria – Jurisdiction in Offenses and Legal Aid), 2007.

The dual court system set up in the occupied West Bank, in violation of international law, has furthered the legitimization of the occupation and the illegal settlements in the occupied Palestinian territory, through a militarily enforced penal system that is only applied to Palestinians without due process guarantees, and which turns a blind eye to settler violence and criminality, allowing it to grow and remain in impunity.

Reports indicate that, since the start of the occupation, the Israeli military has either taken part in or failed to protect Palestinians from violent settler attacks in the occupied West Bank, including, killings, forced displacement, property damage, destruction and unlawful appropriation, discrimination, harassment, and threats.

Violations of the right to a fair trial and due process guarantees

The information suggests that military courts have a record of legalizing Israeli violations of Palestinian human rights, including: approving the extension of detention for interrogation purposes despite the evident marks of torture on prisoners, supporting administrative detention orders without a real cause for arrest, issuing unusually long sentences against Palestinians, and, most importantly, convicting Palestinian detainees based on confessions extracted under duress or torture, instead of finding these confessions inadmissible.

As it relates to due process guarantees, procedural provisions in the Order No. 378 allow for arbitrary procedures on use of evidence (art. 9), on the amendment of charges during proceedings (art. 23), and, for cases considered security offenses, violate the presumption of innocence by placing the burden of proof on the accused (art. 94). Further, the Order allows for arrest without a warrant (article 78), as well as restriction of movement and administrative detention without judicial oversight (articles 85 and 87).

The information suggests that the military judges in military courts consistently provide legal and judicial cover for acts of torture, cruel and degrading treatment against Palestinian detainees carried out by their colleagues in the armed forces and intelligence agencies. It further suggests that the Israeli military forces systematically put Palestinian detainees under severe physical and psychological pressure from the first moments of the arrest until their detention or release, primarily during the interrogation process, without judicial oversight or protection, as a means to extract confessions which are later used by the military court.

Reports indicate that a vast majority of Palestinians interrogated sign purported “confessions”, often in Hebrew, a language they frequently do not understand. Where a “confession” has been signed, it is practically impossible to exclude it as evidence, even where it is alleged to have been extracted under duress, including torture or inhuman and degrading treatment. That leads, necessarily, to defendants agreeing to a “plea bargain” for offenses they did not commit. In doing so, Palestinian detainees plead guilty and waive their right to continue with judicial procedures, including hearing witnesses and examining evidence.

The Israeli occupation continues to place Palestinians under administrative detention (art. 87) indefinitely without charge based on secret material that can be disclosed to neither the detainees nor their lawyers. Following the issuance of an administrative detention order, a judicial review of the order must take place within eight days. This review takes place before a military judge who can reduce, cancel, or confirm the order. The detainee then has a right at any time to appeal the decision of the military judge to the Administrative Detention Appeals Court presided over by another military judge.

Further, reports list the following concerns under the Military Order:

- Despite a provision in article 21 about access to the charge sheet, reports indicate that detainees and their lawyers do not have access to the “secret” information on which the orders are based. The detainee is not able to confront and cross-examine primary witnesses, and since almost all information presented to the court is classified, the detainee is unable to contest its veracity. Detainees are therefore unable to present a meaningful defence.
- Despite article 11 on open courts, reports indicate that Palestinian detainees are tried behind closed doors in Israeli military courts. There is no public access to the court per se. Further, the information indicates that public scrutiny of these proceedings, and the general public’s access to information about the military courts, the harsh treatment of Palestinians in military courts and leniency towards settlers is limited given the current censorship exercised by the Israeli military in Israeli and foreign media, existing since at least 1966. Under Israeli law, journalists working in Israel or for an Israeli publication are required to submit articles dealing with “security issues” to the military censor for review prior to publication, in line with “emergency regulations” enacted after Israel’s founding that have remained in place since. The regulations allow the censor to fully or partially redact articles submitted to it.⁹
- The official language used in these courts is Hebrew, a language most Palestinians from the occupied West Bank do not understand. “Interpretation” is provided in court (article 12) by an Israeli army soldier dressed in military attire. However, the information suggests that these services are invariably inadequate; the interpreter is almost never a professional nor a competent interpreter. Interpreters do not translate everything said during the hearing, including what the military judge says and what the detainees themselves say, which prevents the detainees from expressing themselves and comprehending what is going on in the trial session.

⁹ The Israeli Military Censor is a unit in the Israeli military’s Directorate of Military Intelligence tasked with carrying out preventive censorship. The body is headed by the Israeli Chief Censor, a military official appointed by Israel’s Minister of Defense, who bestows upon the Chief Censor the authority to suppress information deemed compromising from being made public in the media. On average, 2240 press articles in Israel are censored by the Israeli Military Censor each year, approximately 240 of which in full, and around 2000 partially.

- All legal documents, including court decisions, hearing session notes, submitted evidence, witnesses statements, and all other papers issued by the court, are in Hebrew, with the absence of interpretation or translation.

Torture in detention

The use of torture and ill-treatment against Palestinian detainees and prisoners has been reported to be widespread and systematic. The information describes that Palestinian prisoners endure relentless abuse: removed from contact with the outside world, in overcrowded and unsanitary conditions, they typically face deprivation (they are often forced to purchase their own sustenance), medical negligence, limited opportunity for education and physical exercise alike. Documented instances of torture, cruel, inhumane or degrading treatment include sexual assaults; being hooded and blindfolded, forced to stand for long hours, tied to a chair in painful positions, deprived of sleep and food, or exposed to loud music for long hours; and being punished with solitary confinement. Such practices may go unreported due to lack of access to legal representation or fear of retaliation.¹⁰

Reports of torture and ill-treatment of Palestinian detainees have reportedly increased in frequency and gravity since 7 October 2024.

Interference to the free exercise of the legal profession

Israeli military courts allow the Israeli military prosecutor to request a prohibition order against Palestinian detainees to meet with their lawyers for a total period of 60 days. This denies detainees the right to confer with legal counsel, especially during the interrogation process. This prohibition order deliberately hinders legal counsel's ability to prepare a legal defence and has the effect of concealing the Israeli occupation forces' illegal practices during interrogations, such as using torture and ill-treatment.

Court sessions conducted when a prohibition order is still in effect take place in two sessions: in the first session, the lawyer appears in court alone without the detainee; the lawyer must then leave for the second session, when the detainee appears before the court unrepresented, without having spoken with his/her lawyer, and without having received legal advice. Detainees are thus deprived of their right to counsel during the most sensitive period of detention.

Defence lawyers face constant obstacles and banning orders that prevent them from attending interrogations and trials. Palestinian lawyers who represent Palestinians in Israeli military courts face many obstacles that systematically erode the right of Palestinian detainees to legal representation. Defence counsel must contend with military orders, Israeli laws and prison procedures that curtail their ability to provide adequate counsel to their clients. Lawyers' citizenship or residency status dictates their ability to represent Palestinians. For instance, Palestinian lawyers from the occupied West Bank are not permitted any special travel privileges in order to reach their clients in detention. They are subjected

¹⁰ A/HRC/53/59, para 8 and 61.

to the same travel restrictions as all Palestinians in the occupied Palestinian territory, depending on area of residence.

Israeli military courts do not provide defence counsel of detainees with the necessary documents and information to prepare for their defence.

Legal counsel is expected to be fluent in written and oral Hebrew. This is essential to adequately represent Palestinian detainees, understand the witnesses' statements and the presented evidence, in addition to formulating questions and counter-questions. This consequently violates and limits the detainees' right to counsel, given that few Palestinian lawyers are fluent in the Hebrew language.

Changes brought by the October 2023 "Emergency Regulations"

On 13 October 2023, an amendment to the Unlawful Combatants Law, was passed, entitled "Emergency Regulations (Final Deadlines for Dealing with Unlawful Combatants during War or Military Operations for the Year 2023)". The amendment expands the category of officials with authority to issue arrest orders, to include Brigadier Generals as well as those of lower rank, and extends the duration of the power to do so from 7 days to a maximum of 21 days. The maximum period for reviewing the legality of arrest orders was extended to 30 days. An inmate's right of access to legal counsel has been extended from 7 days to a maximum of 21 days. The power to withhold access to a lawyer by the official responsible for issuing the arrest order is extended from 10 to a maximum of 28 days from the date of arrest. Moreover, judges can now extend the prohibition of access to a lawyer to a maximum of 45 days.

On 18 December 2023, the Knesset passed the "Detention of Unlawful Combatants Law (Amendment No. 4 and Temporary Order – Iron Swords), 5784-2023 (2023 amendment law)", amending the Detention of Unlawful Combatants Law, 5762-2002, as amended.

This law makes changes to procedures for the detention of "unlawful combatants". Among other procedures, the law regulates the issue of detention orders, the duration of detention, judicial review, and a detainee's right to legal representation.

The law defines an "unlawful combatant" as: "A person who takes part in hostile activity against the State of Israel, directly or indirectly, or belongs to a force engaged in hostile activity against the State of Israel, but does not meet the conditions granting the status of prisoner of war under international humanitarian law, as detailed in article 4 of the Third Geneva Convention of 12 August 1949 regarding the treatment of prisoners of war".

The law authorizes the Israel Defense Forces Chief of Staff to issue a detention order when there are: "reasonable grounds to believe that an inmate is an unlawful combatant and that their release would harm state security ... provided that [the chief of staff] does not issue such an order until the inmate has been

given an opportunity to voice their arguments in this regard before an officer with the rank of lieutenant colonel or higher authorized by the chief of staff”

A detainee must be brought before a district court judge for review of their detention within 14 days of the arrest and be released if the judge finds that the conditions for the issue of a detention order have not been met.

The 2023 amendment also provides that following the government’s “decision to start a war, take significant military action or take other military actions in accordance with section 40(c) of the Basic Law: The Government”, the Israeli military and Israel Security Agency (ISA) officers with the rank of lieutenant colonel or the head of the ISA team of investigators are enabled to exercise detention authority previously requiring higher-ranking officers.

The 2023 amendment law further extended the period of 96 hours after which a detainee must be released in the absence of a detention order to 45 days, but declares that “a temporary detention order shall not remain in effect for a period exceeding 30 days unless issued or extended by an officer with the rank of major or higher.” The amendment also extended the period within which a detainee must be brought before a judge from 14 to 75 days and the period within which a detainee may meet with an attorney from seven to 30 days, under conditions enumerated.

Increased settler violence in the occupied West Bank in 2023

January to October 2023 saw the highest levels of violence from the Israeli military and Israeli settlers against Palestinians in the occupied West Bank, including East Jerusalem, since United Nations records began in 2005.

Following 7 October, the Israeli military called up 5,500 settlers who are Israeli army reservists, including some with criminal records of violence against Palestinians, and assigned them to West Bank “regional defense” battalions. The authorities distributed 7,000 guns to battalion members and others, including “civilian security squads” established in settlements. Reports further indicate that settlers left leaflets and sent threats on social media to Palestinians after 7 October, such as warnings to “flee to Jordan” or be “exterminate[d],” and that “the day of revenge is coming.”

Between 7 October and 27 December 2023:

- 300 Palestinians were killed in the occupied West Bank, including 291 by the Israeli military and eight by settlers, and one either by settlers or by Israeli forces. Four Israelis were killed in Palestinian attacks in the West Bank in the same period, and four others were killed in Israel.
- The Israeli military had arrested 4,785 Palestinians in the occupied West Bank (including those arrested and released later). As of December, the Israeli Prison Services held 7,417 Palestinians on “security charges”, including 2,873 held under administrative detention without charge or trial. Despite reports that hundreds of settlers were involved in these

attacks, as of 27 December 2023 only two settlers had been reportedly placed in administrative detention for four months under accusations of assault, damage to property and rioting. No indictments have been filed.

- Settlers killed eight Palestinians (with one more Palestinian killed either by settlers or Israeli military) and carried out 367 attacks resulting in Palestinian casualties (36 incidents), damages to Palestinian property (285 incidents), or both (46 incidents). A total of 1,208 Palestinians from 15 herding communities had been displaced as of 27 December, due to settler violence and access restrictions.

During May 2024, reports have also indicated that members of Israel’s security forces are tipping off far-right activists and settlers to the location of aid trucks delivering vital supplies to Gaza, enabling the groups to block and vandalise the convoys, while the UN has called the conditions in Gaza “full-blown famine”. Videos circulated in social media in mid-May showed incidents of attacks by settlers to the convoys, while military forces looked on.

The International Court of Justice has made clear, on numerous occasions, that human rights law and humanitarian law apply concurrently, must be understood as providing complementary guarantees, and continue to apply throughout an occupation.¹¹ Thus, “people under occupation are to enjoy the full panoply of human rights, subject only to any legitimate derogations that are scrupulously justified either by emergencies or the requirements of military rule under occupation”¹². International human rights experts, including former Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, Michael Lynk, have highlighted that “international human rights law, including the overarching right to self-determination, is integral to the application of the laws of occupation”¹³. Both the International Court of Justice and the Human Rights Committee have made clear that the International Covenant on Civil and Political Rights applies to Israel’s actions in the occupied West Bank.¹⁴

At the time Israel ratified the International Covenant on Civil and Political Rights, it lodged a derogation to article 9’s provisions concerning arrest and detention when required “for the defence of the State and for the protection of life and property”. While this derogation has been in place for decades, the Human Rights Committee has made clear that derogations should be “exceptional and temporary in nature”.¹⁵

¹¹ International Court of Justice, *Legality or Threat of Use of Nuclear Weapons, Advisory Opinion*, 8 July 1996, para. 25 (human rights law and international humanitarian law apply concurrently in times of armed conflict) ; ICJ, *The Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, 9 July 2004, para. 106 (human rights law and international humanitarian law apply concurrently in times of armed conflict, and both apply during occupation) ; ICJ, *Case concerning armed activity on the territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment of 19 December 2005, paras. 216–220 (applying human rights and humanitarian law to find violations of both during an occupation).

¹² A/72/556, paragraph 23.

¹³ Ibid.

¹⁴ CCPR/C/ISR/CO/5, paragraphs 6-7.

¹⁵ CCPR/C/21/Rev.1/Add.11, paragraph 2.

Standards on the independence of the judiciary

Without prejudging the accuracy of the allegations related to the military court system, we would like to recall that the exercise of jurisdictional functions by personnel other than an independent judiciary is not compatible with international human rights standards on fair trial.

The requirement of independence refers, in particular, to the procedure and qualifications for the appointment of judges independent of other branches of the State, the guarantees relating to their security in office, and the guarantees of respect for their independent decisions and rulings. The military courts system set up in the occupied West Bank, which is the subject of this communication, appears to violate these requirements. The recent amendments since 7 October 2024 further exacerbate the violations of the right to fair trial.

International standards concur that guarantees of a fair and public trial include the courts' independence and impartiality and require the judicial system to not depend on the discretion of any branch of the government, especially the executive branch and the armed forces. Further, the Human Rights Committee has clarified that the right to a fair trial is non-derogable even during a state of emergency.¹⁶ Indeed, the Human Rights Committee has explicitly instructed Israel that even when a derogation is in place, "a State Party may not depart from the requirement of effective judicial review of detention".¹⁷ In addition, the trial of civilians before military courts must be exceptional, and the military nature of a trial does not exempt such a proceeding from any of the fair trial guarantees under human rights law.¹⁸

Due process and the right to a fair trial

In addition to these structural defects, we express our serious concerns about what appear to be systematic violations of due process guarantees since 1967 (exacerbated since October 2023). There appears to be an inequality of arms, and a lack of equality before the law in military proceedings against Palestinian defendants. In addition to guaranteeing access to counsel, international standards on the right to a fair trial also provide that accused persons must have adequate time and facilities for the preparation of their defence and must be able to communicate with counsel of their choice.

International standards further provide that the right to be judged by ordinary courts of justice under legally established procedures constitutes a basic principle of due process. Palestinians' defence rights within the military system appear to be systematically harmed, including the right to know the facts of the accusation, the ability to bring forward evidence to discredit the charges for which he is accused, and the ability to make effective use of the advice of counsel. Further, the burden of proof in security-related cases has been reversed, lying with the accused instead of the prosecution, while the procedural steps in such proceedings may be changed at any time.

¹⁶ CCPR/C/GC/35, para. 67

¹⁷ CCPR/C./79/Add.93, paragraph 21.

¹⁸ CCPR/C/GC/32, para. 22

We recall that article 11 of UDHR, which reflects customary international law, states that “Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence”. These guarantees of the rights to a fair trial appear to be systematically violated by the military court system in the occupied West Bank, which is applied only to Palestinians and not to Israeli settlers.

As it relates to military tribunals, and the fact that article 43 forbids an appeal on jurisdictional grounds, we take the opportunity to recall that the Human Rights Committee noted the trial of civilians in military or special courts may raise serious problems as far as the equitable, impartial and independent administration of justice is concerned.¹⁹ For this reason, it is important to take all necessary measures to ensure that such trials take place under conditions which genuinely afford the full guarantees of the international standard on the right to a fair trial.

The Human Rights Committee has also established that trials of civilians by military courts should be exceptional and strictly “limited to cases where the State party can show that resorting to such trials is necessary and justified by objective and serious reasons, and where with regard to the specific class of individuals and offences at issue the regular civilian courts are unable to undertake the trials”.²⁰ Fundamental safeguards are also required under international humanitarian law.

In addition, we would like to refer to the United Nations Safeguards guaranteeing protection of the rights of those facing the death penalty, which provide that capital punishment may be imposed only for the most serious crimes, after a legal process which gives all possible safeguards to ensure a fair trial, including the right of anyone suspected of or charged with a crime for which capital punishment may be imposed to adequate legal assistance at all stages of the proceedings. The Safeguards specify that persons below 18 years of age at the time of the commission of the crime shall not be sentenced to death. The Human Rights Committee has noted that “In cases of trials leading to the imposition of the death penalty scrupulous respect of the guarantees of fair trial is particularly important. The imposition of a sentence of death upon conclusion of a trial, in which the provisions of article 14 of the Covenant have not been respected, constitutes a violation of the right to life (article 6 of the Covenant)”.²¹

The right to life and security of the person

The implementation of the military orders discussed above, leading to arrest and detention without oversight by an independent and impartial tribunal, especially without formal charges, and in conditions amounting to ill-treatment, would contravene article 9 of the UDHR and the right of every person not to be arbitrarily deprived of liberty and to challenge the lawfulness of detention before a court and without delay. The Human Rights Committee has found a “widespread practice of arbitrary arrest and detention” of Palestinians by Israel in the occupied Palestinian territory.²² Without access to legal counsel or their families, and without judicial oversight, those detained

¹⁹ CCPR/C/GC/32, paragraph 22.

²⁰ CCPR/C/GC/32, para. 22

²¹ CCPR/C/GC/32, para. 59

²² CCPR/C/ISR/CO/5, paragraph 35.

are at increased risk of all forms of cruel and inhuman treatment, including torture. As it relates to the legislative changes after October 2023, we take note with serious concern that the periods under which individuals detained without judicial oversight and without access to counsel have been unduly extended; and that the definition of “unlawful combatant” is vague and would allow for the abuse of detention orders.

We recall here that the United Nations Declaration on the Protection of All Persons from Enforced Disappearances²³, which reflects customary international law, recognises the right to be held in an officially recognised place of detention, in conformity with national law, and to be brought before a judicial authority promptly after detention in order to challenge the legality of the detention.

Because the military courts appear not to comply with guarantees of independence and impartiality required under human rights law, they cannot adequately carry out the requirements of judicial review and control required to protect against arbitrary detention and cruel and inhuman treatment, including torture.

Enjoyment of all human rights by people living in the occupied Palestinian territory

We are concerned at the allegations that the military order criminalises the exercise of many rights that are protected under international law, and even more concerned that the military courts enforce this criminalization.

The UDHR protects the right to freedom of opinion and expression (article 19), the right to freedom of peaceful assembly and association (article 20), the right to take part in government and the right of equal access to public service (article 21), as well as the right to free choice of employment and the right to form trade unions (article 23). According to article 29 of the UDHR, any limitations to these rights should be “determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society”.

We are especially concerned about the reports that the military courts are the direct link to other violations of human rights and legitimization of the actions taken by the armed forces in contravention of international standards on human rights. In particular, we express our serious concern that under the law in force, detainees are subjected to preventive detention without judicial oversight and, additionally, the imposition of the provisional measure of deprivation of liberty, by an appointee of the Military Advocate General (MAG) upon the accusation by another appointee of the MAG, both of which are interested parties in the proceedings, which do not meet the international standards related to fair trial.

Non-discrimination

The dual legal system in place in the occupied West Bank appears to operate in contravention of the rights in article 2 and 14 of the ICCPR, acceded to by your Excellency’s Government on 3 October 1991; as well as articles 2 of the International

²³ <https://www.ohchr.org/en/instruments-mechanisms/instruments/declaration-protection-all-persons-enforced-disappearance>

Convention on the Elimination of All Forms of Racial Discrimination, acceded to by your Excellency's Government on 3 January 1979, and the general principle of equality and non-discrimination, a fundamental element of international human rights law.

We would like to highlight that all international human rights instruments, complemented by various protocols, address the prohibition of discrimination. For example, the right not to be discriminated against is stated in article 2 of the Universal Declaration of Human Rights and in all human rights treaties. Other provisions, for example, in particular article 7 of the Universal Declaration of Human Rights and article 26 of the International Covenant on Civil and Political Rights, which reaffirm the right to equality before the law and equal protection of the law without discrimination. Article 2(c) requires that States dismantle laws and policies that create or perpetuate racial discrimination.

A situation in which people are tried under different court systems for the alleged commission of crimes, with different rules and different access to due process guarantees, on the basis of their nationality, is a violation of article 2 of the International Convention on the Elimination of All Forms of Racial Discrimination, acceded to by Israel in 1979, in which State parties undertake that they will engage "in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation". The Committee on the Elimination of Racial Discrimination has made clear that Israel's maintenance of "two entirely separate legal systems" for Jewish and Palestinian populations raises "issues under article 3 of the Convention" (outlawing racial segregation and *apartheid*).²⁴

The free exercise of the legal profession and the guarantees of due process

As it relates to the legal profession, we would like to express our concern that the Military Court system in place and Military Order No. 378, may restrict lawyers from exercising their professional duties in defending the rights of clients. Human rights guarantees and principles provide that lawyers are entitled to perform their professional functions without any threat, intimidation, harassment, or interference, and without suffering, or being threatened with, prosecution or any administrative or disciplinary sanctions for actions undertaken in accordance with professional duties and ethical standards.

It is our assessment that the Military Order and related laws and regulations, allow for undue interference with the freedom of lawyers to exercise their legal profession, and thus may open the door to systematic violations of the right to a fair trial and equality before the law by restricting lawyers from fulfilling their legal duties to their clients.

Further, we recall that the free exercise of the legal profession contributes to ensuring access to justice, oversight of state power, protection of due process and judicial guarantees.

²⁴ CERD C/ISR/CO/17-19, paragraph 22.

Concluding remarks

Taking into consideration that the International Court of Justice (ICJ) has clarified that human rights law and humanitarian law apply concurrently, must be understood as providing complementary guarantees, and continue to apply throughout an occupation,²⁵ we take this opportunity to recall the current ICJ proceedings in *South Africa v. Israel*, as well as the investigation and application for arrest warrants by the Prosecutor of the International Criminal Court in the Palestine situation. These international justice bodies have jurisdiction over the actions underlying the allegations that are the subject of this communication and over related internationally wrongful conduct or international crimes.

In closing, we call on Israel to repeal Military Order No. 378 and related laws and regulations, dissolve the military court, and ensure the right to fair trial in the occupied West Bank in compliance with relevant international human rights standards and international humanitarian law.

We stand ready to engage in dialogue with Your Excellency's government on this very important matter.

In connection with the above alleged facts and concerns, please refer to the **Annex on Reference to international human rights law** attached to this letter which cites international human rights instruments and standards relevant to these allegations.

As it is our responsibility, under the mandates provided to us by the Human Rights Council, to seek to clarify all cases brought to our attention, we would be grateful for your observations on the following matters:

1. Please provide any additional information and/or comment(s) you may have on the above-mentioned analysis and allegations.
2. Please explain how the military court system set up in the occupied West Bank is compatible with Your Excellency's Government's obligations under ICCPR, CERD, and articles 7, 8, 9, 10 and 11 of the UDHR, the Hague Regulations and the IV Geneva Convention.
3. Please explain the measures taken to ensure the right to a fair trial in the occupied West Bank and the free exercise of the legal profession, and the relevant human rights law and customary international law norms that are articulated in the UDHR; as well as IHL.
4. Please describe the measures taken to ensure this Order and related laws and regulations comply with the international human rights obligations undertaken by Israel.

²⁵ International Court of Justice, *Legality or Threat of Use of Nuclear Weapons, Advisory Opinion*, 8 July 1996, para. 25 (human rights law and international humanitarian law apply concurrently in times of armed conflict); ICJ, *The Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, 9 July 2004, para. 106 (human rights law and international humanitarian law apply concurrently in times of armed conflict, and both apply during occupation); ICJ, *Case concerning armed activity on the territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment of 19 December 2005, paras. 216–220 (applying human rights and humanitarian law to find violations of both during an occupation).

We would appreciate receiving a response within 60 days. Past this delay, this communication and any response received from your Excellency's Government will be made public via the communications reporting [website](#). They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

While awaiting a reply, we urge that all necessary interim measures be taken to halt the alleged violations and prevent their re-occurrence and in the event that the investigations support or suggest the allegations to be correct, to ensure the accountability of any person(s) responsible for the alleged violations.

We may publicly express our concerns in the near future as, in our view, the information upon which the press release will be based is sufficiently reliable to indicate a matter warranting immediate attention. We also believe that the wider public should be alerted to the potential implications of the above-mentioned allegations. The press release will indicate that we have been in contact with your Excellency's Government's to clarify the issue/s in question.

Please be informed that a copy of this letter has been sent to the Permanent Mission of the State of Palestine.

Please accept, Excellency, the assurances of our highest consideration.

Margaret Satterthwaite
Special Rapporteur on the independence of judges and lawyers

Francesca Albanese
Special Rapporteur on the situation of human rights in the Palestinian territory
occupied since 1967

Annex

Reference to international human rights law

In connection with above alleged facts and concerns, we would like to recall that the control exerted by Israel over the occupied West Bank, including East Jerusalem and occupied Gaza, meets the tests for the existence of a military occupation. The presence of Palestinian authorities does not alter the framework's applicability, nor does it absolve Israel of its obligations as the occupying Power.

Situations of belligerent occupation are governed by the Regulations respecting the Laws and Customs of War on Land (the Hague Regulations), the Geneva Convention relative to the Treatment of Prisoners of War (Third Geneva Convention), the Geneva Convention relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts and customary international humanitarian law.

The Third and Fourth Geneva Conventions, integrated and supplemented by customary rules, respectively provide guarantees and procedures for captured combatants and protection for civilians arrested or detained in occupied territory. The internment of protected persons is permitted only if "absolutely necessary" for the security of the occupying Power or for "imperative reasons of security", and it must comply with relevant provisions of the Fourth Convention. Protected persons can only be deprived of liberty after a fair and impartial trial or appropriate administrative proceedings that respect the presumption of innocence and their right to legal defence. Once detained, they must not be subjected to corporal punishment and must have access to medical care, nutrition and hygiene facilities. Customary international humanitarian law strengthens these minimum guarantees, imposing respect for penal safeguards and prohibiting discrimination, torture, cruel treatment and forced labour²⁶.

Article 64 of the Fourth Geneva Convention emphasizes that priority goes to the occupied people's pre-existing domestic laws, as they should remain in force along with the domestic justice system. Article 64 entails that the legislative powers of the Occupying Power must be limited to its responsibilities under the Fourth Geneva Convention and the implementation of the safeguards set under the Convention for the protection of the Occupied people.

Further the transfer of Palestinian detainees to prisons, interrogation centres, and detention facilities inside the Israeli Occupying Power constitutes a violation of Article 76 of the Fourth Geneva Convention and a war crime in violation of the Rome Statute of the International Criminal Court.

Subsequently, we would like to draw the attention of your Excellency's Government to the applicable standards of international human rights law: the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR), acceded to by Israel on 3 October 1991. We would

²⁶ A/HRC/53/59, paragraph 16

also like to recall that much of the content of the UDHR, including its provisions concerning the right to a fair trial, has passed into binding customary law.

The right to a fair trial is protected in both instruments mentioned above. Article 10 of the Universal Declaration on Human Rights guarantees everyone the “right to a fair and public hearing by an independent and impartial tribunal”, while article 14 of the ICCPR stipulates that: “everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law”.

Furthermore, in its general comment 32 (2007) on article 14, the Human Rights Committee emphasized that the right to equality before courts and tribunals and to a fair trial is an element key to the protection of human rights and serves as a procedural means to safeguard the rule of law. (CCPR/C/GC/32, paragraph 2). Article 14 provides in particular for the principle of equality before competent, independent and impartial courts and tribunals, the presumption of innocence, the granting of time and the facilities necessary for the preparation of the defence and the right of the accused to communicate with the counsel of their choice. Fair trial guarantees can never be subject to derogatory measures that would circumvent the protection of non-derogable rights (CCPR/C/GC/32, paragraph 6).

Access to counsel is an integral part of a fair trial. The Human Rights Committee²⁷ has stated that “the availability or absence of legal assistance often determines whether or not a person can access the relevant proceedings or participate in them in a meaningful way”. The Committee has further indicated that “lawyers should be able to advise and to represent persons charged with a criminal offence in accordance with generally recognised professional ethics without restrictions, influence, pressure or undue interference from any quarter”.

I would like to refer to articles 19, 20 and 21 of the UDHR, which guarantee the rights to freedom of opinion and expression; freedom of thought, conscience and religion; and freedom of peaceful assembly and association. These rights are further expressed in all global and regional human rights treaties on civil and political rights, confirmed in declarations and resolutions, and are considered reflective of customary international law. The ICCPR also guarantees these rights in articles 18, 19 and 21. The conditions for permissible restrictions of these rights are reflected in the UDHR, the ICCPR, and in numerous regional and global human rights treaties, which require that any such restrictions must meet the tests of legality, necessity, and proportionality.

First, any restriction of the rights to freedom of opinion and expression; freedom of thought, conscience and religion; and freedom of peaceful assembly and association must pursue a legitimate objective. Article 29 of the UDHR, for example, limits those objectives strictly, explaining that restrictions must be “solely for the purpose of” the specified objectives of “respect for the rights and freedoms of others and to meet just requirements of morality, public order and general welfare in a democratic society”. Secondly, as expressed in article 29 of the UDHR, as well as in global and regional human rights treaties, any restriction must be “determined by law”. The Human Rights Committee has explained that laws must be “formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly and it must be made

²⁷ Human Rights Committee General Comment No. 32, paragraphs 10 and 34.

accessible to the public.” Third, restrictions must be necessary and proportionate. Article 30 of the UDHR, for example, prohibits the use of overbroad restrictions which would destroy the essence of the right itself. This has been interpreted as an expression of the principle of proportionality. That requirement further entails that the measure must be the least intrusive measure necessary amongst those options that might achieve their protective function in order to protect a specified legitimate objective. Lastly, States have the burden of proof to demonstrate that any restriction is compatible with the requirements under customary international law.

I would also like to refer to the International Convention on the Elimination of All Forms of Racial Discrimination, which Israel ratified on 3 January 1979. Article 2 of this Convention provides that State parties are to “condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and, to this end:

- (a) Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation.
- (b) Each State Party undertakes not to sponsor, defend or support racial discrimination by any persons or organizations.
- (c) Each State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists.
- (d) Each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization...”

Finally, we would like to also refer to the Basic Principles on the Role of Lawyers²⁸ and their requirement that governments must take all appropriate measures to ensure that lawyers are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference, and to guarantee that lawyers are not threatened with prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics.

The Basic Principles²⁹ include a specific provision on the exercise of fundamental freedoms, stating that like other citizens, lawyers “are entitled to freedom of expression, belief, association and assembly”, and have the right to take part in public discussion of matters concerning the law, the administration of justice and the promotion and protection of human rights. Lawyers are also free “to join or form local,

²⁸ Basic Principles on the Role of Lawyers, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Havana (Cuba) from 27 August to 7 September 1990, principle 16.

²⁹ Basic Principles on the Role of Lawyers, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Havana (Cuba) from 27 August to 7 September 1990, principle 23.

national or international organizations and attend their meetings, without suffering professional restrictions by reason of their lawful action or their membership in a lawful organization”. These guarantees are crucial to the profession of the lawyer since they enable practitioners to engage in free debate and exchange about the subject of their profession.