PRESUMED GUILTY:

Remand in Custody by Military Courts in the West Bank

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B'TSELEM – The Israeli Information Center for Human Rights in the Occupied Territories was founded in 1989 by a group of concerned Israelis. It endeavors to document and educate the Israeli public and policymakers about human rights violations in the Occupied Territories, combat the phenomenon of denial prevalent among the Israeli public, and help create a human rights culture in Israel.

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Introduction

Military courts have operated in the Occupied Palestinian Territories (oPt) since the Israeli occupation began in 1967. Over the years, they have come to be one of the main apparatuses serving the regime of occupation. To date, hundreds of thousands of Palestinians have been brought before these courts.[1] Military courts ceased operating in Gaza after Israel withdrew its military forces from the Gaza Strip in 2005, but continue to operate in the West Bank to this day, with the exception of East Jerusalem – an area Israel annexed.

The military courts' jurisdiction has hardly been affected by the division of the West Bank into Areas A, B and C under the Oslo Accords or the transfer of certain civilian and security responsibilities to the Palestinian Authority (hereafter: the PA). All residents of the West Bank continue to be prosecuted in these courts for violations of the military's body of law, such as the use of firearms, stone-throwing, membership in illegal organizations, participation in protests and entry into Israel without a permit. Military courts also preside over criminal offenses and traffic violations.

The following report focuses on one of the central aspects in the work of the military justice system: remand in custody pending end of proceedings. In this context, remand is the detention for the duration of all legal proceedings in the case of a person whose questioning and investigation has been completed and who has been formally charged. The report describes the process by which military courts approve motions for remand put forward by the prosecution and reviews the reasons cited by the judges when approving these motions.

Detention is injurious by definition. It cuts people off from their lives, families, surroundings. In one fell swoop, detainees come under a strict daily routine over which they have no control. They lose their privacy and become dependent on the prison guards. This leads to feelings of helplessness and humiliation, which are exacerbated when the person held in custody is not serving a prison sentence, has not even been sentenced, and should be presumed innocent until

1 Yael Ronen, "Blind in Their Own Cause: The Military Courts in the West Bank", *Cambridge Journal of International and Comparative Law* 2(4), 739, 2013, p. 740.

proven guilty. Detainees also have difficulties mounting an effective defense from behind prison walls, thereby possibly adding to the violation of their rights.

Remand in custody is clearly a necessity in certain circumstances, such as when public safety is at risk, or when steps to ensure a proper criminal procedure are required. Former Chief Supreme Court Justice Meir Shamgar described the dilemma judges face:

> The defendant's very detention raises a serious preliminary question: This is, after all, a person who has not yet been convicted. He is presumed innocent, and our experience shows that the presumption of innocence is not just a matter of theory, but that it is often substantiated when a defendant is acquitted. Balanced against all this, is the need to protect society and its members from repeated offenses of the sort with which the defendant is charged, or other offenses that circumstances often give rise to in the interim phase between the filing of the indictment and the end of the trial.[2]

Because of the severe violation of the rights of defendants, the prosecution might have been expected to exercise caution in demanding remand in custody and the courts might have been expected to ensure remand is granted only when there is no other choice. This, however, is not the situation in the military courts. With the exception of individuals tried for traffic violations, remanding Palestinian defendants in custody for the duration of the proceedings is the rule rather than the exception

One of the outcomes of this policy is that the vast majority of military court cases end in plea bargains. Defendants prefer to avoid a lengthy trial while in custody, knowing that they risk spending more time behind bars than if they take the prison sentence of a plea bargain. As a consequence the prosecution is seldom required to go through a full evidentiary trial, in which it must present evidence to prove a person guilty. In effect, the case is decided at the time remand is granted rather than on the basis of evidence against the defendant.

When hearing remand motions, military justices rely on Israeli law regarding arrest and detention, rather than military law. It is part of the prevailing tendency in the military courts towards bridging the gap between the two legal systems.[3]

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2 CrimFH 2316/95, **Imad Ghneimat v**. **State of Israel**, IsrSC 49(4), 589, 620.

3 Smadar Ben Natan, "Amongst their People: The Application of Israeli Law in the Military Courts in the Territories", *Theory and Criticism* (43, Fall 2014), p. 45 [Hebrew]

Military Judge Col. Netanel Benisho, the current president of the Military Court of Appeals, has described the "civilianization" of the military courts:

> The legislator in the area has shown a slow but steady trend toward imbuing criminal law with a substantially civilian character. This is pursued by legislative amendments that cancel similar arrangements and links to Israeli military law, in favor of closely following civilian law. This trend also emerges from judicial practices in the military courts in the area, inspired by the spirit of judicial activism characteristic of the courts, chiefly the Military Court of Appeals, whose current jurisprudence is largely geared toward bringing the court's main body of work on par with that of civilian courts inside Israel.[4]

Military Judge Col. Aharon Mishnayot, formerly President of the Military Court of Appeals, has also addressed the impact Israeli law has had on the rulings of the military courts, expressed through "direct absorption of norms from Israeli law into the security legislation; judicial absorption of principles that originate in Israeli law, and in the close monitoring by the Supreme Court over IDF actions in the area in general, and the operation of the military courts in particular". Mishnayot notes that this indicates "a bridging of the gap between the law in the area and Israeli law, and increased protection for the rights of those tried by the military courts".[5]

As this report shows, at least with respect to remand proceedings, which are some of the most significant proceedings military courts preside over, the application of Israeli law is merely a formality and has not led to improved protection of the rights of Palestinian defendants.

4 Netanel Benisho, "Criminal Law in Judea, Samaria and the Gaza Strip: Trends and Outlooks", *Mishpat ve-Tzava* (=Hebrew IDF Law Review) (18, 5765-2005), 293, p. 306 [Hebrew].

5 See Aharon Mishnayot, "The Law and Jurisdiction in Judea and Samaria: Between the Current Situation and the Desirable Situation" (not yet published, available on the SSRN website) (Hebrew; English abstract); see also Zvi Leckach and Amir Dahan, "99.9% Conviction Rate in Israel – Distortion of Justice or Just Distortion of Statistics", *Haifa Law Review* (5, 2010), 185, see pp. 200-201 [Hebrew].

The military justice system in the West Bank

Immediately after the occupation in 1967, Maj. Gen. Haim Herzog, the commander of the IDF forces in the West Bank, published a series of proclamations and military orders meant to establish the new regime.[6] In the orders, Maj. Gen. Herzog announced the establishment of a military rule in the occupied territory, the rule's sovereignty and the transfer to it of the powers of "government, legislation, appointments and administration". The order added that the law that had been in effect in the occupied territory until that time would continue to apply, subject to changes to be made by the commander of the Judea and Samaria area.[7]

According to the Fourth Geneva Convention, which governs the conduct of an occupying power in an occupied territory, local penal laws remain in effect, but the occupying power may revoke them "in cases where they constitute a threat to its security or an obstacle to the application of the present Convention". The occupying power may pass new legislation that is necessary "to maintain the orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them".[8]

The occupying power may, according to the Convention, establish military courts to try residents of the occupied territory who have broken laws it has passed. However, based on the understanding that without a state to protect their interests, these residents are more vulnerable and need special protection, the Convention stipulates a number of conditions for the establishment of these courts. Amongst other things, the courts must be located inside the occupied territory and may not be used as a tool for political or racial persecution. Other

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6 Similar orders were issued with respect to the Gaza Strip. They remained in force until Israel's withdrawal from Gaza in September 2005.

7 Proclamation regarding Assumption of Power by the IDF (No. 1) 5727-1967; Proclamation regarding the Regulation of Administration and Law (West Bank) (No. 2) 5727-1967.

8 *Convention (IV) relative to the Protection of Civilian Persons in Time of War* (hereinafter: Fourth Geneva Convention), Art. 64.

articles in the Convention oblige the occupying power to protect the rights of detainees and defendants and establish a series of basic standards guaranteeing due process.[9]

The commander of the IDF forces in the West Bank issued Proclamation No. 3, to which was appended the Order regarding Security Provisions. In this proclamation, the OC of the Command ordered the establishment of military courts, determined which procedures would be in force and the offenses over which the court would preside.[10]

Today, the military court system includes several courts of different instances. Two courts operate in the West Bank as courts of first instance: The Judea Court is located in the Ofer military base and the Samaria Court is located at the Salem military base. Four more branches of the military courts operate inside Israel, adjacent to interrogation centers of the Israel Security Agency (ISA, formerly known as the General Security Service or by the Hebrew acronym *Shabak*). In these courts, military judges preside over hearings on extending the detention of interrogatees. As of 2009, a Military Juvenile Court has been operating at the Ofer military base. The base is also home to the Military Court of Appeals, the Military Court for Administrative Detention and the Military Court of Appeals regarding Administrative Detention.[11]

The military court system is headed by the president of the Military Court of Appeals, an officer holding the rank of colonel. The head of the courts of first instance is an officer with the rank of lieutenant colonel. Eleven judges served on the courts of first instance in 2013. During the same period, three judges served on the court of appeals.[12] Reserve soldiers with legal training, most of them lawyers, serve as judges alongside the military judges.[13]

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9 Fourth Geneva Convention, Arts. 67-77; see also Jean S. Pictet (ed.), *Commentary – IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, ICRC, Geneva, 1958, pp. 339-341; Yael Ronen, supra note 1, p. 43.

10 Proclamation regarding the Entry into Effect of the Order regarding Security Provisions (West Bank) (No. 3) 5727-1967; Order regarding Security Provisions, 5727-1967; Order regarding the Establishment of Military Courts (No. 3) 5727-1967. These provisions were later consolidated into one order: Order regarding Security Provisions [Consolidated Version] (Judea and Samaria) (No. 1651) 5770-2009 (hereinafter: Order regarding Security Provisions).

11 For a history of structural and procedural developments in the military justice system see Mishnayot, supra note 5, pp. 4-7; Yesh Din, *Backyard Proceedings: The Implementation of Due Process Rights in the Military Courts in the Occupied Territories*, December 2007, pp. 37-39.

12 See, Military Courts in the Judea and Samaria Area, *Annual Activity Report 2013* [Hebrew].

13 For more on the structure and powers of the military court system, see Yesh Din, *Backyard Proceedings*, supra note 11, pp. 45-56.

The military courts have jurisdiction over two types of offenses. The first is known as "security offenses", and includes "any offense enumerated in the security legislation and in statute". The jurisdiction of the military courts applies whether the offense was committed in areas under control of the Israeli military, outside the West Bank, or in areas A and B, which have been transferred to the PA, as long as it "breached or was intended to breach the security of the area".[14] The second type is offenses regarded as a threat to public order – particularly traffic violations but also criminal offenses that are not defined as security offenses.[15]

Every year, the military prosecution files thousands of indictments against Palestinians, submitting them to the military courts, which divide them into five categories:

- "Hostile terrorist activity" – such as military training, firearms violations or membership in illegal associations
- "Public disturbances" – which mainly relate to throwing stones and Molotov cocktails and participating in demonstrations
- Illegal entry into Israel
- Criminal offenses
- Traffic violations

14 Order regarding Security Provisions, Section 10.
15 For more, see Yael Ronen, supra note 1, pp. 744-745.

Indictments against Palestinians between 2008 and 2013, according to type of violation[16]

Year	Hostile Terrorist Activity	Public Disturbances	Illegal Entry into Israel	Criminal	Traffic	Total
2008	2,584	593	1,771	666	2,706	**8,320**
2009	1,962	662	1,628	648	3,559	**8,459**
2010	1,405	707	1,887	629	3,888	**8,516**
2011	1,123	721	1,180	707	4,904	**8,635**
2012	1,319	861	1,358	514	3,224	**7,276**
2013	1,854	886	1,751	604	3,755	**8,850**

Officially, military courts are authorized to try anyone who commits an offense in the West Bank, including settlers, Israeli citizens residing in Israel, and foreign nationals. However, in the early 1980s, the Attorney General decided that Israeli citizens would be tried in the Israeli civilian court system according to Israeli penal laws, even if they live in the oPt and the violation was committed in the oPt against oPt residents. That policy remains in effect.[17]

16 Military Courts in the Judea and Samaria Area, *Annual Activity Report 2012*, p. 13 [Hebrew]; *Annual Activity Report 2013*, p. 8 [Hebrew].

17 See IDF Spokesperson's response to Yesh Din, *Backyard Proceedings*, supra note 11, p. 59. For more on this, see Mishnayot, supra note 5, pp. 24-25; Association for Civil Rights in Israel, *One Rule, Two Legal Systems: Israel's Regime of Laws in the West Bank*, November 2014, pp. 31-39.

Legal background: The right to liberty and remand in custody

The right to liberty is entrenched in a series of international conventions dealing with human rights. Like many other rights, the right to liberty is not absolute and there are situations in which it may be infringed, yet only if the infringement is proportional and carried out in accordance with the restrictions enumerated in these conventions.

The International Covenant on Civil and Political Rights (ICCPR) lists the rules that states must uphold when handling persons suspected of breaking the law. The ICCPR prohibits arbitrary arrest or detention and obliges the authorities to inform individuals at the time of their arrest of the reasons for it and the charges against them. Furthermore, individuals must be brought before a judge or other judicial authority immediately after their arrest, and must be tried within a reasonable amount of time.[18]

The right to liberty is also anchored in Israeli law. As Basic Law: Human Dignity and Liberty states, "there shall be no deprivation or restriction of the liberty of a person by imprisonment, arrest, extradition or otherwise".[19] No encroachment on liberty will be made "except by a law befitting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than is required".[20] The justices of the Israeli Supreme Court have repeatedly stressed the caution that must be exercised before encroaching on a person's right to liberty. For example, Justice Yitzhak Zamir wrote:

> Personal liberty is a constitutional right of the first order and it is also, in practical terms, a condition for the exercise of other basic rights. The harm caused to personal liberty, as a stone hitting water, creates a ripple effect of harm to other basic rights: Not just to freedom of movement but also

18 *International Covenant on Civil and Political Rights* (hereinafter: ICCPR), 1966, Art. 9.
19 Basic Law: Human Dignity and Liberty, Sec. 5 (English translation available on Knesset website).
20 Ibid., Sec. 8.

> to freedom of expression, the right to privacy, the right to property and other rights.[21]

This position was adopted by the military courts in the West Bank. Then Vice President of the Military Court of Appeals Lieut. Col. Netanel Benisho wrote:

> There is no need to elaborate on the importance of the right to liberty. This is a right of the first order compared even to other fundamental rights which ought to be granted to every human being as such […] It appears that there is no need to provide any sort of proof that this right applies in the area, even if it has not been constitutionally enacted, as it has in Israel.[22]

Remand in custody makes it possible to detain a person who has been indicted pending the conclusion of his or her trial. As such, it is a severe violation of the right to liberty, as the right is denied–often for a lengthy period of time–even before the individual has been convicted or sentenced.

International law does not set out the conditions that must be met for a judge to be able to order remand in custody. However, it does establish limitations on the use of this tool. The ICCPR states that, in general, persons may not be remanded in custody, although courts may stipulate conditions for release.[23] The Human Rights Committee, which oversees the implementation of the ICCPR, determined the basic principles that are meant to apply in this matter and to limit the cases in which defendants are remanded in custody for the duration of the judicial proceedings against them:

> Detention pending trial must be based on an individualized determination that it is reasonable and necessary taking into account all the circumstances, for such purposes as to prevent flight, interference with evidence or the recurrence of crime. The relevant factors should be specified in law and should not include vague and expansive standards such as "public security". Pretrial detention should not be mandatory for all defendants charged with a particular crime without regard to particular circumstances. Neither should pretrial detention be ordered for a period based on the potential sentence for the crime charged, rather than on a determination of necessity. Courts must examine whether alternatives to pretrial detention, such as bail, electronic bracelets or other conditions, would render detention unnecessary in the particular case […] Pretrial detention of juveniles should be avoided to the fullest extent possible. [24]

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21 HCJ 6055/95, **Sagi Tzemah v. Minister of Interior et al.**, IsrSC 53(5) 241, 261.
22 AA 3603/05, **Basel Husam Muhammad Duas v. Military Prosecutor**.
23 ICCPR, Art. 9(c).
24 Human Rights Committee, General comment No. 35: Article 9 (Liberty and security of person), Adopted by the Committee at its 112th session (7–31 October 2014), para. 38.

Contrary to these principles, military legislation does not determine the conditions required for remanding individuals in custody and does not require considering alternatives to detention, even in the case of minors. The Order regarding Security Provisions states only that the military courts are authorized to extend detention pending the end of proceedings.[25] The order also states that a suspect who has been remanded in custody may ask the court at any time for a "review" of the decision if new facts are discovered. If no new facts are discovered, a request for review may be filed one year after the arrest and every six months thereafter.[26]

While the military order does set limits on the period of remand, it still allows for lengthy detention: If a trial does not begin within 60 days, the detainee must be brought before a Military Court of Appeals judge who will order his or her release unless the judge believes that the circumstances which justified the original detention persist.[27] In the case of a defendant charged with security offenses, if the trial does not end within 18 months, or one year if the defendant is a minor, or if the case involves a non-security related offense, the suspect will be brought before a Military Court of Appeals judge, who will order his or her release unless the judge believes continued detention is justified. In this case, the judge may extend the detention by six months (or three months in the case of a minor). The judge may continue to extend the detention in subsequent hearings.[28]

These rules were introduced only in April 2014, following petitions filed by the Association for Civil Rights in Israel and the PA's Ministry for Prisoners' Affairs, which demanded that the duration of detention permitted under military law, including remand in custody, parallel that allowed under Israeli law.[29] Until the amendment, military law had no provision relating to trial commencement date. The only restriction on remand in custody was that it not exceed two years, regardless of the type of offense or the age of the defendant.

Even after the amendment, detention under military law remains of longer duration than under Israeli law, which stipulates that if trial does not commence within 30 days after indictment, the defendant must be released.[30] The law goes on to state that defendants must also be released if the trial does not conclude

25 Order regarding Security Provisions, Sec. 43.
26 Ibid., Sec. 47.
27 Ibid., Sec. 43a.
28 Ibid., Sec. 44.
29 HCJ 3368/10 **Palestinian Ministry of Prisoners' Affairs et al. v. Minister of Defense et al.** and HCJ 4057/10 **Association for Civil Rights in Israel et al. v. IDF Commander in the Judea and Samaria Area et al.**
30 Criminal Procedure Law (Enforcement Powers – Arrests), 5756-1996 (hereinafter: Law of Arrests), Sec. 60.

within nine months, or six months if the defendant is a minor.[31] A justice of the Supreme Court may extend the remand by 90 additional days – and up to 150 days, if he or she believes that this is justified by type of offense or the complexity of the case. An order of extension may be repeated multiple times.[32] In the case of a minor, the justice may extend the remand for no more than 45 days.[33] With regard to minors under the age of 14, Israeli law absolutely prohibits remand in custody for the duration of proceedings. [34]

Because of these differences, the Supreme Court demanded further explanations from the state regarding the duration of remand in military law.[35] In an update submitted to the court in February 2015, the state wrote that it intended to further shorten the duration of remand and that staff work on this matter was in its final stages. The state claimed that shortening the duration of remand periods had budgetary implications and asked the court to allow it to submit another update after the 2015 Budget Law was approved.[36]

As the military law does not stipulate conditions for remand by military order, military courts have decided to follow Israel's Law of Arrests. For example, then President of the Military Court Col. Shaul Gordon determined that "even though there is no disputing the fact that the provisions of the Criminal Procedure Law (Powers of Enforcement – Arrests) 1996 do not apply in the Area (Judea and Samaria), as a rule, we follow the principles outlined therein".[37]

The Israeli Law of Arrests stipulates that in order for a judge to be authorized to order remand in custody, three cumulative conditions must be met: the presence of *prima facie* evidence of guilt, the presence of one of the grounds for detention enumerated in the law and the absence of applicable alternatives to detention.[38] Further on in this report, we will examine how military justices have interpreted these principles.

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31 Ibid., Sec. 61. For minors, see The Juvenile Law (Adjudication, Penalties and Treatment) 5731-1971 (hereinafter: Juvenile Law), Sec. 10.12.
32 Law of Arrests, Sec. 62.
33 Juvenile Law, Sec. 10.13.
34 Ibid., Sec. 10.10.
35 HCJ 3368/10 **Palestinian Ministry of Prisoners' Affairs et al. v. Minister of Defense et al.** and HCJ 4057/10 **The Association for Civil Rights in Israel et al. v. IDF Commander in the Judea and Samaria Area et al.**, Partial judgment, issued 6 April 2014.
36 HCJ 3368/10 **Palestinian Ministry of Prisoners' Affairs et al. v. Minister of Defense et al.** and HCJ 4057/10 **The Association for Civil Rights in Israel et al. v. IDF Commander in the Judea and Samaria Area et al.**, Updating Notice on behalf of the State, 25 February 2015.
37 AA 157/00, **Military Prosecutor v. Yusef 'Abd al-Hadi Abu Salim**; see also AA 115/02 **Military Prosecutor v. Muhammad Nayef Salim Haj Hussein**, AA 3603/05, supra note 22, Benisho, supra note 4, p. 314.
38 Law of Arrests, Sec. 21.

Figures

Remand in custody in the West Bank

The Military Court Unit does not publish figures on the number of defendants who are remanded to custody each year. B'Tselem's requests for these figures have been rejected with the explanation that they are not available electronically. The only figure available is the number of defendants who were in remand at the end of each year and the duration of their arrest. The figures are presented in the table below:

Individuals in remand at the end of a calendar year:[39]

Year	Number of individuals in remand at the end of the year	In remand for up to a year	In remand between one and two years	In remand over two years
2008	**1,791**	1,378	385	28
2009	**1,205***	944	235	27
2010	**695**	605	79	11
2011	**706**	622	78	6
2012	**1,083**	965	111	7
2013	**1,507**	1,343	151	13

* error in original.

We contacted the Military Prosecutor for Judea and Samaria Lieut. Col. Maurice Hirsch for information about the military prosecution's policy on remand. Our inquiry has not been answered to date.[40]

B'Tselem also contacted the IDF Spokesperson for information about the number of cases in which the military prosecution filed a motion for remand and the

39 Military Courts in the Judea and Samaria Area, *Annual Activity Report 2012*, p. 18 [Hebrew]; Military Courts in the Judea and Samaria Area, *Annual Activity Report 2013*, p. 13 [Hebrew].

40 Letter from B'Tselem to Lieut. Col. Maurice Hirsch, Military Prosecutor for the Judea and Samaria Area, 24 December 2013.

number of cases in which the court granted the request.[41] It took six months for the IDF Spokesperson to provide B'Tselem with a response, which related to a single work-week.[42] According to the IDF Spokesperson, this was because detention proceedings are not entered into the computer system, and therefore, providing figures would constitute "unreasonable allocation of resources under Section 8(1) of the Freedom of Information Act".[43] The information that was provided is shown in the table below:

Military court rulings regarding remand for 10-14 August 2014:

	Type of offense	Prosecution asked for remand in custody for duration of proceedings	Motion became moot – Plea bargain	Motion granted	Motion denied
Hostile Terrorist activity	26	26	1	22 (1 overturned on appeal)	3
Public Disturbances	29	27	3	23	1 (overturned on appeal)
Criminal	1	1			1 (overturned on appeal)
Exiting the West Bank without a Permit	40	32	15	15	2
Traffic	64	0			
Total	160	86	19	60	7

41 Letter from B'Tselem to Maj. Zohar Halevy, Head of Human Rights and Public Liaison Department, IDF Spokesperson, 24 April 2014.
42 Letter to B'Tselem from Public Liaison Department, IDF Spokesperson, 7 October 2014.
43 Letter to B'Tselem from Public Liaison Department, IDF Spokesperson, 4 December 2014.

According to these figures, discounting traffic violations, the military prosecution requested remand in custody in 90% of the cases. The military courts, for their part, granted these motions for remand in the vast majority of the cases, with 90% granted in cases in which the court of first instance made a decision.

The prosecution appealed four of the seven cases in which the court rejected its motion. Two of the appeals were granted and the defendants remained in custody (one on public disturbance charges and the other on criminal charges). A third was denied. In the fourth case, a decision had not been made at the time the response was sent. The defense appealed three cases. One appeal was granted (a terrorism charge) and the defendant was released. The other two appeals were denied. In total, during that week, the prosecution's motion was granted in 91% of the cases in which the court made a decision.

B'Tselem also asked for transcripts of remand proceedings held both in the court of first instance and in the appellate instance. The information was very difficult to obtain. B'Tselem first contacted the IDF Spokesperson on this matter in November 2011.[44] After a lengthy correspondence with various units inside the Israeli military, including the IDF Spokesperson and the Military Courts Unit,[45] in March 2012, B'Tselem received decisions made by the appellate court over a four-month period. In late June 2012, B'Tselem was sent 260 additional transcripts of hearings held by the court of first instance regarding remand. The materials were collected from hearings held on pre-selected dates in order to have a representative sample.

Here too, data analysis shows that the courts of first instance tend to grant the prosecution's motions for remand. In 127 of the 260 cases, there was no hearing. In 105, this was due to a motion for extension filed by the defense, and in the remaining cases, due to technical reasons such as defendant lacking counsel or missing documents in the file. The breakdown of the decisions in the remaining 133 cases as to the prosecution's motion for remand are as follows:

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44 Letter from B'Tselem to Sec. Lieut. Rotem Nissim, Human Rights and Public Liaison Department, IDF Spokesperson, 22 November 2011.

45 Letter from B'Tselem to Military Courts Unit, 2 January 2012; Letters to Maj. Zohar Halevy, Head of Human Rights and Public Liaison Department, IDF Spokesperson, 9 January 2012 and 22 February 2012; Letter from B'Tselem to Lieut. Col. Robert Neufeld, Military Courts Unit Administration Officer at Judea and Samaria Area Military Prosecution, 15 March 2012; Letter to B'Tselem from Maj. Zohar Halevy, Head of Human Rights and Public Liaison Department, IDF Spokesperson, 1 April 2014.

- In 24 cases, the military judge ordered the defendant's conditional release. In one case, the parties reached an agreement on a plea bargain immediately after the decision was rendered, because of the high bail set by the military judge.
- In the remaining 109 files (82%), the military judge ordered remand in custody for the duration of proceedings. In 75 of these cases, the defense consented.

A review of the appellate court decisions provided to B'Tselem shows a higher incidence of acceptance of prosecution appeals compared to defense appeals. Sixty-eight of the appeals provided to B'Tselem related to remand in custody. They included two cases in which both parties filed an appeal. Of these appeals:

- 30 were filed by the defense. 12 (40%) were accepted and the defendants were released.
- 38 were filed by the prosecution. 25 (65%) were accepted and the defendants remained in custody.

Figures for 2012 and 2013 indicate a similar trend:[46]

	Defense appeals	Prosecution appeals
2012	130 (29 accepted = **22%)**	129 (59 accepted = **46%**)
2013	166 (62 accepted = **37%**)	63 (40 accepted = **53%**)

46 Letter to B'Tselem from Public Liaison Department, IDF Spokesperson, 13 April 2014.

Remand in custody in Israel

Like the military justice system, the Israeli justice system does not publish figures on remand in custody. B'Tselem contacted Israel's Judicial Authority for information about the number of remand motions and the decisions made by the court, but it too responded that the figures "cannot be statistically extracted from the Authority's computerized database. Therefore, they cannot be produced".[47]

Information published in various contexts shows that there has been a significant increase in remand in custody in recent years. According to the 2013 activity report of the Public Defender's Office, there were 6,080 cases of remand in custody in Israel in 1998. In 2013 the number climbed to 20,082.[48] According to figures presented by then Deputy Public Defender Yoav Sapir, the proportion of remand cases among the general number of arrests has also increased over the years. In 1998 remand cases accounted for 15% of the total number of arrests. In 2009, they accounted for 27% of the total number of arrests, though the number of indictments served in this period dropped.[49]

One of the only studies on this issue was a statistical survey made by the Judicial Authority Research Department in May 2012. The survey, based on a sample of cases selected from the Magistrates and District Courts between May 2010 and May 2011, found as follows:

- In the Magistrates Courts, the prosecution filed motions for remand in custody for 27.4% of defendants. Motions were granted in about half the cases.
- In the District Courts, the prosecution filed motions for remand in custody for 87.7% of defendants. Motions were granted in about two thirds of the cases.[50]

The study indicates the deep gulf between the situation inside Israel and the situation in the military court system, both with respect to the number of cases in which the military prosecution demands remand in custody and the number of cases in which such motions are granted by the court.

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47 Letter to B'Tselem from Sharon Saban-Safrai, Freedom of Information Officer, Ministry of Justice, 17 December 2014.
48 Ministry of Justice, *Public Defender's Office: Activity Report 2013*, p. 17 [Hebrew].
49 Session of the Knesset's Constitution Law and Justice Committee, 28 February 2011.
50 Oren Gazal-Ayal, Inbal Galon and Keren Weinshall-Margel, *Conviction and Acquittals in Israeli Courts*, University of Haifa and Judicial Authority Research Department, May 2012, pp. 28-29 [Hebrew].

First condition for remand in custody: *Prima facie* evidence

The first condition for approving remand in custody under Israeli law is *prima facie* evidence of the defendant's guilt. Remand decisions are made at an early stage in the legal proceedings, before witnesses are heard and before the defendant has a chance to cross examine them, when judges are as yet unable to determine the quality of the investigation or the reliability of the witnesses. Therefore, the evidence required at this stage need not meet the standard required for a conviction, and is referred to as *prima facie* evidence.

What is *prima facie* evidence?

Israeli law does not explain what the evidence must include in order to be considered *prima facie* evidence. Clarifications were attempted through case law. Justice (as then titled) Meir Shamgar ruled:

> It is impossible to formulate precise criteria to be used by the court when it compares different arguments. It is clear and simple that the court will first examine whether there is *prima facie* evidence to support the allegations made by the Prosecution, and then proceed to examine whether counter testimony may undermine or deny the plausibility of the account offered by the Prosecution. At this point, the court should consider, as stated, the nature of the contradicting evidence, for instance, the relationship between the witness and the suspect, the possibility of human error on the part of all parties vis-à-vis a description that seems, on the face of it, more certain, and other such considerations, which are the result of organizing the material that has been collected up to the relevant stage and the product of judicial perspective and general life experience.[51]

Former Chief Justice of the Supreme Court, Justice Aharon Barak, wrote similarly in a ruling handed down by an expanded, nine-justice panel. Justice Barak stated that the decision should be guided by the question of whether "the nature of the evidence, in the context of the overall evidence available at this stage is

51 MApp 322/80 **State of Israel v. Yehiam Ohana**, IsrSC 35(1) 359, 363.

such that there is a reasonable chance that this evidence would, at the end of the criminal proceeding, become ordinary evidence which on its own or as part of other potential evidence, would serve to properly determine the defendant's guilt". Barak went on to elucidate this point:

> If doubt plagues the evidence on which the Prosecution bases the charges, a sort of "genetic defect" that will not be removed during trial, the evidence no longer has the potential evidentiary force required to give rise to reasonable prospects for conviction. Note well: the question is not whether the Prosecution's evidence "allegedly" proves the defendant's guilt beyond reasonable doubt. Rather, the test is whether the investigative material the Prosecution possesses contains evidentiary potential that could, at the end of the trial, prove the defendant's guilt as required in a criminal trial.[52]

Legal scholarship has argued, *inter alia*, that this case law sets a relatively low threshold that poses no obstacle to the prosecution, seeing that had the case lacked evidence that could potentially lead to a conviction, the prosecution would likely not have filed an indictment to begin with.[53]

Military court judges have declared that they are guided by this case law when deciding whether the prosecution has met the threshold for *prima facie* evidence.[54] However, as we demonstrate below, even the low threshold set by Justice Barak has almost entirely disappeared from the military court system, and military judges often rule that the prosecution has met the *prima facie* evidence threshold even in cases in which the evidence is thin, where there were difficulties obtaining statements or when the prosecution's evidence contains inconsistencies.

Evidence commonly used in military courts

Information provided to B'Tselem by lawyers who represent Palestinian defendants, and observations B'Tselem has held in military courts indicate that in the vast majority of cases, indictments are based on confessions and incriminating testimonies, without other admissible evidence.

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52 CrimApp 8087/95 **Shlomo Zada v. State of Israel**, IsrSC 50(2) 133, 148. See also remarks made by Justice Kedmi in CrimApp 825/98 **State of Israel v. Mahmoud Dahleh**, 52(1) 625.

53 See, Rinat Kitai-Sangero, *Detention: Denying Liberty before the Verdict*, Nevo Publishing, 2011, p. 271 [Hebrew]. For further criticism of the Zada rule see, Gideon Ginat, "*Prima Facie* Evidence. Is it not time to revisit the Zada case tests?", *Hasanegor*, (181, April 2012) [Hebrew].

54 See remarks of (former) President of the Military Court of Appeals, Col. Shaul Gordon in AA 166 & 168/00**, Military Prosecutor v. M.'A. and A.A**. See also, remarks of Military Judge Lieut. Col. Ronen Atzmon in AA 1329 & 1331/13, **Military Prosecution v. Mu'az 'Abd Shaker Hamamreh and Diaa' Mar'i 'Abd al-Fatah Hamamreh**.

One of the issues with relying on this type of evidence is that the process by which it is obtained, during ISA or police investigations, often involves human rights violations. This report does not focus on this issue, but it has been the subject of many publications in the past and is essential for understanding the difficulties of relying almost exclusively on confessions and incriminating testimonies. Over the years, B'Tselem and other human rights organizations have reported abuse and other inhuman and degrading treatment during ISA interrogations, sometimes amounting to torture.[55] In addition, Palestinian detainees are routinely denied the right to confer with counsel, who may advise them and protect their rights.[56] Interrogation of minors also often involves a violation of their rights. To name some: minors are often arrested in the middle of the night; interrogated without the presence of their parents or another adult who looks after their interests, by interrogators who are not necessarily youth investigators, without being given the option of obtaining counsel and after a sleepless night; and are forced to sign statements written in a language they do not understand.[57]

Another feature unique to this type of evidence is that confessions and incriminating testimonies are usually collected in Arabic. Military prosecutors and judges do not often speak Arabic, and are therefore forced to rely on translations into Hebrew. In some cases, a review of the confession given in the original language reveals that the cause for the arrest was an error that originated in mistranslation or errors in transcribing the material.[58]

As detailed below, there are other significant difficulties associated with relying almost exclusively on confessions or incriminating testimony, particularly in remand proceedings:

Confessions

In remand hearings, military court judges tend to attribute a great deal of weight to defendant confessions. The presence of confessions is usually sufficient for a ruling that there is *prima facie* evidence in the case.

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55 See, e.g. B'Tselem and HaMoked: Center for the Defence of the Individual, *Absolute Prohibition: The Torture and Ill-Treatment of Palestinian Detainees*, May 2007; *Kept in the Dark: Treatment of Palestinian Detainees in the Petach- Tikva Interrogation Facility of the Israel Security Agency*, October 2010.

56 Ibid. See also The Public Committee Against Torture in Israel and Nadi al-Asir – Palestinian Prisoner Society, *When the Exception Becomes the Rule: Incommunicado Detention of Palestinian Security Detainees*, October 2010.

57 For more information see, B'Tselem, *No Minor Matter: Violation of the Rights of Palestinian Minors Arrested by Israel on Suspicion of Stone-Throwing*, July 2011.

58 See. e.g., AA S/3094/14, T/3134/14, **AA**. **v**. **Military Prosecution**.

Judges in Israel's civilian courts also attribute a great deal of weight to confessions of guilt, partly on the assumption that people would not incriminate themselves for actions they did not commit. But this assumption has been harshly criticized in the past. The Goldberg Commission, which was appointed to look into convictions based solely on confessions, published its conclusions in December 1994. One of the assertions made by the Commission was that: "The notion that a confession given by the defendant during interrogation is the 'queen of evidence' should be taken with a grain of salt. The presumption that a person does not set himself out to be wicked, in the sense that a person does not incriminate himself if he is innocent, cannot be accepted as a judicial presumption." With this in mind, the Commission determined that a confession should be treated as any other evidence, and that defendants could be convicted based on their confession only when there is other, independent evidence to prove the commission of the offense.[59]

Former Supreme Court Justice Dalia Dorner addressed the trouble with relying on confessions:

> A defendant's confession is suspect evidence, even when it was not given as a result of external pressure that was put on the defendant. This is so because when there is no other solid evidence that could prove the defendant's guilt even without a confession, confessing is often an irrational act, and taking the irrational step of giving a confession, per se, raises doubts as to the veracity of the confession. This doubt is not purely theoretical. It has been proven more than once in human experience.[60]

Experts on criminal law have also addressed these difficulties. As Professor Mordechai Kremnitzer said: "We have known for many years that this presumption that a confession is the queen of evidence does not hold up in reality, because people do confess to things they did not do".[61] Dr. Boaz Sangero asserted that:

> People confess even to things they didn't do. In the past people tended to think that this could happen only to weak people – minors, the mentally

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59 **Report of the Commission on the Matter of Convictions Based Exclusively on Confessions and Causes for Retrial**, December 1994 [Hebrew]. See in particular, the opinion of Prof. Mordechai Kremnitzer, pp. 64-66. On this issue, see also Dalia Dorner, "The Queen of Evidence v. Tareq Nujeidat – the Danger of False Confessions and How to Handle It", *Hapraklit* (49(1), 2006), p. 7 [Hebrew]; Boaz Sangero, "Confession as Grounds for Conviction – Queen of Evidence or Empress of False Convictions?", *Aley Mishpat* (4, 2005), p. 254 [Hebrew].

60 CrimFH 4342/97, **State of Israel v. al-'Abid**, IsrSC 51(1) 736, 836.

61 Revital Hovel and Ronny Linder-Ganz, "Prof. Mordechai Kremnitzer: 'State Attorney Conduct in Zadorov Case – Frightening'", *Haaretz Weekend Magazine*, 16 October 2014 [Hebrew].

> retarded, etc. – but today, we know that it can happen to anyone. Even entirely rational people can make a false confession. Not only is [a person] pressured to confess, he is also painted a discouraging picture and told very clearly there's no chance that he'll be acquitted in trial, so he's even more tempted by the offer.[62]

In any case, according to the law, a defendant's confession is admissible only if the prosecution proves that it was given "freely and willingly".[63] However, during arrest extension hearings, the judges do not check whether the confession meets these criteria, claiming that such contentions require a more in-depth review, and therefore should be considered only at trial.

Based on this case law, military courts have also rejected arguments made by defendants during arrest extension hearings that their confessions had been obtained using violence or other unacceptable methods. For instance, Military Judge Lieut. Col. Zvi Leckach ruled that "claims regarding pressure and defects in the interrogation should be raised during the hearing of the main case".[64] Military Judge Col. Aharon Mishnayot clarified:

> It goes without saying that the interrogation of an adult should also be conducted fairly and that his rights and dignity must be respected. However, at this stage, it is still too early to make a determination that these rights were violated during the Respondent's interrogation. Findings and conclusions on this issue are best left for the trial court.[65]

It was only in rare cases, usually of minors whose rights were violated during their interrogation, that judges ordered the conditional release of the defendant. However, no binding case law requiring release in such cases has been produced and the matter remains at the discretion of the judges.

In the case of a 14-and-a-half-year old minor charged with stone-throwing, his lawyer, Neri Ramati, argued that the minor had been interrogated alone, without a parent or other relative present and without being allowed to confer with counsel. Military Judge Lieut. Col. Netanel Benisho, then Vice President of the Military Court of Appeals, upheld the decision to remand the minor to custody, saying: "Non-compliance with said directive does not render the evidence

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62 Ayelet Shani, "How you could land in jail for committing no crime", *Haaretz* English edition, 9 May 2014 (originally published in Hebrew on 17 April 2014).

63 Evidence Ordinance (New Version), 5731-1971, Sec. 12(a)

64 AA 1141/10 & AA1131/10, **Military Prosecutor v. Ehab Muhammad Jum'ah Khawajah and Muhannad Sa'adat 'Abd al-'Ghani Srur**.

65 AA 1598/12 **Military Prosecution v. Muaiad Jawad Suliman Bahar**.

inadmissible, but may impact its weight. The question of the weight given to the Appellant's confession should therefore be considered, as is the norm, during the main proceeding, with attention to the overall relevant evidence".[66]

In another case, Military Judge Lieut. Col. Benisho ordered the release of a 15-year-old minor who was also charged with stone-throwing. The defense lawyer, Avi Baram, argued that the teenager had been beaten while in custody and interrogated in the middle of the night by an intelligence coordinator who was not a youth investigator, and who took down his confession in Hebrew, without recording it. Lieut. Col. Benisho ruled that these allegations must be examined during the main proceeding. Nonetheless, he did proceed to examine the defense lawyer's arguments, determining that: "Though no legal flaw has been found in the interrogation conducted in this case, the cumulative circumstances described raise a disturbing feeling that this interrogation lacked the proper level of fairness that would allow relying on it to deny the Appellant's liberty". The judge therefore ordered his conditional release.[67]

In another case, two minors under the age of 14 were charged with preparing Molotov cocktails and improvised weapons, and throwing them at a checkpoint. Their lawyer, Iyad Miseq, argued that there were flaws in how they were investigated: they were strip-searched, interrogated at the scene rather than a police station, interrogated while dressed only in their undergarments, and the interrogation was not conducted by a youth investigator. Adv. Miseq also said that one of the minors had been beaten and that the interrogators promised the two that they would be released if they confessed. Military Judge Lieut. Col. Ronen Atzmon rejected their appeal, stating: "I do not see fit to determine at this stage that the affidavit is correct, or that it pulls the rug from under the statements given, or reduces their weight to the point where they can no longer support a conviction. Should the defense deem it appropriate to counter the interrogators' account with the Appellant's allegations – it would have to do so at trial".[68]

Incrimination

The second most common type of evidence used in military courts is incrimination: statements made by others, such as Palestinians or members of the security forces, which incriminate the defendant. Judges tend to attribute

66 AA 1027/10 **S.H. v. Military Prosecution**.
67 AA 2763/09 **A.'A. v. Military Prosecution**.
68 AA 1628 & 1629/13 **A.H. and A.A. v. Military Prosecution**.

a high level of reliability to these incriminating statements at the arrest extension stage, and one incriminating statement, even if it is inconsistent or unreliable, is usually sufficient for meeting the low threshold for *prima facie* evidence.

Unlike confessions, incriminating statements do not have to be given "freely and willingly". Judges, however, refuse to consider allegations about the reliability of incriminating statements. Any examination of inconsistencies or allegations of unreliability is deferred until the trial. A case in point is that of a person who was charged with throwing a single stone at a military jeep and damaging the jeep's body and windshield, the defendant claimed that he had not thrown stones and that the soldiers had misidentified him. Military Judge Lieut. Col. Yoram Haniel rejected this claim and ruled:

> I saw a need to clarify and stress that the Appellant's arguments concern matters of reliability, in respect of which the court makes no decision at this stage in the proceedings. If the defense is seeking to challenge the soldiers' identification of the Appellant and claim that the identification is not sufficiently substantiated, such claim should not be brought at this stage in the proceeding, but rather at the point at which all evidence is considered. The additional allegations made by the defense do not serve to undermine the evidence itself, but rather seek to re-evaluate the weight of the prosecution's evidence, and therefore, should not be considered at this stage, when the court only considers the *prima facie* evidence.[69]

In another case, a man was charged with membership in the Popular Front for the Liberation of Palestine. The defendant argued that he had been incriminated by two individuals with whom he had a personal dispute. Military Judge Lieut. Col. Ronen Atzmon rejected the argument, ruling that the "Appellant's contention regarding a dispute between him and the two individuals who incriminated him does not provide sufficient cause, in my opinion, to rule at this early stage that the weight of the evidence in this case has been significantly undermined. This matter can be deliberated and decided at trial".[70]

It takes a glaring defect for a military judge to rule that an incriminating statement is insufficient for meeting the *prima facie* evidence requirement, so glaring, in fact, that it is virtually conjectural. Even in a case in which it was proven that the individuals who gave the incriminating statements had lied, at least about some

69 AA 1133/08 **Islam Muhammad Qar'ish v. Military Prosecution**.
70 AA 1035/13 **Amjad 'Ahed Fouad Samhan v. Military Prosecution**.

of the information they gave, the judge ruled that the incrimination was sufficient to meet the threshold for *prima facie* evidence and that the two false incriminating statements supported one another. In this case, five Palestinians had been charged with participating in demonstrations and stone-throwing in Kafr Qadum. The evidence in the file included incriminating statements by two individuals. Military Judge Lieut. Col. Benisho noted that both individuals separately incriminated a man who it later emerged had been in prison at the time of the incident in which he was allegedly incriminated. The judge wrote: "This erroneous incrimination calls into question the reliability of the statements made by the witnesses. Such doubt is of the sort the court should address at the arrest stage already, as it may go to the root of the evidence". Yet he went on to rule: "Even if the wrong incrimination has a significant impact on any finding of reliability with respect to the evidence, the witness may have been wrong about one person, but correct about others […] Moreover, the very fact that one person was named by two witnesses could lead to the conclusion that their statements are sufficiently substantiated". The judge did not reject the incrimination, but ruled only that "significant external evidentiary support" was required, despite the fact that this was an early stage in the proceedings. Such evidentiary support was found in the incriminating statement made by the other witness, even though it too was deemed inaccurate. According to Military Judge Lieut. Col. Benisho, "there is nothing to preclude deficient evidence, such as the statement made by one of the incriminating individuals, from finding support in another incriminating statement, even if it too is flawed".[71]

In some cases, incriminating statements are given in a method the rulings refer to as the "laundry list" method. This type of incrimination is usually found in incidents of suspected stone-throwing. The person offering the incriminating evidence gives a long list of names of people who allegedly took part in the incident. The Court of Appeals ruled that although a general, unspecified incriminating statement would not be disqualified as evidence, it would not always meet the threshold of *prima facie* evidence. Military Judge Lieut. Col. Zvi Leckach has written: "When we are looking at an incriminating statement in the form of a 'laundry list', without significant details and without required questions having been asked, it is difficult to attribute full weight to such evidence, even at this *prima facie* phase".[72]

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71 AA 1770-1774/14 **Military Prosecution v. Mus'ab Da'ud Muhammad Shteiwi et al**.

72 AA 1131 & 1141/10, supra note 64. See also remarks by Lieut. Col. Leckach in AA 2595/09 **'Abd al-Fatah Muhammad 'Abd al-Qader Ekhlayel v. Military Prosecution**.

According to military judge Lieut. Col. Atzmon:

> Even a long list of suspects may constitute *prima facie* evidence. Its weight, or the chance that it may lead to a conviction, cannot be automatically discounted. However, whether or not the statement and the list are reliable should be considered in each case, and in some circumstances, such mass incriminations may be discounted owing to doubts regarding the incriminating person's ability to remember what role each of the individuals listed in his statement played.[73]

However, case law does not clearly state what level of specificity is required for such a list to be considered sufficient evidence, and there are cases in which judges have found an incriminating statement to be general and therefore not meeting the standard of *prima facie* evidence. For example, on the strength of a single incriminating statement, a person was charged with participating in demonstrations and with stone-throwing during these demonstrations. The person who gave the statement named 15 people. The defendant's name was number 11 on the list. The individual who gave the statement alleged that he and the defendant had participated in demonstrations in stone-throwing incidents together on several occasions and added: "I have no further details about him". Military Judge Col. Mishnayot ruled that: "The witness made a general reference to the entire list, and his statement contains no details about the specific actions attributed to each of the persons named in the list, nor is there any additional identifying information. No investigative effort was made to supplement the details contained in the incriminating witness' statement". Therefore, the judge ruled, "This remains evidence of limited power" and ordered the defendant's conditional release.[74]

In other cases of similar incriminating statements, judges have ruled that the threshold had been met. For example, in one case two Palestinians were charged with participating in several demonstrations and stone-throwing incidents in the Palestinian village of Ni'lin based on an incriminating statement given by one person. Military Judge Col. Aryeh Noah rejected the argument made by defense attorney Adv. Nomi Heger that the incriminating statement was a "laundry list" that provided many names of incriminated individuals, ruling:

> The witness did incriminate a significant number of individuals involved, and did not state the exact dates of the offenses. However, this does not

73 AA 1808/13 **Military Prosecution v. Bilal Talal 'Abd a-Rahman Barghouti**.
74 AA 2422/12, **Military Prosecution v. M.T.**

> eliminate or significantly reduce the *prima facie* weight of the testimony. This Court's experience shows that participation in mass public disturbances in the area is routine and these often end with casualties. The village of Ni'lin has recently become a flashpoint for constant confrontation between stone-throwers and security forces, to the point where these incidents have become a national crisis. The list of incidents in the incriminating testimony attests to the frequency of these incidents. It is clear that none of the participants keeps a "riot log" where participants register and sign in.[75]

In another case, a man was charged with throwing stones at military forces on several occasions. The judge presiding in the court of first instance ruled that the incriminating statement was not sufficiently detailed and rejected the prosecution's motion for remand. The military prosecution appealed, claiming the incriminating statement was sufficient. Military Judge Lieut. Col. Ronen Atzmon accepted the appeal, explaining:

> The picture that emerges is that of violent protests that are held on a regular basis near the perimeter fence. Experience shows that these protests are staged by many people rather than just the eight or ten people mentioned by the incriminating witnesses. When the matter concerns a series of offenses committed together with many other people, one cannot expect that everyone who attended the demonstrations would be able to provide personal details about all other participants […][T]he fact that the Respondent's name is mentioned only in the statement given by the person who made the incrimination and not in the statements given by other participants need not be attributed a great deal of significance. Sometimes, in offenses committed en masse, one credible incriminating statement is sufficient for conviction even in offenses that are more serious than stone-throwing.[76]

75 AA 4987 & 4988/08, **Safwan Nimer Hussein Nafe'a and Muntaser Fadel Jamileh Khawajah v. Military Prosecution**.

76 AA 1522/11, **Military Prosecution v. S.Sh.**

Second condition for remand in custody: Grounds for detention

After the judge determines that the case contains *prima facie* evidence, the second condition which must be fulfilled in order to approve a request for remand in custody is the existence of grounds justifying detention. Israel's Law of Arrests establishes three such grounds: concerns regarding obstruction of justice or a flight risk, or that the defendant "poses a danger to the security of a person, the public or to national security".[77]

By definition, these grounds for detention are forward looking. They focus on any future intentions the defendant might harbor of disrupting the investigation or committing an act that would endanger public safety, and are primarily predicated on the judge's assessment of how the defendant would behave if released. This is not a matter of hard facts and, like any assessment of this kind, "is necessarily made in conditions of uncertainty; by its very nature, we can expect mistakes".[78]

As we shall see below, military court judges ignore this aspect of grounds for detention, relying instead on a number of presumptions about the future conduct of defendants. Unlike the relatively limited "presumption of danger" provided for in the Israeli Law of Arrests, military courts have attached this presumption to a long list of violations. Military judges also make the sweeping assumption that Palestinians standing trial will not appear for their hearings, without proof that this is the case with respect to the specific defendant in the case.

This generalized approach frees the prosecution from the need to prove that there are grounds for detaining the specific defendant whose remand in custody is being considered by the court. In fact, the underlying assumption of the court is that grounds exist and therefore, in the vast majority of cases, the prosecution has little difficulty meeting this condition as well.

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77 Law of Arrests, Sec. 21(a)(1).
78 Kitai-Sangero, supra, note 53, p. 277.

Grounds for detention 1: Posing danger

"Posing danger", as grounds for detention, is not necessarily connected to the charges for which the defendant is on trial, but rather to concern that if released, the defendant would commit new offenses in addition to those enumerated in the indictment. Therefore, there is something practically coincidental about detention on these grounds, given that if the defendant had not already been charged, he or she could not have been detained all. Holding persons in detention on the grounds that they may pose danger is a preventive measure, a type of administrative detention specific to defendants. According to Dr. Rinat Kitai-Sangero:

> The legitimacy of holding a person in detention in order to prevent further offenses is far from self-evident […] accepting these grounds for detention involves grappling with complex constitutional and moral issues. While these issues may not necessarily lead to the conclusion that these grounds for detention should be disqualified as unconstitutional, they nevertheless ought to impact how widely such grounds are used and restrict the type and substance of the offenses the prevention of which could justify the incarceration of an individual not yet convicted by a court of law.[79]

The Israeli Law of Arrests determines "a presumption of danger" for a series of serious offenses such as espionage and treason, severe violence, offenses involving narcotics and a host of offenses against national security, including some that do not involve violence.[80]

Military courts have applied the presumption of danger to many additional offenses. The result is that almost all offenses for which Palestinians are charged (with the exception of traffic violations and criminal offenses) are included in the list. Military Judge Col. Aryeh Noah explained this policy, saying that while it is true that military courts use Israeli law on arrests as a tool for interpretation, nevertheless "we cannot ignore the special circumstances that prevail in the area when we set out to define 'danger posed' and remand alternatives".[81]

The following are some examples of how the "presumption of danger" has been expanded in military courts:

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79 Ibid., p. 147. For more see also pp. 133-138.

80 For criticism of the presumption of danger, see ibid., pp. 292-298. See also, Rinat Kitai, "The Conflict between the Presumption of Danger under the Law of Arrests and Basic Law: Human Dignity and Liberty", *Hapraklit* (46(2), 2003), 282, p. 307 [Hebrew].

81 AA 4987 & 4988/08, supra note 75.

Entry into Israel without a permit – danger automatically presumed

Entering Israel without a permit, when it also involves other violations or when it is not the first time a defendant has been arrested for this offense, is considered an offense that automatically meets the criteria for the grounds of 'posing danger'. In this way, for example, former Military Court President Col. Shaul Gordon wrote:

> A situation in which an individual commits the offense of exiting the area without a permit or driving an Israeli vehicle without a permit and at the same time, or in order to facilitate the above, commits other offenses such as forgery or using a false identity, will normally be sufficient for remand […] the grounds for remand in such cases are that of posing danger.[82]

President of the court, Col. Netanel Benisho, also wrote:

> We have stated repeatedly that violation of a closed zone order, could give rise to the grounds of posing danger […] Thus, for example, if the defendant has a record of offenses of this type or enters Israel frequently […] when this offense contains an element of forgery or use of a forged document, the danger posed increases, as does the risk of flight.[83]

The rule regarding the grounds of danger posed by the defendant in cases of entry into Israel without a permit continues to exist even when a judge explicitly rules that no danger emanates from the specific defendants at hand. For example, former President of the Military Court Col. Shaul Gordon ruled:

> The danger anticipated from the Defendant is not measured by his intentions, but by the actual security breach his actions cause. I am ready to accept that were the Defendant the only one trying to enter Israel without a permit, his actions, as grave as they might be, would not impose any special burden on the security forces. However, given the prevalence of this serious practice, and given the special security realities these days, about which I need not elaborate, the Defendant and many others like him do impose a heavy burden on the security forces, to the point where there is a clear impediment to the forces' ability to concentrate on their operations against terrorists trying to infiltrate into Israel.[84]

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82 AA 116/01 **'Eid 'Abd al-Karim Natsheh v. Military Prosecutor**.
83 AA 1848/13 **Sameh 'Adnan Muhammad Mahmoud 'Abid v. Military Prosecution**.
84 AA 116/01, supra note 82.

In another case, Lieut. Col. Shlomi Kochav wrote:

> I am prepared to concede that the Appellant does not intend to commit any offense in Israel and wishes only to earn a living or evade people seeking to harm him in the PA. The danger, however, comes from another direction altogether. The danger is that amidst the large number of Palestinians trying to find work in Israel, terrorists also slip in and infiltrate. Therefore, the laws and permits governing entry into Israel must be strictly enforced; otherwise, terrorists (which the Appellant certainly is not) will manage to enter Israel. This is the reason for the grounds for detention in such cases and for the danger in the case before us.[85]

These statements by the judges demonstrate that the remand of defendants in cases of entry into Israel without a permit is not meant to prevent danger emanating from the defendants themselves but to deter others from committing the same offense. The judges are well aware that most of the defendants charged with this violation enter Israel to earn a living. Therefore, their far-reaching interpretation of the law contradicts the basic principle of the presumption of danger, which is meant to avert danger emanating from the defendants themselves, and it places defendants in an impossible situation, because they have no way of personally countering the judge's assumption or influencing his decision.[86]

Automatic danger in stone-throwing offenses

In many verdicts, military judges have ruled time and again that stone-throwing fulfills the criteria for the grounds of posing danger. This finding has been made even when the stone-throwing is a one-time incident or when minors under the age of 14 are involved, with the judges completely disregarding the many variances among the cases. Judges have ruled that the danger increases when the indictment refers to participation in "mass public disturbances" or when the stones are thrown at the road or aimed at a vehicle.

For example, former Military Court President Col. Aharon Mishnayot wrote:

> The subject at hand is a mass public disturbance. During the lower court hearing, the defense lawyer noted that 25 youths were involved in the incident. Thus, there is an aggravating circumstance that increases the

85 AA 2238/10, **Military Prosecution v. Muaiad Muhammad 'Abd al-Hafez Sadqah**.
86 For more, see Kitai, supra note 80, pp. 292-294.

> danger. It is true that the defendant in this case is a minor born in June 1994; however, he is close to the age of majority in the area (16). The case involves especially grave circumstances because of the mass character of the incident, which could potentially pose greater danger. Therefore, I found no fault in the decision of the honorable lower court judge, who ruled that the public interest requires the Defendant be remanded in custody, in order to provide a fitting response to the danger emanating from his actions despite his age.[87]

Similarly, Military Judge Lieut. Col. Yoram Haniel held:

> Even though the matter under consideration involves a single stone thrown by a person with a previously clean record, the incident indicates the danger he poses and the vital importance of holding him. The balance required between the private interest, which is fundamental to the rights of the Appellant, and the public interest, which obliges us to safeguard the well-being of IDF soldiers and guarantee public order, must be maintained. This balance points to danger and to the need to remand the Defendant in custody for the duration of the proceedings.[88]

Military Judge Lieut. Col. Zvi Leckach wrote:

> Admittedly the matter under consideration involves a single incident, but the circumstances are particularly grave. Anyone who walks with a group, making a special, premeditated effort to reach a main road used by civilian vehicles with the aim of throwing volleys of stones at them, indicates danger that cannot be neutralized by seeking alternatives to remand. The Appellant himself threw two stones and his companions threw additional ones. Heading in a group towards a main road with premeditated intent demonstrates in advance the desire to cause harm and a particular potential for danger. Therefore, the danger emanating from the Appellant is high and there is no justification for an alternative to remand.[89]

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87 AA 1306/10 **A.S. v. Military Prosecution**. In October 2011, the age of majority in the West Bank was raised to 18. See Order regarding Security Provisions (Amendment No. 10) (Judea and Samaria Area) 5771-2011, Sec. 3. For more, see http://www.btselem.org/legislation/20111005_minority_age_changed.

88 AA 1133/08, supra note 69.

89 AA 1533/12 **Y.S. v. Military Prosecution**.

Automatic presumption of danger in offenses involving membership and activity in organizations classified as "illegal"

According to the Law of Arrests, membership and activity in organizations classified as "illegal" meet the criteria for "presumed danger".[90] These offenses are enumerated in Sections 84 and 85 of the Defense (Emergency) Regulations 1945, enacted during the British Mandate. The Defense Regulations grant the authorities broad discretion and use sweeping terms. The definition of an "unlawful organization" includes a host of activities, ranging from calling to destroy the State of Israel and encouraging terrorism against the government or its employees through to "instigating hatred or contempt or incitement to hatred towards the government or its ministers". The specific involvement of an individual in the organization also falls under a broad range of activities, including holding office in the organization, administering a service on its behalf, attending meetings, possessing a leaflet or symbol of the organization or making a donation to the organization.[91]

The actual role defendants play within this broad range of activities, which also include legitimate political activity, ought to be taken into account in the decisions military judges make in motions for remand put forward by the prosecution, particularly with respect to the danger posed. However, the presumption of danger is automatically made with respect to virtually anyone charged with violating the Defense (Emergency) Regulations, completely disregarding the nature of the alleged act.

According to the case law followed by the military courts, if there is evidence indicating that an individual was a member of an illegal organization at any given time, that person will be regarded as continuing to be a member of this organization unless he or she manages to unequivocally prove otherwise. Therefore, even if the incriminating testimony with respect to activity in an illegal organization was given years earlier, the court considers the activity as ongoing, and deduces that the defendant poses a danger. This is the case even when there is no evidence that the defendant is still a member of

90 Law of Arrests, Sec. 21(a)(1)(c)(2).

91 For more on the issues inherent to these offenses, see Michal Tzur (supervised by Prof. Mordechai Kremnitzer) *Defense (Emergency) Regulations 1945*, Israel Democracy Institute, October 1999, pp. 47-54 [Hebrew]; Ghanayim Khalid, Mordechai Kremnitzer, *Offenses Against the State*, Israel Democracy Institute, pp. 24-27 [Hebrew].

the unlawful organization or continues to pose a danger as a result of this membership.[92]

The specific nature of the defendant's activity in an organization declared unlawful carries almost no weight. The Supreme Court established that distinguishing between civilian activity and military activity in organizations declared "unlawful" is "artificial and mistaken".[93] Justice Shoham held:

> Indeed, we are dealing with civilian activity in areas that tug at the heartstrings, including charity, welfare, education, religion, etc. However, these are the missions and aims of the civilian branch of a terrorist organization, that is, to make people sympathetic and draw them closer to the activities of Hamas and expand its circle of supporters. It is not for naught that Hamas' activities, even in the clearly civilian sphere, are banned in law-abiding countries, and all the more so in Israel and Jerusalem.[94]

Military courts have also adopted this rule and established that the question of whether the defendant's activity in an organization declared unlawful was civilian or military is irrelevant. Adjudicating an appeal against a decision to remand Hamas ministers and members of the legislative council of the PA in custody, former Military Court President Col. Shaul Gordon wrote:

> Everyone now knows that the distinction between military and civilian activities is an artificial one […]This Court has ruled often enough that lawful and worthy deeds in and of themselves, like religious teaching or distributing food to the needy, are to come under the definition of providing a service to an unlawful organization if they are done in the name of Hamas […] Even if the Appellants' actions were indeed confined to the civilian sphere, the very fact of their membership in this hostile organization and their willingness to fulfill a function on its behalf establishes the grounds of posing danger.[95]

In another case, in which a woman was charged with activity on behalf of a charitable organization declared an unlawful association, former Military Court President Col. Aharon Mishnayot wrote:

> Indeed, on the face of it, the matter under consideration involves humanitarian activity meant to help the needy. However, when the activity is conducted within the framework of an unlawful organization, it contributes

92 Single Panel Appeal (Judea and Samaria Area) 56/00, '**Ata Ibrahim Muhammad Qawasmeh v. Military Prosecutor**.

93 Justice Procaccia in CrimApp 6552/05, **Rasem 'Abidat v. State of Israel**.

94 CrimApp 392/12 **Anon. et al. v. State of Israel**.

95 AA 3249/06 **Military Prosecutor v. Basem Ahmad Musa Za'arur**.

> to glorifying the reputation and status of the organization, increasing its power and strengthening its influence over the population. Ultimately, it increases public support for organizations that threaten the security of the area and of Israel.[96]

The military courts did not settle for merely eliminating the distinction between military and civilian activity, in accordance with Supreme Court rulings, but took things a step further and established that there was no requirement for any kind of meaningful activity in the outlawed organization to establish the grounds of posing danger. What is termed "intangible membership" in the organization is sufficient for considering a person dangerous. Col. Gordon made the following determination regarding a person who was charged with joining the student branch of Islamic Jihad at the Open University in Dura: "The evidence does not point to specific activity on the Respondent's part. However, we have already ruled that even intangible membership in a terrorist organization will normally justify remand."[97] Lieut. Col. Benisho wrote, "It is a well-known rule that the offense of membership in an unlawful organization, even if it does not include active participation, will establish cause to remand given the danger posed by anyone willing to join such an organization".[98]

Grounds for detention 2: Flight risk

Another ground for detention that appears in the Law of Arrests is flight risk. This cause is established when there is concern that if the defendant is released – conditionally or not – he or she will flee and not report to trial.

Verdicts by the military courts demonstrate that the concern is inherent regarding almost all Palestinian defendants and that the prosecution is not required to present evidence of concerns about a particular defendant. All that is required is for the defendant to be living in Area A or B, where most of the Palestinians in the West Bank live, for the court to accept the prosecution's claim of flight risk.

The military prosecution's argument starts with the end of the procedure, wherein if the defendant does not show up for trial, it will not be possible to re-arrest because that would require sending soldiers into Areas A or B, which

96 AA 3509/07 **Military Prosecution v. Nada Jamal Muhammd Hassan**.
97 AA 2244/05 **Military Prosecutor v. 'Alaa Rizeq Issa Abu Sundus**.
98 AA 1593/05 **Military Prosecutor v. Shadi Ziad Ibrahim Hawarin**.

may place the soldiers' lives in jeopardy. In order to head off such a scenario, the prosecution demands that the defendant not be released and does not present a shred of evidence to show that the defendant actually is a flight risk.

As a rule, the judges of the Military Court of Appeals accept the prosecution's argument and they too consider the theoretical question rather than the actual defendants before them. Lieut. Military Judge Col. Ronen Atzmon made this clear:

> The fact that the defendant's home is in Area A or B, where there is great difficultly to monitor whether release conditions are being upheld or to locate and arrest a person, is a serious consideration in determining whether to release a defendant from custody during trial. The consequence is that only in cases where there is a low flight risk and when the court gives relatively high credence to the defendant will it be justified to conditionally release the defendant to an area that is not in full Israeli control.[99]

The Supreme Court established an almost opposite rule on this matter, but in this case, the military court judges preferred to disregard it. According to the Supreme Court, though the judges may consider where a defendant lives, place of residence is not in itself sufficient to constitute grounds for detention. Residence in Area A or B cannot, in and of itself, preclude the release of the defendant from detention. This is what Justice Joubran wrote on the subject:

> The court has expressed its opinion in many decisions that the fact that the defendant lives in an area not under Israeli control and not under the supervision of the Israel Police, is not enough by itself to detain him in circumstances in which a defendant living in Israel would have been released. The fact that a defendant lives in the area of the [Palestinian] Autonomy, is, by itself, just one consideration in rejecting an alternative to detention. The main consideration is whether there is a substantial flight risk.[100]

99 AA 1940/14 **Military Prosecution v. Fares Riad Fares Abu Hassan**.

100 CrimApp 6339/03 **State of Israel v. Hushiyah Mahmoud**. For more on this issue see Kitai-Sangero, supra note 53, p. 280.

Third condition for remand in custody: Lack of alternatives to detention

Having met the requirement for *prima facie* evidence to prove a person's guilt, and that one of the grounds for detention is present, the third condition for remand is that the objective of the detention cannot be achieved by another means, less injurious to the defendant ("alternative to detention").[101] Judges in Israeli courts have several such options: partial or full house arrest, electronic bracelets, a third party bond, removal from residence, summons to report to a police station, travel ban, incarceration in a closed residence instead of a detention facility, etc. The appropriate option is selected in accordance with the grounds for detention in each case and the personal circumstances of the defendant.

The legal requirement to seek an alternative to detention clearly indicates that release must be the default, as former Deputy Chief Supreme Court Justice Menachem Elon held:

> Even when grounds for detention are present, there are restrictions. The basic and elementary right of individual liberty endures and this right gives rise to an obligation to try to find means that uphold the purpose of the detention that mitigates the injury caused to the defendant.[102]

The military courts have embraced these words in principle and have held that the judge must consider whether there is an alternative to detention and also examine the feasibility of the detention alternative on an individual basis, in terms of the particular circumstances of the defendant currently before the court. Military Judge Lieut. Col. Netanel Benisho wrote:

> When it is possible to achieve the purpose of the detention by means that cause lesser injury to the defendant's liberty, the court must choose that option (Section 21a (b) (1) of Law of Arrests). This test must be

101 Law of Arrest, Sec. 21(b)(1).
102 CrimApp 335/89 **Military Prosecution v. Avraham Ben Eliyahu Lavan**, IsrSC 43(2) 410, 418.

> personal and individual and in that context, the court will juxtapose the attributes of the offense and the offender and the grounds deriving from them on the one hand, with the terms of the proposed alternative on the other […] The range of considerations before the court when it sets out to decide whether to hold or release the defendant is, therefore, very broad.[103]

In practice, however, military judges will agree to order an alternative to detention only in exceptional circumstances. The judges release the prosecution from the burden of proving that there is no suitable alternative to detention and place the burden of proving that such an alternative exists on the defendant. As President of the Military Court of Appeals, Col. Netanel Benisho wrote, "The defense is expected to take the initiative to make concrete proposals for alternatives to detention. It is a basic duty of the defense attorney's toward his client as well as towards the court, which he is obliged to assist in doing justice".[104] However, there are two fundamental reasons why the burden placed on the defense in these cases is particularly onerous and why there are few instances in which the lawyer can meet it.

The first reason is the long list of offenses in which military judges have determined that the danger associated with the defendant cannot be offset by an alternative to detention. Aside from exceptional situations, the personal circumstances of the defendant are rarely considered in these cases. For example, the military courts have determined that it would be difficult to find an alternative to detention in cases where the indictment has to do with entering Israel without a permit. In a rare decision, Military Judge Lieut. Col. Zvi Leckach ruled that many of those entering Israel or West Bank settlements without a permit do so for economic reasons. Some may enter for criminal reasons, but the vast majority do not try to harm Israel's national security or its people in any way. Based on this understanding of the facts, the judge ruled that in such cases it would be appropriate to consider an alternative to detention:

> When the background for these violations is economic need, and particularly in the case of a first-time offender, a monetary guarantee for the defendant's appearance in court for the continuation of the proceedings in his matter can and should be considered.[105]

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103 AA 4497/08 **Military Prosecution v. A.K.**
104 AA 2616/11 **Military Prosecution v. R.K.**
105 AA 2649/11 **Mu'amar Ali Muhammd a-Siq v. Military Prosecution**.

The military prosecution was of the opinion that this decision represented a new case law rule, and demanded the President of the Military Court of Appeals hold a further hearing. Former President Col. Aharon Mishnayot rejected the request and explained that while he did not agree with Military Judge Lieut. Col. Lekach's verdict and would have likely ruled otherwise, "the range of reasonability can include various outcomes, all of which are legitimate, and one cannot expect the discretion of all judges to be identical in a given set of circumstances". He added that as he saw it, alternatives to detention should be considered only if the defendant is a first-time offender, and the circumstances surrounding the commission of the offense "were not particularly grave". If an individual repeats the offense even after serving a prison sentence, or when under a suspended sentence, "As a rule, it will not be possible to resolve the issue of the danger he poses through an alternative to detention, and remand is clearly preferable".[106]

In a similar vein, military courts have ruled that it is almost impossible to offset the danger posed by defendants in offenses involving stone-throwing. Lieut. Col. Netanel Benisho ruled that "it is undeniable that in most cases it is extremely difficult to find an appropriate alternative to detention in offenses involving stone-throwing […] Therefore, there will only be a few cases in which the court will be convinced that there is an alternative".[107] The courts will show willingness to consider an alternative to detention in cases involving such offenses only in exceptional circumstances; for instance, in the case of defendants who are very young minors or have participated in incidents only once. However, even in these cases, the judges are not in agreement about the circumstances in which defendants can be released, as Military Judge Lieut. Col. Ronen Atzmon pointed out:

> It is difficult to find a clear answer to the question of when a minor who has thrown stones should be detained. Even when the minor is about 14 years of age and had a momentary lapse in which he threw stones at a car, and even when no known damage has been caused, some have been remanded in custody […] and others have been released to an alternative to detention. I believe that when it comes to minors older than 14 who are charged with stone-throwing in a single incident and without aggravated circumstances (such as a problematic past, throwing stones with a slingshot, participating in a violent mass incident or throwing objects at an unprotected car traveling

106 AA 1315/12 **Military Prosecution v. Hani Khamis Khalil Zein**.
107 AA 4497/08, supra note 103.

> at high speed) and no known damage was caused, as long as the grounds of posing danger are present, an alternative to detention should nevertheless be considered favorably.[108]

Military judges have also found that it is almost impossible to find alternatives to detention regarding the offense of membership and activities in an illegal organization. Former President of the Military Court of Appeals Col. Aharon Mishnayot held that these violations are "security violations" regarding which "the rule is that only in rare and exceptional cases is it possible to achieve the purpose of detention through an alternative to detention".[109] In another case, Military Judge Lieut. Col. Ronen Atzmon held that when the indictment involves these sorts of violations, there is no room whatsoever to examine alternatives to detention.

> Even though the lower court judge did not mention that he had looked into alternatives to detention, he made no mistake in this case since jurisprudence has frequently held – both in the Territories and in Israel – that when security offenses are involved, it would be difficult to find alternatives to detention, and normally, the correct decision would be to remand the defendant in custody in such cases.[110]

The vast majority of indictments filed in the military courts (apart from traffic violations) involve entry into Israel without a permit, "public disturbances" and "hostile terrorist activity". Since 2008, the sum total of these charges account for 86% to 88% of all offenses (with the exception of 2011 when they made up 81%).[111] Apparently, the far-reaching position of the judges – whereby in the overwhelming majority of cases there is no cause to consider alternatives to detention regardless of personal circumstances – precludes almost any possibility of releasing defendants to an alternative to detention.

The second reason why the burden placed on the defense is so heavy when it comes to proposing an alternative to detention is that even in the few cases in which the court is prepared to consider the possibility, the defense will find it difficult to propose alternatives because there are very few available in the West Bank. House arrests or technological solutions like electronic bracelets are not considered relevant by the courts, and in most cases, the judges refuse to accept guarantees from Palestinians. This is how Military Judge Lieut. Col. Netanel

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108 AA 1540/11 **M.B. v. Military Prosecution**.
109 AA 4538/08 **Military Prosecution v. 'Issa Muhammad Ahmad 'Enbawi**.
110 AA 1035/13, supra note 69.
111 See supra note 16.

Benisho explained the problem when discussing the possibility of alternatives to detention regarding defendants charged with stone-throwing:

> We cannot deny that in most cases it is extremely difficult to find an appropriate alternative to detention when it comes to violations involving stone-throwing. The overall feeling in the area, which views this kind of behavior in a favorable light, increases the chances of recidivism, especially when it comes to young defendants whose understanding is not fully formed and who are very easily influenced. Furthermore, the difficult conditions and many security constraints that limit the activity of the security forces in the area do not usually make it possible to effectively control and monitor a defendant who has been released. Therefore, there will only be a few cases in which the court will be convinced that there actually is an alternative to detention.[112]

Moreover, the information judges have about defendants is limited to begin with because there is no probation report. Inside Israel, the Law of Arrests empowers judges to issue an order for such a report, which would include "the personal circumstances of the defendant, the implications of the arrest, the alternatives to detention and release, or a recommendation regarding special conditions for release and how to monitor their observance".[113] When the defendant is a minor, the law requires such a report and the judge has no discretion at all whether to ask for it or not.[114] The purpose of the report is to assess the degree of danger posed by the defendant or flight risk potential, in order to determine whether the defendant can be trusted if released and, if so, to examine relevant alternatives to detention.[115]

Military law is silent on the issue of probation reports and the military prosecution strongly opposes them. In a rare occurrence, when Military Judge Maj. Samzar Shagog ordered such a report in the case of a minor, the prosecution quickly appealed the decision on the grounds that the court had no authority to do so.[116]

In a number of cases, judges of the Military Court of Appeals have voiced criticism over the fact that there is no possibility of ordering a probation report, particularly in the case of minors, complaining that this makes it difficult for

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112 AA 4497/08, supra note 103.
113 Law of Arrests, Sec. 21a.
114 Juvenile Law, Sec. 10g(b).
115 Haya Zandberg, "Arrest Report", *Hamishpat* XIII, 155, p. 159 [Hebrew].
116 Case 1038/14 **Military Prosecutor v. Anon.**, Detailed Notice of Appeal and Scheduling Motion, 4 March 2014.

them to do their job. Military Judge Lieut. Col. Zvi Leckach wrote, "Regrettably, the military courts cannot obtain a probation report for a minor, even though it could shed much light on the chances that the father of the family could educate his son and put him on the right path. Without this report, the court can only rely on its direct impression from the open statement given to it by the father".[117] In another case, President of the Military Court Judge Col. Netanel Benisho wrote:

> The present case has once again driven home the need for a probation report, the possibility of which, to my regret, has not yet been recognized by the legislator in the area. I agree with those who think that in general, when we are dealing with ideologically motivated offenses, we can make an informed decision on the basis of the evidence and the arguments of the parties without the need for a probation report. Nevertheless, there are many cases in which the court senses that beyond the issue of the offense itself, there is good reason to get a broader picture regarding the defendant, including his personality, his actions and occupation, his social and family ties and even an assessment of the possibilities for releasing him under various schemes or restrictions.[118]

In May 2014, the Military Court of Appeals went so far as determining that the defendants should be allowed to meet with relevant experts and submit their own probation report, despite the objections of the prosecution. This decision was made in a remand hearing for two minors who had been charged with throwing stones. Their lawyer, Neri Ramati, asked that they be sent to the Welfare Staff Officer for a probation report. The military prosecution objected and Adv. Ramati then asked that they at least be allowed to meet with an expert of their own choosing and submit a probation report; the prosecution objected to this as well. Col. Benisho accepted the request and criticized the prosecution for its refusal:

> Even if there is currently no explicit authority to do so in the law in effect in the area, there is no impediment to the Prosecution agreeing to the voluntary preparation of a probation report by an independent person, be it the Welfare Staff Officer or an Israel Prison Service social worker, as, indeed, has already been done on several occasions. This possibility is preferable to the current position of the military prosecution which rejects any referral by the court to a social worker or psychologist for preparation of such an opinion.[119]

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117 AA 1889/09, **Military Prosecution v. R.F.**
118 AA 1488/12 **Military Prosecution v. Saja Shaker 'Abd al-Karim 'Alami.**
119 AA 1782 & 1783/14 **Anon. et al. v. Military Prosecution.**

In August 2014, Attorney General Yehuda Weinstein contacted Military Advocate General Maj. Gen. Danny Efroni demanding military law be amended to authorize military courts to ask for probation reports before ruling on requests to remand minors in custody.[120] Weinstein explained that the directive formed part of the efforts to have military law conform to the provisions of the Juvenile Law, "and to do so taking into consideration the special conditions and the security situation prevailing in the Judea and Samaria Area". He added that he was aware that this directive could run into practical difficulties and "therefore, it might help only a very small number of defendants each year", but that the court should not be denied the possibility of doing so when applicable.

120 Letter from Attorney General Yehuda Weinstein to MAG Maj. Gen. Danny Efroni, 17 August 2014.

Release on bail

According to Israel's Law of Arrests, in order for a judge to order a defendant's remand in custody, the prosecution must prove the presence of all three conditions: *prima facie* evidence to prove guilt, grounds for arrest and lack of a relevant alternative to detention which could achieve the purpose of detention in a manner that is less injurious to the defendant.

Despite the clear phrasing of the law, in an absolute majority of cases, military courts do not unconditionally release Palestinian defendants whom the prosecution has asked to remand in custody for the duration of the proceedings. Even when judges believe there is insufficient evidence or grounds for detention, they will still order an alternative to detention in the form of conditional release, usually depositing a sum of money. In some cases the court will add more conditions such as third-party bail and release the defendant only after the money has been deposited.

Israel's Law of Arrests contains a section that permits the court to release defendants on bail just to ensure they appear for their hearing, even if the prosecution has failed to prove the three conditions required for remand (military judges do not explicitly state that they rely on this section).[121] However, even in such cases, the prosecution must provide some sort of evidence pointing to flight risk. Justice Barak wrote, "It is not sufficient to argue that an indictment has been filed. The prosecution must demonstrate a concern – that has graduated from pure theory into reasonable concern justifying remand – that the defendant will not appear for trial".[122] Dr. Rinat Kitai-Sangero clarified that, "Even if there is a theoretical chance of flight motivated simply by the prospect of conviction and penalty, it is not enough to impose restrictions on a specific individual without concrete evidence to substantiate flight risk".[123]

Nonetheless, military court deliberations revolve solely around the sum of the bail. Questions such as whether there is concern the defendant will not appear

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121 Law of Arrests, Sec. 44(b).

122 CrimApp 5767/91 **State of Israel v. Yair Ben Efrayim Levy**, IsrSC 46(1) 394, 396.

123 Rinat Kitai-Sangero, "Criticism of the Requirement to Provide a Guarantee as a Condition for Release from Detention", *The David Weiner Book – On Criminal Law and Ethics* (Dror Arad-Eilon, Yoram Rabin and Yaniv Vaki, Eds., 2009), p. 393 [Hebrew].

for trial or whether it is proper and justified to demand a financial deposit in return for the defendant's release are not considered at all. The premise for deliberation is that without a guarantee, the defendant will not appear for trial. Concern increases when the defendant is already under a suspended sentence.

Below, are some examples illustrating how even when the evidence is thin or the grounds for detention unconvincing, the judges made the release of the defendant conditional on depositing substantial sums of money:

- 'Imad Jadallah was charged with membership in a Hamas cell. According to the indictment, he put up posters and participated in rallies and processions in which cell members wore uniforms and carried axes. The lower court remanded Jadallah to custody and he appealed the decision. Military Judge Lieut. Col. Shlomi Kochav ruled that the indictment was based on one incriminating statement, in which the person making the incriminating statement said that he had carried out operations as part of the Hamas cell together with the defendant. However, the defendant was under administrative detention on the date mentioned by the informant. The judge agreed with defense counsel's argument that the informant's testimony was mistaken and held, "This is cause for calling into question the entire testimony of the informant regarding the Appellant". Despite the absence of any evidential infrastructure, the judge proceeded to examine whether there were grounds for arrest and ruled that according to the testimony of the informant "the Defendant's activity had ceased a year earlier, which indicates reduced risk". Lieut. Col. Kochav went on to examine the possibility of an alternative to detention and wrote that "this combination of reduced risk in terms of grounds and the weakness of the incriminating testimony in terms of evidence leads to the conclusion that an alternative to detention is the proper solution in this case". Lieut. Col. Kochav added that there was "increased concern the defendant will flee given the suspended sentence against him that is still in effect", and ultimately ordered Jadallah released on condition that he deposit bail of NIS 12,000 [approx. USD 3,000] to guarantee his appearance at trial.[124]
- Marwan Daher was charged with arms trafficking and possession of firearms. He maintained that he kept a hand gun for self-defense because his business required him to carry large amounts of cash on his person and he lived in

124 AA 1039/11, **Jadallah v. Military Prosecution**.

Area B, where policing was ineffective. The lower court judge ordered his release on bail set at NIS 25,000 [approx. USD 6,250] and on the provision of a self-signed guarantee and a third-party signed guarantee, of NIS 50,000 [approx. USD 12,500] each. The prosecution appealed and the judge, Lieut. Col. Ronen Atzmon, focused the discussion on the grounds for detention. He maintained that while there is presumption of danger in everything pertaining to offenses involving firearms, this presumption, like any other, may be refuted. He ruled: "In the matter at hand, the defendant kept a hand gun, which is a 'defensive' weapon. He had no criminal record and there was no concern that the gun was meant to serve a criminal or terrorist intent. The prosecution had not disproved the argument that the defendant was a family man with a sizeable, legitimate business. He had handed over the gun to the police and there was therefore no concern that it would be used to harm others." Because of the low risk, Lieut. Col. Atzmon ruled that an alternative to detention could be considered and added that "no allegation has been made that the Appellant is a flight risk". At the same time, the judge wrote: "I am also of the opinion that the alternative to detention ordered by the lower court will serve to spur the Appellant to appear for his court hearings".[125]

- In 2013, Anas Bani 'Odeh was indicted on three charges. Two of them concerned being active in Hamas in the years 2004-2007. The prosecution conceded that these charges did not justify remand. The third charge was an "offense against public order". The prosecution alleged that Bani 'Odeh had loaded a telephone calling card with NIS 60 [approx. USD 15] on behalf of a prisoner and received payment from the prisoner's father. The judge of the court of first instance accepted the prosecution's argument that the defendant should be remanded in custody for the duration of proceedings. Bani 'Odeh appealed the decision and Military Judge Lieut. Col. Ronen Atzmon accepted the appeal. He wrote in his decision, "the existing evidence cannot substantiate a conviction or justify remand". He added that even if such evidence existed and even if had there been grounds for detention, nevertheless in this case, because of the "trifling nature of the assistance and the fact that it was a one-time, small-scale event", an alternative to detention could have been sufficient. Nonetheless, and despite the fact that the court did not rule there was a flight risk, the judge ruled that the defendant would

125 AA 1397/11 **Military Prosecution v. Marwan Daher**.

be released only if he deposited NIS 5,000 [approx. USD 1,250] "to guarantee his appearance for the resumption of his trial".[126]

- Mujahed Jaradat was accused of participating in a solidarity procession with prisoners on hunger strike, throwing stones during the procession and "arms trafficking". According to the indictment, his student dormitory roommate told him there was a firearm in their room which a certain person was going to pick up, and asked him not to let anyone except that person into the room. The man arrived the following day. The judge of the court of first instance ordered Jaradat's remand in custody. Jaradat appealed the decision. In his decision, Court President Col. Netanel Benisho focused only on the charges of arms trafficking and accepted the appeal. He contended that the evidence in the case raised doubts as to whether firearms were even involved. Therefore, he continued, "it is doubtful whether there was an offense of arms trafficking that can be attributed to the Appellant", and that in any case, his involvement was limited and therefore, "we cannot say that the incident is indicative of patent danger". Col. Benisho also wrote that the court must take into consideration the fact that the defendant was completing his studies, which was an "interest that could reasonably keep him from getting involved in criminal activity". The judge added: "I saw fit to put my faith in the Appellant's father, who promised to vouch for his son's appearance". Although there was no *prima facie* evidence that the Appellant had committed an offense, or evidence that an offense had been committed at all, no grounds for detention or concern of flight risk, the judge still ordered a deposit of NIS 7,000 [approx. USD 1,750] as a condition for release.[127]

The sums of money defendants are ordered to deposit for their release reach thousands of shekels. Considering the difficult economic situation of many West Bank residents, some will clearly have trouble raising the money and remain in custody. In addition, because there are no probation reports, the judges are completely unaware of detainees' socio-economic circumstances and bail sums are set arbitrarily.

Therefore, military courts hold "bail review" hearings three to five days after a decision to conditionally release a defendant is made. In these hearings, the

126 AA 1038/13 **Anas Bani 'Odeh v. Military Prosecution**.
127 AA 1390/14 **Mujahed Jaradat v. Military Prosecution**.

parties discuss the possibility of mitigating the terms set for the bail so that the defendant will be able to fulfill them. In some cases, the judges do reduce the deposit amount. Col. Benisho explained the need to set terms defendants can fulfill:

> It is a known rule that conditions for release are meant to guarantee the defendant's appearance for hearings held in his case, and sometimes also to nullify the grounds that could have justified remand. Since that is so, when the defendant cannot meet the conditions, the court must find a new balance between the wish to release and the aforesaid need to guarantee appearance.[128]

Once a judge orders release, the court issues a voucher which must be paid at the post office and presented to the court secretariat or the prison where the defendant is held. Then, a release order is sent to the relevant prison facility and the defendant is released.[129]

This procedure, which appears simple enough, is replete with technical and bureaucratic difficulties. First, the defendant's family does not always know that a remand hearing is being held. When this is the case, the family is not at court to receive the payment voucher, and the lawyer has to wait for the end of the day to contact them and find a way to deliver the voucher to them. Second, the sum ordered by the court must be paid in cash and only in an Israeli post office. Yet, as Palestinians have limited access to Israeli post office branches, they can actually make the payment in one branch only, in Qalandia, which is located between Jerusalem and Ramallah. Third, once paid, the voucher must be brought in person to the relevant authorities, and this, too, is no simple task. Most of the detainees are held in prisons inside Israel, so Palestinians have no access to them. Therefore, they must go to the court secretariat at the Ofer military base. However, the checkpoint on the way to the base closes at 3:00 PM. If the judge's decision is handed down only around noon, the family will not be able to pay the voucher and return to the court in time, and the defendant will remain behind bars another day. Even if the family does manage to get back to the court, they will have to wait at the gate until a prison guard approaches them, takes the voucher and hands it over to the court secretariat.

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128 AA 2564/11 **'Alaa Faiz 'Abd a-Rahman al-Ja'abri v. Military Prosecution**.

129 Letter to B'Tselem from Zohar Halevy, Head of Public Liaison Department, IDF Spokesperson, 22 January 2012; letter to B'Tselem from Meishar Tehila Cohen, Freedom of Information Officer, Israel Prison Service Spokesperson's Office, 14 October 2012.

Because of these complications, even defendants who meet all the conditions set by the judge will most likely not be released on the day of the decision.

Defendants are released when the voucher arrives at the holding facility. If this happens in the evening or at night, the defendants are released without collecting their possessions. They are taken to the nearest checkpoint and sent home with no money, cell phones or identity cards.

In most cases, the deposit is converted to a fine as part of the plea bargain signed with the defendant. When this does not happen, retrieval of the deposit involves a long and complicated bureaucratic process that requires substantial involvement by the defendant's lawyer.[130] B'Tselem has submitted several Freedom of Information applications to the Civil Administration regarding the amounts of money deposited for bail and how much of it was returned to the defendants after their release.[131] The applications were not answered.

130 For a detailed account of the proceedings, see Hagai Matar, "Occupation Levies", *Halr*, 15 October 2010 [Hebrew].

131 Letters from B'Tselem to Sec. Lieut. Amos Wagner, Civil Administration Public Liaison Officer and Freedom of Information Officer, 28 October 2014, 2 December 2014 and 23 March 2015.

The outcome: Plea bargains

A plea bargain is an agreement between the prosecution and the defendant whereby the parties agree to the outcome of the trial, skipping over the phase in which the prosecution must present evidence to prove the guilt of the defendant and the defendant is given the opportunity to refute the evidence. In the plea bargain, the parties can agree on the charges and on the sentence the prosecution will seek. In return, the defendant undertakes to plead guilty to the facts as set out in the indictment.

The policy practiced by the military courts with respect to remand in custody creates a strong incentive for defendants to sign plea bargains so as to complete the proceedings as quickly as possible. Defendants know that the court will very likely grant a remand request, and that if they choose to go to trial, they will have to do so while in custody. Furthermore, military court trials are lengthy, so even if ultimately acquitted, defendants may spend more time behind bars in remand than if they take the prison sentence offered in a plea bargain. Plea bargains are especially attractive to minors charged with stone-throwing or defendants accused of entering Israel without a permit. In these cases, the sentence defendants can expect in a plea bargain is a few months in prison, whereas trials may last longer.

This situation is one of the main reasons why a very large proportion of the cases heard by military courts end in plea bargains. Statistics regarding judicial proceedings against minors between 2010 and 2015 provided to B'Tselem by the IDF Spokesperson indicate that full trials, during which evidence is heard, are extremely rare. Of the 642 cases whose outcomes were provided to B'Tselem, a full trial was held in only five (0.8%). In 13 cases, the defendant pleaded guilty and was sentenced by the judge without a plea bargain. Plea bargains were reached in the remaining 624 cases.[132]

Based on reports issued by the military courts, a similar picture emerges regarding the total number of cases in which the evidentiary stage was conducted:

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132 See B'Tselem report, *No Minor Matter*, supra note 57, p. 52.

Number of cases in which evidence was heard in court

	Number of defendants whose trials concluded in the year noted (omitting traffic violations)	Number of full trials
2005	6,870	**164 (2.38%)**
2006	5,638	**127 (2.25%)**
2007	5,497	**93 (1.69%)**
2008	6,332	**161 (2.54%)**
2009	5,782	**133 (2.3%)**
2010[133]	5,416	**82 (1.51%)**

Between 2008 and 2010, the military courts conducted a special project meant to examine trial outcomes according to the individual charges rather than the end result of the entire case. These figures demonstrate that only a small proportion of the individual charges reached a ruling by the court as part of an evidentiary trial. In 2008, out of 12,894 individual charges, only 580 (4.5%) were disputed and brought to trial for resolution.[134] The figures also show that 40% of the charges included in the indictments filed in court were dropped by the prosecution as part of a plea bargain.[135] In a system based on such arrangements, it would not be unreasonable to presume that at least some of the charges were entered into the indictment for the sole purpose of being taken out in a plea bargain.[136]

In response to a report written by Israeli human rights NGO Yesh Din about the military courts, the IDF Spokesperson stated that plea bargains are customary inside Israel as well and should not be regarded as improper. The spokesperson added:

> [O]nce the accused has decided to reach a settlement through his attorney, the court will usually honor the settlement. Settlements are usually a definite public interest, that in the reality of the region can greatly benefit accused persons whose attorneys believe have a high chance of being convicted. Assuming that the defense attorney has carried out his work properly, in such a case the interest to reach settlement is first and foremost the interest

133 The Military Courts Unit stopped publishing figures that year.
134 Leckach and Dahan, supra note 5, p. 201. The annual reports produced by the military courts present only conviction and acquittal rates, not the actual figures.
135 Ibid., p. 20. See also, Military Courts in the Judea and Samaria Area, *Annual Activity Report 2008*, p. 12, *Annual Activity Report 2009*, p. 12, *Annual Activity Report 2010*, p. 12 [Hebrew].
136 Yesh Din, *Backyard Proceedings*, supra note 11, p. 138.

> of the accused person who can minimize the severity of the indictment filed against him, and that of his sentence. Therefore, there is no flaw in reaching settlements.[137]

The IDF Spokesperson is correct in saying that there is nothing wrong with plea bargains per se and that they are an integral part of every judicial system. They save time for all parties involved and often serve the defendant's interest. It is also true that plea bargains are customary in Israel proper. A study of a sample of cases heard in courts in Israel between May 2010 and May 2011 shows a high rate of plea bargains, albeit not as high as in the military courts. According to the findings, 76.5% of defendants in the Magistrates' Courts and 85.7% of the defendants in the District Court signed plea bargains.[138]

However, the IDF Spokesperson is mistaken in portraying plea bargains in military courts as if they are made for the good of the defendants alone, in implying that defense lawyers have a duty to work toward plea bargains and in stating that defendants sign these plea bargains only when they "believe [they] have a high chance of being convicted". These statements disregard the realities of military court proceedings and the impacts of these courts' remand policy: if defendants do not sign plea bargains, they would have to spend months in prison before their innocence might be proven.

137 Ibid., p. 143.
138 Oren Gazal-Ayal, Inbal Galon and Keren Weinshall-Margel, *Conviction and Acquittals in Israeli Courts*, supra note 50, pp. 22-26.

Conclusions

> The mission of the military court system in the Judea and Samaria Area is to enforce law and order by trying defendants accused of security and other criminal offenses that were committed in the area or directed against it while securing **due process** and **fair trial**.[139]

To all intents and purposes, the Israeli military court appears to be a court like any other. There are prosecutors and defense attorneys. There are rules of procedure, laws and regulations. There are judges who hand down rulings and verdicts couched in reasoned legal language. Nonetheless, this façade of propriety masks one of the most injurious apparatuses of the occupation.

In one of his decisions regarding remand in custody pending the end of legal proceedings, Military Judge Lieut. Col. Ronen Atzmon ruled: "The law regarding arrests in the area, as in Israel, includes a number of rules and reservations, presumptions and means of refuting them. It is important to always remember that the primary rule is that suspects or defendants are entitled to their freedom, and one should not hasten to arrest them. Detention is the exception rather than the rule".[140] What actually goes on in the military court system, however, is quite the opposite. Remand is the rule rather than the exception, and Lieut. Col. Atzmon's remark merely underscores the gulf between the clean legal rhetoric military courts use and the injustice suffered by the individuals prosecuted in them, who are always Palestinians.

With the exception of traffic violations, the military prosecution routinely asks for remand in custody for the duration of the proceedings and the courts grant the vast majority of the motions. Ostensibly, military judges rely on the three conditions stipulated in Israeli law for approving remand, which are meant to restrict the use of this measure. However, the interpretation military judges give these conditions renders them meaningless and nullifies their effectiveness as potent checks on the process of approving remand in custody. Instead of the prosecution having to prove that each of the conditions laid out in the law has

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139 Military Courts in the Judea and Samaria Area, *Annual Activity Report 2013*, p. 2, emphasis in original [Hebrew].

140 AA 1397/11, supra note 125.

been met, the burden of proof has been shifted onto the defendant, who is forced to contend with a string of presumptions the military courts established over the years:

- The threshold for meeting the requirement of *prima facie* evidence is so low that it poses no obstacle to the prosecution. Military courts accept a single confession or incriminating statement, dubious as it may be, as sufficient for meeting the already low threshold. Military judges ignore complaints by detainees – both adults and minors – that they confessed due to abuse during interrogation, maintaining that such allegations should be deliberated only at trial, and rely on the confessions to grant remand in custody.
- The requirement for "grounds for detention" has been replaced with a string of presumptions that release the prosecution from its obligation to present evidence justifying the detention of the particular defendant whose matter is before the court. Judges have ruled that the grounds of "posing danger" are automatically present in most offenses with which Palestinians are charged. They have also ruled that in the vast majority of cases the grounds of "flight risk" are also present, given where defendants live.
- Military courts have also ruled that defendants in most types of offenses cannot be released to an alternative to custody. Even in the few cases in which the judges agree to release defendants, they set high bail, reaching thousands of shekels.

As a result of this military court policy, in most cases defendants are held in custody for the duration of their trial. Knowing that a trial will likely take longer than the prison sentence they would receive in a plea bargain, especially on relatively minor charges, most defendants hasten to sign such plea bargains. All too often, the decision to detain a person is tantamount to conviction, since the defendant's fate is sealed at the time the decision to remand in custody is made, rather than based on the evidence. In other words, a pretrial decision, remand in custody of a person who has not been convicted, routinely renders the judicial proceeding meaningless.

This state of affairs contradicts the principles set out in international law regarding custodial remand for the duration of proceedings. Under these principles, remand in custody may be resorted to in exceptional cases only, certainly when minors are involved. The Human Rights Committee, which is charged with the implementation of the International Covenant on Civil and Political Rights has clarified that remand cannot be ordered based only on the offense with which

a defendant is charged, that the defendant's personal circumstances must be taken into account, and that remand should be used only when there are no other available options.

Military courts rely on Israeli law and the jurisprudence of Israeli courts operating inside the Green Line when it comes to remand proceedings. As clarified in a document prepared by the Military Advocate General's Corps, reliance on Israeli law extends to other areas as well:

> The [military] courts have done much to bring the law applicable in the Judea and Samaria Area closer to Israeli law, both in terms of substantive law and in terms of legal procedure […]. The conclusion is therefore, that not only do the courts uphold due process in a bid to conduct fair trials, but they also strike an appropriate balance between the public interest of penalizing offenders and the basic rights of defendants in criminal proceedings, in accordance with the norms accepted in Israeli law.[141]

However, the two legal systems, the one inside the Green Line and the one in the West Bank, are fundamentally different. They are predicated on different values and protect different interests.[142] Unlike the Israeli justice system, the military courts do not reflect the interests of the defendants' own society, but rather the interests of the regime of occupation, an occupation fast approaching the fifty year mark.

The military judges and prosecutors are always Israelis. They are soldiers in uniform enforcing martial law on the civilian Palestinian population living under military rule. The people who take part in administering the occupation are on one side, while the regime's subjects are on the other. Military courts are not an impartial, neutral arbitrator. They are firmly entrenched on one side of this unequal balance.

The application of Israeli law may be significant on a declarative level. The use of language rooted in the Israeli legal world obfuscates the crucial differences between the Israeli justice system that operates inside Israel's sovereign borders and the military courts operating in the West Bank. As such, its main contribution to the military justice system is not in providing broader protection for defendants' rights or seeing justice done, but rather as a whitewash, glossing over the flaws of the military court system.

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141 Response of the IDF and the Ministry of Justice to ACRI report, 30 November 2014. The full response is available at: http://www.law.idf.il/163-6949-he/Patzar.aspx [Hebrew].

142 For more, see Smadar Ben Natan, supra note 3.

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