

THE MILITARY COURTS UNIT (JUDEA AND SAMARIA)

Introduction

The Military Courts in Judea and Samaria (hereinafter: "**The Military Courts**") were established in accordance with international law, and have jurisdiction to hear ordinary criminal cases and cases involving security offenses.

The purpose of the Military Courts in Judea and Samaria is to apply and implement the Rule of Law, by trying those accused of perpetrating security or other criminal offences, whether committed in the Judea and Samaria, or intended to cause harm therein, and through judicial review of administrative decisions, all in accordance with jurisdiction bestowed upon the courts. All this through judicial independence, and the assurance of just and fair legal proceedings.

Article 66 of the 4th Geneva Convention refers to the role of the military courts. The conditions of the article are that the accused may only be brought before courts whose members have military status and are subordinate to the military authorities. I will highlight a main point. The courts do not define subordinate as the military authorities have the right to hand down orders to the court. The law explicitly denies this right.

In HCJ 320/80 Kwasama v. Ministry of Defense, the Israeli high court of justice ruled: ***"What distinguishes the war of the State from the war of its enemies is that the State fights while upholding the law where as its enemies fight while violating the law. The moral strength and objective justice of the Government's war depends entirely on upholding the laws of the State..."***. This landmark decision of the Israeli high court of justice applies to the relationship between the law and the security needs of the state. Of course the military courts are committed to this principle determined by the high court of justice.

Judicial independence of the Military Courts is anchored in section 8 of the Security Provisions Order: ***"In Judicial matters a person vested with judicial power shall not be subject to any authority but that of the law and security legislation"***

In HCJ 87/85 Arjub vs. IDF Military Commander in Judea and Samaria – The High Court of Justice stated that although the military courts are an important part of the ruling system in the area, **they have to be absolutely impartial and independent in their considerations, inter alia by protecting the law and holding a fair trial, as the judicial proceedings serve the main objective of making justice** by assuring its appearance.

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Section 11 of the Security Provisions Order states that Judges are selected by a special Independent Judicial Appointments Committee (similar to Israel's system of judicial appointments that includes a former judge of the Israeli district court, an elected representative of the Israeli bar and other chosen representatives).

Here are some chosen examples of many precedential decisions of the military courts that implies the judicial independence of the military courts.

The Abu Snina Case (2003) – The abolition of vicarious liability due to mere solidarity of conspirators was initiated by the military courts without receiving any request from the defense.

The Anonymous Case (2003) – The Military Court of Appeals stipulates it has the authority to hear a petition to disclose privileged evidence

The Abu Galia Case (2005) – The court acquitted a defendant of theft by acknowledging the defense of de minimis even though the counsel did not raise the defense.

The Nimer Case (2006) - Recognition of 'Abuse of Process' defense.

The Schwartz Case (2006) - "The Military Courts are authorized to review the orders of the Military Commander according to the norms of International Law".

The Dababse Case (2006) – The court initiated a change allowing for compensation to the defendant in case of an acquittal.

The Abu Alan Case (2010) – The court widened judicial review to matters concerning the right to property (forfeitures).

The main principles of the criminal procedure in the military courts are: same evidentiary rules as in Israel, same substantial and procedure principles as in Israel, right to confer with counsel during investigation, right to counsel during trial, right to receive all evidence / the prosecution cannot submit secret evidence, right to appear in court, judicial hearings are in open court, right to confront the witnesses, right to call witnesses and right of appeal.

The Military Courts are comprised of two regional courts, each with a separate juvenile court, as well as a separate court for the review of administrative detention orders. Defendants have a right of appeal to the Military Court of Appeals.

Additionally, the Military Court system is subject to judicial review by the Israel High Court of Justice.

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Judicial Independence

The Military Courts are a separate and distinct unit within the Israel Defense Forces (IDF) and are independent in judicial matters from the IDF command hierarchy and subject only to the law.

Military Court judges are independent jurists authorized inter alia to examine evidence, oversee proceedings and render legally binding judgments.

Military Court judges are required to uphold the rule of law and are subject to ethical and professional standards, similar to all criminal and civil judges in Israel.

Military Court judges are selected by a Judicial Selection Committee. The Committee is chaired by the President of the Military Court of Appeals. All Military Court judicial candidates must meet the professional qualification requirements for magistrate court judges in Israel, and must be IDF officers in active or reserve duty. The Judicial Selection Committee selects judges from a broad range of legal backgrounds, including the private sector, academia, and the military.

Due Process

The right of suspects and defendants to due process in the Military Courts is strictly upheld through a variety of mechanisms, such as:

1. **The Right to Legal Representation**

During all judicial proceedings, suspects and defendants are entitled to representation by an attorney of their choice, including Palestinian attorneys. In certain cases, a defense attorney may be appointed by the Military Courts. All defense attorneys, including Palestinian attorneys, are granted full access to the Military Courts and to all the evidence brought before the court.

2. **Defendant's Presence at Hearings**

Defendants have the right to be present at all hearings relating to them.

3. **Public Hearings**

As a rule, proceedings in the Military Courts are open to the public. Military courts strictly uphold the publicity of hearings in general, and the presence of family members in particular, especially in cases involving

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minor defendants. Journalists, NGO representatives and other observers are often present at these hearings.

Military Courts have the authority to conduct an in camera hearing, but this is done only in special circumstances and where specific strict grounds are met.

4. *Translation of Proceedings*

Proceedings in the Military Courts are conducted in Hebrew and translated into Arabic during the course of the proceedings by court interpreters. Several Military Court judges are also fluent in Arabic. As of April 2013, all indictments are translated into Arabic.

5. *Judicial Review of Detention*

The maximum period of detention before being brought before a judge is 48 hours for ordinary crimes and 96 hours for security offenses. If the suspect is not brought before a judge within these periods, he/she is released. A judge may order to extend the detention of a suspect for a period of up to 20 days, and afterwards for periods of up to 15 days each upon further review. A suspect may not be detained for an overall period exceeding 60 days without being indicted.

The time frame for judicial review of detention of juveniles is shorter, as indicated below.

6. *Notification of the Charges*

A written indictment is submitted to defendants. Additionally, the indictment is read out to each defendant in Court in their native language, unless the defense attorney waives this right. In any case, the judge ascertains that the defendant fully comprehends the charges against him/her.

7. *Right to Receive all Evidence*

Defendants are entitled to receive a copy of the evidence against them and to summon witnesses in their defense. The prosecution may not use any evidence that has not previously been provided to the defense.

The Juvenile Military Court in Judea and Samaria

Background

Until 2009 the relevant legislation in the Area regarding minors was minimal and included these main principles: Age 12 is the minimum age of criminal liability, Children under the age 14 cannot be sentenced to more than 6 months in prison, No capital punishment.

The lack of relevant legislation regarding minors never kept the courts from considering the age of the defendant in the different stages of the judicial process. The court of appeals in the Area ruled that when dealing with minors the courts should refrain from handing down severe punishments in order to facilitate the rehabilitation of minors (H v. MP - 2000).

Reforms in the Law Applying to Minors in the Area

In 2008 after the Israeli youth law was amended (Amendment No. 14 to the [Israeli] Youth Law) there were many reforms in the law applying to minors in the area. It is important to note that in 2008, a year before the legislature, The Juvenile Court in Samaria applied most of the special rules regarding minors.

The main reforms were:

1. The establishment of the Military Juvenile Court where a presiding judge sitting in a judicial panel (or a single judge) hearing a case involving a minor is required to be qualified youth judge.
2. The raising the age of majority in the area from 16 to 18 years of age, It should be noted, that even prior to that The military Courts in the area had applied special rules regarding minors, and in practice had already treated juvenile offenders between the ages of 16 and 18 as minors.
3. Judicial proceedings involving minors are held separately from those of adults.
4. A minor is not indicted together with an adult.
5. Trials are held in closed session and the parents of the defendant shall be awarded special rights during the trial. As a matter of policy, people who are not direct family members of the defendant can be present as long as the minor and his family agree.
6. Establishing an obligation to inform a minor's parent or close adult relative when a minor is brought to a police station for investigation, according to the contact details provided by the minor.

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7. Parents have the right to act on behalf of the minor by filing applications, questioning witnesses together with or instead of the minor.

9. Imposing a duty to inform a minor of his/her right to consult an attorney in private, before the beginning of an investigation, such notification must be explained in a language which the minor understands according to the minor's age and level of maturity. Furthermore, a notification regarding the minor's investigation must be provided to a defense attorney named by the minor.

10. The Juvenile Military Court may, if deemed vital for sentencing purposes, order the preparation a Probation Officer's Report by a welfare officer in the Civil administration. To the extent possible, such report may contain information regarding the minor's history, family, financial situation, health (including that of his/her family members) and personal circumstances which led him/her to commit the offense. The report may also provide the court with assessment of the likelihood of the minor's rehabilitation.

11. Shortening of the detention periods of juveniles (pre-trial and trial) [from 96H to 24/48H).

12. Shortening periods of statute of limitations.

Important Juvenile Court Rulings

In The N. A. R. Case the military appeals court ruled:

"Although the provisions of Amendment No. 14 to the [Israeli] Youth Law do not apply in the Area, it is impossible to ignore their spirit or the principles underlying the protection of a minor's rights, even if he is suspected of committing offenses, and dominant weight must be given to the supreme principal of the best interest of the minor, as stated in the proposed law. Ultimately, a minor is a minor is a minor, whether he lives in a place where Israeli law applies in its entirety, or in another place, where, although Israeli law does not apply in its entirety, it is subject to the significant influence of the Israeli legal system".

This principle can be found in many decisions of the military court of appeals. For example: The Military Courts ruled that the principles of the Israeli legislation regarding minors should apply in the Area. The Military Courts ruled that as general policy, the police should refrain from investigating minors during night hours although there is no specific legal prevention in the military law of the Area. The Military Courts ruled that an investigation not conducted by a specially trained Youth Investigator may result in the release of a minor suspect/defendant. The Military Courts considered the

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infringement of legal representation rights as a reason for release and minors were released in several cases in which legal representation was denied from them. The Military Courts requested a pre detention review although there is no relevant legislation in the Area. Military Court's rulings determine that delay in bringing the minor to the investigation may lead to release from custody. Military Court's rulings clearly determine that unnecessary prolonging of the legal procedure may lead to the defendant's release from custody.

It is also important to mention that many minors are released from custody even when there is ample evidence supporting a severe indictment, when there is reason to believe that they will not repeat the offence. General considerations are: the minor's age, the positive involvement of an influential adult, the possibility of keeping the minor away from negative influence, etc.

Judicial Review by the High Court of Justice

The Military Courts do not operate in a void. In addition to the internal mechanisms for judicial review within the military system, the Military Court system is subject to review by Israel's Supreme Court, sitting as the High Court of Justice.

Any defendant who believes his rights have been violated at any stage of the judicial process in the Military Courts can submit a petition to the High Court of Justice, which will hear the petition in accordance with the highest standards of judicial review.