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Problems Defending Palestinians in Israeli Courts

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Established in 1992, the Addameer (Arabic for conscience) Prisoners Support and Human Rights Association provides support for Palestinian prisoners and works to end torture, arbitrary arrests and detentions, other forms of abuse, and unjust and unequal treatment in Israel's criminal justice system that handles Jews one way and Palestinians another.

In January 2007, it published a report titled "Defending Palestinian Prisoners: A Report on the Status of Defense Lawyers in Israeli Courts" in which it explained obstacles lawyers face in representing Palestinians in military and civil courts. They're hampered by military orders, Israeli laws, and prison procedures that prevent them from adequately helping clients – from their time of arrest through detention, trial, imprisonment, appeal, and other constraints against justice.

Yet international law is clear and unequivocal. Article 2, section 3(b)(c) of the International Covenant on Civil and Political Rights (ICCPR) states:

> ....persons "shall have (the) right (to effective remedy through a) competent judicial, administrative or legislative (authority), or by any other competent authority provided for the legal system of the State (to) ensure that the competent authorities shall enforce (judicial) remed(ies)."

Article 14, section 1 states:

> "All persons shall be equal before the courts and tribunals (and) shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law." They shall "be presumed innocent until proved guilty according to law."

They're also entitled to competent counsel, may meet with them in confidence, and censorship of their written and oral communications is prohibited.

Addameer's report is based on interviews, from May – July 2006, with 14 defense attorneys representing Palestinian clients. Their accounts show what Arabs are up against in Israel's criminal justice system, one imprisoning over 650,000 Palestinians since 1967, detaining between 9,000 – 12,000 or more at any time, many hundreds administratively without charges or trial, hundreds aged 18 or younger, and dozens of women.

Palestine is under an oppressive military occupation. At times of political tension, the IDF detains large numbers of Palestinians "because the regulations that govern Israeli military tribunals provide little procedural protection to detainees." From March – October 2000,

over 15,000 West Bank Palestinians were arrested. Over 1,000 were held in administrative detention without charge.

Procedural flexibility lets military prosecutors process large number of cases swiftly to the disadvantage of defendants. Most are settled by one-sided plea bargains. In 2005, nearly 10,000 cases were handled. Only 167 went to trial, and of those, 15 acquittals were won. In the same year, military courts conducted nearly 12,000 hearings to extend prisoner detentions and levied around $3 million in fines, nearly always against people acting freely or in self-defense as international law allows, suspected of doing it, or their family members as well as themselves.

Three types of courts have jurisdiction over Palestinians:

> — Palestinian civil ones not covered in this report;
>
> — Israeli military courts, Ofer and Salem, located on Israeli military bases; they prosecute Palestinians accused of self-defense, attending a demonstration, putting up political posters proclaiming Palestinian rights, displaying the Palestinian flag or other symbols, or doing anything authorities say threaten Israeli security; and
>
> — Israeli civil courts handling Israeli Arabs and West Bank and Gaza Palestinians accused of whatever officials call a crime; "due process protection under Israeli civil law (is compromised for) defendants accused of being security threats," with or without evidence to prove it.

Administrative detention is oppressive and frequently used. It lets military authorities hold prisoners indefinitely without charge, on secret evidence withheld at the discretion of prosecutors from detainees and their counsel. Under military orders and Israeli law, commanders may order prisoners held for six months and can renew detentions indefinitely.

Lawyers' citizenship or residency status dictate their ability to represent clients. Those in the Occupied Territories (OPT) may only work in military courts and are constrained by checkpoints and other travel restrictions from visiting clients. Meeting them inside Israel is nearly impossible as travel permits are rarely given for "security reasons."

As a rule, West Bank attorneys see clients for the first time on hearing days and only a few minutes in advance. Gaza ones can't represent West Bank clients because travel permission is nearly impossible to get. It means judicial fairness and international law are severely compromised from the start.

Lawyers with Jerusalem IDs face other obstacles. They may take the Israeli Bar Association test to be licensed in Israeli courts. However, those passing the Palestinian Bar must apply annually to the Israeli Department of Justice for permission to represent clients in military courts and to visit them at interrogation centers and prisons.

Lawyers who are Israeli citizens, Arabs and Jews, may represent clients in military and civil courts, including the High Court, and may apply for permission to visit clients in detention. However, they may not enter Gaza or Area A (under Palestinian control) in the West Bank.

Obstacles to A Legal Defense

Article 49 of the Fourth Geneva Convention prohibits:

> "Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not….regardless of their motive."

Nonetheless, the IDF regularly moves Palestinian prisoners from the West Bank to Israeli-based detention and interrogation centers (including the secret "Facility 1391") and prisons.

After arrest and initial detention, Palestinians go first to interrogation centers. They may be held without judicial order for eight days and thereafter indefinitely. Lawyers have no access for up to 90 days, and prisoners have virtually no other outside contact during detention.

Following interrogation, they may either be released, formally charged, or placed under indefinite administrative detention. Those charged are transferred to Israeli prisons to await trial. Bail is almost never allowed. Administrative detainees are taken to Israeli prisons for six months after which they're subject to indefinite extensions.

Lawyers find it difficult to impossible to visit clients because restrictions "are so onerous" that most don't even try, except for the brief moments they're allowed before hearings begin.

In addition, learning where clients are held is so daunting that one attorney said:

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

However, under military orders, authorities are obligated to inform families where prisoners are held and when they're moved. A central database is also maintained. Attorneys are supposed to have access, but getting it is hard, and the information in it often is inaccurate and not up to date.

Even worse, under Israeli law and military orders, Palestinian prisoners accused of being "security threats" may be prohibited from consulting an attorney – in military courts for up to 90 days and in civil ones up to three weeks. Appeals to the High Court may be made, but only by lawyers with Israeli citizenship or Israeli NGOs.

Permission is required to see clients in prison, but only on certain days, under imposed restrictions, and all prisons have their own procedures. Jewish lawyers are less impeded than Arab ones, but obstacles impeding judicial fairness hamper prisoners and counsel throughout the judicial process.

For example:

> — besides needing permission to visit clients, lawyers must have proof of power of attorney from prisoners' families even though requiring this has no legal basis and getting it is burdensome given West Bank travel restrictions;
>
> — interviewing prisoners requires knowing where they're held; learning when they're moved and where; dealing with orders barring meetings with clients; putting up with difficult travel through checkpoints; long waits inside prisons;

> limited amounts of time with clients; speaking with them on phones behind a thick plastic window easily monitored by authorities; and restricted access to documents; it makes some attorneys call these obstacles “a way of making the lawyer think a thousand times before deciding to visit the prison” under a judicial process rigged to get convictions.

Scheduling is another problem in military courts. Lawyers must report there by 9:30 AM, then endure unreliable timetables for hearings. An entire day may be consumed for a 15-minute one, and some attorneys report that they waited until 7PM for it to begin. They also say they’re treated like prisoners themselves because their clients have faint hope for justice, yet they do their best under a very unfair system practically assuring convictions.

Entering facilities is nerve-wracking and intimidating as well. West Bank lawyers aren’t allowed to drive to military courts on the grounds that they pose security threats. Once at a facility, they endure waits to be admitted. They need soldiers to unlock gates. Some are cooperative, others not, and then they must clear security. Those in traditional Islamic dress are especially pressed to prove they’re lawyers, not terrorists seeking entry.

One attorney described his Gaza experience saying:

> “As a lawyer, you are a cow. They treat us like they are trying to milk us. They squeeze everything from us: our dignity, our time – everything.”

Logistical obstacles are also daunting in the West Bank. For Gaza-based lawyers, they’re even more restrictive, especially since Israel’s “disengagement” in August-September 2005 and now that Gaza remains under siege.

Prior to summer 2005, Gazans were tried in the Erez military court on the Gaza/Israeli border through which lawyers needed permission to cross. From 2003 – 2005, only two got it, and they endured “obtrusive security procedures,” including public and at times embarrassing searches, long delays, and no set hearing schedules.

In addition, whenever border crossings were closed, lawyers were denied access to Erez, so weren’t able to assist clients and couldn’t see them “during their detention at facilities inside Israel.”

Post-disengagement, Erez was closed and lawyers are now denied access to Israeli military courts and prisons inside Israel. Gazans arrested are usually held in Askalan/Shikma prison, then tried or given detention hearings at the B’ir Sab’a/Beersheba courthouse inside Israel. Only lawyers with Israeli citizenship may represent them. Gazan attorneys “are reduced to playing the tole of messengers between the families of prisoners and lawyers inside Israel.”

Language is another obstacle as military and civil court proceedings are in Hebrew. Lawyers must be proficient enough to understand them. Palestinians may not be and require Arabic translations, a process their attorneys call “uneven” at best. Also, translators speak so quietly that detainees may not understand the most perfect translation, so can’t follow the proceedings properly. Nor can their families consigned to the back of courtrooms.

Another problem is a lack of official court proceedings in Arabic, so prisoner responses become “the answers of the guy who is translating.” In addition, “all confessions, statements, police reports, military codes and judicial rulings are provided in Hebrew

without translation, even though Arabic is an official language in Israel." But not in military or civil courts.

Under West Bank military orders, unauthorized political activities are crimes, including putting up posters, writing slogans on walls, being members of certain political parties or organizations, displaying Palestinian flags or symbols, attending demonstrations, and socializing with persons classified as security threats – legal activities in democracies but not in Israel or the OPT.

Palestinians engaging in them are prosecuted under the umbrella charge of "threatening the security of the state." They bear the burden of proof, so guilty unless proved innocent is the legal standard in violation of international law. In addition, lawyers face months of delay to learn the charges against clients that are often vague and lack details, including about claimed offenses, dates, time and place where occurred plus evidence that would hold up in legitimate proceedings.

"Lawyers representing administrative detainees must contend with impossibly vague charges" such as "being a threat to the security of the area with no other details provided." Even when more information is gotten, it's only after clients have been held for months.

An egregious example was a man held administratively for five years during which time the court refused to say why. Finally, counsel learned that he allegedly said that he wanted to participate in a suicide attack, but no evidence was offered to prove it.

Secret evidence is also an issue, described by one lawyer as "like entering a dark room and not knowing where to go or what to do." Courts may order evidence kept confidential and unavailable to counsel. It makes a proper defense near impossible, so counsel is hamstrung and clients are effectively guilty as charged.

Some evidence may be declassified, and all or most of it is in regular military tribunals. Still attorneys can't easily access it because specific documents must be described and requested. Without precise knowledge, they must make educated guesses based on previous cases and hope they apply to their clients.

Delays and other obstructions are always problems. In addition, judges have "complete discretion over whether to declassify evidence and tend to arrive at inconsistent decisions" from one case to another.

Even in regular military tribunals, prosecutors may use secret evidence although they can do it more easily for administrative detainees. However, under Israel's judicial system, the deck is heavily stacked against Palestinians very much subject to the whims of the court.

Interrogation reports are another issue. Everything learned must be recorded and made part of the evidence. Yet it's not automatically disclosed to attorneys. They must request it, but weeks may elapse before it's gotten, and usually the material doesn't help because inappropriate details are provided in lieu of relevant facts pertaining to the case.

Torture is another issue with reports saying it's routinely used against the great majority of detainees, and under Israeli law is allowed in "ticking bomb" cases that easily can apply to anyone. Disproving them is daunting as defendants' testimonies are ineffective against prosecution charges and disclaimers on detention treatment.

Further, prisoners must prove that their free will was compromised, and that confessions were obtained under torture. “This is difficult for several reasons:”

> — courts don’t consider isolation torture;
>
> — the Israeli High Court ruled “that the attorney general may determine whether to charge interrogators (accused of torture) who have invoked the defense of ‘necessity;’ ”
>
> — most often, lawyers can’t obtain medical records for evidence of abusive treatment; and
>
> — even if prisoners prove torture, courts aren’t obligated to dismiss evidence if they believe confessions were made despite torture or abuse.

The defense is further hampered by being rarely able to call witnesses in detention hearings. When allowed, they may only testify on matters of family life, moral character, and other factors unrelated to charges. Most often, military prosecutors are attorney’s only information source, but not as witnesses. “Instead, the prosecutor answers all of the defense lawyer’s questions without being sworn in and has the right” to answer none. To have witnesses in regular military tribunals, attorneys must apply for hard to get travel permits so they may appear in court.

Accessing the law is also hampered as military judges are governed by military orders and military appeals court decisions. Orders must be published but are only available in West Bank civil administration offices, accessible only by special permission. “In practice, many military orders remain unpublished and can be obtained only by contacting the Defense Ministry’s legal department directly.”

As for judicial decisions, military courts aren’t required to publish them, and until recently only four defense attorneys got access to them. The military now publishes some decisions, but they’re not widely distributed, comprehensive, or regularly updated enough to be helpful. As a result, lawyers rely mostly on word of mouth for information on new military orders and favorable decisions that may help their clients.

Further, military judges don’t have to explain their rulings on matters relating to administrative detentions and extensions. It means defendants are at the mercy of courts and on whether counsel is on good terms with officials.

On matters of objectivity and judicial fairness, one lawyer said:

> “There should be three sides in a trial – defense, prosecution and judge – and each should be independent from (the other). Here, both the prosecution and judge have the same role,” so the scales of justice weigh heavily against defendants.

In military courts, seven-member committees appoint judges, then approved by the West Bank’s military commander. The physical setting is also troublesome as it’s located on one of two West Bank military bases. Prosecutors and judges wear uniforms. Proceedings stop at 1PM so they, translators and soldiers may eat together in the mess hall. Defense lawyers are excluded, are on their own to provide meals, and have no access to prosecutor – judge

consultations outside of court.

Also troublesome is the training of court officials. Most prosecutors provide service as part of their military obligation and have no training or experience in civil proceedings. Those remaining in the IDF go on to become judges, “putting them in the position of evaluating cases brought by their former colleagues. This means that many people brought up in the system and have never appeared in a civil court, but now they’re judging their friends and past friends,” so most defendants don’t have a chance before them.

Differences between military and civil courts are especially stark. “Lawyers who defend Palestinians must contend with inequalities arising from two systems of law in Israel and the OPT.” Civil law provides greater protections, but Occupied Palestinians generally don’t fall under its jurisdiction.

For example an Israeli and Palestinian may be charged with the same offense, such as participating in an unauthorized demonstration. In civil courts, an Israeli, at most, faces a fine and suspended sentence for a first offense. In contrast, Palestinian face up to ten years in prison for exercising what Americans call free expression and the right to assemble.

“Some of the most glaring differences between (civil and military proceedings) are in the treatment of juveniles.” Israeli civil courts protect them with special procedures not available to Palestinian youths in military courts making them as vulnerable to injustice as adults. In addition, juveniles as young as 17 serve sentences in adult prisons. Only those 16 and younger go to special facilities for youths.

Israeli Arabs are as vulnerable as Palestinians in the Territories for judicial fairness. They may be tried in military courts, and according to the “test of most connection” in Israeli law, Jerusalem Arabs come under the jurisdiction of military courts if accused of committing acts constituting security threats in the eyes of authorities.

Around 98% of the time, plea bargains, not trials, settle things because lawyers prefer them for the following reasons:

> — they often best serve clients under a grossly unfair system; so if a defendant confessed under torture and it’s admitted as evidence, a plea bargain is the best option;
>
> — civil cases must be completed in nine months, but military ones may take two years without bail for charges bringing shorter sentences;
>
> — the ordeal of trial and detention, family separation, and other systemic inequities means clients are better served by ending proceedings faster;
>
> — going to trial and losing may bring harsher sentences because the courts are so overloaded, the authorities want fast resolutions and aren’t pleased when they’re extended; and
>
> — it’s hoped that bending to the prosecution will bring greater leniency; contesting is generally futile and harmful to client interests under an unfair system.

Appeals

Military Courts of Appeals accept them, and orders barring access to lawyers and extending administrative detentions may be appealed to Israel's High Court. In cases involving security threats, appellate reviews don't help. Succeeding presents an onerous burden requiring lawyers to prove legal errors or effectively demonstrate that sentences were unfair.

Military Court of Appeals decisions are final, although in rare cases may be appealed to the High Court in demonstrable cases of "egregious and extreme" legal errors or a lack of jurisdiction by the military court. However, in administrative detention cases, the High Court ruled that it has discretion when extensions are ordered and defendants were denied access to lawyers.

Yet attorneys say authorities treat "almost every Palestinian as a ticking bomb case," so presenting an effective defense is near impossible. Also, the High Court ruled that prisoners may be denied counsel if doing so is "absolutely necessary" for the good of the investigation or to protect national security.

It's why lawyers complain about the fairness of military court trials. Even if they occasionally win reduced sentences and on rare occasions acquittals, most are justifiably angry about a fundamentally unjust system treating Palestinians one way and Jews another. The comments below express their frustration:

> — "….the whole process is oppressive;"
>
> — "I learned how to help people, but it's just not possible in the military courts; (They) exist to administer the occupation, not the law; I feel helpless;"
>
> — "The most frustrating thing is that you have to work within the occupation; you oppose the system, but you have to work within it;"
>
> — "I am surprised that anyone can work as a lawyer for administrative detainees without dying of a stroke;"
>
> — having to deal with secret evidence, vague charges, and indefinite detentions, one lawyer said: "You try to make claims about the procedures that were undertaken and it's patently obvious that the judge views the whole thing as completely beside the point; he's just waiting….to look at the secret evidence and then approve the administrative detention order;" and
>
> — "There is the prosecution, a judge, a lawyer, a prisoner. It looks legitimate but it is not; these tribunals should be boycotted."

Lawyers also face the problem of being retaliated against by Israeli security forces for representing Palestinians. Travel restrictions may be imposed, but there's danger of harsher treatment. Both attorneys and clients aren't safe under occupation laws and judicial unfairness.

Conclusion

Addameer reported that lawyers believe "that a general boycott of the military courts would be better in the long term for Palestinian prisoners," but say to be effective should be organized by them. However, no movement exists, and the task of building one is daunting to impossible given detainees' isolation, harsh treatment, and need for help that an activist effort would compromise. For their part, lawyers feel obligated to help despite their

impotence under a fundamentally unfair system.

How can they feel otherwise in a Jewish state favoring Jews alone, no others – one that vilifies Palestinians as security threats, terrorists, and ticking bombs, claims all actions against them are justified, and defies international law and fundamental Judaic dogma and morality. That's what Palestinians and Israeli Arabs face and why they're denied judicial fairness, something only afforded Jews.

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Stephen Lendman lives in Chicago. He can be reached at lendmanstephen@sbcglobal.net. His new book as editor and contributor is titled "Flashpoint in Ukraine: US Drive for Hegemony Risks WW III." http://www.claritypress.com/LendmanIII.html Visit his blog site at sjlendman.blogspot.com. Listen to cutting-edge discussions with distinguished guests on the Progressive Radio News Hour on the Progressive Radio Network. It airs three times weekly: live on Sundays at 1PM Central time plus two prerecorded archived programs.