

## **Denial of the right to life and liberty of person as a crime of apartheid**

Addameer Prisoner Support and Human Rights Association

Since the beginning of the occupation of Palestinian territories in 1967, more than 700,000 Palestinians have been arrested by the Israeli authorities. As of 1 November 2011, there were approximately 4,897 Palestinian political prisoners held in Israeli prisons. Addameer defines political prisoners as any Palestinian—resident of the West Bank, including East Jerusalem, the Gaza Strip, or Israel—arrested in relation to the occupation. Of these prisoners, 269 were administrative detainees, 10 were women, 176 were children, and 22 were members of the Palestinian Legislative Council. In terms of origin, 141 were from East Jerusalem, 162 were citizens of Israel, 494 were from the Gaza Strip and the remainder (4,100) from the West Bank.

These prisoners are arrested on the basis of different legal systems depending on their residence, whether in the West Bank, East Jerusalem, Gaza Strip or Israel.

### **West Bank**

In the West Bank, Israeli authorities carry out arrests and detentions of Palestinians by virtue of a system of military regulations in place since the beginning of the occupation, with over 2,500 military orders issued over the past 44 years. Currently, the Order Regarding Security Provisions [Consolidated Version] (Judea and Samaria) (No. 1651), which replaces 20 pre-existing military orders, provides the authority to arrest and prosecute Palestinians from the West Bank for so-called “security” offences. These offences include injury to persons; offences against the authorities of the “area” and against the public order; obstruction of judicial proceedings; offences regarding weapons and war equipment, property, espionage or contact with enemy or hostile organization, and a number of other issues. Furthermore, Order No. 101 Order Regarding the Prohibition of Acts of Incitement and Hostile Propaganda, issued in August 1967, criminalizes a range of civic activities including organizing and participating in protests, assemblies or vigils; waving flags and other political symbols; printing and distributing political material. The order also deems any acts of influencing public opinion as prohibited “political incitement” and, under the heading of “support to a hostile organization”, prohibits any activity that demonstrates sympathy for an organization deemed illegal under military orders, be it chanting slogans or waving a flag or other political symbols. Military Order 101 also establishes a basis for censorship in the occupied West Bank by forbidding any individual to “print or publicize in the region any publication of notice, poster, photo, pamphlet or other document containing material having a political significance”, except in cases where the military commander has granted a permit.

Despite living in the same territory, Jewish settlers illegally residing in the West Bank and Israeli citizens committing “offences” in the West Bank, such as participating in demonstrations against the Annexation Wall in Palestinian villages, are not subjected to this legislation, but rather to Israeli criminal law, applied extra-territorially. Under this separate and unequal legal regime, Palestinians are subjected to more severe detention and sentencing provisions than Jewish settlers and Israeli citizens, with little or no effective judicial oversight.

### *Due Process*

Under military order 1651, Palestinians can be held for 8 days after their arrest before seeing a judge. This detention can be renewed for a maximum period of 180 days without any charges being brought. During this period, a Palestinian can also be denied access to a lawyer for a maximum of 90 days. In comparison, Israeli settlers or citizens arrested under Israeli criminal law for a criminal offense committed in the West Bank can only be held for 24 hours without appearing before a judge. After these 24 hours, detention can only be renewed for a maximum period of 60 days without any charges being brought. Israelis accused of a criminal offense can only be denied access to a lawyer for a maximum of 48 hours.

Under military order 1651, if a Palestinian is ordered detained until the end of the legal proceedings, this detention can last up to 2 years, which may then be extended by six-month periods with no maximum limitation. Under Israeli criminal law, applicable to settlers residing in the West Bank and Israelis committing offenses in the West Bank, detention until the end of legal proceedings can only last up to 9 months, whether for a criminal or security offense. This detention can then be extended “from time to time”, but only for periods of three months.

In addition, there are differences in the way charges are filed under Israeli military and criminal law. Under criminal law, charge sheets must be very detailed, including specific dates, time and place for the alleged offences the defendant is accused of. Under military law, on the other hands, no such specifics are required, making it virtually impossible to prove the defendant’s innocence.

#### *Sentencing provisions*

Military order 1651 provides for harsher sentencing provisions than Israeli criminal law. Murder, for example, is punishable with the death penalty under military order 1651, article 209, although in practice such sentences are commuted to life imprisonment. In Israeli criminal law, on the other hand, murder is punishable by life imprisonment. However, under Israeli criminal law, if an offense is punishable by life imprisonment, but that penalty is not mandatory, then the maximum term of imprisonment that can be imposed by a court is 20 years. No such provision exists in Israeli military law applicable to Palestinians.

Similarly, while manslaughter is punishable by life imprisonment under military order 1651, it is only punishable by 20 years’ imprisonment in Israeli law. Carrying, holding and manufacturing weapons is punishable by life imprisonment under Israeli military law, but under Israeli criminal law, the maximum penalty is 15 years’ imprisonment. With regard to incitement, while this “offence” is punishable by 10 years’ imprisonment under Israeli military law, it is only punishable by a maximum of five years’ imprisonment under Israeli criminal law. Under military law, there is no maximum set penalty for membership of an illegal organization, with a military court decision instead setting a precedent that the minimum penalty is 24 months’ imprisonment. In fact some Palestinians, such as Ahmad Sa’adat, have been sentenced to as much as 30 years’ imprisonment on such charges. Under Israeli criminal law, the maximum penalty is on year.

In addition, under Israeli criminal law, a person cannot be held criminally responsible for attempting to commit an offence, if, through his/her own decision or remorse, he/she refrained from committing it. Again, no such provision exists in Israeli military law.

In practice, the differences in law produce much higher sentences for Palestinians committing similar or lesser crimes than Israelis. On 21 January 2011, Israeli settler Nahum Korman who beat an 11-year-old Palestinian child, Helmi Shusha, to death, was sentenced to 6 months of community service. On the same day, Suad Ghazal, a 15-year-old Palestinian girl accused of attempting to stab an Israeli settler was sentenced to 6 and a half years in prison.

#### *Administrative detention*

Under both military order 1651 (applicable to Palestinians) and the Emergency Powers (Detention) Law of 1979 (applicable to Israeli citizens), administrative detention orders can be issued for a period of 1-6 months, with no limits set on the number of times this detention can be renewed. However, while Palestinians must be brought before a judge for review of the order only within 8 days of arrest, Israeli citizens must be brought before a judge within 48 hours of arrest. Furthermore, Israeli citizens are entitled to periodic review of their detention every three months, but there is no such provision for Palestinians.

While administrative detention has been used both regularly and on a large scale against Palestinians, historically, only approximately 9 settlers have been placed in administrative detention. Some Palestinians have spent as many as six and a half consecutive years in this form of detention, while settlers are on average only detained for a few months, with the longest reported period being the administrative detention of Israeli settler Noam Federman for 9 months in 2004. Federman's case was also particular in that he was placed in administrative detention until the end of legal proceedings against him after he was charged with involvement in a 2002 attempt to bomb a girls' school in East Jerusalem. Furthermore, in 2005, the Jerusalem Magistrate's Court ordered the Israeli state to pay Federman NIS 100,000 as compensation for wrongfully placing him in administrative detention. It was the first time such a former administrative detainee was compensated for his detention.

#### *Definition of children*

Under Israeli domestic law applicable to Israeli citizens, the age of majority is defined as 18 while up until very recently the age of majority of Palestinians under military order 1651 was 16. On 27 September, the Israeli military commander of the West Bank issued military order 1676 to raise the age of Palestinian majority in the military court system from 16 to 18. Despite this, however, the amendment states that minors over the age of 16 may still be held in detention with adults, a provision that does not exist in Israeli criminal law. Furthermore, while Israeli children have the right to have a parent present during interrogation, this right is not fully accorded to Palestinian children under military legislation. Although military order 1676 includes a requirement to immediately notify the child's parents upon his or her arrest and interrogation, it also gives interrogators many openings to avoid this requirement. Furthermore, the amendment requires interrogators to inform minors of their right to an attorney, but states that they will only notify an attorney "whose particulars were provided by the minor."

In general, Israel's Youth Law, which applies to Israeli minors, has been amended over the years to incorporate the rules of international law concerning the treatment of juveniles in criminal matters and the obligations derived from these rules. These amendments emphasize options for the rehabilitation of juveniles, their rights as human beings, the rights of witnesses who are minors, and more fundamentally favor alternatives to arrest, which is viewed as an absolute last

resort. In contrast, despite the creation of a military court to try Palestinian children separately from adults in 2009, military legislation has not been amended to correct many of the due process deficiencies relating to the arrest and prosecution of Palestinian children.

### **East Jerusalem**

In East Jerusalem, although Israel imposed Israeli civil law upon its illegal annexation of the city in 1967, Palestinian residents continue to be subjected to a dual system of law: Israeli civil law and Israeli military regulations. In that framework, Israeli authorities often detain and interrogate Palestinians from East Jerusalem under military orders, a system that permits longer periods of detention, before transferring them to the Israeli civil system for trial, where prosecutors can seek higher sentences based on the principle that security offences are less common than in the military system in the oPt. The arrest and detention of Jewish settlers residing in East Jerusalem, however, is governed solely by Israeli civil law, which affords them greater protection and due process rights.

### **Gaza Strip**

Before Israel's unilateral "withdrawal" from the Gaza Strip in 2005, a system of military orders similar to the one currently in place in the West Bank governed the arrest of Gazans. Since then, however, Gazans have been subjected to a different legal regime than Palestinians in the West Bank and are instead either arrested on the basis of Israeli criminal law, under which they are automatically classified as "security" prisoners and suffer from harsher standards of detention and sentencing than their Israeli "criminal" counterparts [see "Israel" section], or under the *Incarceration of Unlawful Combatants Law*.

In 2002, the Israeli Knesset passed the *Incarceration of Unlawful Combatants Law*, which is used to detain residents of the Gaza Strip without trial. Under this law, Israeli officers are authorized to order the internment of a Palestinian first for a period of 96 hours, which can then be renewed for an indefinite period of time as opposed to administrative detention of Palestinians from the West Bank and Israeli citizens, which can only be ordered for a maximum of 6 months at a time. The internment can only be ended when one of the conditions for the internment ceases to exist or other reasons to justify the person's release arise. Alleged unlawful combatants must be brought before a judge within 14 days of the issuance of the internment order. If the order is confirmed by the judge, the internment must be reviewed every six months. To date, according to B'Tselem and Hamoked, Israel has imprisoned 39 Gazans under the Unlawful Combatants Law, 34 during or after the Israeli offensive on the Gaza Strip, and 5 between 2005 and 2008.

#### *Detention conditions*

Palestinians from the Gaza Strip detained in Israeli prisons have been subjected to additional discriminatory treatment as a result of Israel's June 2007 imposition of a total prohibition on family visits to these prisoners. On 9 December 2009, the Israeli High Court of Justice ruled against two petitions filed by Palestinian and Israeli human rights organizations in 2008 protesting the legality of the ban on family visits. The court held that the right to family visits in prison is not within the "framework of the basic humanitarian needs of the residents of the Strip, which Israel is obligated to enable". In addition, starting in November 2009, Israel has effectively prevented these prisoners from receiving money from their families to buy basic necessities through the prison canteens by requiring that transfers of money be conditional on the

physical presence of a family member at an Israeli bank—an impossibility for families residing in the Gaza Strip.

## **Israel**

Finally, within the domestic criminal justice system itself, Israeli authorities discriminate between incarcerated Jewish and Palestinian citizens by distinguishing between criminal and “security” prisoners, with the majority of the latter being Palestinians. As of 1 September 2011, there were 5,438 security and 12,421 criminal prisoners in Israeli prisons. The overwhelming majority (5,204) of the security prisoners were Palestinians from the West Bank, including East Jerusalem, and the Gaza Strip. Of the remaining 234 security prisoners, the majority were Palestinians with Israeli citizenship. Although the exact numbers were not available for 2011, statistics from 2009 can also be used to illustrate the proportion of Jewish and Palestinian security prisoners. According to Adalah, in 2009 only 16 of the 7,740 security prisoners were Jewish.

### *Due Process*

Israeli citizens accused of committing a “security” offence may be held for 4 days before being brought before a judge. This detention can be renewed for a maximum period of 60 days without any charges being brought. During this period, the detainee can also be denied access to a lawyer for a maximum of 21 days. In comparison, Israeli citizens accused of committing a criminal offence can only be held for 24 hours without appearing before a judge. After these 24 hours, detention can only be renewed for a maximum period of 60 days without any charges being brought. Israelis accused of a criminal offense can only be denied access to a lawyer for a maximum of 48 hours.

## **The treatment and detention conditions of Palestinian political prisoners**

Palestinian political prisoners, whether from the West Bank, including East Jerusalem, the Gaza Strip, or Israel, are defined as “security” prisoners by Israel. As a result they are subjected to harsher interrogation techniques and more severe detention conditions than their Israeli criminal counterparts.

### *Torture*

Security prisoners are interrogated by the Israeli Security Agency (ISA), which often uses methods that amount to ill-treatment and torture. Criminal prisoners, on the other hand, are interrogated by the Israeli police, whose methods of operation are governed by a different set of rules. This has created two distinct regimes of interrogation, with the one affording less protection and rife with abuse used almost exclusively against Palestinians, whether from the oPt or Israel.

The use of physical pressure against prisoners and detainees is less common since the 1999 High Court ruling in *The Public Committee Against Torture in Israel v. Government of Israel*, which placed certain restrictions on the use of torture during interrogation. However, under the court’s decision, “moderate physical pressure” was allowed to continue in “necessity of defense” and in “ticking time-bomb” cases. As a result, Israeli interrogators continue to use forbidden interrogation techniques.

When complaints are filed against an ISA officer, they are submitted to the Attorney General, who decides whether to forward them to the Police Investigation Department (PID), an external body part of the Ministry of Justice, for criminal investigation. In practice, however, complaints are forwarded to the Officer in Charge of GSS Interrogee Complaints (OCGIC), an ISA officer, who reviews the complaint and is required to report directly to the Attorney General on the validity of the complaint. As a result, the OCGIC is thus responsible for investigating both his ISA colleagues and the detainee who registered the complaint. The conflict of interests in this matter is clear and undermines a detainee's right to an independent and impartial investigation. The results of this flawed structure are clear: according to the Public Committee Against Torture in Israel (PCATI), the recourse to DIP has not been used once in recent years. In addition, all torture allegations and complaints are either denied or justified under the banner of "necessity defense" and none of the 621 complaints submitted between September 2001 and September 2009 resulted in a criminal investigation. In a few isolated cases, disciplinary measures have been applied against ISA officers, but none included harsh measures such as fines, dismissal or demotion.

#### *Detention conditions*

Detention conditions differ greatly between criminal and "security" prisoners. Privileges such as the ability to make phone calls, receive family visits without a glass divider, and occasional visits outside the prison are only available to criminal prisoners. Indeed, while criminal prisoners may use phones on a regular basis, "security" prisoners are denied the use of phones, except in exceptional circumstances, such as the death of a family member, but even then, authorization must be obtained from prison officials. Security prisoners are confined to their cells for the majority of the day, except for a few hours of recreation. No such restrictions are imposed on criminal prisoners. Discrimination is especially apparent in education, with criminal prisoners enjoying rich and well-organized formal and informal education programs while "security" prisoners, including minors, are entitled only to minimal education programs. Adult "security" prisoners, for example, can only study by correspondence at the Open University, which only offers studies in Hebrew. While criminal prisoners may be eligible for occasional visits outside of prison, this is virtually impossible for Palestinian "security" prisoners. In addition, other rights, such as the right to be released on parole, are applied preferentially to criminal prisoners, with only a very small percentage of security prisoners eligible for early release.

In practice, Israel also discriminates between Jewish and Palestinian "security" prisoners by offering preferential treatment to the former. Ami Popper, a former Israeli army officer, was sentenced to 7 life sentences for killing 7 Palestinians in 1990 although his sentence was commuted to 40 years in 1999. During his imprisonment, Popper, who is categorized as a "security" prisoner, has married and fathered three children. He has also been able to take hundreds of vacations outside prison, during one of which, driving without a valid license, he was involved in a car accident that killed his first wife and one of his children.

#### **Conclusion**

It therefore appears that Israel's arrest and detention of Palestinians in the oPt and within Israel proper is governed by a regime of laws and institutions almost completely separate from the one administering the arrest of Jewish Israelis. Because this system enables the large-scale arbitrary arrest of Palestinians while generally affording them lower protections and guarantees than

Jewish Israelis, it should be understood as a discriminatory institutional tool of domination and oppression against them.