

Navigating the Judicial Terrain Under Israeli  
Occupation: Palestinian and Israeli Lawyers in  
the Military Courts

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ARTICLE

NAVIGATING THE JUDICIAL TERRAIN UNDER  
ISRAELI OCCUPATION:  
PALESTINIAN AND ISRAELI LAWYERS IN THE  
MILITARY COURTS

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### I. INTRODUCTION

This research seeks to shed light on one professional group practicing in the Israeli Occupied Territories: defense lawyers representing Palestinians before the Israeli military courts. These lawyers—Israeli and Palestinian—are important actors within a judicial apparatus, which has been in place since 1967, and is part of a prolonged military occupation.<sup>1</sup> Over the years, the military court system in the Occupied Territories has taken several steps to professionalize, mainly by incorporating numerous universal features that characterize civil courts operating in liberal democracies.<sup>2</sup> These include the exclusion of lay judges (non-jurist military personnel) from the bench, the adoption of special trial procedures for minors, allowing appeals on interim and final decisions, and generally amending the military substantive and procedural rules to resemble those of the Israeli civil system.<sup>3</sup>

Almost all Palestinians charged in military courts are represented by a defense lawyer, Israeli or Palestinian.<sup>4</sup> The Israeli defense lawyers are members of the Israeli Bar Association (“IBA”) and are governed by the Israeli law regulating professional practice—The Israel Bar Association Act of 1961.<sup>5</sup> Israeli lawyers are also bound by the ethical rules promulgated by the IBA, and by Israeli court decisions interpreting the law, role, and duties of lawyers.<sup>6</sup> Palestinian lawyers are members of the Palestinian Bar Association. After the establishment of the Palestinian Authority (“PA”) following the Oslo Accords of 1996, the legal profession in the PA began to

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1. GEORGE E. BISHARAT, *PALESTINIAN LAWYERS AND ISRAELI RULE: LAW AND DISORDER IN THE WEST BANK* (1989).

2. Smadar Ben-Natan, *Inside and Outside Israeli Law: The Application of Israeli Law in the Military Courts of the Occupied Palestinian Territory*, 43 *THEORY & CRITICISM* 45 (2014) (Isr.) [hereinafter *Inside and Outside Israeli Law*].

3. *Id.*

4. YESH-DIN, *BACKYARD PROCEEDINGS: THE IMPLEMENTATION OF DUE PROCESS RIGHTS IN THE MILITARY COURTS IN THE OCCUPIED TERRITORIES* (2007).

5. Bar Association Act, 5721-1961, 178 (1960-61) (Isr.).

6. NETA ZIV, *WHO WILL GUARD THE GUARDIANS OF LAW? LAWYERS IN ISRAEL BETWEEN THE STATE, MARKET AND CIVIL SOCIETY* (2015) (Isr.).

institutionalize.<sup>7</sup> To date, ten law schools operate in the PA where Palestinian students can obtain a law degree.<sup>8</sup> In 1997, the Palestinian Bar Association was established, the PA enacted a law regulating the legal profession, and a professional ethical code for Palestinian lawyers was adopted.<sup>9</sup> These professional developments took place as the Israeli occupation continued, which included the prosecution of thousands of Palestinians each month before the military courts and their incarceration in Israeli prisons for security and criminal offenses committed in the occupied territories.

Hence, the Palestinian legal profession has been institutionalizing in the context of two political processes. The first is the PA's course of "state building," which required the formation of an independent justice system, including an autonomous and professional bar.<sup>10</sup> The second is the ongoing national conflict, including a military occupation that has lasted for over fifty years.<sup>11</sup> From the Israeli side, the military courts have increasingly endeavored to resemble—at least formally, structurally, and procedurally—normalized judicial institutions, despite being courts that operate under a military regime.<sup>12</sup>

Representation before the military courts takes place with close proximity to the issue of political/security prisoners—a highly potent and contested topic both within the PA, as well as between Israel and the Palestinian representative bodies.<sup>13</sup> What the military justice

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7. Mutaz Qafisheh, *A Century of the Law Profession in Palestine: quo vadis?*, 25 INT'L J. LEGAL PROF. 175 (2018).

8. Mutaz M. Qafisheh, *Modern Legal Education in Palestine: The Clinical Programs of Hebron University*, in EXPERIMENTAL LEGAL EDUCATION IN A GLOBALIZED WORLD: THE MIDDLE EAST & BEYOND 198-235 (Mutaz M. Qafisheh & Stephen A. Rosenbaum, eds., 2016).

9. *Id.*

10. Qafisheh, *supra* note 7.

11. See generally David Kretzmer, *The Law of Belligerent Occupation in the Supreme Court of Israel*, 94 INT'L REV. OF THE RED CROSS 207 (2012); ORNA BEN-NAFTALI, MICHAEL SFARD & HEDI VITERBO, THE ABC OF THE OPT: A LEGAL LEXICON OF THE ISRAELI CONTROL OVER THE OCCUPIED PALESTINIAN TERRITORY 264 (2018).

12. Ben-Natan, *supra* note 2.

13. See *infra* note 69; *Government of the State of Palestine*, PERMANENT OBSERVER MISSION OF THE ST. OF PALESTINE TO THE UNITED NATIONS N.Y., <http://palestineun.org/about-palestine/government-of-the-state-of-palestine/> [<https://perma.cc/AKL9-HH2U>]. The Israeli government considers the PA's support for Palestinians convicted of security offenses—including providing financial support to their families, as well as other forms of support such as legal defense—as unacceptable. The government has initiated legislative steps to authorize the government to deduct the sum the PA provides families of convicted offenders from the amount of money Israel transfers to the PA (e.g., mainly taxes collected in relation to Palestinian workers). See, e.g., Shahar Hay, *Knesset passes bill to deduct terror funds from PA in first*

system regards as an illegal act and a punishable offense is often considered an act of political resistance in the eyes of Palestinians. Hence, defense lawyers perform their work on a finely delineated line that embodies multiple aspects and different layers of interactions between the professional/legal and the political. As they mediate between their clients and the Israeli military regime, they can either try to politicize the process, or take part in the law's pacifying and normalizing role within the occupation.

By focusing on defense lawyers practicing before the court, this research aims to probe into their practice and better understand the interplay between the legal and the political in representing clients before the military courts. The inquiry wished to reveal: who are the lawyers that appear before the "courts of the enemy"? What are the formal and informal regulatory regimes that govern their practice? What are the lawyers' motivations for doing this work? Who pays their fees? Do they consider themselves part of the Palestinian political struggle or professionals dedicated mainly to the wellbeing of their individual clients? Who do they owe their fiduciary duties to? Do they believe they are legitimating the Israeli occupation or is their practice part of the political struggle against it? How do they demarcate the relationship between the professional and the political? Have the answers to these questions changed over time, as lawyers continue to practice before "the judicial arm of a control regime that has been deemed the longest military occupation in modern history"?<sup>14</sup>

Part II lays out the literature on the military courts and the lawyers practicing before them. Part III describes the human rights legalistic critique of the military justice system, and Part IV analyzes how this same discourse affects the interplay between the professional and the political on the practice of defense lawyers. Part V portrays the regulatory regime that applies to each group of lawyers and Part VI discusses the makeup of this particular professional group. Part VII describes the research method applied in this project and Part VIII the main findings. The Article concludes by questioning the legitimizing force of legal representation before the Israeli military courts.

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reading, YNET NEWS (May 8, 2018), <https://www.ynetnews.com/articles/0,7340,L-5254508,00.html> [<https://perma.cc/B6WM-XS2A>].

14. BEN-NAFTALI, SFARD & VIRTEBO, *supra* note 11, at 264.

## II. MILITARY COURTS IN THE OCCUPIED TERRITORIES – LITERATURE REVIEW

The military courts operating in the Occupied Territories are part of a comprehensive and complex legal system that applies in these areas. This system consists of an amalgam of legal sources. They include local law - civil law (mainly Jordanian law, and after the Oslo Accords, Palestinian law) and religious law (relating to family and personal status issues), as well as international law (international humanitarian law and international human rights law), as well as military law (orders issued by the Israeli army, which cover almost all areas of life).

The topic of the law of occupation has been addressed extensively in academic writing, with a particular focus on the role of the Israeli judiciary in the review of military action in the territories.<sup>15</sup> This literature constitutes the general background for my research, which addresses one institution within this system—the military courts and specific professional actors within them: defense lawyers. These lawyers work amidst two additional professional groups: military prosecutors and military judges.

Military courts operating in an occupied territories are recognized under international law, specifically in Article 66 of the Fourth Geneva Convention.<sup>16</sup> In the Israeli context, they were established through military orders promulgated immediately following the occupation in 1967,<sup>17</sup> and since 1970, the basis for their operation has been Security Provisions Order No. 378.<sup>18</sup> The military courts' jurisdiction includes

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15. For most recent references, *see generally* AEYAL GROSS, *THE WRITING ON THE WALL: RETHINKING THE INTERNATIONAL LAW OF OCCUPATION* (2017); Kretzmer, *supra* note 11; EYAL BENVENISTI, *THE INTERNATIONAL LAW OF OCCUPATION* (2nd ed. 2012); BEN-NAFTALI, SEARD & VIRTEBO, *supra* note 11; YORAM DINSTEIN, *THE INTERNATIONAL LAW OF BELLIGERENT OCCUPATION* (2009); MICHAEL KARAYANNI, *CONFLICTS IN A CONFLICT: A CONFLICT OF LAWS CASE STUDY ON ISRAEL AND THE PALESTINIAN TERRITORIES* (2014).

16. Article 66 of The Fourth Geneva Convention states: "In case of a breach of the penal provisions promulgated by it by virtue of the second paragraph of Article 64, the Occupying Power may hand over the accused to its properly constituted, non-political military courts, on condition that the said courts sit in the occupied country. Courts of appeal shall preferably sit in the occupied country." Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 66 (1949) [hereinafter *The Fourth Geneva Convention*].

17. Meir Shamgar, *Legal Concepts and Problems of the Military Government—The Initial Stage*, in 1 *MILITARY GOVERNMENT IN THE TERRITORIES ADMINISTERED BY ISRAEL 1967–1980: THE LEGAL ASPECTS* 14 (Meir Shamgar ed., 1982).

18. LISA HAJJAR, *COURTING CONFLICT: THE ISRAELI MILITARY COURT SYSTEM IN THE WEST BANK AND GAZA* (2005); Sharon Weill, *The Judicial Arm of the Occupation: The Israeli*

security related offenses committed in the territories as well as criminal offenses without any security component (such as theft, bribery, tax-related offenses, environmental offenses, traffic violations, domestic violence, and assault). Following the establishment of the PA, there have been detailed provisions regulating the jurisdiction of these courts regarding offenses committed within the jurisdiction of the PA.<sup>19</sup> Even though military courts' jurisdiction covers offenses committed by Jewish settlers, this population, by and large, is not tried in these courts, but in civil Israeli courts, within Israel.<sup>20</sup>

Weill labels the military courts “the judicial arm of the occupation,” Hajjar identifies them as “both a product and site of the Israeli-Palestinian conflict,” and Cavanaugh posits that the military courts are “at the intersection of politics and law.”<sup>21</sup> They are a central component of the Israeli army’s apparatus that maintains, controls, sustains, and normalizes the prolonged Israeli occupation.<sup>22</sup> They are also an established, dominant and familiar institution among Palestinian residents of the Occupied Territories, since most families have experienced some encounter with their judicial régime—either directly or indirectly.<sup>23</sup>

It is estimated that since the beginning of the occupation, over 800,000 Palestinians had been prosecuted in the military courts, for both security-related and criminal offences.<sup>24</sup> According to data provided by Israeli sources, each year a minimum of 12,000 indictments are filed before these courts.<sup>25</sup> Since almost all of these cases end with a plea bargain, and suspects tend to be kept in custody for prolonged periods, this judicial process also coincides with an

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*Military Courts in the Occupied Territories*, 89 INT’L REV. OF THE RED CROSS 395, 401 (2007); YESH-DIN, *supra* note 4.

19. HAJJAR, *supra* note 18, at 46.

20. B’TSELEM, *LAW ENFORCEMENT ON ISRAELI CIVILIANS IN THE OCCUPIED TERRITORIES* (1994).

21. Weill, *supra* note 18, at 1; HAJJAR, *supra* note 18, at 1; Kathleen Cavanaugh, *The Israeli Military Court System In The West Bank and Gaza*, 12 J. CONFLICT & SECURITY L. 197, 205 (2007).

22. Weill, *supra* note 18.

23. HAJJAR, *supra* note 18 (courting conflict)

24. Nethanel Benisho, *Criminal Law in the West Bank and Gaza*, 18 IDF L. REV. 299 (2005); Weill, *supra* note 18, at 396; Neri Ramati, *From Security Interrogations to Criminal Evidence: Methods of Interrogation by the General Security Services and the Police of Palestinians Accused of Security Offenses in the Military Courts* (2017) (unpublished manuscript) (on file with author).

25. Ramati, *supra* note 24.

extremely high level of incarceration.<sup>26</sup> For example, during February 2016, 6,700 Palestinians from the West Bank were incarcerated in Israeli prisons, out of a population of 1,800,000 Palestinians in the West Bank.<sup>27</sup>

Research on the legal and institutional aspects of the military courts has been conducted through different lenses over the prolonged Israeli occupation. First, several military officials that had taken part in the establishment and operation of the courts documented their formal basis and modus operandi. Meir Shamgar, who served both as Judge Advocate General (“JAG”) in 1967, and later as Israel’s Attorney General and President of the Israeli Supreme Court, documented the legal basis of the occupation in its early stages, including the military courts.<sup>28</sup> Zvi Hadar, who was the JAG following Shamgar, also described the legal framework and structure of the military courts.<sup>29</sup> Amnon Strashnov, who served as president of the military courts and then as the Israel Defense Force’s (“IDF”) JAG during the 1980s, documented in his book *Justice Under Fire*, the legal apparatus in the occupied territories during the first Palestinian uprising, including the role of the military courts therein.<sup>30</sup> Nethanel Benisho, who currently serves as the President of the military courts, documented the later period of military courts’ operation, as well as the relationship between the law applied in Israeli courts and that in military courts.<sup>31</sup>

Second, international law scholars have pointed to the unique character of the military courts under The Law of Occupation. Cavanaugh describes the formal regulatory framework of the courts, as well as the main features of their actual practice, and Kretzmer critically analyzes the Supreme Court’s limited oversight of their jurisdiction. Through the indeterminate and fungible legal concept of *territorial jurisdiction*, Sharon Weill demonstrates how the military courts assumed jurisdiction over offenses committed extraterritorially

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26. ADDAMEER PRISONER SUPPORT & HUMAN RIGHTS ASS’N, PRESUMED GUILTY: FAILURES OF THE ISRAELI MILITARY COURT SYSTEM: AN INTERNATIONAL LAW PERSPECTIVE (2009).

27. Ramati, *supra* note 24.

28. Shamgar, *supra* note 17, at 14.

29. Zvi Hadar, *The Military Courts*, in 1 MILITARY GOVERNMENT IN THE TERRITORIES ADMINISTERED BY ISRAEL 1967–1980: THE LEGAL ASPECTS 193 (Meir Shamgar ed., 1982).

30. AMNON STRASHNOV, JUSTICE UNDER FIRE (1994).

31. *Id.*; Benisho, *supra* note 24.



(for example, in Area A, under the control of the PA), thereby creating a “borderless judicial domination.”<sup>32</sup>

A third line of research on the military courts applies a socio-political methodology. In 1989, Bisharat published the first book that explored the status and the role of Palestinian lawyers in the West Bank (as labeled by the author), during the first two decades of the occupation.<sup>33</sup> Bisharat described the lawyers as a disintegrating profession, and explained how the lawyers’ strike, declared soon after the occupation, in fact, led to the profession’s decline and fossilization.<sup>34</sup> Bisharat continued to examine these lawyers a decade later, again focusing on the intersection between lawyers’ professional identity and the multiple political constraints surrounding their practice.<sup>35</sup> As part of his exploration, he discussed the dilemma of legitimating the occupation through representation in the military courts.<sup>36</sup> Lisa Hajjar’s work on the military courts provides a hard look at the perplexity of Israel’s claim to pursue “justice” within a non-democratic military legal regime.<sup>37</sup> Hajjar’s fieldwork offers an ethnography of the military courts from various points of view (those of access, language, physical setting, and actors), and included meetings and interviews with lawyers practicing in these courts.<sup>38</sup>

Smadar Ben-Natan has conducted extensive work on the military courts in recent years. Her focus has been on the consequences of the application of Israeli legal norms and standards in the military courts.<sup>39</sup> Ben-Natan suggests that the move towards “legal harmonization” can be understood as Israel’s response to the criticism alleging that it violates procedural and substantive norms of international human rights law in the military courts.<sup>40</sup> She claims that this move towards legal-resemblance, in fact, hinders access to justice to the military courts. It also weakens the application of international humanitarian law during analysis of the legality of the occupation (by stressing

32. Weill, *supra* note 18, at 417.

33. BISHARAT, *supra* note 1.

34. *Id.*

35. George E. Bisharat, *Courting Justice? Legitimation in Lawyering under Israeli Occupation*, 20 L. & SOC. INQUIRY 349, 365–405 (2005).

36. *Id.*

37. HAJJAR, *supra* note 18.

38. *Id.*

39. Smadar Ben-Natan, *The Honey Trap: The Application of Israeli Law in the Military Courts of the Occupied Palestinian Territory* (2014) (unpublished MSt. dissertation, Oxford University) [hereinafter *The Honey Trap*].

40. *Id.*

international human rights law) and brings the reality on the ground closer to a permanent occupation, if not de facto annexation, of the occupied territories.<sup>41</sup>

The military courts have been continuously monitored by numerous human rights organizations over the years. These include Palestinian human rights organizations,<sup>42</sup> Israeli human rights organizations,<sup>43</sup> and international human rights groups.<sup>44</sup> The central findings of these reports underscoring flaws in due process and procedural failings that amount to human rights violations of Palestinians prosecuted in the military courts, will be discussed in the next section. As explained above, partially as a response to this critique, the military orders introduced procedural and substantive amendments to the court's regulatory regime, in an attempt to move them closer to the Israeli courts' standards.<sup>45</sup>

Finally, the military courts have been explored in a unique and powerful documentary film, entitled "The Law in These Parts."<sup>46</sup> The film documents the establishment of the military legal system in the occupied territories beginning in 1967, through testimony of military legal professionals who had been its legal and institutional architects.<sup>47</sup> The well-designed nature of the military courts' apparatus and the

41. ADDAMEER PRISONER SUPPORT & HUMAN RIGHTS ASS'N, *supra* note 26; ADDAMEER PRISONER SUPPORT & HUMAN RIGHTS ASS'N, DEFENDING PALESTINIAN PRISONERS: A REPORT ON THE STATUS OF DEFENSE LAWYERS IN ISRAELI MILITARY COURTS (2008); RAJA SHEHADEH & JÜNÄTHÄN KUTTÄB, THE WEST BANK AND THE RULE OF LAW (Int'l Comm'n. of Jurists, Geneva eds., 1980).

42. For Palestinian human rights organizations, *see, e.g.*, ADDAMEER PRISONER SUPPORT & HUMAN RIGHTS ASS'N, *supra* note 26; SHEHADEH & Kuttäb, *supra* note 41.

43. For reports by Israeli human rights organizations, *see, e.g.*, B'TSELEM, PRESUMED GUILTY: REMAND IN CUSTODY BY MILITARY COURTS IN THE W. BANK (2015) [hereinafter PRESUMED GUILTY]; B'TSELEM, NO MINOR MATTER - VIOLATION OF THE RIGHTS OF PALESTINIAN MINORS ARRESTED BY ISRAEL ON SUSPICION OF STONE THROWING (2011) [hereinafter NO MINOR MATTER]; NO LEGAL FRONTIERS, ALL GUILTY! OBSERVATIONS ON THE MILITARY JUVENILE COURT (2010-11); YESH-DIN, *supra* note 4; B'TSELEM, *supra* note 20; B'TSELEM, THE MILITARY COURT SYSTEM IN THE WEST BANK (1990) [hereinafter THE MILITARY COURT SYSTEM].

44. For reports by international human rights organizations, *see, e.g.*, LAWYERS' COMM. FOR HUMAN RIGHTS, LAWYERS AND THE MILITARY JUSTICE SYSTEM (1992); AMNESTY INT'L, ISRAEL ET TERRITOIRES OCCUPÉS: JUSTICE MILITAIRE EN TERRITOIRES OCCUPÉS [ISRAEL AND THE OCCUPIED TERRITORIES: THE MILITARY JUSTICE SYSTEM IN THE OCCUPIED TERRITORIES] (1991); INT'L COMM. OF JURISTS, INQUIRY INTO THE ISRAELI MILITARY COURT SYSTEM IN THE OCCUPIED WEST BANK AND GAZA (1989).

45. The Honey Trap, *supra* note 39; *Inside and Outside Israeli Law*, *supra* note 2.

46. THE LAW IN THESE PARTS (Ra'anana Alexandowicz ed., 2011).

47. *Id.*

unremitting ways in which they took part in the institutional legalization of the prolonged military rule, clearly demonstrate how these courts had transformed into “the judicial arm of the occupation.”<sup>48</sup>

### III. THE MILITARY COURTS—HUMAN RIGHTS, LAW, AND POLITICS

As described above, since the 1980s, numerous human rights organizations have monitored and scrutinized the Israeli military courts. Their activity is part of a broader effort under which human rights groups have observed and documented human rights violations in the Occupied Territories. This approach utilizes the human rights lens—through established standards, benchmarks, and norms—to evaluate the critique that military courts cannot, and do not, function as fair and independent judicial institutions, given their structural affiliation with the military government. Hence, the human rights approach differs from that of international humanitarian law (“IHL”). While the Geneva Convention requires that military courts be “properly constituted” and “non-political” (and that they sit in the occupied territory), the human rights framework requires adherence to additional norms.<sup>49</sup>

Early in the occupation, human rights reports addressed essential flaws in the operation of the military courts and the military justice system in general.<sup>50</sup> Their main points were the lack of an appeals court, the membership of lay (non-jurist) military personnel on the bench, and failure to notify families of the whereabouts of a detainee. They also challenged the practice of preventing lawyers and detainees from meeting, lack of special procedures for minors, as well as the length of the detention period before judicial review. These were accompanied by complaints regarding inadequate physical access to the courts, language barriers, failure to bring detainees to hearings and their postponement, and other administrative flaws.<sup>51</sup>

A significant part of this critique focused on the period that preceded formal judicial hearings, during which detainees were held in

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48. As coined by Weil, *supra* note 18.

49. GROSS, *supra* note 15.

50. See SHEHADEH & KUTTĀB, *supra* note 42; THE MILITARY COURT SYSTEM, *supra* note 43.

51. SHEHADEH & KUTTĀB, *supra* note 41.

custody and interrogated by security personnel.<sup>52</sup> During this period, in which external scrutiny was limited and it was difficult to access a lawyer, most detainees rendered a confession to the accusations against them.<sup>53</sup> The detainees would remain in custody, and the court would rarely remand bail.<sup>54</sup> Consequently, the main function of the court was reduced to approving a plea bargain between the prosecution and the accused, mediated by a defense lawyer.<sup>55</sup>

As decades of occupation went by, and the temporary nature of the occupation had lost most of its meaning—human rights law, due process principles, and legalistic discourse have become vital parts of the law of occupation—at least formally and rhetorically.<sup>56</sup> This trend has infiltrated the military courts as well. An appeals court was established in 1989, and lay judges were removed from the bench.<sup>57</sup> A designated court for minors was established with special procedures (such as holding hearings in camera and limiting the interrogation of children without their parents), and, in general, the military penal code was gradually harmonized, to a substantial degree, with the Israeli penal code.<sup>58</sup>

From the point of view of military personnel, this process led to improvement in the court's functioning and better adherence to human rights norms.<sup>59</sup> Critical scholars and human rights activists acknowledged that the procedural measures introduced increased professionalization, independence, and impartiality.<sup>60</sup> However, they pointed to the limitations of such measures to counter the court's fundamental partiality and prejudice: legalization may have led to an appearance of procedural justice, but it did not touch the core problems

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52. See ADDAMEER PRISONER SUPPORT & HUMAN RIGHTS ASS'N, *supra* note 26, at 17-20.

53. *Id.*

54. *Id.*

55. B'TSELEM, *supra* note 20; ADDAMEER PRISONER SUPPORT & HUMAN RIGHTS ASS'N, *supra* note 24; NO MINOR MATTER, *supra* note 43; B'TSELEM, PRESUMED GUILTY, *supra* note 26.

56. See GROSS, *supra* note 15; Orna Ben-Naftali, *PathoLAWgical Occupation: Normalizing the Exceptional Case of the Occupied Palestinian Territory and Other Legal Pathologies*, in INTERNATIONAL HUMANITARIAN LAW AND INTERNATIONAL HUMAN RIGHTS LAW: PAS DE DEUX 129-200 (Orna Ben-Naftali ed., 2011).

57. Ben-Natan, *Inside and Outside Israeli Law*, *supra* note 1.

58. *Id.*

59. Zvi Lekah, *Protecting Human Rights in the Military Courts in the Era of the Fight Against Terror*, in THE MORDECHAI KREMNITZER BOOK 641 (A. Bendor, H. Gnaim, I. Saban, eds., 2017) (Isr.).

60. Ben-Natan, *The Honey Trap*, *supra* note 39; GROSS, *supra* note 15.

of the system.<sup>61</sup> Moreover, some claimed that the salience of the human rights discourse overshadowed adherence to norms under IHL and the law of occupation.<sup>62</sup>

Despite legalization, Israeli, Palestinian, and international human rights organizations persisted in their critique of the court, pointing to entrenched problems of various sorts. First were the unchanged conditions of pre-trial detention and interrogations, which led to a compelling tendency for confessions.<sup>63</sup> Absent any significant modification of these pretrial procedures, most cases in military courts continued to end in a plea bargain.<sup>64</sup> The military court affirmed confessions that were allegedly obtained based either on a rational calculation of a risk of a harsher outcome, or because of difficulties in conducting a full trial, while the accused remained in custody.<sup>65</sup> Second, some of the formal procedural safeguards, especially those relating to minors, were simply not observed in practice.<sup>66</sup> Third, many decisions of a military judge were discretionary, and depended on acceptance of the prosecution's or the defense's argument.<sup>67</sup> Military judges, for the most part, ruled in favor of the prosecution, and rejected the positions of the defense.<sup>68</sup>

Be the reason as it may, this tendency was said to reveal the unevenness of the military court and its impartiality. Under this line of thought, since the military courts were established by the military regime and constitute part of the military occupation's apparatus, they must serve the system upon which they rely. Within a highly potent political conflict, they are the final institutions that transform "acts of resistance" into criminal charges. Despite enhanced legalism, the courts cannot perform as equalizers; by and large, they do not bridge the power gap between the occupier and the occupied.

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61. The Honey Trap, *supra* note 39.

62. GROSS, *supra* note 15.

63. ADDAMEER PRISONER SUPPORT & HUMAN RIGHTS ASS'N, *supra* note 26.

64. *Id.*

65. *Id.*

66. NO MINOR MATTER, *supra* note 43.

67. ADDAMEER PRISONER SUPPORT & HUMAN RIGHTS ASS'N, *supra* note 26.

68. ADDAMEER PRISONER SUPPORT & HUMAN RIGHTS ASS'N, *supra* note 26.

IV. FUSING THE PROFESSIONAL AND POLITICAL—DEFENSE  
LAWYERS

The tension between formal legalization and substantive justice described above applies, similarly, to the professional sphere and to the defense lawyers practicing before the military courts. Arguably, more law opened up opportunities for novel legal arguments, in particular claims regarding violations of procedural due process. In theory, enhanced legalization meant that lawyers could harness their professional skills to the advantage of their clients, exploiting opportunities for professional interventions. They could detect a violation of a detainee's rights during interrogation, claim lack of sufficient evidence to support extended detention, demand remedies based on flaws in the treatment of minors, and the like. In Part VIII, the Article explores this potential for professional intervention.

Concurrently, the mass processing of thousands of cases before the military courts, their institutionalization, and professionalization, impacted the Palestinian polity as well. The PA government includes a Ministry for Prisoners' Affairs.<sup>69</sup> The Ministry covers the costs of the defense of Palestinians charged with security offenses in the military courts.<sup>70</sup> The office retains lawyers to provide representation through renewed annual retainer agreements and other fee arrangements.<sup>71</sup> In addition, a number of Palestinian and international NGOs located in the territories fund legal aid for political prisoners. These include the Addameer Prison Support and Human Rights Association, Defense for Children International, and the Palestinian Prisoners' Club [Nadi El-Asir Al Falestini], who pay lawyers to provide legal defense in the military courts.<sup>72</sup>

Alongside this apparatus, an informal (but politically powerful) Committee of Prisoners' Affairs ("the Prisoners' Committee") operates from within the Israeli prisons and maintains close contact with the Ministry of Political Prisoners.<sup>73</sup> The Prisoners' Committee has

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69. *Government of the State of Palestine*, *supra* note 13.

70. Interview with J.B., attorney (Feb. 19, 2018).

71. *Id.*

72. *Id.*

73. On the activities of The Palestinian Committee of Prisoners' Affairs, *see, e.g., Calls for saving hunger-striking prisoners in Israeli jails*, PALINFO (Sept. 14, 2016), <https://english.palinfo.com/news/2016/9/14/Calls-for-saving-hunger-striking-prisoners-in-Israeli-jails> [<https://perma.cc/4EUP-WBCS>].

occasionally intervened on topics relating to prisoners' status and conditions, including legal representation before the military courts.<sup>74</sup>

Hence the web of institutions, laws, personnel, policies, procedures, and other types of regulation have created a multi-faceted space within which the defense lawyers work. The law is but one factor within this complex framework. To be sure, the process of legalization and professionalization underscores the professional aspects of the defense lawyer's potential and actual work. However, these traits intertwine with the political aspects and the social context of their lawyering. Therefore, the core questions remain: to what extent do these new professional opportunities impact the representation of defendants in the military courts? What do defense lawyers think about them? How have they affected the defense bar practicing before these courts?

To this point, Ben-Natan has strongly argued that participating in the legal game reinforces and strengthens the illusion of justice, without tackling the underlying flawed foundations of military rule and the military justice system.<sup>75</sup> Ban-Natan asserts that the legal amendments and new procedures have, in fact, imposed additional hurdles upon lawyers—especially Palestinian lawyers who do not speak or read Hebrew.<sup>76</sup> She claims that they had worsened the lawyers' opportunities for effective representation and in fact situated them at a disadvantage.<sup>77</sup> Ben-Natan, however, does not claim to bring the voices of the Palestinian lawyers themselves on this matter; rather she offers a viable point of view regarding the impact of legal harmonization on their professional role.

My research, detailed below in Parts V, VI, VII, and VIII, offers a complementary perspective on this point, based mainly on interviews with lawyers about the courts, their professionalization, and the lawyers' role within the system. It suggests that the defense lawyers themselves carry ambivalent and mixed attitudes towards the military courts, and about their role as lawyers within this system, the meaning of practicing law under military rule, and the fusion of the political and professional. It also demonstrates that despite being a small group, the defense lawyers are not a monolithic group, and voice different views on these topics.

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74. *Id.*

75. The Honey Trap, *supra* note 39.

76. *Id.*

77. *Id.*

V. REGULATORY REGIME—FORMAL RULES AND INFORMAL POWERS

There are multiple formal and informal regulatory regimes that govern defense lawyers practicing before the military courts. First, lawyers must abide by the national (state) rules regulating the legal profession.

Israeli lawyers are governed by the Israeli Bar Association Act of 1961, and the bylaws and regulations promulgated under this law.<sup>78</sup> They are members of the IBA, to which they pay yearly membership dues; Israeli lawyers are subjected to the IBA's disciplinary jurisdiction and ethical standards.<sup>79</sup>

Palestinian lawyers are governed by the Palestinian Civil Advocates Law (formerly named The Legal Profession Law No. 3).<sup>80</sup> They are members of the Palestinian Bar Association ("PBA"), pay dues to the organization, and practice under its jurisdiction.<sup>81</sup> The Palestinian lawyers are covered by the PBA's pension scheme and are governed by its professional and ethical norms.<sup>82</sup>

However, the territorial jurisdiction of these laws and professional organizations is limited to Israel and the PA and does not extend to the occupied territories.<sup>83</sup> Since they practice in the occupied territories, defense lawyers are under the jurisdiction of the military rules and orders promulgated by the military commander. Sections 74-85 of the Order Regarding Security Provisions ("the military order") address the topic of "Parties and their Representatives" in the military courts and relate to legal representation.<sup>84</sup> Sections 74 and 76 of the military order state that defendants in the military courts have a right to be represented

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78. Bar Association Act, *supra* note 5.

79. See Issachar Rosen-Svi, *Constructing Professionalism: The Professional Project of the Israeli Judiciary*, 31 SETON HALL L. REV. 760, 780 (2001); Eli Salzberger, *Kesher Hamishpetanim Hayisraeli: Al Lishkat Orkhe Hadin Uba'ale Brita [The Israeli Jurists Conspiracy: On the Israeli Bar and its Allies]*, 32 MISHPATIM 43 *passim* (2001) (Isr.); Neta Ziv, *Combining Professionalism, Nation Building and Public Service: The Professional Project of the Israeli Bar 1928–2002*, 71 FORDHAM L. REV. 1621, 1640–49 (2003); NETA ZIV, WHO WILL GUARD THE GUARDIANS OF LAW? LAWYERS IN ISRAEL BETWEEN THE STATE, MARKET AND CIVIL SOCIETY (2015) (Isr.).

80. Law No. 5 of Dec. 28, 1999 Concerning the Amendment of Legal Profession Law No. 3 of 1999, PALESTINE GAZETTE No. 32, at 5 (Feb. 29, 2000) (Palestine).

81. Qafisheh, *supra* note 7, at 17.

82. *Id.*

83. The IBA and PBA may, however, discipline lawyers for unethical behavior that does not have territorial dimensions, such as general criminal behavior.

84. Order Regarding Security Provisions (Judea and Samaria), 5770-2009 (Isr.).



by an Israeli lawyer or a Palestinian lawyer—labeled “a local lawyer.”<sup>85</sup> Under certain circumstances, a defendant may be appointed a lawyer by the military court, which also determines the fee paid to the appointed lawyer, as per Sections 77, 83, and 84 of the military order.<sup>86</sup> In Section 80, the military order conditions the replacement of a lawyer upon the approval of the court,<sup>87</sup> and, in Section 82, states that the court will not refuse to approve switching a lawyer, unless the change might lead to an unreasonable postponement of the judicial proceedings.<sup>88</sup> In Section 85, the military order details a (gendered) dress code for the lawyers appearing before it.<sup>89</sup>

Other than these rather few provisions, the military order provides no guidance on the additional aspects of defense lawyers’ conduct, nor are there any ethical norms that apply to them. As in any court, the presiding military judge is authorized to control and discipline conduct in the courtroom, and this includes the power to require lawyers to conduct themselves in a proper manner. The military court’s de-facto power to police lawyers’ behavior relates, first of all, to issues of civility and etiquette, including the duty to speak when addressed, the requirement to not arrive late or fail to show up, as well as guidelines regarding talking to family members present in the courtroom. It also covers the role of lawyers as officers of the court and their part in the administration of justice. This includes the lawyer’s duty of candor towards the court, the prohibition against lying to the court, the duty to reveal the existence of a former proceeding relevant to the case at hand, and the like.<sup>90</sup> In the military courts, judges often exercise this authority.

Alongside these formal rules, defense lawyers are indirectly subjected to policies and decisions of the PA, in particular the Ministry of Prisoner Affairs and the Committee for Prisoners Affairs. The fee structure implemented by the PA establishes a multi-party relationship between the lawyers, the clients, the military courts, and the PA itself. As will be explained below, the impact of the fee arrangement is highly determinate within the construct of representation.<sup>91</sup> It creates

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85. *Id.* §§ 74, 76.

86. *Id.* §§ 77, 83, 84.

87. *Id.* § 80.

88. *Id.* § 82.

89. *Id.* § 85.

90. See MODEL RULES OF PROF’L CONDUCT, R. 1.6, 1.7, 3.3 (AM. BAR ASS’N 2016).

91. *Infra* Part VIII(D).

incentives for lawyers to maintain a certain caseload, since the lawyers become dependent on the income generated by these fees. The fee structure is also relevant to questions of legitimacy of representation. It enables the lawyers to hold the PA responsible for “cooperating” with the military government and the occupier’s courts. Hence, it absolves them from taking personal or collective professional responsibility for the legitimation of the military courts, as fair and objective legal institutions.

This construct of representation is not unidimensional. Given the high caseload in the military courts—thousands of cases a month—the courts rely on the presence of defense lawyers to process their cases in an orderly and smooth manner. As will be discussed below, the military courts have become entirely dependent on the defense lawyers and cannot operate without them.<sup>92</sup> Military judges rarely make a judicial move without the detainee or accused being represented.<sup>93</sup> Hence, the defense lawyers have turned into an integral element within the military judicial system.

Defense lawyers are also in close and constant contact with prisoners’ families. A lawyer is usually contacted and hired by a detainee’s family. Family members look upon them as crucial mediators between the detainee and the military bodies. Families are often involved in decisions during the hearings, such as the amount of bail and the terms of the plea bargain, and the lawyers convey information between the detainee and the family during “in real time” representation.

#### VI. DEFENSE LAWYERS—MAKEUP AND PRACTICE

Observations and interviews conducted as part of my research revealed the following findings. Currently there are about sixty to seventy defense lawyers practicing before the military courts. About forty percent of the lawyers are Israeli. Most of them are Arab citizens of Israel or residents of East Jerusalem, and a handful are Jewish. Some of the Israeli lawyers studied in Israeli law schools and others studied abroad (mainly in Jordan). The larger group of lawyers that practice before the military courts are Palestinian lawyers who are members of the PBA. They studied law in a variety of law schools, most of them in the Middle East (Jordan, Lebanon, Egypt, and North Africa) as well as

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92. *Infra* Part VIII.

93. *Infra* Part VIII.

in the occupied territories, where currently ten law schools operate. Most of the lawyers are men, and there are fewer than ten women in this practice.

For most defense lawyers, practicing before the military courts is their sole, or main, professional occupation. This means that they appear in a military court between four and five times a week and remain in the court compound most of the day. Since the military courts operate inside military bases, the defense lawyers spend most of their working time in a secluded, Israeli military environment.

The lawyers' counterparts are military prosecutors, military judges, and the court's logistic and administrative personnel. These include guards (some belonging to the police and some to the IDF), court translators, secretaries, and other administrative staff responsible for processing the trials. All these functionaries wear military uniforms and belong to the military apparatus maintaining the occupation.

Within this unique, if not peculiar, environment, the defense lawyers constitute a distinctive professional group. Although small in number, this group of lawyers is not monolithic. Each one has constructed his or her rationale about the politics of representation and has adopted a form of reasoning to account for his or her professional role within the military courts.

Therefore, the objective of this research was to better understand the formal norms and informal forces that influence the identity and practices of defense lawyers in the Israeli military courts. Its goal was to explore the intertwining of the professional and the political during representation, as well as the politics of representing political/security prisoners given the significance of this group and topic within the Israeli-Palestinian context. In general, the research wishes to unveil a legal site where law and politics interplay intensely, and in which the legal profession plays an important role.

#### *VII. RESEARCH METHOD AND SETTING*

During the months of March, July, and August of 2017, and during the first part of 2018, I conducted research on defense lawyers in military courts. This stage of the research included ten visits to the military court in the Ofer army base near Ramallah. Each visit lasted between two and four hours. Being a licensed member of the IBA, I accessed the court as any other lawyer would. At times, I was accompanied by Arabic-speaking law students, who obtained ad-hoc

permission to join me during these visits. In principle, the courts are open to the public. In practice, one has to obtain a permit to enter, as the courts are part of a closed army base.

The physical layout and architectural design of the court deserve special attention. Entrance into the compound requires one to go through a security check and to pass through a number of metal electronic gates. Palestinians—including defendants who are not detained and family members of the detainees—enter the compound through a different gate, and are allotted a number of waiting areas, in which they remain until called to enter the courtroom. There are seven courtrooms (constructed as prefabricated units), set in a row, in which different hearings take place. Separate rooms are designated for pre-trial detention hearings, juvenile trials, appeal hearings, plea bargains and full trials, and administrative detention hearings, among other purposes.

There is a physical separation between the areas where families wait, the “middle yard,” where the detainees are held in custody, and the “back yard,” where the lawyers, prosecutors, and military personnel have their offices. One cannot freely pass between the family waiting area and the middle yard and back yard. The different courtrooms are connected to each other by a wall/fence, in a way that blocks passage from one side of the base to another. As a result, the most common way to move between the different court areas is through the courtrooms themselves.

Each courtroom has at least three doors: one for the use of families/defendants/public, one for the judges, and one for the lawyers and the detainees. This constellation leads to constant “traffic” within the small courtrooms. Lawyers keep going in and out of the courtroom, “cutting in” through one door and “cutting out” through another, in order to get from one side of the compound to the other. Some of the courtrooms are small, and the lawyers have to squeeze themselves to pass through, especially when a number of detainees wait in the detention area in the courtroom (behind a low wooden bar), accompanied by their security guards. All this commotion occurs while the judicial hearings continue. Since the lawyers often have hearings that overlap in scheduling, a loudspeaker is used to summon them, as well as to summon family members that are called to enter the courtroom to attend the hearing of their relative. Family members go in and out of the courtroom as hearings continue and make constant attempts to communicate with the detained family member, and are

frequently interrupted by the judge, who requires they refrain from doing so.

This setup often leads to a somewhat chaotic feeling, which unexpectedly also creates a certain atmosphere of informality and casualness in the courtroom. Since judges, prosecutors and defense lawyers are repeat players in these proceedings, they all seem to recognize (and adhere to) the blurred boundaries between the formality of the procedure and the loose ambience during which the trials take place. I sat in court and observed different hearings, motions, and trials. Judges were, for the most part, accommodating, and did not impose any difficulties during my observations. Occasionally present in the court were observers from Israeli NGOs, mainly women peace organizations, that operate “court-watches” over court proceedings of women defendants.

I conducted interviews with sixteen defense lawyers.<sup>94</sup> Most interviews took place during the lunch breaks in the court hearings, in the lawyers’ meeting room, or in the base’s open-air cafeteria. Two interviews were held in a lawyer’s office in the occupied territories and one in Tel Aviv (a Jewish lawyer). Most lawyers, but not all, were accommodating and were happy to discuss their work with me. With some, there were language barriers that could not be overcome. Others were suspicious and did not want to talk. One lawyer, for example, explained that the mere consent to be interviewed by an Israeli academic legitimates the occupation and the military judicial proceedings. He refused to take part in the research.

After my fourth or fifth visit to the court, more lawyers were willing to meet and discuss various aspects of their work, despite some ambivalence, suspicion, and hesitance some continued to express during the interviews. Each interview lasted between forty-five and ninety minutes. Eight interviews were recorded. Seven lawyers were members of the IBA; six were members of the PBA; three were members of both bars, but these lawyers first became members of the PBA and then took the Israeli bar exam. The dual membership lawyers resided in East Jerusalem.<sup>95</sup> Out of the sixteen lawyers, I met four women.

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94. Apparently, Hamas lawyers act separately. However, I did not meet any.

95. The Israel Bar Association Act requires members to be residents of Israel, rather than citizens (section 42). Residents of east Jerusalem, most of whom are not citizens of Israel, can become members of the Israeli Bar Association.

### VIII. FINDINGS

#### A. Practice Conditions

My research, observations, and interviews resulted in the following findings. Most lawyers are repeat players in the military court system. Their practice is constituted almost entirely of representing defendants in the military courts, since it is difficult to commit to other cases given the caseload and intensity of scheduled hearings. This means that they come to court almost every day (four to five times a week), and most have been doing so for years.

When a lawyer has a case scheduled in the military court, he usually has to remain there at least half of the day, if not the full day. Cases are not necessarily scheduled in a consecutive manner for the same lawyers, and often they need to wait for hours between cases. As a result, the lawyers find themselves spending most of their working time in the military court compound. The base itself is quite small, and the IDF personnel (professional and lay) remain in the same space. This enables the lawyers to become familiar and to develop working relationships with the prosecutors, judges, and administrative staff. They work in a military base together. They buy food and drinks in the same canteen and visit the same administrative offices of the courts. This is a rare situation of physical “mingling” between Israeli soldiers and Palestinians.

Given this setting, military judges know lawyers by name, as well as by professional style and character. They often refer to them by their first names. For example, during one hearing, a judge, somewhat humorously, alluded to a lawyer as being “tough” and a “hardliner,” while the other was referred to as more accommodating. More accommodating means, as an example, agreeing to additional delays or postponements in the hearing of the case, due to the prosecution’s failure to bring a witness on its behalf. Witnesses are heard in cases in which the defendant did not confess, or when the prosecution’s request for detention pending trial is contested. However, the prosecution often fails to present witnesses for a variety of reasons. Some witnesses are soldiers on duty at the time of the event who have since been released from the army. In other cases, witnesses are Palestinian “collaborators” of some sort, and do not want to come to court to testify. This is a case where the defense lawyer can insist on either releasing the client or can use this failure during plea-bargaining as a consideration for a more lenient sentence. There are some lawyers who are more assertive than

others in such circumstances, and judges, who are familiar with the lawyers' attitudes—insinuate their views on the lawyers' modes of representation.

*B. Differentiating Israeli and Palestinian Lawyers—The Question of Professionalism*

The interviews I conducted revealed a clear distinction, if not stratification, between Israeli and Palestinian lawyers. To begin with, most Israeli lawyers speak Hebrew, while most Palestinian lawyers do not. It is therefore more difficult for Palestinian lawyers to navigate the military justice system and to represent their clients. In theory, interrogation materials need to be provided to the lawyers in Arabic (some investigations are conducted in Arabic, the spoken language of most defendants), but lawyers pointed to problems with obtaining this material in a sufficient manner. The court hearings themselves are conducted in Hebrew (though some judges seem to be fluent in Arabic), and translators are provided. The opinions on the quality of translators (usually Druze military personnel) were mixed. However, most lawyers admitted there are severe problems with translation.

Israeli lawyers frequently criticized (some) Palestinian lawyers referring to their professionalism. They recognized the strong incentives for defense lawyers to “work with the system,” by entering a plea on behalf of the client. However, they distinguished between cases in which a plea bargain seemed to be the right professional decision (where there were no detectable procedural flaws, and the evidence against the accused was clear and substantial), and circumstances in which it was possible to raise legal arguments on behalf of the client. Such arguments would include, for example, that procedures were not followed (for example a minor was detained together with adults), or that the evidence against the defendant is weak and can be contested, so the lawyer can modify the indictment or mitigate the sentence (usually as part of a plea bargain).

Israeli lawyers repeatedly claimed that for various reasons some Palestinian lawyers do not operate this way: they are quick to enter a plea bargain, rarely challenge the evidence, raise no legal arguments, and “trade” prospects of different clients in order to maintain a good relationship with the prosecution.<sup>96</sup>

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96. This was a common allegation. The caseload of Palestinian lawyers, especially those on the payroll of the PA, is extremely heavy. It includes defendants with severe, as well as

In contrast, one senior Israeli lawyer who works with a Palestinian prisoner rights organization offered a different way to understand this conduct (which in and of itself was not contested). He claimed that Palestinian lawyers can be “good lawyers” within the unjust system of the military courts. He argued that these lawyers, even if they do not speak Hebrew, and even if they cannot challenge evidence against their client or detect procedural failures, should not be judged according to such universal professional standards. Under this view, the typical professional expectations from a legalistic lawyer assume a justice system that is fair and impartial. Since the military courts fail to meet these attributes, the role of defense lawyers should be redefined against an unfair institutional reality, and the definition of professionalism should be adjusted accordingly. Purportedly, the Palestinian lawyers have learned to navigate the military justice system through its own rationalization and institutional routine—the processing of thousands of cases smoothly and orderly, which results in pacifying the resistance against the occupation. Within this political context, it is unrealistic to expect that good conventional lawyering will lead to any sort of justice. Therefore, many Palestinian lawyers do the best they can: they meet their client and provide emotional support, they maintain contact with the family, and they try to get the best plea deal for their client while working with and alongside the military prosecution, and by maintaining a reasonable working relationship with the system.

These are two different ways to think about the role of lawyers and about professionalism. The Israeli lawyers defined professionalism in universal terms, underscoring the learned aspect of their work as the central indicator of what it means to be a good lawyer. In contrast, the senior Israeli-Palestinian lawyer offered a contextual understanding of this term, which takes into account a reality, five decades long, of an occupying force’s justice system that does not live up to its own claims of fairness.

If we understand professionalism in these different meanings, it can explain the findings described in section H below, that all lawyers—Palestinian and Israeli—stated it was possible for them to be “good” and “professional” lawyers in the military court system. This

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lighter, offenses. Since plea bargains are an outcome of negotiation with a prosecutor – all of which are repeat players in the system – Palestinian lawyers need to maintain a workable relationship with the prosecution. The claim is that they often do not negotiate each case individually on its merits, but exchange benefits and “deals” among different clients they represent. This was considered to be unethical and unprofessional by some lawyers.



determination depended upon the way they related to the military justice system and how they managed the fusion of its legalistic and political components.

### *C. The Quandary of Plea Bargaining*

My research showed that all lawyers referred to the problem of plea bargains as an essential, ingrained predicament within the military court system. The strong inclination to resort to plea bargains in the military courts is the outcome of two sets of features.

The first is more substantive—the absence of lawyers from the preliminary stages of the detention and investigation. As explained in Part III, most detainees are arrested by the army or the police in the territories, and they remain in custody in detention centers for interrogation, under conditions that make it extremely difficult for lawyers to meet with them.<sup>97</sup> They must be brought before a judge for extension of the detention after ninety-six hours (if suspected of a security offense) or forty-eight hours (if suspected of a criminal offense).<sup>98</sup> In addition, in security-related offenses, the IDF or the General Security Service are authorized to prevent a meeting with a lawyer for fifteen days, a period that can be extended by the military court.<sup>99</sup> As a result, many detainees arrive in court after they have already confessed to some offense, making it difficult for the lawyer to conduct a hearing or a trial with evidence and witnesses.

Second, the military court system is highly burdened with thousands of cases each month.<sup>100</sup> Therefore, it heavily relies on plea bargains—which take a few minutes at the most to approve—in order to process the caseload. To a large extent, lawyers are discouraged from litigating cases and are encouraged to enter plea bargains. A number of lawyers admitted that their chances of getting a more lenient sentence for their client decreases if they choose to conduct a full trial (called an “open trial”), compared to the “deal” they can obtain through a plea.

This dilemma in and of itself is not foreign to criminal defense lawyering and constitutes a well-recognized phenomenon in the criminal justice system at large. In the military courts, however, this

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97. *See supra* Part III.

98. Order Regarding Security Provisions (Judea and Samaria), 5770-2009, § 31, 31A, 31B (Isr.). Special provisions are set for minors.

99. *Id.* §§ 58-59A.

100. Ramati, *supra* note 24.

occurrence is exacerbated. The reason is the lack of significant oversight and screening of cases at the initial investigation stages, which takes place in the Israeli civil system, in which weaker and unsubstantiated cases that will not lead to indictments are weeded out.<sup>101</sup> The lack of similar screening in the military justice system—which has a much higher detention rate—allegedly leads to a higher percentage of cases brought to trial, and among these over ninety-nine percent end with a conviction.

From the lawyers' perspective, the plea bargain quandary cuts through the heart of their professional experience. Most lawyers reflected upon this dilemma arduously, revealing a lucid recognition of the institutional straits within which they conduct their work. The reality under which they are expected, and in fact do submit themselves to the “plea pipeline” revealed itself as a source of constant personal and professional frustration. It is therefore not surprising that lawyers do feel a sense of professional achievement if and when they are able to divert from the plea bargain track and actually do the work of a “real lawyer.” This complexity about plea bargains also explains the critique voiced by some of the lawyers towards others, regarding the abuse of the plea system, explained above.

#### *D. Impact of the Palestinian Authority*

My research revealed that defense lawyers in the military courts are influenced by the PA in a number of ways. First, as mentioned above, the PA Ministry of Prisoners Affairs and the prisoners' NGOs pay the lawyers to represent defendants and detainees in the military courts.<sup>102</sup> Most lawyers are hired on a retainer basis, through yearly renewable contracts. They are therefore obliged to take representation and, accordingly, many have very heavy caseloads.

A number of lawyers mentioned that they used to work with the PA and the NGOs but have ceased to do so for a number of reasons.

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101. For example, according to the Israeli State Attorney Report for 2017, almost forty percent of investigation cases referred to the State Attorney's Office ended with no indictment, following screening by the police or another investigatory agency. See MINISTRY OF JUSTICE, STATE ATTORNEY REPORT FOR 2017 (2017) (Isr.), <http://www.justice.gov.il/Units/StateAttorney/Documents/data-report-2017.pdf> [https://perma.cc/9FNV-6CMN]. In contrast, human rights organizations report a very high percentage of **detentions** leading to indictments of Palestinian detainees and a policy to release detainees. See PRESUMED GUILTY, *supra* note 26. I have not found equivalent data on number of investigations conducted compared to number of indictments in the Occupied Territories.

102. See *supra* Part IV.

The first is the lack of discretion about the number and type of cases they can handle, resulting in a loss of professional independence. The second is their notion that criminal defense has in and of itself become an “industry,” a source of a steady and stable income that turns the NGOs, as well as the lawyers, into stakeholders in the continuance of the occupation. Another lawyer complained about the lack of supervision by the NGOs and the PA over lawyers’ competence and the quality of representation, hence their unwillingness to be affiliated with criminal defense.

The relationship between the defense lawyers and the PA/NGOs is, however, more complex than merely providing the means to represent defendants and detainees. The PA cooperates with the Palestinian Committee of Prisoners’ Affairs, established by the PLO (“Palestinian Liberation Organization”).<sup>103</sup> This committee is the body that provides financial support to the Palestinian prisoners’ families.<sup>104</sup> Although moneys are channeled through the PA, the committee remains an important political actor in the prisoners’ affairs. This financial support includes the fees for lawyers’ representation of defendants and detainees in the military courts. The affiliation between the PA and the committee is complex and affected by the relationship between the PA and the Israeli government. Israel had demanded that the PA dissolve the prisoners’ committee, objecting to payments made by the PA to Palestinian prisoners and their families.<sup>105</sup> As part of this position, in 2018 the Israeli government-initiated legislation to authorize it to cease transfer of funds to the PA because of its support of prisoners.<sup>106</sup> The legislation is pending.<sup>107</sup>

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103. *See supra* Part IV and accompanying notes.

104. *See supra* Part IV and accompanying notes.

105. *See, e.g.*, Dov Lieber, *Defying US, Palestinian official vows payments to terrorists will continue*, *The Times of Israel* (June 14, 2017), <https://www.timesofisrael.com/defying-us-palestinian-official-vows-payments-to-prisoners-will-continue/> [https://perma.cc/GP36-YCPW]; *Al-Resalah: Abbas plans to dissolve Palestinian Committee of Prisoners’ Affairs*, *MA’AN NEWS AGENCY* (June 19, 2017), <https://www.maannews.com/Content.aspx?id=777713> [https://perma.cc/VZA8-YC8U].

106. In general, the Israeli government considers the PA’s support for Palestinians convicted of security offenses – including providing financial support to their families, as well as other forms of support such as legal defence - as unacceptable. The government has initiated legislative steps to authorize the government to deduct from the moneys Israel transfers to the PA (mainly taxes collected in relation to Palestinian workers) the sum the PA provides families of convicted offenders. *See e.g.*, Shahar Hay, *Knesset passes bill to deduct terror funds from PA in first reading*, *YNEY* (May 8, 2018), <https://www.ynetnews.com/articles/0,7340,L-5254508,00.html> [https://perma.cc/YYP3-RU95].

107. *Id.*

Meanwhile, from time to time, the prisoners' committee exercises great influence in relation to Israeli prison conditions and affairs, including through declaring prison strikes on various grounds. For example, in April 2017, the committee declared a hunger strike of all Palestinian prisoners, mainly related to policies of family visitation to prisons.<sup>108</sup> As part of the strike, defense lawyers were instructed to suspend their representation and not to appear in the military courts.<sup>109</sup> The lawyers interviewed reported that all lawyers obeyed this instruction. The expectation to comply with this collective decision was, apparently, unambiguous, and there was no room for individual non-compliance. The court strike lasted for a few days, during which court hearings were disrupted and entered a state of disarray, to the point that the court administration considered appointing Israeli lawyers to replace the lawyers on strike.<sup>110</sup> However, the strike ended shortly thereafter and representation resumed.

#### *E. Defense Lawyers and Families*

The interviews I conducted, along with my observations, showed that most lawyers underscored the significance of their relationships with their clients' families and explained that serving as a liaison between client and family is an integral part of their professional mission. Most often, the first approach to a lawyer is carried out by a family member, and the lawyer remains the family's prominent linkage to their detained family member during the period of detention and imprisonment.

Most lawyers seemed to take for granted their function as support providers for the families. One lawyer explicitly described herself as a "social worker" in addition to being a lawyer, and in general, this responsibility seems to blend into the "job description" of the defense lawyer.<sup>111</sup> During the court hearing, the role of the lawyer is amplified. Families may attend the hearing (up to two members), and the court is

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108. See, e.g., *Hundreds of Palestinian prisoners in Israel go on hunger strike*, THE GUARDIAN (Apr. 17, 2017), <https://www.theguardian.com/world/2017/apr/17/palestinian-prisoners-israel-hunger-strike> [<https://perma.cc/QY9J-WT8J>]; *Mass Palestinian hunger strike in Israeli jails ends after visitation deal*, THE GUARDIAN (May 27, 2017), <https://www.theguardian.com/world/2017/may/27/mass-palestinian-hunger-strike-israel-ends> [<https://perma.cc/CU9N-UASU>].

109. Interviews (July 2017).

110. *Id.*

111. *Id.*

the place where they see the detainee and can perceive their wellbeing. Since the family is not permitted to formally engage with the detainee (through touching or passing belongings), the lawyer bridges this distance. There are situations in which decisions about the amount of punitive fines are reached by the family member, with or without the client being involved. For example, the customary rate of exchange between a fine and jail time is ILS1,000 (the equivalent to about US\$300) for one month of jail time. There were cases in which this negotiation was conducted between the lawyer and the family member first, and afterwards the client's consent was obtained.

*F. Motivations for Military Court Practice*

In my interviews, I found that lawyers expressed a mixture of motivations for practicing in the military courts. Some stated that it was work with a good and steady income, insinuating that representation became simply another routine job. Most lawyers, however, emphasized in some way or another the political dimensions of their work.

Most lawyers underscored the individualistic aspect of their work as embodying political dimensions—assisting a person involved in the struggle against the occupation; one lawyer described his work as “my way to assist in the resistance to the occupation”; another explained that the practice keeps him within the inner circles of knowledge about the politics of resistance to occupation. Another lawyer claimed his main motivation was to provide quality representation to the families of detainees, to counter poor and unethical representation of other lawyers. One lawyer talked about his motivation to “do justice” for his clients, something he believed could be done in the military courts. A number of lawyers explained that representation is what lawyers do as “witness bearers” to the injustice done by the occupation. In this sense, lawyers’ participation in the judicial process is considered part of a historical, collective act documenting a counter-narrative to that forwarded by the State of Israel of an enlightened occupation. At the same time, one lawyer explained that he has been working in the field for so many years, that it was hard to leave, though he would have liked to.

### *G. The Dilemma of Legitimation*

A most noteworthy finding in my research was that the question of legitimating the occupation—i.e., whether, through their participation in the judicial process, they take part in strengthening its legitimacy—was familiar to almost all lawyers. Most of them responded that they understood the dilemma and acknowledged it, but refused to take responsibility for it. Their main argument was that in general, representation is not a professional decision - neither a collective nor an individual one. They rejected any attempt to impose the burden of legitimation upon the lawyers. Only one lawyer said that she thinks about the dilemma every time she appears in court, but still, she stated that it is not a strong enough reason for her to abandon the practice.

The reason articulated by the lawyers was that representation in the military courts was a practice accepted by the political collective to which they belonged, represented by the PA and the Office for Prisoners' Affairs. After all, the salary of many lawyers originates from the PA's budget. Hence, if the PA (representing the Palestinians) does not want legal representation in the military courts to take place, it could order so. As long as it does not, representation is not a personal-professional decision, but a national-collective one.

### *H. Back to the Question of Professionalism*

Asked at the end of my questionnaire if they feel that they can be "a good lawyer" in the military courts, most lawyers answered in the affirmative, with reference to the individual aspects of their practice. They identified and emphasized personal agency as grounds for this answer. If the lawyer makes the effort to read the police files, if she analyzes the evidence against her client, keeps up with legal precedent, takes advantage of mishaps that occurred during interrogation, and articulates a sound legal argument when possible, then one can be a good lawyer.

One lawyer estimated that it is probably better to represent a client accused of a security offense in the military court compared to the civil court in Israel. Here, he explained, everyone is accused of a security offense; it is the rule not the exception, and conduct is measured by a relative scale of severity, which is different than in an Israeli court. The political conflict that bore the judicial process is "the normal," the everyday reality within which military judges, prosecutors, and defense

lawyers conduct their affairs. The insular nature of the court is an advantage, which persistent and professional lawyers can use to benefit their clients.

Hence, the defense lawyers managed to construct a space, although temporary and highly restrictive, that provided them with a sense of professional competence and identity.

### IX. CONCLUSION

The literature on the legitimizing effect of law on political and social change is well established. A significant portion of it points to the depoliticizing effects of law on political struggles.<sup>112</sup> At the center of this critique stands the practice of impact litigation, or legal reform litigation, in which lawyers proactively approach the courts, seek redress for rights violations, and ask courts to create change by establishing legal precedents that become general obligatory norms.<sup>113</sup>

In the context of the Israeli occupation, such proactive legal strategy has been used extensively. The strategy has been used through direct petitions to the Israeli Supreme Court against acts of the military government, and to some extent through civil damages suits litigated before the Israeli civil courts on behalf of civilians injured or killed by Israeli security forces.<sup>114</sup>

The legal course adopted by Israeli and Palestinian civil society organizations, to petition the Israeli Supreme Court for legal remedies, has been contentious.<sup>115</sup> The controversy over impact litigation of this sort had intensified as the occupation has continued, given the overall assessment that, in the long run, its costs will have become greater than its benefits.<sup>116</sup> To be sure, occasionally the Supreme Court has provided

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112. See, e.g., STUART A. SHEINGOLD, *THE POLITICS OF RIGHTS, LAWYERS, PUBLIC POLITICS, AND SOCIAL CHANGE* (1974).

113. GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (Univ. of Chi. Press, 2d ed., 2008).

114. DAVID KRETZMER, *THE OCCUPATION OF JUSTICE: THE SUPREME COURT OF ISREAL AND THE OCCUPIED TERRITORIES* (2002); Gilat J. Bachar, *Access Denied – Using Procedure to Restrict Tort Litigation: Lessons from the Israeli-Palestinian Experience*, 92 *CHI.-KENT L. REV.* 841 (2018).

115. Kretzmer, *supra* note 11; Ronen Shamir, *Landmark Cases and the Reproduction of Legitimacy: The Case of Israel's High Court of Justice*, 24 *L. & SOC'Y. REV.* 781, 781 (1990).

116. Kretzmer, *supra* note 11; Ben Naftali, *supra* note 56; George E. Bisharat, *Law, Land and Legitimacy in Israel and the Occupied Territories*, 43 *AM. U. L. REV.* 467, 562 (1994); Behnam Dayanim, *The Israeli Supreme Court and the Deportations of Palestinians: The Interaction of Law and Legitimacy*, 30 *STAN. J. INT'L. L.* 143 (1994).

an ad hoc remedy or restricted the military government, but with most “hard cases,” such as house demolitions, targeted killings, the legality of the settlements, and deportations—it has sided with the government, providing it with an aura of legality and legitimacy. As David Kretzmer explains, “[i]t would be naïve to think that a domestic court could deal with such an anomalous situation as if it were an outside, neutral, observer that is oblivious to the political realities in its own country.”<sup>117</sup>

At first blush, the topic of this Article escapes this critique. The lawyers subject of this Article are not initiating litigation in military courts or calling for court intervention. They do not harness the law to bring about change, but use law in its most traditional role—as a shield to protect individuals from state power. Their appearance before the courts is defensive rather than proactive, and hardly involves reformative legal argumentation.

Nevertheless, there are significant depoliticizing aspects to defense lawyering as well. As Ronen Shamir and Sarah Chinsky note, for the criminal defense lawyer to achieve the best result on behalf of her client, she must remove and disassociate the client as much as possible from the political context in which the offense was allegedly committed.<sup>118</sup> The accused must minimize his involvement with the act against the occupier, rather than stand behind what is often considered an act of resistance.

From an institutional perspective, the military government has a strong interest to portray the military courts as a judicial system that resembles a civil justice system, completely detached from the non-democratic base of its apparatus. This contributes to normalizing the occupation, with a legitimizing and a pacifying effect. What is considered by the occupied as resistance, is transformed into a criminal offense, and at times an act of terror. Channeling such acts into the military courts, which gradually assume the features of a fair judicial process—including strong reliance on defense lawyers—depoliticizes the reality in which the military courts operate.

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117. Kretzmer, *supra* note 11, at 236.

118. Ronen Shamir & Sara Chinsky, *Destruction of Houses and Construction of a Cause: Lawyers and Bedouins in Israeli Courts*, in *CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES* 227 (Austin Sarat & Stuart Scheingold eds., 1998); Neta Ziv, *Lawyers Talking Rights and Clients Breaking Rules: Between Legal Positivism and Distributive Justice in Israeli Poverty Lawyering*, 10 *CLINICAL L. REV.* 209 (2004).



Palestinian defense lawyers have been operating in the military courts amidst this contradiction for many decades, and from the interviews conducted seem well aware of the dynamics described above. However, over time, these arguments have lost much of their force. They have largely been relegated to the books of critical scholars, hovering above the day-to-day work of the Palestinian defense lawyers in the military courts of the occupation.

After fifty years of occupation, the lawyers have no illusions: law has neither the power to obstruct the occupation, nor to significantly contribute to its continuance. It offers very little opportunity for resistance, but it is hardly a force of legitimation.

It seems the lawyers have developed justifications for their practice within boundaries of a reasoning that is largely constructed by the enclosed military court system. The involvement of the PA in funding lawyers' defense takes part in institutionalizing their practice. Their special responsibility vis-à-vis their clients' families bestows upon them a unique role that no one else can fulfill.

The formalization and improvement of the courts' procedures offer opportunities for some lawyers to exhibit professionalism and enhanced lawyering skills. Even the internal stratification—the differentiation between lawyers who serve their clients professionally and those who do less so—contributes to this process. It assists in creating a self-imagined experience of professionalism that thrives within the confines of a perplexing judicial regime.

On the one hand, the military court embraces the lawyers. It fully integrates them within its process; it greatly depends on them to maintain the judicial scheme, and the lawyers seem aware of this entanglement. The court engages the lawyers in a professional interaction, constructing an experience of familiarity and mutual understanding about the rules of the legal game, as well as its boundaries. At the same time, the Palestinian defense lawyers will always remain outsiders in this system. They will never truly belong to the community that established the military courts, with which they continuously engage. At the end of the court day, the lawyers—Palestinians and Israelis alike—return to a place, where the external political reality overshadows any real or imagined sense of justice they may have envisioned in the military court.