Military Court Watch

Monitoring the treatment of children in Israeli military detention

Two boys, two laws:

The discriminatory application of law in the West Bank

Submission[1]

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Submitted to:

- UN Working Group on Arbitrary Detention.

Copied to:

- UNICEF
- UN Committee on the Rights of the Child.

1. Introduction

1.1 This submission is based on the legal principle that no state is permitted to discriminate between individuals over whom it exercises penal jurisdiction on the grounds of race or national identity.[2]

1.2 The purpose of this submission is to draw attention to a situation where two legal systems are currently being operated in a single territory by one authority and applied to individuals based solely on their race or national identity.

1.3 Since 1967, Israel has exercised penal jurisdiction over both Palestinians and Israeli settlers living in the West Bank. Although Israeli military law technically applies to all individuals in the West Bank, in practice, the authorities apply civilian law to settlers and military law to Palestinians.

1.4 In most conflict situations the issue of unlawful discrimination does not arise. However, in the context of Israel's occupation of Palestinian territory, the issue of unlawful discrimination has arisen as a direct consequence of settlement activity in occupied territory. Whilst there is no serious dispute that Israel's settlements are illegal, there is also no lawful justification upon which Israel can discriminate between persons over which it exercises penal jurisdiction in the West Bank.

1.5 This issue is within the mandate of the UN Working Group on Arbitrary Detention which defines detention as arbitrary when the depravation of liberty results from the exercise of the rights or freedoms guaranteed by, *inter alia*, Article 7 of the Universal Declaration of Human Rights. Article 7 provides that: "All are equal before the law and are entitled without discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination."[3]

2. Background

2.1 Following six days of armed conflict in June 1967, Israeli forces occupied East Jerusalem, the West Bank, Gaza (Palestine) and the Golan Heights. It has been decisively established that these territories are occupied and the Fourth Geneva Convention applies in full.[4] Accordingly, a number of legal principles apply including the following:

(i) Sovereignty and title to occupied territory cannot be transferred to the occupying power. This principle applies even if the occupying power was initially acting in self-defence. *De jure* or *de facto* annexation does not alter the status of the territory or its population;[5]

(ii) The occupying power is entrusted with the management of public order and civil life in the territory under control. In view of the principle of self-determination, the people under occupation are the beneficiaries of this trust. The dispossession and oppression of these people violates this trust;[6]

(iii) All human rights treaties to which Israel is a party apply to all residents of the West Bank; [7]and

(iv) The occupation of these territories must be temporary.[8]

2.2 Under the applicable law,civilians living under military occupation should continue to be subject to their own laws and tried in their own courts. This is consistent with the principle that occupations must be temporary in nature and no sovereignty passes to the occupying power. However, under Articles 64 and 66 of the Fourth Geneva Convention, local laws may be suspended or revoked by an occupying power "where they constitute a threat to its security" and replaced with military law enforced in "properly constituted, non-political military courts." Although the power to issue military orders is extensive it must never be used as a means to oppress the local population.

2.3 In accordance with these principles, Israeli military law was imposed in the West Bank on 7 June 1967, and the area commander was granted full executive, legislative and judicial authority over the Palestinian civilian population.[9] In the ensuing four decades, over 1,700 military orders have been issued and between 750,000-800,000 Palestinian men, women and children have been prosecuted in Israeli military courts and imprisoned.[10] A different approach was adopted in East Jerusalem whereby the territory was formally annexed and Israeli civilian law applied. However, the annexation of East Jerusalem has no legal validity and is not recognised outside Israel.[11]

2.4 In September 1967, the Israeli government permitted its citizens to settle in East Jerusalem and the West Bank in violation of international law. During the intervening period, over 200 settlements have been established with a population now exceeding 520,000 Israeli citizens.[12] Technically speaking, Israeli military law applies to all persons in the West Bank, whether they be Palestinian or Israeli, but in practice civilian law is applied to the settlers, whereas military law, with far fewer rights and protections, is reserved for Palestinians, giving rise to a situation of unlawful discrimination.

3. A specific example of discrimination

3.1 Under the principle of non-discrimination, if a Palestinian child throws a stone at an Israeli child from a settlement, or visa versa, both children should be dealt with equally under the law. This does not mean that Israel must apply its civilian law to Palestinians, as this would be viewed as an indicia of annexation, but the laws that are applied, must treat all residents of the West Bank equally. However, the current reality in the West Bank is that Palestinian children accused of throwing stones are prosecuted in military courts, whereas their Israeli counterparts living in the settlement next door, are dealt with

in Israel's civilian juvenile justice system. Not surprisingly, the civilian system has far greater rights and protections than its military counterpart.

3.2 The following table presents examples of how Palestinian and Israeli children living in the West Bank are treated differently under the applicable laws. The discrepancies widen considerably when actual practice, as opposed to differential legal provisions, is taken into consideration.

#	Description	Israeli child		Palestinian child	
1	Minimum age of criminal responsibility	12[13]		12[14]	
2	Minimum age for custodial sentences	14[15]		12[16]	
3	Age of majority	18[17]		16-18[18]	
4	Prohibition against night interrogation	Yes[19]		No	
5	Legal right to have a parent present during questioning	Yes[20] (exceptions apply)		No	
6	Legal right to consult with a lawyer prior to questioning	Yes[21]		Limited[22]	
7	Legal requirement for interrogations to be audio-visually recorded	Partial[23]		No	
8	Maximum period of detention before being brought before a judge	12-13 yrs	12 hrs[24]	12-13 yrs	24 hrs[25]
				14-15 yrs	48 hrs[26]
		14-17 yrs	24 hrs	16-17 hrs	4 days[27]
9	Maximum period of detention without access to a lawyer	48 hours[28]		90 days[29]	
10	Maximum period of detention without charge	40 days[30]		150 days[31]	
11	Maximum period of detention between being charged and conclusion of trial	6 months[32]		1 year[33]	

4. Concluding words and recommendations

4.1 As a direct consequence of Israeli settlement activity and the application of two legal systems, a situation of unlawful discrimination now exists in the West Bank, based on an individual's race or national identity. This situation would not have arisen had successive Israeli government's abided by their legal obligations not to construct settlements.Until

an acceptable political solution can be found consistent with international law, it is submitted that Israel must abide by the principle of non-discrimination and ensure that the military law applied to Palestinians provides rights and protections no less than those afforded to Israeli citizens living in the settlements.

4.3 In the case of Palestinian children prosecuted under Israeli military law, the relevant military law should be amended to ensure that the same rights and protections afforded to Israeli settler children under the civilian law are provided in full, and the following safeguards implemented:

(i) No child should be interrogated at night;

(ii) All children must be accompanied by a parent throughout their interrogation;

(iii) All children must be permitted to consult with a lawyer of choice prior to interrogation;

(iv) All interrogations must be audio-visually recorded;

(v) All children must be brought before a judge within 12-24 hours of arrest;

(vi) No child under the age of 14 should receive a custodial sentence;

(vii) Sentencing provisions applicable to adults should not be applied to persons below the age of 18; and

(vii) Any breach of these recommendations, including any unexplained gaps in the audio-visual recording, should result in the discontinuation of the prosecution and the child's immediate release.

4.4 Further reading:

(i) UN Committee on the Rights of the Child – Concluding Observations (2013);[34]

(ii) US State Department – Country Reports on Human Rights Practices (2013);[35]

(iii) UNICEF – Children in Israeli Military Detention (2013);[36] and

(iv) Children in Military Custody (2012).[37]

[1] Military Court Watch (MCW) is a voluntary association founded by a group of lawyers and other professionals with a belief in the rule of law. MCW is guided by two basic principles. First, all children detained by the Israeli military authorities are entitled to all the rights and protections guaranteed under international law. Secondly, that there can be no legal justification for treating Palestinian and Israeli children differently under Israel's military and civilian legal systems. More information about MCW is available on the group's website at www.militarycourtwatch.org

[2]Universal Declaration of Human Rights – Articles 2 and 7; International Covenant on Civil and Political Rights (ICCPR) – Article 2(1); Convention on the Rights of the Child (CRC) – Article 2; Children in Military Custody: A report written by a delegation of British lawyers on the treatment of Palestinian children under Israeli military law (June 2012), paragraph 14. Available at: http://is.gd/BWUzUh

[3]Fact Sheet No. 26, Working Group on Arbitrary Detention. Available at: http://is.gd/an8j7Q. Also note that Article 10 of the Universal Declaration of Human Rights provides that: "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him." It is doubtful that a military tribunal which includes judicial officers who live in the settlements could ever satisfy this test of independence and impartiality.

[4]International Court of Justice (ICJ): – Advisory Opinion: Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories (2004) (ICJ Advisory Opinion) – paragraph 101; UN Security Council resolutions: 271 (1969); 446 (1979); 641 (1989); 681 (1990); and 799 (1992). The Israeli military authorities initially acknowledged the application of the Fourth Geneva Convention when they issued the Security Provisions Order on 7 June 1967. However, reference to the Fourth Geneva Convention was subsequently removed. See David Kretzmer, The Occupation of Justice (2002), pages32-33.

[5]Article 2 of the UN Charter; UN Security Council resolution 298 (1971);Berkeley Journal of International Law, Illegal Occupation: Framing the Occupied Palestinian Territory (2005), Orna Ben-Naftali, Aeyal M. Gross and KerenMichaeli, Volume 23, Issue 3, Article 2, pages 554 and 570-71. Available at: http://is.gd/gtq7Md

[6]Berkeley Journal of International Law, Illegal Occupation: Framing the Occupied Palestinian Territory (2005), Orna Ben-Naftali, Aeyal M. Gross and KerenMichaeli, Volume 23, Issue 3, Article 2, page 555.

[7] ICJ Advisory Opinion – paragraph 106. Any inconsistency that may arise between the operation of international humanitarian law and human rights law being determined by the principle of *lexspecialis* .

[8]Berkeley Journal of International Law, Illegal Occupation: Framing the Occupied Palestinian Territory (2005), Orna Ben-Naftali, Aeyal M. Gross and KerenMichaeli, Volume 23, Issue 3, Article 2,pages 555 and 560. The authors of this article argue persuasively that a violation of any of these three principles (sovereignty, trust and duration)renders an occupation illegal.

[9] Israeli Military Proclamation No. 2 (June 1967).

[10]UN Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, Professor John Dugard: Human Rights Situation in Palestine and Other Occupied Arab Territories, 21 January 2008, A/HRC/7/17, paragraph 45. The report estimated that between 1967 and January 2008, 700,000 Palestinians had been detained under Israeli military law. On a pro-rata basis and taking into consideration that the number of prisoners has fallen in recent years, the current estimate is that 750,000-800,000 Palestinians have now been detained by the Israeli authorities since June 1967.

[11] See for exampleUN Security Council resolution 476 of 1980.

[12]Report of the independent international fact-finding mission to investigate the implications of the Israeli settlements on the civil, political, economic, social and cultural rights of the Palestinian people throughout the Occupied Palestinian Territory, including East Jerusalem – Human Rights Council, January 2013. Available at: http://is.gd/SziEDa

[13]Penal Law (1977) – Section 34F.

[14] Military Order 1651 – Articles 1 and 191.

[15]Youth (Trial, Punishment and Modes of Treatment) Law (1971) – Section 1.

[16]Military Order 1651 – Articles 1, 136 and 168.

[17]Youth (Trial, Punishment and Modes of Treatment) Law (1971) – Section 1.

[18] In September 2011, Military Order 1676 came into effect requiring that all children below the age of 18 be tried before a military juvenile judge. However, the sentencing provisions applicable to adults still apply to children aged 16 and 17. Accordingly, there is still a substantive differential between the civilian and military legal systems.

[19]Youth (Trial, Punishment and Modes of Treatment) Law (1971) – Section 9J.

[20]Youth (Trial, Punishment and Modes of Treatment) Law (1971) – Section 9H. A parent is allowed to be present at all times in circumstances where the child has not been formally arrested, but may not intervene in the interrogation process. Exceptions include: Parents do not present themselves within a reasonable time; waiting for a parent would harm the investigation, the child, or a third party; parents cannot be located after a reasonable attempt; and a parent can be removed from the interrogation if he/she threatens the child or disrupts the interrogation. Reasons why a parent is not present must be documented in writing by an authorized officer.

[21]Youth (Trial, Punishment and Modes of Treatment) Law (1971) – Section I(a)(1).

[22] Military Order 1676 – Article 136 b(c) – A child must be notified that he has the right to consult with a lawyer, but this right can be suspended for up to 90 days in "security" related offences. (See Military Order 1651 – Article 58(c)). On arrival at a police station a child must be informed that he has the right to consult with a lawyer but there is no stipulation as to when this consultation should take place. The military courts have said on a number of occasions that a child should consult with a lawyer prior to interrogation but this rarely happens in practice. This is due, in part, to the fact that most children are arrested at night and generally will not have the contact details of a lawyer. Further, it is extremely rare for the military courts to reject evidence obtained from a child during interrogation in circumstances where the child did not first consult with a lawyer.

[23] In all cases other than security offences where the maximum penalty is 10 years or more (Criminal Procedure (Suspects Interrogation) Law (2002) – Sections 4 and 17). There is no requirement for the audio-visual recording of interrogations in security cases.

[24]Youth (Trial, Punishment and Modes of Treatment) Law (2008) – Amendment 14. Children aged between 12 and 13 must be brought before a judge within 12 hours, and children 14 years and above must be brought before a judge within 24 hours.

[25]Military Order 1685 as amended by Military Order 1711 (effective April 2013).

[26]Military Order 1685 as amended by Military Order 1711 (effective April 2013).

[27]Military Order 1685 as amended by Military Order 1694 (effective August 2012). Note that these time periods in which a Palestinian child must be brought before a military court judge for the first time can be doubled in "special circumstances".

[28]Criminal Procedures (Powers of Enforcement-Arrests) Law (1996) – Section 34.

[29]Military Order 1651 – Articles 58(C) and (D), 59(B) and (C).

[30]Youth (Trial, Punishment and Modes of Treatment) Law (1971) – Sectoin 10K; Criminal Procedure (Enforcement Powers-Arrests) Law (1996) – Section 59.

[31] Military Order 1685 (effective 1 March 2012) reduces the time period a detainee can be held without charge from 180 days to 150 days. Under the new order, a military court judge can extend the detention period in which a person can be held without charge up to a maximum of 60 days. After 60 days, the period can be further extended up to a maximum of 90 days by a judge of the Military Appeals Court. The cumulative effect of these provisions is that a person can be detained for up to 150 days before he/she must be charged. This time does not include the initial period of detention between arrest and the first appearance before a judge, which can range from 24 hours up to 4 days, depending on the age of the detainee, although these time periods can be doubled in "special circumstances".

[32] Youth (Trial, Punishment and Modes of Treatment) Law (1971) – Section 10L; Criminal Procedure (Enforement Powers-Arrests) Law (1996) – Section 61 – 9 months for adults, with possible extensions.

[33] Military Order 1651 as amended by Military Order 1711 (effective April 2013). A minor now can be detained for up to one year between being charged and the conclusion of his/her trial. After one year, a judge of the Military Appeals Court can extend the period of detention every three months, with no limit on the number of extensions.

[34]Available at: http://is.gd/smYxlt

[35]Available at: http://is.gd/5nSRDt

[36]Available at: http://is.gd/Yu59IN

[37]Available at: http://is.gd/bL3w2D