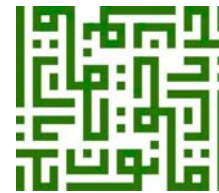




**The Independent Commission
for Human Rights**



ICHR

**The Detention of Civilians by Palestinian Security Agencies
With a Stamp of Approval by the Military Judicial Commission**

**By Advocate
Ghandi Rabie'**

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ICHR addresses:

Main Office

Ramallah- Behind the PLC

in front of Thalasemia Center, P.O.Box 2264

Tel: 00972 2 2987536\ 2986958

Fax: 00972 2 2987211

e-mail: ichr@ichr.ps - www.ichr.ps

Regional Offices

North Office: Nablus
Sufian St.- Allaham Blg. Fl 1
Tel: 00972 9 2335668
Fax: 00972 9 2336408

Gaza and North Office: Khan Younis
Jalal St., Alfarra blg, Fl 4
Above the Arab Bank
Tel: 00972 8 2060443
Fax: 00972 8 2060443

Middle Office: Ramallah
Behind the PLC
In front of Thalasemia Center
Tel: 00972 2 2960241
Fax: 00972 2987211

Gaza Middle and South Office: Al Rimal
In front of the PLC
Behind the Palestine International Bank
Tel: 00972 8 2836632\ 2824438
Fax: 00972 8 2845019

South Office

Hebron
Ras El jora- Hreizat BLG, Fl 1
Tel: 00972 2 2295443
Fax: 00972 2 2211120

Bethlehem
Nazzal Blg, Fl 2 above the Arab Bank
Tel: 00972 2 2750549
Fax: 00972 2 2746885

"Since this matter is beyond the jurisdiction and mandate of the military courts, as stated in article 101 | 2 of the Basic Law: "Military Courts shall be established by special law. Such courts shall not have any jurisdiction beyond military affairs" and since the decision of the Chief of the judicial military commission to detain the defendant constitutes an extortion of power and undermines the plaintiff's personal freedom which is safeguarded by the Basic Law in articles 11 and 12, therefore, the decision to arrest the plaintiff should be made invalid and illegitimate".

Excerpt from the court ruling on case # 156 / 2008 issued on 14/7/2008
by the Palestinian High Court of Justice

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Preface:

This Report entitled "*The Detention of Civilians by Palestinian Security Agencies With a Stamp of Approval by the Military Judicial Commission*" (Hay'et al-Qada' al-A'skari) addresses a phenomenon which has created a clear pattern of human rights violations within the Palestinian-controlled territory in 2008. Highlighting the detention of civilians by security agencies based on decisions made by the Head of the Military Judicial Commission in the West Bank, the Report also focuses on the establishment of the Military Judicial Commission, its powers and tasks according to provisions of the *Revolutionary Law of Penal Procedure of the Palestine Liberation Organization of 1979*. The Report is an outcome of a special, distinctive effort made by the **Independent Commission for Human Rights (ICHR)**. It urges officials and decision makers to cease bringing civilians before military courts and detaining civilians by security agencies upon a stamp of approval by the Head of the Military Judicial Commission.

In addition, the Report discusses absent legal safeguards for persons detained by a decision from the Head of the Military Judicial Commission. Citing several judgments entered by the High Court of Justice, it also explains that all procedures implemented by the Military Justice Authority are null and void and outside the jurisdiction of that authority. In this context, the Report confirms that presentation of civilians before the Military Justice Authority is illegal as it contravenes provisions of the Basic Law. Consequently, an alternative judicial system parallel to the regular civilian judiciary will be in place. According to respective international norms, detentions carried out by the Military Justice Authority are also arbitrary.

Through a number of conclusions and recommendations, the Report urges decision makers to meet their responsibilities. Accordingly, the Executive Authority must respect judicial independence, implement decisions issued by the High Court of Justice, and prevent emergence of a parallel judicial system. The President is also advised to issue clear

directives to the Head of the Military Judicial Commission to cease approval of detaining civilians by the General Intelligence, Military Intelligence, and Preventive Security agencies on arbitrary grounds. Such approval, in the opinion of ICHR, violates provisions of the law.

Issued by the **ICHR** Department of Monitoring Policies and National Legislations, this Report is an embodiment of a distinctive effort jointly produced by various programs of the **ICHR**, particularly the West Bank Program, throughout **ICHR** Regional Offices in the West Bank. To safeguard sound legal procedures and to promote the rule of law, **ICHR** looks to relevant decision makers to adopt recommendations set by the Report and finally terminate the phenomenon in question.

Advocate Salah Mousa

**Director of ICHR Monitoring
Policies and National Legislations
Department**

Introduction:

In light of the events that took place in June 2007 and ended up with Hamas taking over Palestinian National Authority (PNA) institutions by force in the Gaza Strip, the Preventative Security Services (PSS) and the Palestinian General Intelligence (PGI) agencies in the West Bank have conducted arrest campaigns against Hamas members and activists.

In this context, the Independent Commission for Human Rights (ICHR), in its capacity as an “Ombudsman”, has received a number of complaints that show disregard of rules and regulations related to arrest and capture of Palestinians by the PSS and the PGI, and has noticed that measures undertaken were in contravention of provisions of the Basic Law and the Palestinian Penal Procedural Code # 3 of 2001.

The Palestinian security agencies in the West Bank have been regularly conducting detention and arrest of individuals for days, weeks and sometimes months. Some of those arrested are held in solitary confinement without charge or with trivial charges. At any rate, such behavior is seen as a violation of the mandate of judicial capture which is indicated in the Palestinian Procedures Penal Code.

ICHR has received affidavits and complaints that indicate that most individuals held by the PSS and the PGI in the West Bank are not allowed to appear before the civil judiciary and that the civil public prosecution does not know about them. What happens is that the interrogators usually obtain an order from the Chief of the Military Judicial Commission to hold persons for periods of time that could reach to as long as 6 months without any need to even appear before the military court or before the military prosecution.

The fact that the PSS and the PGI and the military prosecution in the West Bank carry out such measures in a repetitive manner is actually a violation of the related Palestinian laws whether the amended Basic Law and/or the Palestinian Penal Procedural Code.

This report is based on 100 cases where the persons involved have been subjected to arbitrary detention by the PSS and the PGI in the West Bank in 2008. The report also sheds light on some important aspects on the process of arresting persons and holding them by permission issued by the Chief of the Military Judicial Commission. In all cases, the concerned individuals or their family members on their behalf have sought the help of ICHR on the matter.

The report is also based on affidavits and follow-ups conducted by the commission from January to September 2008. During this period, ICHR visited a number of detention centers and prisons of the PSS and the PGI in the West Bank. ICHR met more than 30 individuals who had been arrested or met with their family members in addition to meeting their lawyers.

ICHR has appealed to President Abbas by addressing him through a letter including a legal memorandum on 22 May 2008. Another similar legal memorandum was also addressed to the Chief of the PGI, Tawfeeq Atirawi on 19 June 2008. Unfortunately, the decision by the Chief of the Military Judicial Commission to detain civilians endured despite the presidential decision issued on 16 October 2008 to both the Directors and Heads of the PSS and the PGI in the West Bank based on ICHR's legal memorandum, requesting them to refrain from making civilians appear before the military judiciary if they are not proved to be members of armed militias.

This report attempts to discuss this phenomenon and sheds light on its illegality based on applicable Palestinian laws and relevant international human rights principles. After reviewing a number of court rulings and examining the extent of compliance of the governing authorities with these rulings, the report draws out a number of conclusions and recommendations which ICHR wishes to follow up with decision-makers and officials to urge them to take the appropriate steps to respect the rule of law and consolidate law and order within the Palestinian-controlled Territory.

1- A general background on the Military Judicial Commission

The Military Judicial Commission is an extension of the so called revolutionary judiciary related to the Palestinian Revolutionary Forces and the factions under the Palestinian Liberation Organization (PLO). The laws of the PLO constitute the legal foundations of the military judiciary, particularly following the issuance of legislative order # 5 by the Chairman of the PLO's Executive Committee, Yasser Arafat on 11 November 1979¹. The laws regulated the behavior of the Palestinian revolutionary forces in the Diaspora and the other places where they were located. The provisions of the laws were applicable to the military personnel and civilians who committed crimes against the Palestinian revolution.

After the signing of the Oslo accords in 1993, the military judiciary mandate was also applicable to PA controlled areas where military courts were formed and military prosecutors were appointed in all the governorates of the West Bank and the Gaza Strip².

The validation of the revolutionary law of 1979 in Palestinian-controlled Territory does not have any legal or constitutional foundation to retain it. As a matter of fact, various decrees published in the official gazette and the valid laws in Palestinian-controlled Territory such as Decree # 1 of 1995 issued by Chairman Yasser Arafat was very clear in this respect where it was stated in article 1 that "laws and regulations and orders issued before 5 June 1967 shall remain valid in Palestinian-controlled Territory (the West Bank and the Gaza

¹ In 1979, Chairman Yasser Arafat in his capacity as Head of the PLO's Executive Committee issued an order which he dubbed as legislative order # 5 in which he ordered the activation of four laws as follows:

- a- the Revolutionary Penal Procedural Code
- b- The Revolutionary Penal Code
- c- Prisons Law – Correction Centers
- d- Revolutionary Fee Court System

² Dr. Ibrahim Sha'ban, professor of constitutional law thinks that the revolutionary penal code has no constitutional foundation and that Chairman Arafat ordered the validation and continuation of the existing laws that regulated the affairs in the Palestinian –controlled Territory and that there was no reference whatsoever to the validation of the PLO laws. Professor Sha'ban concludes that the basis for governance in Palestine is the rule of law and that all authorities (legislative, judicial and executive), institutions, agencies, establishments and people are all under the law (article 6 of the Basic Law) and that human rights and basic freedoms are binding and should be honored (article 10 of the Basic Law). Additionally, personal freedom is natural, safeguarded and protected and that it is unlawful to arrest, search, imprison, restrict the freedom, or prevent the movement of any person, except by judicial order in accordance with the provisions of the law. The law shall specify the period of pre-arrest detention. Excerpt taken from the website www.amin.org/look/amin/en-section.php where the article was published on 11 June 2008.

Strip) until they are unified”. The presidential decree clearly pinpoints to all the previous rules, regulations and orders that were valid in Palestinian-controlled Territory (West Bank and Gaza Strip), however, since the Revolutionary Code was never valid in the West Bank and Gaza Strip, its application should be seen as a violation of the presidential decree. Perhaps even more assuring is the amended Basic Law of 2003 that put an end to the mandate of courts when it was indicated that in article 10(2) that all “military courts shall be established by special law. Such courts shall not have any jurisdiction beyond military affairs”. The preceding opinion had often been referred to in many court rulings issued by the High Court of Justice which underlined that military courts shall not have any jurisdiction other than military affairs and that they had **no** authority to arrest or detain or extend the detention of civilians³.

Despite the absence of legal and constitutional foundations for Revolutionary Law issued by the PLO in 1979, and our reservations on its applicability in the case of arrest of civilians, ICHR attempts in this report to examine the jurisdiction of the military judiciary as stated in the provisions of the law when it comes to the extent of compliance of the Chief of the Military Judicial Commission and the Palestinian security agencies with the safeguards which should be provided for arrested individuals as stated in the Revolutionary Law and the procedures that should be pursued upon detention and arrest and extension of detention as stated in the provisions of the law. This report clearly shows that despite ICHR’s reservations on applying the law to civilians, security agencies with the approval of the Chief of the Military Judicial Commission, are taking measures which even contravene with the provisions of the Revolutionary Law itself.

1- Powers of the Military Judicial Commission

The Standard Trial Proceedings Revolutionary Code of 1979 indicated the establishment of the revolutionary judicial council– which is currently referred to as the Military Judicial Commission. The Chief of the Military

³ In the same context, ICHR addressed a letter to the Chief of the Military Judicial Commission on 23 November 2008 requesting an appointment to listen to the legal foundations used in arresting civilians. On 24 November 2008, a response to the letter was received in which it was stated that 1) “no civilians were arrested but rather persons who belong to outlawed organizations and members of armed militia that constitute danger to law and order” and 2) “that any procedures taken against these individuals were preventative in order to prevent what had happened in Gaza which was seen as an overthrow of the legitimate authority through a *coup d’etat*”.

Judicial Commission assumes the administrative affairs and directly reports to the Supreme Commander who is also the Chairman of the PLO. He is assisted by the officers of the military judiciary and, according to law, he is entrusted in article 357 to assume the mission of supervising and administering the military prosecution and the military courts in addition to other powers⁴ such as:

- 1- Receiving contest to appeals against the military Attorney General if the defendant contests against the specialty of the court, or not hearing the charges of the case, or dropping the case or even when the case does not require a punishment⁵, or contest the decisions of the military Attorney General whether the decision tends towards indictment or pursuing a trial. ⁶
- 2- Oversight of the detention and allowing an extension for the prosecution after the elapse of the permitted and initial period of detention which is usually 45 days for the military prosecutor and 3 months for the military Attorney General in crimes threatening the security of the revolution⁷.
- 3- Approve the military court's ruling to release by bail whoever is indicted with a felony or a misdemeanor⁸.

Upon revising the above powers and functions, we find out that the Chief of the Military Judicial Commission assumes the oversight and supervision of the military judiciary and can extend the period of detention. However, the Chief of the Military Judicial Commission cannot overrule the powers of the military prosecution that can directly permit the arrest of those accused by the

⁴ The Standard Trial Proceedings Code numerates a number of powers vested in the military judiciary such as:

1- appointment of military judges and their secondment as stipulated in article 116 2- recommend to the Supreme Commander the appointment of a judge for the Central Court and the judges of the military court in permanent session and the judges of the high military court (articles 120, 122 and 124) 3- examine the rebuttals of military court judges (article 144) 4- the examination and settlement of contests of sentences in absentia and appeals and contest applications against cassation rulings issued by the military court in permanent session and the high court and applications for re-trials as indicated in articles 238 paragraph a, 245, and 259 paragraph a & b and article 278 paragraph a – 5- issue orders to try court judges, military prosecutors and approve their arrest if they are accused with felonies or misdemeanors (article 277 paragraph a & b and 278 paragraph a. 6- examine and make decisions in appointing a certain reference (individual) in the event of a dispute between the prosecution or / and military courts or the defendant (articles from 309 until 312. 7- consult with the supreme commander on issues related to amnesty article 352 paragraph b.

⁵ Article 51 paragraph B of the Standard Trial Proceedings Code issued by the PLO.

⁶ Article 106 paragraph B of the Standard Trial Proceedings Code issued by the PLO.

⁷ Article 88 of the Standard Trial Proceedings Code issued by the PLO

⁸ Article 94 of the Standard Trial Proceedings Code issued by the PLO

security services with the knowledge of the military prosecution. Article 88, paragraphs A and B of the PLO's Standard Trial Proceedings Revolutionary Code – despite ICHR's disapproval to apply it on civilians – affirm the necessity of allowing detention and extension of detention conducted through the military prosecution and the Military Judicial Commission acquires a degree of oversight upon extension of detention as a legal safeguard for the accused individuals and prevent the judicial officers to act as they wish when they conduct the arrest. Facts on the ground however, are different because the PSS and the PGI agencies report directly to the Chief of the Military Judicial Commission thus violating the PLO's Trial Proceedings Revolutionary Code of 1979.

Moreover, Article 11, paragraph 2 of the Palestinian Basic Law of 2003 states that it is not permissible to arrest, capture or restrict the freedom of any individual unless by a judicial order and in accordance with the provisions of the law. This means that detention and arrests should rely on legal justification and that the power to do so is clear and specific and should always be based on the law. In the Revolutionary Penal Code, the power to detain is also stipulated by law and is conducted by the judicial police and the military prosecution and **not** by the Chief of the Military Judicial Commission. Moreover, security services seeking the approval of the Chief of the Military Judicial Commission are also preventing the accused individuals from exercising their right for a fair trial which is guaranteed in the Basic Law particularly because the Military Judicial Commission is not the party responsible for detention.

B- Security Services Arresting Individuals Through the Approval of the Military Judicial Commission

Since 2008, the PSS and the PGI in the West Bank have been arresting citizens and interrogating them on crimes punishable by the Trial Proceedings Revolutionary Code of 1979⁹. Detention is usually made by obtaining an approval from the Chief of the Military Judicial Commission without even having to bring the suspects to appear before him.

⁹ The PLO's Standard Trial Proceedings Code punishes a number of crimes such as murder, robbery and other crimes. For more, refer to the PLO's Standard Trial Proceedings Code issued in accordance with legislative order # 5.

Despite the fact that members of the PSS and the PGI enjoy the capacity of the judicial police¹⁰, they have actually violated this privilege by not allowing the suspects to appear before the prosecutors within 24 hours after arrest as stipulated in article 117 paragraph 2 of the Palestinian Penal Procedural Code. It is stated that no one shall be held more than 24 hours, and that the prosecution shall be informed promptly about the arrest. Additionally, Article 105 of the Penal Procedural Code states that “interrogation should start within 24 hours following the appearance of the suspect before the prosecutor who either orders his arrest or release”.

Although the military prosecution should be in charge of the interrogation¹¹ and filing charges¹² as stipulated in the Revolutionary Proceedings Revolutionary Code, it actually never assumes this role but leaves it to the personnel of the security services through the Chief of the Military Judicial Commission. The military prosecution is the party to which complaints by the captured individuals are made to protest against the arrest or inhuman treatment or torture. Hence, individuals held by the security agencies are deprived of a fair trial even under the provisions of the Revolutionary Law particularly when the military prosecution cannot meet the standards of independence and impartiality to carry out its duty according to the law or otherwise be accountable before the Military Judicial Commission. Instead, the Chief of the Military Judicial Commission who should overlook and ensure the legality of the procedures and safeguard persons’ rights according to the law, is the one who issues orders of arrest to the security agencies and permits those agencies to violate the law and set standards of independence and impartiality.

Moreover, absence of oversight by the official and civil establishments also provides the opportunity for the security services to interpret the law to their own favor. For example, ICHR has received a letter from the legal advisor of the PGI agency on 23 June 2008 in response to a letter addressed to the Chief of the PGI, Tawfeeq Atirawi, on 19 June 2008 over the illegitimacy of arresting of civilians by an order issued by the Chief of the Military Judicial Commission in which the following response was given to ICHR: “in line

¹⁰ The general intelligence law # 17 of 2005 has bestowed upon its members the capacity of being judicial police to enable them to carry out their duties in article 12. The decision was also endorsed by President Abbas regarding the powers of the preventative security members in decree # () of 2007 in article 7 so that officers of the preventative security apparatus enjoy the feature of judicial police in accordance with the provisions of the law to enable them to facilitate their duties.

¹¹ Article 41 and what proceeds of the Standard Trial Proceedings Code of 1979 issued by the PLO

¹² Article 105 and what proceeds of the Standard Trial Proceedings Code of 1979 issued by the PLO

with article 83 paragraph C and article 88 paragraphs A & B of the standard Penal Procedural Code of 1979, the Chief of the Military Judicial Commission has the power of arresting and extending the arrest of any individual who threatens the interior or exterior security and safety of the homeland. This applies to the cases of the detention of civilians held by us because the suspects pose a threat to the interior security and safety and the Chief of the Military Judicial Commission has the power to do so especially that these suspects are still under interrogation.”¹³

ICHR also received another letter from the General Intelligence on 26 August 2008 in response to an inquiry by ICHR on the arrest of Khaldon Mathloume, Ahmad Hamayel and Aktham Nassar in which it was stated that their arrest came in accordance with rules and regulations and by the competent legal party. The arrest was approved by the Chief of the Military Judicial Commission who has the power to do so and because they were still under interrogation.

On 17 August 2008, the PSS in Hebron responded to ICHR over the circumstances surrounding the arrest of Jibril Jayawi, Mu'taz Al Ju'beh, Tawfeeq Al Hroub and Awad Al Hroub in which it was stated that the arrest was made in line with the rules and regulations by the Military Judicial Commission.

If we actually refer to article 83 paragraph C and article 88 paragraphs A & B, it is clearly stated in article 83 that the person in charge of approving detention is the military prosecutor, whereas article 88 (paragraphs A&B) states that detention should be initiated by the military prosecutor and then by the Chief of the Military Judicial Commission. But it should be noted that the reference of article 88 paragraph B revolves around the **revolution's security** whereas we refer here to a national authority governed by the Basic Law and other emanating laws.

Moreover, article 79 of the Standard Trial Proceedings Revolutionary Code of 1979 obligates the judicial officers to promptly hear the statements of the accused who should be later referred within 48 hours to the competent prosecutor who in his turn must question the accused within 24 hours and explore the possibility of either holding the accused for more time or releasing him, but this never happens in reality. Additionally, article 98; paragraph B of the Standard Trial Proceedings Revolutionary Code of 1979

¹³ Letter received by ICHR on 23 June 2008 signed by the legal advisor of the General Intelligence.

states that no person shall be made to appear in the court for a criminal case unless the Attorney General or his deputy has already issued a decision to charge him with that crime.

In light of the above, it is clear that the accused individuals must be made to appear before the military prosecution or else all procedures become invalidated. Additionally, holding individuals by the Military Judicial Commission is a violation of the presidential decree disseminated to Directors of the security agencies in the West Bank on 18 October 2008 stating that “no civilian other than those who are members of armed militias or possess arms or store arms and use arms to incur damage to the general order shall be made to appear before the Military Judicial Commission”. The decree is based on an earlier legal memorandum issued by ICHR. Cases available to ICHR clearly indicate that most of the individuals arrested by the security agencies after the approval of the Chief of the Military Judicial Commission were civilians who were never charged with membership to the so called “armed militias”.

Article 356 of the Standard Trial Proceedings Code of 1979 specifies that “the Palestinian revolutionary judiciary is an institution of the PLO and has its own prosecution, courts, correction centers and other branches according to revolutionary legislation”. Hence, forcing civilians by the security agencies to appear before military courts is illegal. The security services were formed as a result of laws emanating from the PNA and cannot be regarded as apparatuses of the revolution. The Chief of the Military Judicial Commission cannot impose a parallel judiciary and undermine the foundations of the rule of law. He cannot institutionalize an overlap between the PNA and the PLO apparatuses. The PNA institutions have their own laws and regulators that formulate the framework of the three authorities, the legislative, the judicial and the executive represented in the Basic Law.

C- The Legitimacy of Presenting Civilians to the Military Judicial Commission

The procedures followed in military courts as stipulated in the Standard Trial Proceedings Revolutionary Code of 1979 constitute a violation of international law and human rights standards which officials in the PNA need to honor due to the PNA 's commitment to abide by the amended Basic Law of 2003 where its is stipulated in article 10 that " Basic human rights and freedoms shall be binding and respected and that the Palestinian National Authority shall work without delay to join regional and international declarations and conventions which protect human rights. It should be noted that the Universal Declaration of Human Rights and the International

Covenant of Civil and Political Rights guarantee the right of individuals for litigation and protect safeguards for a fair trial – facts which are absent in the Palestinian military judiciary because it is deemed as an exceptional form of judiciary.

Additionally, procedures – stipulated in the PLO's Standard Trial Proceedings Revolutionary Code of 1979 - related to remanding or extending the period of arrest by the Military Judicial Commission which demands certain rules in scrutinizing the crime or upon selecting the competent court or when it comes to court's procedures or endorsement of a sentence or trying certain crimes or trying certain individuals, these procedures constitute a violation of the Penal Procedural Code of 2001 which contains general standards applicable to all individuals and to every crime. The military procedures also violate Article 101 paragraph 2 of the amended Basic Law of 2003 which stipulates that "military courts shall be established by special law and that such courts shall have no jurisdiction beyond military affairs". Consequently, the jurisdiction of the military judiciary is restricted to military personnel only. It is by extending this jurisdiction to civilians that the ordinary judiciary is excluded and is deemed as a transgression on the principles of justice and equality which have been affirmed in article 9 of the Palestinian Basic Law where it is stipulated that "All Palestinian are equal under the law and judiciary without discrimination based on sex, race, religion, political views or disability".

Furthermore, ICHR views the referral of civilians to the Military Judicial Commission as contravening with the special principles of the judiciary in the amended Basic Law of 2003 and contravenes with article 30, paragraph 1 where it is stipulated that "Litigation is a protected and guaranteed right to all people. Each Palestinian shall have the right to find his sanctuary in the legal system". However, the military judiciary has no foundations of the legal system because it is part of the Executive Authority and all of its judges are subservient to the Law of Civil Servants in the Security Agencies of 2005.

2- High Court Rulings on Detaining Civilians With a Permission Granted by the Military Judicial Commission¹⁴

In many of its rulings, the Palestinian High Court of Justice has affirmed that detaining civilians by the Military Judicial Commission is a violation of the Palestinian Basic Law as well as the Penal Procedural Code and that all

¹⁴ Article 33 paragraph 3 of the formation of regular courts # 5 of 2001 grants the right to the Palestinian high court of justice to examine requests of release of individuals who have been illegally held.

detentions are invalid and should be revoked. The rulings also called for the immediate release of the detainees.

On 2 November 2008, the High Court in Ramallah ruled in favor of the immediate release of Amjad Othman Al Hammouri¹⁵. In the ruling, the court said:

"On this matter, the court finds that article 1 of the presidential decree # 1 of 1994, which is still valid and issued by the Chairman of the PNA, stipulates that "All laws and regulations that were issued before 5 June 1967 shall remain valid in the West Bank and the Gaza Strip until they are unified in both regions (West Bank and Gaza)". Additionally, Law # 5 of 1995 came to compliment and affirms Law # 1 of 1994 where it is stipulated in article 1 that "all powers vested in laws, decrees and legislation and valid in the West Bank and Gaza before 19 May 1994 shall be referred to the PNA". Article 4 of the same law also states that all laws that contravene the provisions of this law shall be revoked. Moreover, Article 485 of the Penal Procedural Code # 3 of 2001 which has replaced all other previous penal codes, should be the applicable code with regards to searches, seizure, detention and referral and not as it is claimed by the public prosecutors' office in its response to the court that all detention procedures have been met in accordance with articles 83 and 88 of the standard trial proceedings code of 1979 which is not even valid in Palestinian-controlled Territory. By applying the law on the facts available in this case and the submitted evidence and because the ruling or the contested procedure in question here has been issued against the defendant who has not been proved to be a member of any military security party and no evidence has been presented to this end and because the law that should be applied on accused civilians is the Penal Procedural Code # 3 of 2001, then the decision should be invalidated. Additionally, the Palestinian Basic Law has restricted the jurisdiction of the military judiciary to the military affairs only, as stipulated in article 101 "such courts (military) shall not have any jurisdiction beyond military affairs" therefore the decision or / and the detention of the plaintiff and his continuous detention by the party complained against here is seen as an unjust condition emanating from incompetent party – a fact that makes it invalid and should be revoked. For these reasons, the court decided to promptly release the defendant in the military court and free him from detention unless he is detained for any other charge".

¹⁵ Although the court's ruling was loud and clear, the general Intelligence agency is still holding Al Hammouri and refrains from executing the court order.

In another ruling issued on 14 July 2008, the High Court of Justice in Ramallah ruled the prompt release of detainee Al Miqdad Abu Jheisha. In the ruling, the court stated that the plaintiff was a civilian detained by the PSS since 14 June 08, who instead of being made to appear before the prosecution within 24 hours after his detention, in accordance with article 34 of the Penal Code which deals with investigation of crimes and settle them as stated in article 55 of the same code, the PSS has asked the Chief of the Military Judicial Commission to detain the plaintiff, who then issued an order to detain the plaintiff for a period that does not exceed 6 months. This matter, as highlighted above, is beyond the jurisdiction of the military courts in accordance with article 102 / 2 of the Basic Law which stipulates that "*military courts shall be established by special laws and they shall not have any jurisdiction beyond military affairs*". Consequently, the decision of the Chief of the Military Judicial Commission to detain the plaintiff should be deemed as extortion of power and undermines the personal freedom of the plaintiff which is safeguarded by the Basic Law in articles 12 & 13 and therefore the decision to detain him is invalid and illegitimate.

Despite the clear and decisive position of the High Court of Justice on the issue of civilians detained by the military judiciary, the Chief of the Military Judicial Commission still issues orders of detention thus undermining the integrity of the civilian judiciary and violates the rights and freedoms of Palestinian citizens. ICHR monitored a process of procrastination by the security services and registered a number of complaints regarding the refrain of the PSS and the PGI to implement the rulings of the High Court of Justice thus affirming to ICHR that both the PGI and the PSS have gone beyond their jurisdiction and have notably violated the law and undermined the constitutional standards and principles indicated in the Basic Law affirmed in article 106 in which it is stated that "*Judicial sentences shall be implemented. Abstention or suspension of implementation in any manner shall be considered a crime that qualifies for imprisonment, or dismissal from position, if the accused individual is a public official or servant. The plaintiff may file his case directly to the concerned court, and the National Authority shall guarantee him full compensation*".

3- Arbitrary Detention

For the detention to be considered legal and not arbitrary, it is essential to have sufficient evidence upon which the indictment for a committed crime is based. Additionally, it is important to provide concrete objective elements that support that the detainee has actually committed that crime. If the crime

was not witnessed by judicial police, the public prosecution is the competent party to issue the arrest warrant.

When a citizen is accused of committing a crime, detention is not an automatic procedure because it is not a penalty as much as a precautionary measure. The Palestinian Penal Procedures Law requires the quick appearance of detainees before the public prosecution within 24 hours from the time of detention, and requires the public prosecution to take the detainee to court within 48 hours. The court considers and decides on the prolongation of the detention and is competent to extend the detention for a period of 15 days or order the release of the detainee. During this period, the law allows the defendant to file a request for release on bail.

The review by ICHR of the circumstances surrounding the detention of individuals, the way the arrests are conducted , and the procedures applied during the arrest and detention reflect that persons are detained without trial for a period sometimes reaching to six months only upon the decision of the Chief of the Military Judicial Commission. This is a long period of time during which persons are detained without trial and without the basic procedural rights guaranteed by the Palestinian Penal Procedures Law, and is a grave violation of article (14) of the amended Palestinian Basic Law which stipulates that the "*defendant is innocent until proven guilty by a legal court of law that guarantees the defendant the right to defend him/herself. Each individual accused of a crime should have a lawyer to defend him/her.*" Article 12 of the amended Basic Law of 2003 also stipulates that "*any individual who is arrested or detained should be informed of the reasons for the arrest or the detention quickly in a language that is understandable to him/her and that he/her can call a lawyer and be taken to trial without delay.*"

Arbitrary detention starts with the absence of a legal justification for the deprivation of freedom and the detention, and/or takes place in violation of safeguards for a fair trial. This is the conclusion reached by the UN Working Group on arbitrary detention when it determined that detention is considered arbitrary in the following situations:¹⁸

- A) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty.
- B) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, such as the right

¹⁸ Journal of Working Group on arbitrary detention number 26: <http://www.ohchr.org/Documents/Publications/FactSheet26ar.pdf> accessed on 26/8/08.

to equality before law, the right to freedom of opinion and thinking, the right to form peaceful organizations, the right to participate in public affairs and to assume public office, and the right to freedom of movement.¹⁹

c) If the international norms of fair trial are violated.²⁰

The PGI agency has, in violation of these legal procedures and standards, arrested Ameer Dahbour in Qalqilya on 16/8/2008 after allegedly searching his house without presenting him with a search warrant. The PGI held Dahbour for 17 days upon the decision of the Military Judicial Commission without presenting him before any party that is competent to look into the legality of his detention.

In another incident, the Hebron Directorate of PGI agency arrested Maher Sabarneh on 14/8/2008 after summoning him to appear before the Directorate on 13/8/2008. Sabarneh confirmed that from that date until the 19/8/2008, the date of ICHR's visit to the detention center of the PGI in Hebron, he did not appear before the public prosecution or any other judicial authority. Sabarneh was not informed about the party that had ordered his detention. ICHR discovered later that Sabarneh was being held upon the authorization of the Chief of the Military Judicial Commission.

On 18/9/2008 ICHR received a complaint from Mr. Fareed Abu Sa'dah. In the complaint Mr. Abu Sa'dah indicated that his brother Mir'eb Abu Sa'dah from the village of Allar in the Tulkarem Governorate was arrested and detained by the PGI agency since 24/8/2008 without appearing before a competent judicial body. ICHR received a reply on 9/10/2008 from the PGI stating that Mr. Mir'eb Abu Sa'dah had been released on 28/9/2008 by the Chief of the Military Judicial Commission.

¹⁹ Articles referred to from the Universal Declaration of Human Rights are 7,13, 14, 18,19,20,21 and articles 12, 18, 19, 21, 22, 25, 26 and 27 of the International Covenant on Civil and Political Rights

²⁰ The international norms for free trial in the pre-trial phase are: 1- The right to personal freedom. 2-The right of the detainee to access information related to circumstances of his/her detention. 3- The right to solicit the services of a lawyer before trial. 4- The right to contact with the external world. 5- The right to appear without delay before a judge or any other judicial officer. 6- The right to appeal the legality of detention. 7- The right to a fair trial within a reasonable period of time or release. 8- The right to a certain period of time and sufficient facilities for the preparation of a defense. 9- The existence of guarantees and safeguards for the detainees throughout the interrogation phases. 10- The right to humane conditions during detention and protection against torture.

ICHR also received on 4/8/2008 a complaint from Mohammad Al Hroub stating that his brother Tawfeeq Al Hroub was arrested on 19/7/2008 by members of the PSS while on his way to his shop in Deir Samet town west of Hebron. Since his arrest, according to the complaint received by ICHR, Tawfeeq's family received no contact or information about the place of his detention. ICHR followed up on his case and discovered that Mr. Tawfeeq Al Hroub was detained upon the authorization of the Military Judicial Commission.

In all the cases followed by ICHR, most of the people detained by the PGI and the PSS informed us that they were detained upon a decision by the Military Judicial Commission. They also stated that throughout their detention period they did not appear before the military or civil public prosecution. As such, the guarantees and the rights guaranteed by the Basic Law, the Palestinian Penal Procedures Law, and the international criteria and norms of human rights relating to the right to a free trial are violated in the following manner:

a- Guarantees relating to questioning and pressing charges

The Palestinian legislators linked the process of questioning and pressing charges with safeguards that guarantee the freedom of the defendant during interrogation. These safeguards are derived primarily from the Palestinian Basic Law²¹. Questioning can only take place if the full freedom of the defendant was guaranteed throughout it, with space for discussion and refuting evidence guaranteed. Questioning is one of the initial interrogation procedures and also constitutes a means for defense.

When judicial police officers are informed of a grave crime, they should promptly inform the public prosecutor and implement his/her instructions and procedures firmly and precisely. When a defendant is arrested by police officers or other security forces, the judicial police should listen to the defendant's statements made upon his/her arrest. If the judicial police was not convinced of the defendant's statements, they should transfer him/her within 24 hours to a competent public prosecutor.

²¹ Article 14 of the amended Basic Law of 2003 stipulated that a defendant is presumed innocent until proven guilty through a legal trial that guarantees him/her the right for defending him/herself. Every individual accused of a crime should have a lawyer to defend him/her. Article 12 of the amended Basic Law of 2003 stipulates that any individual who is arrested or detained should be informed about the reasons for the arrest or detention, and should be informed promptly in a language that he/she understands of the charges brought against him/her, and that he/she can call a lawyer and should be brought to trial without delay.

For the questioning to be considered legally sound-as one of the initial interrogation procedures- it should include the following elements:

- 1- Confirm the identity of the defendant, and confirm his/her personal data, in terms of name, age, profession, place of residence and his/her features and characteristics when the defendant is questioned for the first time during the interrogation.
- 2- Define clearly the concrete incidents of which the defendant is accused and determine their legal designation.
- 3- Confront the defendant with the recorded evidences against him/her and discuss them with him/her in detail. The interrogator may confront the defendant with the actual evidence if it doesn't harm the interrogation.
- 4- Invite the defendant to present his/her defense and to bring forward evidence of his/her innocence.

Article 105 of the Palestinian Penal Procedural Law stipulated that questioning should take place within 24 hours from the date of transferring the defendant to the public prosecutor who ordered his/her arrest or be released.

Given the gravity of conducting the questioning, the Palestinian legislators bounded this process by several safeguards:

1. The public prosecutor should question the defendant on all criminal accounts brought against him/her and on all felons for which the prosecutor deems questioning as necessary. The public prosecutor should not assign a judicial police officer to conduct the questioning of a defendant in his/her place.
2. Questioning should take place under conditions that do not influence the will of the defendant. For the questioning to be considered legally sound, the defendant shall be kept away from any external influences that undermine his will or spoil his/her confession. If a condition existed that might influence the will of the defendant during his/her questioning in such a manner that his/her statements are not given by full free will, the questioning will be considered null and void and cannot be used as a legal basis for further actions.
3. The public prosecutor shall inform the defendant of all charges brought against him/her and shall inform the defendant that anything he/she might say could be used against him/her in a court of law.
4. The right of the defendant to ensure the recording of his/her statement in the questioning transcript.
5. The right of the defendant to remain silent and not answer questions addressed to him/her. The defendant is free to choose the time and the manner in which he/she expresses his/her defense. The defendant

has the right to refuse to answer questions addressed to him/her. Refraining from answering in this case should not be considered as evidence of being guilty of the charges pressed against him/her.

6. The defendant shall have the right to postpone the questioning for 24 hours until his/her lawyer is present. If the lawyer did not show up or if the defendant changed his/her mind about contracting a lawyer, then questioning can take place immediately.²²
7. The right of the defendant's lawyer to access the investigation conducted prior to the questioning.

In a manner that violates these safeguards, the PGI in Hebron Governorate arrested on 21/7/2008 the citizen Raed Odeh from the Arroub Refugee Camp. Odeh was transferred to the PGI's interrogation center and remained in a detention center for 40 days. He did not appear before any judicial body on accusation of his affiliation with Hamas movement.²³ On 22/9/2008, the Chief interrogator within the PGI office in the Hebron governorate told the ICHR's researcher that the aforementioned citizen was released on 1/9/2008 on personal bail and after signing a pledge to refrain from any actions that might prejudice or undermine security and public order.²⁴ ICHR sees in this not only a circumvention of the safeguards related to questioning, which is the competence of the public prosecution, but also an attack against the judicial authority as the PGI has taken responsibility to regulate release on bail which is solely the competence of the judiciary.

²² Article 98 of the Palestinian Penal Procedural Law stipulated that the public prosecutor may question the defendant prior to summoning his/her lawyer if the defendant was caught red handed or there is a need to accelerate the process for fear of loss of evidences ,provided that the justifications for accelerating the procedures are duly recorded in the questioning transcript. The lawyer shall have the right to review the statements made by the defendant once questioning is completed. One can conclude from this article, that the legislators guaranteed the defendant important safeguards in terms of the defendant's right to accept questioning only in the presence of his/her lawyer. Calling the lawyer to be present during the questioning is also another safeguard to the benefit of the defendant. As such the defendant may relinquish this right openly and in advance and he/she shall have the right to reverse this relinquishing of his/her right and ask for his/her lawyer to be called again. The principle in this case is that the role of the lawyer is passive during the questioning. Article 102 (2) of the Palestinian Penal Procedural Law stipulates that "the lawyer shall not have the right to speak during the questioning except when authorized by the public prosecutor. Should the public prosecutor refuse to grant the lawyer authorization to speak, the incident shall be recorded in the interrogation transcript. "

²³ Complaint by Raed Kahled Hassan Odeh filed with the ICHR on 19/8/2008 during the Commission's visit of the Intelligence Service interrogation center in the Hebron Governorate.

²⁴ Interview conducted by ICHR's researcher with the Chief interrogator at the Intelligence Service offices in the Hebron Governorate on 22/9/2008.

This also happened in the case of Hassan Badawi from Beit Ummar who was arrested on 14/8/2008 by the PGI. He was detained upon the authorization of the Military judicial Council on the charge of political activism²⁵, and was later released on 30/8/2008 on personal bail and after signing a pledge not to undermine security and public order.

In a third case, a PGI agency in Qalqilya Governorate arrested Mustafa Sabri on 31/7/2008, as stated to the Commission by his brother Issa Sabri. He was detained at the detention center of the PGI in Qalqilya until 13/8/2008 without appearing before the civil prosecution since he was transferred on that day to the military prosecution.

In another case, the Preventive Security Agency in Hebron Governorate arrested Mr. Munther Al A'dam from Tarqoumia on 11/9/2008. Interrogators charged him with possession of weapons and affiliation with Hamas movement without any supervision from the public prosecution as stated by Mr. Al A'dam himself. He did not appear before the public prosecution and was not aware of the identity of the party that ordered his arrest.²⁶ Mr. Al A'dam remained in detention until 24/9/2008, the date of ICHR's visit to the PSS detention center in Hebron Governorate, deprived of his basic rights, even those rights stipulated by the Revolutionary Law on the Standards of Court Proceedings of 1979.²⁷

In the majority of cases reviewed by ICHR, the detainees, held by authorization from the Military Judicial Commission confirmed that they did not appear before the civil or military prosecution and that the interrogation and the pressing of charges was done by interrogators from the PGI and the PSS without any observance of legal procedures.

²⁵ The complaint by Hassan Ahmad Mohammad Badawi filed with ICHR on 19/8/2008 during the Commission's visit to the interrogation center of the GI in the Hebron Governorate.

²⁶ Complaint filed with ICHR by Munther Sadeq Mohammad Al A'dam on 24/9/2008 during the Commission's visit to the Preventive Security interrogation center in Hebron Governorate.

²⁷ In his explanatory memo, the head of the Revolutionary Judicial Panel Brigadier General Mohammad Ar Rousan stated that when the Revolutionary Law on Standard Court Proceedings of 1979 was issued, article two of the law titled "Freedom of defense for the defendant stipulated that the law provided for many safeguards to protect the innocents and to avoid judicial mistakes aiming at ensuring and upholding respect of individuals' basic freedoms it also regulates solidly the guarantees for defense and allows the defendant to actually use all means, rights, and legal and material privileges granted by the law. These guarantees are binding or otherwise the procedures are deemed null and void and so is the verdict that is based on them.

b- Family visits and contact with the external world

The minimum standards of handling prisoners allow defendants to immediately inform their families about their detention. All reasonable facilities shall be made available to the detainee to contact his/her family and friends and to enjoy visits by them.²⁸ Principles related to the protection of individuals who are subjected to any form of detention or imprisonment confirmed the right of the detained individual to visits by his/her family members and to sufficient opportunities to contact the external world²⁹. The Palestinian Penal Procedural Law acknowledges the right of a detainee to contact his/her family³⁰ and to have visits whereas banning visits is within the mandate of the prosecutor and can be done for interrogation purposes only. Despite that, the PGI and the PSS do not allow prompt communication with family members, thus violating the previous legal principles and provisions.

On 20 September 2008, ICHR received a complaint from Ms. Nida' Raí in which she confirmed that on 16 September 2008, her husband Jalal Al Rai was detained by the PSS. She tried to visit him in the headquarters of the PSS in Hebron but was prevented from doing so although she was allowed to leave some clothes for him³¹.

In another affidavit, Mohammad Al Awawda said that his son was detained by the PGI in Hebron on 1 September 2008. He tried to visit but was not allowed until after 12 days following his detention and was only permitted to see him for a short time³².

ICHR has received numerous requests from detainees held by the PSS and the PGI and sanctioned by the Military Judicial Commission to visit their beloved ones. The absence of judicial oversight over the performance of the PGI and the PSS has allowed for the expansion of powers of both the PGI and the PSS in violation of nationally and internationally acknowledged standards which guarantee the rights of the detainee to family or advocate visits and communication with the outside world.

²⁸ Article 92 of the minimum model standards for treating prisoners adopted by the UN Conference to prevent crime and handle prisoners that took place in Geneva in 1955.

²⁹ Principle 19 of the principles related to the protection of individuals who are subjected to any form of detention and imprisonment that was endorsed by a decision of the UN General Assembly in 1988.

³⁰ Article 123 of the Palestinian Penal Procedural Law.

³¹ the complaint by Nida Al Rai filed on 22 Sep 08

³² Compliant filed by Mohammad Al Awawda on 15 Sep 08

c- Legal assistance to detainees

In most of the cases followed up by ICHR, detainees held by the PGI and the PSS through the Military Judicial Commission complained about not having a lawyer and that very few of them actually were allowed to be represented by lawyers.

Although Palestinian laws affirms the right of lawyers to carry out their duties, the Palestinian penal code³³ also obligates interrogators to show the lawyers the results of the investigation in a complete manner to acquaint them with the procedures of the investigation and the concluded evidence in order to facilitate the duty of defending the accused.

Despite that, lawyer Ahmad Al Khatib, one of the lawyers representing a number of detainees held by the security services, said that they would not allow him to conduct a free visit to his clients in contravention of the penal code.

Another lawyer Abdil Karim Farrah complained to ICHR about being denied access to his client in contravention of the international standards and the basic principles of the Basic law.

ICHR has also noticed during its visits to the detainees that most of them were not represented by a lawyer because they were told that their detention was short and that they would be promptly released.

On 11 September 2008, ICHR received a complaint from Abdo Al Haimouni in which he said that on 9 September 2008 at about 12:00 midnight, a number of PGI members detained his son Mohannad, a student at the polytechnic university. The father was told by the officer in charge that he wanted to speak to his son for 5 minutes³⁴. Ironically, ICHR lawyers have not been able to meet with Mohannad until 22 September 2008, the date of the visit, but were told that the interrogation has not yet been completed.

4- Accountability and compensation for arbitrary detention

The Palestinian Basic Law safeguards personal freedom and asserts that *"Each aggression committed against any personal freedom, against the private life of a human being, or against any rights or freedoms which have been guaranteed by the law or by this basic law, shall be considered as a crime. Criminal and civil case resultant from such infringement shall not be*

³³ refer to article 102 / 3 of the Palestinian penal code of 2001

³⁴ compliant filed by Abdo Al Haimouni on 11 Sep 08

*subject to any status of limitation. The National Authority shall guarantee fair indemnity for those who suffered from such damages*³⁵. Moreover, Article 247 of the penal revolutionary code of 1979, applicable to the members of the security agencies, states that anyone who detains or imprisons any person for any case other than those cases indicated in the law shall be punished by at least 6 months imprisonment.

Additionally, the Jordanian Criminal Law #16 of 1960 – valid in the West Bank – stipulates that no person can detain or imprison another person other than the authority that is mandated for this duty. Article 178 states that “*any person who detains or arrests another person under conditions other than what is indicated in the law shall be punished by imprisonment for 3 months to one year*”. In article 179, it is stated that “[...] *approving detention without a judicial order or warrant, or being kept in prison after the imprisonment period by the prison wardens or the correction centers or any public servants on behalf of the prison wardens shall lead to imprisonment for a period of time running between one month and one year*”.

International human rights law obligates the payment of compensation for any violation of personal freedom and safety. The International Covenant for Civil and Political Rights affirms compulsory compensation for a person who has fallen victim to illegal and unrighteous detention³⁶.

Despite these principles and standards, the victims of arbitrary detention and violations of legal procedures in the Palestinian-controlled Territory cannot obtain any indemnity for the damage incurred on them. The military prosecution which is the party responsible to follow up the complaints against military personnel from the PGI and the PSS is subservient to the Chief of the Military Judicial Commission who gives the authority and the permission for the security agencies to detain individuals.

The civil courts also refuse to file cases against military personnel who commit crimes such as torture, ill-treatment and abuse of power etc. claiming that filing such cases does not fall under their jurisdiction. On the other hand, victims of arbitrary arrest and detention do not refer their cases to civil courts, for much consideration and are satisfied with filing their complaints to ICHR.

³⁵ article 35 of the Amended Palestinian Basic Law of 2003

³⁶ article 9 / 5 of the International Covenant of Civil and Political Rights

Conclusion:

- 1- All the procedures undertaken by the Military Judicial Commission including the detention of civilians by the security agencies contravene with the Revolutionary Law, the Basic Law and the Penal Procedural Code #3 of 2001. This has been re-affirmed by the numerous rulings of the High Court of Justice.
- 2- According to the UN definition of arbitrary detention, it is clear to ICHR that all those detained upon a decision by the Chief of the Military Judicial Commission have suffered arbitrary detention including the assault on their personal freedom and the undermining of their basic rights which are guaranteed in the Palestinian Basic law.
- 3- ICHR has noticed that a kind of a parallel judiciary has been emerging in the West Bank with political sponsorship since the Gaza events and the forceful armed control of Hamas in the Gaza Strip. This will lead to the undermining of the whole justice system if the Military Judicial Commission continues to encroach on the powers of civil judiciary.
- 4- ICHR has also noticed that despite numerous decisions made by the High Court of Justice and the rulings issued by the court confirming the illegality and incompetence of the Chief of the Military Judicial Commission to detain civilians; hence ordering their immediate release, security agencies continued to arrest civilians and have not implemented the decisions of the High Court of Justice.
- 5- ICHR has also concluded that the Military Judicial Commission has violated the Revolutionary Law of 1979 - the legal reference point for the Military Judicial Commission - in approving the arrest and detention of civilians by the security agencies. The Military Judicial Commission violated the provisions of the law and has reached as far as non-compliance with the instructions of the President who is deemed the Supreme Commander according to the revolutionary law. The reference here is made to a memo addressed to the directors of the security services in the PSS and the PGI to stop making civilians appear before the Military Judicial Commission apart from exceptional cases.

Recommendations:

- 1- The executive authority must do more to honor the independence of the judiciary by implementing the rulings of the Palestinian High Court of Justice and preventing the emergence of a parallel judiciary by sending clear instruction from the President to the Chief of the Military Judicial Commission asking him to refrain from approving the detention of civilians by the PSS and the PGI in an arbitrary manner and in contravention of the provisions of the law.
- 2- All detainees held by the PSS and the PGI must be allowed to appear without delay before the regular judiciary, which is the party originally responsible for these cases in order to examine whether there is a good reason to still hold or release them.
- 3- The prosecutors need to assume their responsibility for detaining, arresting, interrogating and extending the detention of individuals in their capacity as judicial officers in accordance with the provisions of the law.
- 4- The PLC committee for rights and freedoms needs to be reactivated in a manner that will guarantee the practice of real oversight on the performance of PSS and the PGI.
- 5- Civil society organizations need to establish legal assistance programs in cooperation with the Palestinian Bar Association and in partnership with ICHR to provide legal assistance for arbitrarily detained victims.