



# **Inquiry into the Israeli Military Court System in the Occupied West Bank and Gaza**

Report of a Mission

by

Jordan J. Paust, United States  
Gerhard von Glahn, United States  
Günter Woratsch, Austria

INTERNATIONAL COMMISSION OF JURISTS

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## Preface

At the request of Al-Haq, the International Commission of Jurists' affiliate in the Israeli Occupied Territory in the West Bank, the Commission decided to send a mission to study the working of the military justice system in the West Bank and Gaza.

We were fortunate in persuading three distinguished international lawyers, to undertake the mission, namely

- Professor Jordan J. Paust, University of Houston Law Center, Houston, Texas,
- Dr. Gerhard von Glahn, Professor Emeritus in Political Science, University of Minnesota-Duluth, Minnesota, and
- Mr. Justice Günter Woratsch of the Federal Court of Appeals in Vienna, and President of the International Association of Judges.

We are deeply grateful to the participants for carrying out this mission for two weeks in June and July 1989, and for the fair and objective report they have prepared on this subject following an energetic and strenuous mission.

The report is essentially a factual report on the justice system, in most cases accompanied by conclusions and recommendations. When they find practices which appear to them to violate international human rights law, they state so clearly.

The participants are deeply concerned about the continuing reports of mistreatment and torture of suspects during interrogation, and point out that this violates human rights and the law of war and constitutes a criminally sanctionable war crime.

They were also 'deeply concerned' about the inability of defence lawyers to visit their clients until after interrogation and the "confession". They recommend that 'attorneys be given access to an accused at an early

date and that no person be held for more than 48 hours without a judicial warrant or formal charges and access to a court. This recommendation is in accordance with international penal law.

They were told that some 95% of alleged security offenders "confess" and defence lawyers complained that most confessions are the result of mistreatment or torture. The mission recommended greater corroboration of confessions.

Defence attorneys also complain that the charges are often inadequate and they are unable to obtain details until the hearing of the plea (if then), and some charge sheets are in a language the accused cannot understand.

The mission made numerous recommendations for improving the treatment of arrested persons in accordance with the Geneva Conventions and other international law.

Other subjects on which the mission made recommendations include family visits, review and dismissal by the prosecutor, bail, hearing on pleas, sentencing on guilty pleas, the newly created Military Appeals Court, the role of the Supreme Court, administrative detention (ie. without charge or trial), and quasi-judicial tribunals.

The International Commission of Jurists is deeply grateful to the Ford Foundation Cairo Office for funding this project.

*Niall MacDermot*  
Secretary-General

International Commission of Jurists

December, 1989

## **Background of the Mission**

On 12 February 1989, Al-Haq (Law in the Service of Man), the West Bank affiliate of the International Commission of Jurists based in Geneva, Switzerland, requested the Secretary-General of the International Commission to organize a mission to the West Bank and the Gaza Strip. The mission was to study and report on the military justice system in the occupied territories in question. The stated reason for the request was the deterioration observed in the operation of the military court system, particularly since the onset of the Intifada (Uprising) on 9 December 1987. The Secretary-General approved the above request and on 26 May announced the composition of the mission:

- Professor Jordan J. Paust, University of Houston Law Center, Houston, Texas,
- Dr. Gerhard von Glahn, Professor Emeritus (Political Science), University of Minnesota-Duluth, Duluth, Minnesota,
- Mr. Justice Günter Woratsch, Federal Court of Appeals, Vienna, Austria, and President of the International Association of Judges.

The mission spent two weeks (from 25 June to 9 July, 1989) in the West Bank, the Gaza Strip and Israel; it was based in East Jerusalem. A large part of the local arrangements, appointments, and documentation services was supplied by the Al-Haq staff or set up by phone contacts with Israeli officials, especially the Deputy Legal Adviser in the Ministry of Foreign Affairs.



## **Object of the Mission**

Secretary-General Niall MacDermot of the International Commission of Jurists defined the mandate of the mission by letter (26 May 1989) to each member of the mission as "to study and report on the military justice system in the occupied territories in the West Bank and Gaza Strip." The precise scope of the study undertaken was determined by consultation among the members of the mission and with the Secretary-General and Mr. Raja Shehadeh, Co-Director of Al-Haq.

Members of the mission agreed that the study of the military court system in the Israeli-occupied territories should include an analysis of applicable international law instruments; appropriate references in the body of this report to adherence to or violation of rules laid down in such instruments, as found in the operations of the court system; and a coverage of the practice of administrative detention (viewed as being associated with the formal military court system).

## **Methods Utilized by the Mission**

A major source of information was lengthy trial observations in military courts in Ramallah, Nablus and Gaza City. On each of seven mornings either two or three of us witnessed hearings or trials in the courts, accompanied by trilingual interpreters supplied by Al-Haq, Law in the Service of Man. In addition to observations, we discussed procedures and problems with military judges, military prosecutors, and Palestinian defense lawyers involved in the observed proceedings.

We interviewed, and in a few cases were briefed by, the Advocate General of the Israeli Defense Forces (IDF) and his international law section chief; the Legal Advisers for the West Bank and for the Gaza Strip (including members of their staff); the Presidents of the Military Courts in Gaza, Nablus and Ramallah; the President of the new Military Appeals Court; the President of Israel's High Court of Justice; several military judges in Ramallah, Nablus and Gaza; military prosecutors in Gaza and Ramallah; the commander of the military prison in Gaza (known as Ansar 2), several members of his command, and three Palestinian juveniles held in the

prison; representatives of the Quakers' Legal Aid, of the Israeli Association for Civil Rights (ACRI), of the International Committee of the Red Cross (ICRC), of the Arab Lawyers Committee in the West Bank and the Gaza Bar Association, and of Arab lawyers who had been on strike since the start of the occupation in 1967; several Arab defense lawyers in Ramallah, Nablus and Gaza; a number of Palestinian ex-detainees; and in particular staff members of Al-Haq, the West Bank affiliate of the International Commission of Jurists. The Al-Haq office in Ramallah also supplied us with a massive accumulation of printed and typed material, including key military orders, the Israeli "Landau Report" on certain practices found to exist in military interrogation procedures, reports by active as well as by striking Arab defense lawyers, numerous Al-Haq publications, and the texts of certain relevant international agreements. The final two days of our mission were devoted to developing a detailed outline of this report and to allocating to the individual members of the mission responsibility for drafting specific sections of this report after reaching their home bases.

## **The International Humanitarian Law Applicable to Military Courts During Belligerent Occupation**

The rules applicable to belligerent occupation have been developed over the past ninety years and today form an important segment of international humanitarian law. Two among the instruments that we accept as standards by which to evaluate the Israeli military court system we deem to be especially important: the Regulations annexed to the 1907 Hague Convention No. IV Respecting the Laws and Customs of War on Land (hereafter cited as Regulations) and the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, of 12 August 1949 (hereafter cited as G.C.). The most pertinent parts of the Regulations are Articles 42-56, in particular Articles 42 and 43, the latter referring to the law-making authority of a military occupant.

We agree with most States as well as the Israeli courts that the Regulations are a part of customary international law.<sup>1</sup> As such their provisions represent binding obligations on *all* States and belligerents. The cited provisions above therefore apply to the territories "occupied" by Israel within the meaning of customary international law reflected in article 42 of the

annex to the 1907 Hague Convention, which states: "Territory is considered occupied when it is placed under the authority of the hostile army." These territories include the West Bank and Gaza.

The 1949 Fourth Geneva Convention (G.C.) also applies to the Israeli-occupied territories. The applicability of the G.C. to the West Bank and the Gaza Strip has been affirmed by the United Nations<sup>2</sup>, the International Committee of the Red Cross<sup>3</sup>, and most States<sup>4</sup>.

The Israeli government ratified the G.C. on 10 April 1951, but from the beginning of the 1967 military occupations profoundly different interpretations were expressed by Israel's government and the International Committee of the Red Cross (and many States) concerning the applicability of G.C. to the Israeli-occupied territories. Israel's position was and continues to be that the wording of the G.C. did not lead to its applicability to every situation of belligerent occupation, specifically not to territory that had not been under the sovereignty of another High Contracting Party.<sup>5</sup> On the other hand, Israel has stated repeatedly that the "humanitarian provisions" of the G.C. would be observed.<sup>6</sup> We have been unable to locate any formal official Israeli statement as to the precise nature of these humanitarian provisions, but the entire G.C. is held by the I.C.R.C. and most States to be a part of the humanitarian law of war. Nonetheless, when questioned by members of the mission, the Advocate General of the IDF admitted that Articles 47-78 of the G.C. are among its relevant "humanitarian provisions" and he added that these were being applied or complied with by the IDF.

It appears obvious to members of the mission that territory not belonging to a state but newly controlled and occupied by its armed forces during an armed conflict of an international character is "occupied" territory within the meaning of customary international law. In the situation under consideration, even if the West Bank and the Gaza Strip had been merely areas occupied by other states prior to the 1967 war, they would still be occupied territories within the meaning of both customary law and the G.C. (and any customary portions thereof).

The second paragraph of Article 2 of the G.C. does not pose ownership as a stated qualification where reference is made to "territory of a High Contracting Party." Paragraph 2 may thus include occupied territory of such a party, and perhaps territorial possessions, trust territories, administered territory, or a mandated territory.<sup>7</sup> More importantly, the second paragraph of Article 2 of the G.C. (with or without any supposed distinction among territories) is merely an alternative to paragraph 1 of Article 2, either of which acts as a threshold "for the entry into force of the Convention."<sup>8</sup> As Pictet noted in his authoritative comment, the second paragraph "was intended to fill the gap left by paragraph 1" and "does not refer to

cases in which territory is occupied during hostilities... [but] only refers to cases where the occupation has taken place...without hostilities."<sup>9</sup> With respect to "territory...occupied during hostilities," he added, "in such cases the Convention will have been in force since the outbreak of hostilities...and any occupation carried out in wartime is covered by paragraph 1."<sup>10</sup> Stressing that "no loophole is left," Pictet noted further: "In all cases of occupation, whether carried out by force or without meeting any resistance, the Convention becomes applicable to individuals."<sup>11</sup>

We also note that there is no distinction in the Fourth Geneva Convention between hostilities (or belligerent occupations) that are defensive or offensive, just or unjust, non-aggressive or aggressive.<sup>12</sup> It is also important to note that it is the applicability of such international laws governing occupation that authorizes certain powers for the occupying forces that they would not otherwise possess.<sup>13</sup> If rights of the population are not legally effective, then it cannot be that the exercise of occupying powers is legally permissible or effective. Legally, the two must coincide. They reflect a complementarity of purpose and legal policies at stake.<sup>14</sup>

It has been asserted, concerning the subject matter of our study, that "it has from the very first been the declared policy of the State of Israel that its military and civil organs abide by the humanitarian provisions of the Hague Regulations and the Fourth Geneva Convention of 1949 as if they were binding and applicable. And whenever the question arose in the courts of Israel...the position invariably taken by the government and by the military commanders was that those provisions of the Hague Regulations and of the Geneva Convention should be followed."<sup>15</sup> Furthermore, General Staff Order No. 33.0133 (20 July 1982) commands that "All IDF soldiers are required to act in accordance with the provisions included in" the Geneva Conventions.<sup>16</sup> It therefore appears that all military prosecutors and judges, as well as commanders, are under orders to comply with and to assure compliance with Articles 47-78 of the Fourth Geneva Convention and that they are not to take any action inconsistent with the provisions of that instrument.

Israeli courts have also applied provisions of the G.C. as standards authorizing certain powers exercised by Israel in the occupied territories,<sup>17</sup> but, on the other hand, several Israeli courts have refused to apply rights under the Fourth Geneva Convention.<sup>18</sup>

In view of what has been noted above, Israel also appears to be estopped to deny the applicability of the humanitarian law of war as laid down in the Hague Regulations and the Fourth Geneva Convention of 1949.<sup>19</sup>

We wish to point out that certain other international instruments will be mentioned in this report because they repeat or reinforce the standards

laid down in the Regulations and the Fourth Geneva Convention of 1949 for the operations of a military court system under belligerent occupation (even though Israel is not a party to all of the agreements in question). Among these additional instruments are the Universal Declaration of Human Rights (1948), now regarded by many commentators as having acquired the status of customary international law and, at a minimum, as reflecting the basic human rights norms referred to in obligations set forth in articles 55(c) and 56 of the U.N. Charter (which Israel has ratified); the 1966 International Covenant on Civil and Political Rights, signed but not ratified by Israel;<sup>20</sup> the 1969 American Convention on Human Rights; the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms; the 1981 African (Banjul) Charter on Human and Peoples' Rights; and the 1977 Additional Protocol to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), of which Israel is not a party (a listing of the relevant provisions of the foregoing international instruments, as they relate to the subjects of our investigation, is found in the text and footnotes to this report).

While it is true that Israel has not become a party to all of the above international agreements, we agree that their relevant provisions, especially when they coincide, represent international standards by which, in the present instance, many aspects of the operations of a military court system under occupation can be evaluated. At a minimum they are useful juridic aids for interpreting the evolving content of custom and the due process guarantees of the Geneva Conventions and human rights guaranteed by the U.N. Charter.

## **The Israeli Military Court System in the Occupied Territories**

### **A. Origin and Structure**

A belligerent occupant is entitled by Article 66 of the Fourth Geneva Convention of 1949 to establish "properly constituted, non-political military courts" to enforce regulations in territory under his belligerent occupation.<sup>21</sup> This right was well-established in international law and practice

long before the 1949 Diplomatic Conference which drafted the Fourth Geneva Convention.<sup>22</sup>

The establishment of military courts and the publication of penal provisions are sanctioned under international law as methods by which a military occupant enforces law and order in occupied territory. The military courts operated by Israel in the occupied territories of the West Bank and the Gaza Strip were founded in part on the *Defence (Emergency) Regulations* issued by the British Mandate Government in Palestine in 1945<sup>23</sup> and, to a far greater extent, in the Israel *Proclamation No. 3* and its annexed *Security Provisions Order (SPO)*, issued by the respective Area Commanders. That initial Order has since been amended and expanded by over a thousand Military Orders (MOs). Among the latter, MO No. 378, West Bank (1970) and its counterpart for the Gaza Strip possess particular importance. The Military Orders are not published by the occupation authorities in an official gazette or in the press. They are distributed, sometimes quite long after their date of issue, to lawyers on what has been claimed to be a limited scale. Inasmuch as many MOs represent amendments of earlier ones, it seemed to us that it would be difficult for persons not members of the IDF to trace regulations issued on a specific topic.

The lack of prompt and adequate publication in the local language appear to us to be a clear violation of G.C. Article 65, which reads:

The penal provisions enacted by the Occupying Power shall not come into force before they have been published and brought to the knowledge of the inhabitants in their own language.

Similarly, we feel that Section 3 of Military Order No. 225 (1968), which states that "ignorance of the law or [a] security enactment does not afford any excuse," is incompatible with the requirement of G.C. Article 65 that such provisions be "brought to the knowledge of the inhabitants in their own language."

## **B. Military Courts of First Instance<sup>24</sup>**

Israel's military court system in the West Bank and Gaza operated, at the time of our visit, on two levels created by MOs: the Military Courts (courts of first instance) and the new Military Appeals Court. The Supreme Court of Israel, sitting as the High Court of Justice, had to be considered as a relatively seldom used apex of the system, but was, of course, not created as such by any Military Order.

Military courts of first instance (hereafter military courts) operated in Nablus, Ramallah, and Gaza City, with satellite courts (open several days each week) in Jenin, Hebron, Kalkilya and Tulkarem. At the direction of the President of the Courts, court sessions could also be held elsewhere. In general, the courts in Nablus and Gaza City seemed to be more formal than the one-judge court in Ramallah. Despite years of occupation, the courtroom used by a single judge seems to be a temporary building with little space for witnesses, the typical rows of ten or twenty accused brought in from buses or the tents, and the two or more remaining rows for the few family members allowed inside the gate and then inside the courtroom. Although prosecutors and judges wore casual uniforms, defense counsel are under orders to wear formal attire beneath long, black judicial robes, making their attire far more inappropriate in summer and in non-air-conditioned buildings. The holding areas for accused in Ramallah and Nablus are crowded but seem humane compared to the dark cell-like room in the Gaza City military court area.

The military courts are empowered to try all offenses connected with security as defined in MOs. Military Order No. 3781 of 1970, as amended (Order Concerning Security Instructions - Judea and Samaria) lists more than 30 specific security offenses subject to the jurisdiction of the military courts. Some of the offenses listed appear to be above criticism, dealing with security problems encountered quite probably by any belligerent occupying force. Others however, in our view, contain such overly-broad language that enforcement could embrace a wide spectrum of indigenous and permissible activity. An early example, found in MO No. 101, of 27 August 1967, prohibits "a congregation of ten people or more in a place where a speech is heard on a political subject or on a subject which can be interpreted as a political subject or who are gathered for the purpose of deliberating on such a subject." According to one Palestinian lawyer, a judge of the military court in Ramallah once remarked that a large Palestinian family, of over ten persons discussing politics at the dinner table, would be violating the MO in question. MO No. 378 (1970) also prohibits "insulting behavior" toward any IDF soldier (Article 65) and contains the overly-broad prohibition of "any act likely to disturb the peace or public order" (Article 68).

In addition to security offenses, the military courts may try criminal offenses that may become security offenses, such as non-prevention of offenses, threats, distributing pamphlets, inciting to riots, providing false information, or disobeying a military commander's order to supply information. The courts may also deal with offenses affecting the military justice system directly, such as escape from legal custody, perjury, disorderly be-

haviour in court, failure to answer a summons to appear in court, and contempt of court.

The jurisdiction (and apparently a significant caseload) of the military courts also includes a number of economic offenses, including failure to make prescribed payments (including income taxes) to the occupation authorities, bribery of public officials, customs fraud, negligent damage to governmental or military property, as well as procuring, and trading in, military equipment. There exist also certain specific offenses linked to security that are tried in the military courts: looting (cf. G.C. art. 33), entering or leaving a specified area without a permit, incitement and hostile propaganda, illegal contacts, and the illegal closing of businesses during political strikes.<sup>25</sup> It can be seen that several of the above categories are again of a nature which permits rather broad interpretation by a military judge and significant potential for misuse and abuse.

The courts of first instance may also deal with a large group of offenses based on the occupant's right and duty under the Hague Regulations of 1907 to restore and to ensure the "civil life" (*la vie publique*) as required by Article 43 of the Regulations. Examples of this kind of jurisdiction, as defined in a number of MOs, are Preservation of Holy Places (MO No. 163), Abandoned Property (MO No. 58), Traffic Law (MO No. 399, as amended), and Parks (MO No. 373).

Technically the Military Courts have jurisdiction over all criminal cases. According to Article 2 of the Jurisdiction in Criminal Offences Order (as amended) of 25 June 1967:

A Military Court shall be competent to try any criminal offence in accordance with the laws in force at the time such offence was committed, whether the offence was committed before or after the Israel Defence Forces entered the Region.

Article 3 of that Order reads:

Every criminal offence shall be deemed to be an offence against the Security Provisions Order, whether or not jurisdiction to try such offence is exclusive to a particular court or tribunal.

Finally, courts of first instance may shift a trial for a claimed security offense from a local Palestinian court into the jurisdiction of the military courts. We were told by several defense lawyers that such decisions to remove a case from a local court were reportedly based on unpublished internal guidelines existing within the military court system and that such



guidelines were based, in turn, on policy directives of the General Security Service (the Shin Bet). On the other hand we were told by one military judge that such transfers of cases from local courts to the military courts were extremely rare. The matter can be summarized as follows: the military courts have concurrent jurisdiction with local Palestinian courts in criminal cases in general, but enjoy exclusive jurisdiction in all instances in which a security question is invoked. In an undisclosed manner, knowledge of what could be classified as security violations coming into the local courts reaches the military system in time to have the case in question moved into the jurisdictional sphere of the latter. The entire procedure appears to be in conformity with G.C. Article 66, even though several defense lawyers decried it as an illegal interference with the work of the local courts.

According to the Advocate General of the IDF, as quoted in the *Jerusalem Post* of 12 June 1989, the military courts had tried over 13,000 residents of the occupied territories between the beginning of the Intifada (Uprising) on 8 December 1987 and 11 June 1989.

It should be kept in mind that while the jurisdiction of the military courts technically includes Israeli citizens, in practice it does not. Under Israeli law, Israeli citizens are under the law of their country even if residing in the occupied territories or committing offences therein. Those individuals are tried in Israel by domestic courts under domestic law. Similarly, members of the Israeli Defense Forces who commit offenses in the occupied territories are tried by courts-martial in Israel.

### C. The Military Appeals Court

A Military Appeals Court became a part of the Israeli military court system on 1 April 1989 through the provisions of MO No. 1265 (Order Regarding Security Instructions - Amendment No. 58, of 1 January 1989). The establishment of this court appears to have been the result of years of effort by Arab lawyers to fill an important gap in the military court system. The actual creation of the Appeals Court, we were informed, was the result of a High Court of Justice ruling on a petition by an East Jerusalem lawyer (Darwish Nasser) who had asked the Court to instruct the IDF to establish a court of appeal.

The new court, which sits alternately in Ramallah and Gaza, will only hear cases involving sentences in excess of five years' imprisonment. Persons convicted by a single-judge military court must petition to have their appeal heard, while those convicted by a three-judge court may appeal di-

rectly. The President of the Court serves as chairman of any panel on which he sits; if he is not on the bench, he told us, he selects another career legally-trained judge to serve as chairman and his deputy generally hears cases in Gaza.

The Military Appeals Court sits as a court of three, except (a) if the sentence being appealed is a death sentence; (b) when the President of the Court so decides; or (c) if the Chief Military Prosecutor considers that there is a need for a larger bench. In those instances, a five-judge bench will be used. (See also below for details on the early operations of the Military Appeals Court).

### D. Judges

The judges serving in military courts are either regular (career) or reserve officers in the IDF called up for service to fill the office of judge. In the Military Courts (of first instance) lesser offenses are handled in one-judge courts staffed by an officer trained in the law; serious offences are tried in three-judge courts staffed by at least one legally qualified judge and one or two other IDF officers. Two full-time career judges are assigned to each of the three permanent Military Courts in Ramallah, Nablus and Gaza: one serves as Chief Justice (or President) of the Court, the other as Chief Military Prosecutor. There are, in addition, five or six judges who are in the reserves. Prosecution before any Military Court is conducted by a Military Prosecutor, legally qualified, who belongs to the Advocate General section of the IDF. He, too, may be either a career or a reserve officer. In addition to judges and prosecutors, Military Courts are staffed by clerks (military) and by translators/interpreters (military). The latter are discussed briefly in a subsequent portion of this report.

As far as the new Military Appeals Court is concerned, judges are similar in military status and legal training to the judges in the Military Courts. The President of the Appeals Court informed us that in a three-judge court, at least two of the judges must be trained in the law and that in a five-judge tribunal at least three judges must be so trained. All these judges, just like those in the Military Courts, can be removed by the Commander of the IDF; the President of the Military Appeals Court insisted that no such removal had taken place since the beginning of the occupation in 1967. He also stated that the lowest rank of any military judge is Major, involving then at least ten years of service in various legal assignments.

One question raised on several occasions by Arab defense lawyers dealt with the independence of the military judges. The lawyers in question

expressed doubts that such independence existed, in view of the military status of the judges who, without any doubt, were serving as officers in the IDF. The lawyers maintained that military officers, bound to enforce and apply military regulations laid down in the Military Orders, could not be expected to be independent in fulfilling their judicial duties. On the other hand, a number of the military officials (including judges) with whom we raised this issue insisted equally strenuously that they were indeed able to act with independence as professionals, adding that no authority gave them any advice on decisions. And the President of the new Military Appeals Court stated that in his view that court assisted in protecting the independence of Military Court judges by being able to send a given case back to the court of first instance in question for purposes of a rehearing. He also stated that it was his belief that the military judges retained their independence, even though all of them were connected administratively with the office of the Military Advocate General of the IDF. Prosecutors, however, do not act independently but follow the advice and orders of their superiors within the Advocate General's chain of command.

Two of the members of the mission felt that there was another problem connected with the employment of reserve officers as military judges; this, however, by oversight, was not put by them to the judges interviewed. The problem was related to the obvious fact that the reserve lawyers/judges performing their required duties had been, in many cases, engaged in the practice of law other than criminal, while the bulk of the cases tried in the military courts had to do with security matters, i.e., criminal matters as far as the military forces were concerned. Hence the question arose: did the legal training (both within and outside of the military) and practical experience of the reserve officer/lawyer in a non-criminal sphere of law suffice to enable him to function effectively as a reservist judge in essentially criminal law cases. Personally, we found no military lawyer or judge to be of questionable competence and we were generally impressed with the level of competence of those that we met. Further, as noted by the Advocate General and confirmed (at least in part) by other officers, all military judges must be approved by a special committee (composed of members of the Israeli Parliament, the High Court and the Israeli Bar Association) and the Advocate General (who is himself appointed by the Minister of Justice, not the Minister of Defense).

## Arrests

Military Order No. 378 allows any Israeli soldier to arrest any person who has committed or is suspected of having committed any "security offense."<sup>26</sup> Functionally, such an arrest can occur without an initial warrant and can last for a period of 18 days before it is extended by a military judge. Under the military order, any arrestee can be held without a warrant for up to four days and the period of detention can be extended for another seven days upon the "warrant" of a police officer, who can merely assert that an "investigation" is in progress. If needed, another police officer "warrant" can extend the period of detention another seven days (for a total of eighteen days from the time of arrest). A military judge must approve extensions of detention beyond the initial eighteen day period, but the military judge can extend detention without charges for a period of six months. This extension "hearing" can take place in the jail or in a prison facility. It appears that most Palestinians arrested in the occupied territories are arrested by the military. Further, most of those arrested for security offenses have been arrested at the scene of a disturbance or nearby, in their homes during the night, or in military compounds after having been summoned for questioning.<sup>27</sup>

According to Israeli sources, more than 35,000 persons have been arrested for security offenses in the occupied territories since the beginning of the Intifada in December, 1987.<sup>28</sup> Most of those arrested for security offenses have been young Palestinian males and the most common offense seems to involve stone throwing, a breach of public order. The age of criminal responsibility under Israeli law, which has been extended to the territories, is 12, although it appeared to members of the mission that most minors accused or convicted of security offenses were males from 14 to 18 years of age. Apparently all women detainees are incarcerated inside Israel because of a claimed absence of suitable facilities in the occupied territories.

In Gaza City, the commander of the prison camp known as Ansar 2 stated that in that facility there were some 110 persons from 15 to 16 years of age, some 30 of whom were serving their sentences in the prison tents. Members of the mission interviewed three such persons. All of the 15 to 16 year olds were together and were separated from adults, with the exception of one or two adult prisoner supervisors, although pre-trial and sentenced detainees were not separated.<sup>29</sup> The prison camp commander in Gaza also stated that they were receiving some 10 to 15 persons per day. In Gaza, members of the mission also saw the sentencing of a young person

who had pleaded guilty to acts of stone throwing and tire burning when the accused had been 13 years old (at the start of the Intifada in December, 1987).

According to the Legal Adviser for the West Bank, there were some 5,200 persons being held, mostly in tents, when members of the mission visited his office. Some 850 were said to be prisoners serving their sentences, and there were some 1,500 administrative detainees (held without charges). Different figures were provided by other military personnel, although they did not appear to include administrative detainees. The President of the Military Appeals Courts for the West Bank and Gaza, sitting in Ramallah, stated that there were some 3,500 persons arrested and awaiting trial in the West Bank. The Advocate General of the Israeli Defense Forces (IDF) indicated that there were some 3,500 persons detained in a pre-trial phase and some 7,000 persons in a "trial" phase. The President of the Military Courts in Gaza added that they had finished 1,500 cases in the last six months. Reflecting earlier figures, the 1989 U.S. Country Report cited an IDF accounting of "5,656 Palestinians being held in prisons or detention centres" as of November 18, 1988.<sup>30</sup> It is apparent, then, that the number of persons being held in a pre-trial and trial phase has probably doubled in the first part of 1989.

The President of the Military Appeals Court also stated that some 2,000 cases had been tried in the military courts in May and June of 1989 to alleviate problems posed by delays in reaching the plea and trial stages. The Legal Adviser for the West Bank also acknowledged that when there is an overflow of local detainees, such persons are sent to Megiddo (inside Israel) and Ketziot (in the Negev desert inside Israel). Administrative detainees (held without charges) are also sent "originally and initially" to Ketziot. In Gaza, Ansar 2 can accommodate 1,100 prisoners according to the camp commander. No sentenced adults are in Ansar 2, members of the mission were told, and they are sent to Ketziot to serve their sentences.

According to the President of the Military Appeals Court, most of those arrested for security offenses are "caught red handed" by soldiers and are taken to the police. There the arresting soldiers give testimony and the police ask those arrested for their reaction. The President of the Military Courts in the West Bank added that in most cases the "confession" is taken by the police and that it can be written in Hebrew or Arabic depending upon the abilities of the police. According to the Legal Adviser for the West Bank, most interrogations are conducted by the police.

This was confirmed by the military prison camp commander in Gaza, who stated that most of the detainees there are brought in after interrogation by the police, but those accused of more serious offenses (such as fire-

bombing or membership in an illegal organization) go to Gaza prison for interrogation. Police interrogations can take place at the Gaza military camp, with extremely small holding sheds and interrogation rooms in sight and earshot of (and very close proximity to) military prison facilities. Yet the prison camp commander stated that police interrogations occurred outside his area of responsibility (and under the responsibility of a police commander). We were told that some are arrested elsewhere along the Gaza strip and do not arrive at the military camp for some 24 hours. Yet a member of ACRI (the Israeli Association for Civil Rights) in Tel-Aviv complained of the "loss" of some persons in the Gaza area for "maybe two days" in a police station. The ICRC (International Committee of the Red Cross) is also concerned about persons being held for long terms in police stations, apparently for interrogation. In Gaza, some defense lawyers also complained of military interrogations (and mistreatment or torture of arrestees) before the police interrogations, even with respect to more ordinary security offenses—but they added that young rock throwers are usually interrogated in the Gaza area quickly by the Army and that they are not interrogated by the security services (the Shin Bet). The Advocate General of the IDF also confirmed that most security offenses are rather ordinary (such as rock throwing) and that interrogations of such suspects will be conducted by the police or military. More serious offenses, however, usually result in interrogation by the Israeli security services (the Shin Bet).

Further, as the 1989 U.S. Country Report notes, "detainees are often not told the reasons for their detention."<sup>31</sup> Palestinian defense attorneys in Gaza reported that perhaps 4 to 10 percent of the arrestees get "written reasons" for their arrest and that since the intifada most are not even told why they are arrested at the time of arrest or in the military camp before interrogation. The typical detainee, according to these lawyers, first learns of the reasons for his arrest during interrogation. The same attorneys stated that if an accused is arrested close to the family, family members are not told why the person has been arrested. Similar complaints are made by defense lawyers in the West Bank, some of which appear in a formal statement of January 1, 1989, addressing the reasons for a lawyers' strike earlier this year.<sup>32</sup> When members of the mission interviewed the three minors held at Ansar 2 in Gaza, each stated that they did not learn of the reason for their detention until interrogation and the drafting of charges.

Additionally, under relevant military orders, it is possible to have a "secret" arrest of an individual for up to eight days. An arrest can be kept secret for a period of 96 hours if authorized by a military judge, for example, if demanded by "reasons of local security or the interests of the investigation." Such a period can "be extended periodically as long as the to-

tal of periods does not exceed 8 days."<sup>33</sup> In Gaza, the Legal Adviser informed members of the mission that a judge reviews such orders after the first four days (e.g., after the first 96 hours).

Earlier, complaints were commonplace that those arrested were "lost" for several days or weeks. Still common are complaints from family members and others that they do not know where an arrestee is taken until notice of his whereabouts is obtained through contacts with other prisoners and their families or attorneys, and this can still take days or weeks. Military personnel do not notify families of an arrest, nor the whereabouts of a detainee, a point complained about also in the West Bank lawyers' strike statement of January, 1989.

After twelve years, the ICRC was able to supplement such an informal network of information because of an agreement with the government of Israel. Under the arrangement, the IDF is supposed to inform the ICRC, within 12 days of arrest, of the name of any detainee and the ICRC is supposed to be able to visit each detainee from the territories no later than 14 days after arrest (and to see such persons without witnesses). The Red Cross can then add the names to their computers and the families can and do call to find out whether a relative has been arrested and/or the whereabouts of such a detained person. Sometimes the family calls the Red Cross first in the hope that by giving the name of their relative to the ICRC the Red Cross can more easily affirm needed information and obtain access to the detainee. In general it is assumed that the information network is accurate for Gaza but lacks appropriate accuracy in the West Bank, perhaps due to less organizational effort by the military there or the existence of more secret arrests. Once located, the ICRC can also visit a detainee up to two or three times per week and information can be passed on to family members orally. In Gaza, the prison camp commander indicated that the ICRC visits the tents each week for one day, starting at 10:00 a.m., and that the ICRC delegates can visit specific prisoners upon request two or three times per week. Yet, the President of the ICRC has complained recently that there are "a number of places of detention to which the ICRC does not yet have access."<sup>34</sup>

Military Order No. 1220 of 1988 finally provided families the right to be informed "without delay" of the whereabouts of the detained person, unless such person requests otherwise or, under Military Order No. 378 for the West Bank (or its equivalent for Gaza), there has been a "secret" arrest. The Advocate General of the IDF stated that postcards are now to be made available to every detained person from the time of arrest and that these can be used (with free postage) by a detainee to inform family members of his arrest and whereabouts. Members of the mission saw and obtained one

such postcard from the children's tents in Ansar 2 (see Appendix A). The card is less than 4 x 6 inches and has writing in English, Hebrew and Arabic concerning sender and address information on one side (including spaces for "Detainee no." and "Identity card" number) and some ten lines for writing on the other side. The Advocate General added that, under court order, the military would have to disclose the name and whereabouts of any person detained by the IDF.

The Legal Adviser for the West Bank stated that the cards are provided by the military not at the time of arrest but at the military prisons. It had been left to each detainee to decide whether or not to fill out the card, but about one month before the mission's visit the Legal Adviser had instructed the prison commanders in the West Bank to assure that a card was completed for each detainee. The instruction was repeated about a week prior to the mission's visit. The Legal Adviser for Gaza also stated that the cards are provided to each person once they reach the military prison. He did not know what happens from the time of arrest until the detainee reaches the military prison. He also indicated that the prisoners usually only send out some 30 cards out of a thousand and that they use them for recreation (e.g., to make playing cards), points confirmed by the prison camp commander at Ansar 2 in the same detail. A defense attorney in Gaza also stated that the cards are provided after interrogation, although another defense attorney stated that personally he had never heard of the existence of such cards or the sending of letters. In seeming agreement, the prison camp commander at Ansar 2 stated that each prisoner receives a card when he arrives and that some 300 cards are given to each tent (with each tent housing some 28 people on cots). Members of the mission were told that in no case had the guards misused the cards or denied the right of a detainee to use such a card.

Members of the mission are not aware of the existence of any possibility for a detainee to communicate with others by card, letter, phone, or otherwise until after interrogation and arrival at a military prison camp. Phones are not available to a detainee even then. If interrogation is extended beyond 14 days, however, the ICRC should be able to gain access to a detainee, but not the detainee's lawyer or any member of his family. The 1989 U.S. Country Report noted that family members are not notified of detainee arrests and that attorneys "are actually not allowed to see clients until after interrogations are completed."<sup>35</sup> The Report added: "Officials at times have declined to confirm detentions to consular officials who have inquired on behalf of nationals of their countries."<sup>36</sup>

An encouraging development is the use by the IDF of computers to track criminal files. Not only should the computers aid the military in



avoiding unnecessary hearing and trial delays, but use of computers can also aid in the processing of detainees and proper notification to family members. It is even possible for the IDF to process a detainee by name and number, including (as the cards indicate) a detainee's identity card number and address information, and to exchange this information with the ICRC for more immediate networking with the families and their attorneys. It should also be possible for the police to process and share such information.

The Advocate General of the IDF seemed open to the use of computers for more immediate notification to families and attorneys. He expressed some concern about the similarity of certain names, but use of detainee numbers, identification card numbers and other information should be of help to both the military and those seeking notice of arrest and the whereabouts of a detained person. Such information is vital to the proper defense of those going to trial in a matter of days or weeks after arrest and interrogation. The Legal Adviser for the West Bank also stated that there are computers in each military prison but that the computers are not yet linked "on line" and that information is brought twice a week to a central terminal for access by others. At the military courts in Nablus, there was also a recently installed computer system for tracking files, but the system was not in use when members of the mission visited. Similarly, there was one computer in use in the court secretary's offices in Ramallah. In Gaza, members of the mission were told that all detainees in control of the military were in the computer files and that the secretary of the military courts places all files into a computer for use there, including the name of any defense attorney known to be representing a detainee. In general, it was the impression of members of the mission that the military is much more organized along these lines in Gaza.

"Despite improvement in record keeping," the 1989 U.S. Country Report added, "the authorities had difficulty keeping track of all detainees."<sup>37</sup> Defense attorneys also still complain about inadequate information concerning the location of their clients, especially in the West Bank.

In general, there are numerous complaints of mistreatment or torture of Palestinians during the arrest phase (*i.e.* before interrogation). Earlier, there had also been complaints of an official policy to mistreat arrestees, including the "breaking of bones."<sup>38</sup> We were informed by Israeli military officers that if such had ever been a policy it has been stopped and that soldiers are being prosecuted for engaging in such activity in the past. Members of the mission, along with much of the world, had seen instances of the "breaking of bones" on television prior to coming to the Middle East, but we were unable to confirm or deny continued reports of mistreatment

at the time of arrest. Reports by other organizations confirmed earlier instances of excessive force and beatings and raised serious concerns about the lack of effective controls within the Israeli military and the lack of adequate civil remedies and criminal sanctions against perpetrators.<sup>39</sup>

While the mission was in the Middle East, a four year old boy was detained, with his father, in the West Bank and a date set for trial some ten days later. The child had apparently made a "V" for victory sign and cried out "PLO." The father might have had to pay a criminal fine for the boy's actions (despite the fact that the child could not be criminally responsible), but charges were later dropped.<sup>40</sup> The Legal Adviser for Gaza told members of the mission that a military order allows the "control" of parents because of the conduct of their children and that criminal fines or bonds (or "guarantees"), after a hearing, are possible.<sup>41</sup> He also indicated that the matter is on appeal to the Israeli Supreme Court, having been challenged, we were told, under precepts of democracy, prohibitions against collective punishment, and Jewish values (e.g., the principle that guilt must be personal). We also heard of the misuse of power in order to arrest family members. For example, we heard that the identity cards of parents had been taken in order to entice their children to come to police stations or other facilities for retrieval, at which point they would themselves be arrested.<sup>42</sup>

### *Concerns, Conclusions and Recommendations*

Human rights law guarantees freedom from "arbitrary arrest or detention."<sup>43</sup> In this regard, we are concerned about the broad range of possible "security offenses" under Israeli military orders and the large number of persons arrested for "security offenses" since December of 1987. We understand from several sources that the typical case involves alleged stone throwing, but the recent case of the four year old boy and his father demonstrates how "arbitrary" and unfair arrests can be under the circumstances. We have also heard allegations of arbitrary arrests involving the arrest of any teenager in the vicinity of an incident, mass arrests, and arrests for political purposes.<sup>44</sup>

We propose that the IDF take more seriously its responsibilities under human rights and Geneva law by refining in more detail the types of security offenses it seeks to respond to and that relevant IDF commanders and their legal advisers make greater effort to assure (through directives, training and otherwise) that persons arrested are in fact reasonably accused of having committed a security offense. The fact that occupation has existed

for some twenty-two years is an added factor with respect to the need for greater normalization of offenses and arrest procedures.

In this regard, we are also greatly concerned about the possible and alleged misuse of power under Military Order No. 378 which establishes procedures for arresting a person up to 18 days without access to a judge or lawyer. We find that such a procedure smacks of potential impropriety in connection with both the arbitrariness of arrests and delayed and improperly coercive interrogations. We recommend that, as under ordinary Israeli law, no person be held without a judicial warrant or formal charges and access to a court for more than 48 hours. Under Article 71 of the G.C., accused persons must be "promptly" informed, in writing, of the particulars of the charges against them. We feel that the 18 day procedure is generally incompatible with the spirit of the Geneva requirement that accused persons be promptly informed of charges against them and generally be treated with dignity and given due process of law. Under Article 9 (4) of the 1966 Covenant on Civil and Political Rights, anyone arrested or detained "shall be entitled to take proceedings before a court in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful." We feel that the 18 day procedure is incompatible with the spirit of Article 9 (4) of the Covenant and should be abandoned.

Under Article 9 (2) of the 1966 Covenant, anyone arrested is to be "informed, at the time of arrest, of the reasons for his arrest."<sup>45</sup> We have heard numerous complaints that this is not done and we note that the 1989 U.S. Country Report declares that detainees "are often not told the reasons for their detention."<sup>46</sup> We consider any such failure to be a violation of human rights law and we urge appropriate IDF commanders and their legal advisers and police officials to take effective action in order to assure compliance. We also request, as a humanitarian measure, that families also be informed promptly of the reason(s) for the arrest of a member of their family—if possible at the time of arrest and later when a family member inquires or through expanded use of the postcards. Under paragraph 92 of the U.N. Standard Minimum Rules for the Treatment of Prisoners,<sup>47</sup> "an untried prisoner shall be allowed to inform immediately his family of his detention and shall be given all reasonable facilities for communicating with his family and friends." Article 25 of the G.C. also requires that all persons in occupied territory "shall be enabled to give news of a strictly personal nature to members of their families wherever they may be, and to receive news from them."

We also find the use of "secret" arrest procedures to be thwarting of the dignity of an accused and his or her family, and to smack of potential

impropriety. Section 702 of the *Restatement of the Foreign Relations Law of the United States* declares that a state violates customary international law if it "practices, encourages, or condones... causing the disappearance of individuals." It is in the dark of secrecy that evil can lurk. We are of the opinion that secret arrests are far too incompatible with the rule of law and humane treatment to be maintained. We understand that the inclusion of the military judge in secret arrest procedures is probably meant to provide a check on impropriety, but we feel that there is too great a danger of compromising the role of a judicial official in a democratic society to maintain the practice of secret arrests.

For several reasons noted above, we also recommend that the ICRC be given the names and whereabouts of *all* detained persons within 48 hours of arrest and that the Red Cross be given access to *all* such persons and earlier than 14 days. We recommend that the same sort of information be made available to any family member or appropriate attorney or foreign consular official. In this regard, there should be an adequate networking of police and military computers. We applaud the use of postcards in the military prisons and the initiative of those military officers who make sure that a card is filled out and sent for each prisoner.

With respect to the location of detained persons, it is clear that certain Israeli practices violate the Geneva Conventions. Under Article 76 of the G.C., all those accused or convicted "shall be detained in the occupied country, and if convicted they shall serve their sentences therein." Thus, the detention inside Israel of arrested and convicted Palestinians "protected by the ... Convention" constitutes an "unlawful confinement" within the meaning of Article 147 and a "grave breach" of the Convention.

Israeli practices in not separating pre-trial and sentenced children or juveniles is also violative of human rights law. Article 10 (2)(a) of the 1966 Covenant requires the same segregation of accused from convicted persons, "save in exceptional circumstances." With the passage of some twenty-two years and the nature of most military prison facilities (e.g., tents separated by wire fences) we find no such "exceptional circumstances" to exist. Yet, from what we could observe, accused juveniles are fairly separated from adults within the meaning of Article 10 (2)(b) and 10 (3) of the Covenant. Article 76 of the G.C. also requires that Israel pay "proper regard...to the special treatment due to minors."

With respect to the practice of punishing parents because of the conduct of their children, we recommend that such practices cease. We are concerned that such practices may violate the customary prohibition of collective punishment and the fundamental precept that guilt must be personal, both of which are evident in the law of war and in human rights

norms.<sup>48</sup> The same concerns apply to any misuse of parental ID cards or any coercive tactic practiced against the family of an accused.

One need not stress that mistreatment of captured persons violates both Geneva<sup>49</sup> and human rights law.<sup>50</sup> Any such violation of the law of war is a war crime<sup>51</sup> and a violation of Israeli military orders.<sup>52</sup> Criminal prosecution of known perpetrators and those guilty of any complicitous involvement should continue. Also, Israel is required to seek out and to initiate prosecution of any person reasonably accused of such an offence.<sup>53</sup> Under both customary and treaty-based international law, civil remedies should also be made available against perpetrators, complicitors and those in positions of power who issued orders or policy statements that a reasonable person under the circumstances would either know or should know can lead to the mistreatment of arrested or detained persons.<sup>54</sup> Training of police and military should stress the impropriety of any cruel, inhumane or degrading treatment of such persons. It would seem useful also to coordinate general training policy and efforts concerning the arrest of captured persons with the ICRC in order to gain objective supplemental guidance.

## Interrogation

Following arrest a detainee is usually interrogated by one or more members of the military, police, or the security service (Shin Bet). Interrogation can be either a one or two step process depending on the nature of an alleged offense and the interests of the military or security service (Shin Bet). A more ordinary security offense may well involve interrogation by the police. If the military and/or the security service personnel interrogate a suspect, there will probably also be a more formal interrogation by the police following the first interrogation.

The Advocate General of the IDF stated that there are basically two types of interrogation: 1) regular, by the military or police; and 2) special, by the security service. The Advocate General stated that during a regular interrogation the accused is told of his right to silence and that the interrogator has to write down the fact that such a warning was given to an accused. Once the police interrogate, it is apparent that an accused is informed of a right to silence (but that silence can be used against him) and that he has the right to an attorney. Such is written in a police report of the

police interrogation. We were told by defense lawyers, however, that in the case of double interrogations, the subsequent police warnings are irrelevant once the accused has "confessed" to the first set of interrogators—that in such a case two confessions often occur, but that only the confession "obtained" by the police (with appropriately recorded warnings) is used at trial.<sup>55</sup>

The Advocate General of the IDF also stated that a suspect is not informed of his right to an interpreter during interrogation because the interrogators must know how to speak Arabic. Attorneys from the Israeli Association for Civil Rights (ACRI) affirmed that interrogations are conducted in Arabic, but stated that most "admissions" (or signed "confessions") are written in Hebrew, a language which most accused apparently do not understand.<sup>56</sup> Some Palestinian defense lawyers complained that they had asked to have the confessions written in Arabic but that this had "not been done."

Interrogation is functionally protected from outside interference. It is during interrogation that most allegations of mistreatment and torture occur; and during interrogation, arrested persons are unable to consult with a lawyer or member of their family. Functionally, they do not receive postcards for mailing until after interrogation and the ICRC may have access to a person being interrogated, but only after the first fourteen days of interrogation. Military Order No. 1220 mentioned the right of a detainee to see a lawyer immediately after arrest, but such a practice does not occur. The Advocate General affirmed that attorneys are not allowed to see their clients before or during interrogation. The order also provides that those in charge of an investigation can delay access to a lawyer for up to fifteen days from the date of arrest "if he is of the opinion that this is necessary for reasons of local security or if the good of the investigation demands it."<sup>57</sup> It is even possible under the order to withhold access to a lawyer for another fifteen days "if it is certain that this is necessary for reasons of local security or if the good of the investigation demands it," and perhaps for additional 30-day periods.<sup>58</sup> Nonetheless, "security" is of no obvious importance under the orders, since another clause states that in spite of such decisions "the head of the investigation shall allow the detainee to meet a lawyer if the investigation has been concluded."<sup>59</sup> Lawyers do not normally see their clients until after interrogation (but can before the charges are formalized),<sup>60</sup> and it is during interrogation, without the aid of a lawyer, that the accused may first learn of the reason(s) for his arrest.

In Gaza, when we interviewed the three fifteen-year-old juveniles held at Ansar 2, each boy stated (in front of the prison commander) that he had been tortured or mistreated during interrogation. Each stated also that he

first learned why he was arrested during interrogation or upon the filing of charges. We also saw a hearing involving a juvenile who (as confirmed by the Legal Adviser for Gaza) was not interrogated for the first 24 hours following arrest and who was informed only during interrogation of the reasons for his arrest. He was charged within 48 hours of arrest. The Legal Adviser added that perhaps in more serious cases an accused is not told the reason for his arrest because of the needs of interrogation.

The commander of the military prison in Gaza stated that most persons arrested for security offenses in Gaza are brought to his facility after interrogation by the police, in close proximity to his office and the tents. He stated that those accused of more serious offences go to Gaza prison for interrogation. Also in Gaza, a military judge told members of the mission that charges are prepared in most cases now within three or four days of arrest and that trials on the evidence occur within ten days in many cases and that 80% are finished in three months. A defense attorney in Gaza stated that an attorney can see his client usually within eight to ten days if the interrogation is over and that ordinary rock-throwing cases usually involve interrogation quickly by the army and not the Shin Bet.

More generally, detainees who have not been thoroughly interrogated within eighteen days of arrest can receive an extension of detention after a hearing before a military judge. The hearing on extension of detention can take place within a prison, within a military court or elsewhere. Defense lawyers often complain that extension of detention hearings usually take place in the prisons and without adequate notice to counsel. The Advocate General of the IDF stated that defense lawyers should be allowed to participate in such hearings, but there are other problems posed for lawyers who do participate. It is reported that the defense is not allowed full opportunity to respond during such hearings:

The police may show the judge some evidence but are under no obligation to show this to the defence. At this hearing the judge may ask the defendant for his response, and will record any indication of partial confession. Any such submission is treated as a judicial admission for the purposes of any trial that may follow. If the period initially granted by the judge proves to be insufficient, it can be extended for up to six months until a charge sheet has been drawn up.<sup>61</sup>

## *Concerns, Conclusions and Recommendations*

We are deeply concerned about the continuing reports of mistreatment and torture during interrogation and the apparent desire to obtain "confessions" from the accused.<sup>62</sup> We are concerned that the Shin Bet is apparently answerable only to the Prime Minister, but that the military court system takes advantage of the fruits of interrogation by the police or the Shin Bet. We do not agree with the camp commander in Gaza that what occurs within a few feet of his area of formal responsibility, under police control, is necessarily outside his area of personal and professional responsibility. If one should have known of impropriety and one could have taken some form of corrective action (even reporting to others), one can be responsible in part for such impropriety. Similarly, lawyers within the military (prosecutors or judges) must not allow known or discoverable improprieties to take their effect within the military justice system.<sup>63</sup>

The mistreatment or torture of an accused in occupied territory is violative of human rights and the law of war and constitutes a criminally sanctionable war crime.<sup>64</sup> Israel, of all nations, must not tolerate such illegality. Additionally, the Israeli military must not engage in a functional complicity with the police or Shin Bet involving violations of the law.<sup>65</sup> Because of alleged abuses, we recommend that defense counsel receive adequate notice and play a more viable role during any extension of detention hearings and that military judges conducting such hearings assure that the accused are not subjected to mistreatment, that they ask relevant questions of each accused. As noted above, we also recommend that attorneys be given access to an accused at an early date and that no person be held without a judicial warrant or formal charges and access to a court for more than 48 hours. If many of the accused are now charged within three or four days, we feel that interrogation periods can be limited. Under the circumstances, extended or delayed interrogation seems to serve only to coerce.

We also recommend that interrogation take place only in police stations and military prisons and that, within occupied territory, all such places be under the direct control and supervision of the military. We recommend that no military personnel engage in actual interrogation and that only *professional* police interrogators or the Shin Bet perform such roles under the supervision of and training by the military.

We are also of the opinion that the denial of interpreters during interrogation poses problems for an accused, whose answers to questions (or whose silence) may be recorded and used against him, and that such a practice violates Article 72 of the G.C., which states: "Accused persons shall, unless they freely waive such assistance, be aided by an interpreter,



both during preliminary investigation and during the hearing in court." The interrogation, as part of the investigation and effort to produce confessions, is clearly part of a preliminary investigation within the meaning of Article 72. In particular, we recommend further that *all* signed confessions be written in a language which the accused readily understands or be ruled inadmissible.

## Confessions

Confessions have clearly been part of the military justice system and the interrogation process seems to operate with the goal of producing confessions, documented finally by the police, for use in the plea and trial phases. We have heard that some 95% of the alleged security offenders "confess."<sup>66</sup> In Gaza, a military judge told members of the mission that over 90% have confessions but that, today, far fewer admit guilt at the plea and trial phases. There are different patterns emerging however at different times and places. One West Bank military judge told us, for example, that prisoners from Megiddo rarely if ever confess because other prisoners might kill the person who does confess. An attorney in Gaza also stated that within the last few months before our visit some 40% refuse to take part in any confession. Also in Gaza a military judge stated that fewer serious crimes now have confessions.<sup>67</sup> Similarly, the military in the West Bank may be more inclined to charge some stone throwers caught "red handed" on the basis of military witness testimony, without a signed confession,<sup>68</sup> but there is still a "confession" in most cases.

On the other hand most defense lawyers complain that once there has been a signed confession, and given the "normal" delays in the military justice system, the defense attorney's "hands are tied," the formal hearings are generally proper but "just a show." Defense lawyers still complain that most "confessions" are the result of mistreatment or torture, but that they are forced to accept guilty pleas because of even more delays in the system before one gets to a hearing "on the evidence." Prior to such a hearing there can be a "small trial" or mini-hearing on the propriety of the confession, but defense lawyers complain of the near impossibility of convincing a judge to rule against military witnesses and the documented police checklist (e.g., the set of warnings to an accused during police interrogation).<sup>69</sup>

According to military prosecutors and judges, the burden of proof concerning the voluntariness of a confession is on the prosecutor and confessions must be corroborated by "something else." Defense attorneys complain, however, that the "something else" can be de minimus and that, according to military decisions, it can come from "within" the confession itself, for example, because it seems to be reasonable and without inconsistencies.<sup>70</sup> Amnesty International has been concerned that confessions are received with little or no corroboration and that such a process provides little or no protection against mistreatment during interrogation.<sup>71</sup>

Again, most confessions are still written in Hebrew, a language which most accused do not understand.

### *Concerns and Recommendations*

Again, we are deeply concerned about the continuing reports of mistreatment and torture during the interrogation and "confession" processes. Coerced confessions are impermissible under human rights and Geneva law.<sup>72</sup> Efforts should be increased to assure that such mistreatment does not occur and that coerced confessions play no role, even indirectly, in the military justice system.

We are also concerned that there may not be enough corroboration of confessions under military law. Given the history of coerced confessions and the fact that under both human rights and Geneva law an accused has the "right to be presumed innocent until proved guilty"<sup>73</sup> there is a need for greater inquiry into the voluntariness of confessions and corroborating circumstances, not less.

Again, we also recommend that all confessions be written in a language which the accused readily understands or that they be rendered inadmissible. Further, as explained below, we are deeply concerned about the inability of defense lawyers to visit clients until after interrogation and the "confession."

## Charges

Formal charges are usually prepared after the arrest, interrogation and "confession" of a suspect. Defense attorneys complain that the charges, often a few sentences added to a standard form, do not provide adequate specification of facts and that they are often unable to obtain details until the time of the hearing on the plea (if then). It is also stated that in many instances the accused learns of the formal charges through the defense attorney, often at the first hearing on the plea.<sup>74</sup>

In Gaza, the Legal Adviser stated that with respect to ordinary offenses they try to get the charge sheets out within 24 hours, but a military judge in Gaza stated that such charge sheets are out on average in three to four days after arrest. One defendant that we had seen had been charged within two days. A legal officer in Gaza also stated that the accused often gets the charges in court and through his attorney but that in quick trials (in a few days) this is "prompt." In one case in Gaza (on 3 July) the defense attorney claimed that he did not receive the charges until that day although the accused was arrested May 6th. The prosecutor did not deny such and the military judge postponed the hearing for three weeks to a month. In another case sentencing was postponed because the charges weren't clear as to whether or not relevant acts allegedly occurred in 1987 or 1988.

Defense attorneys also complain that some of the charge sheets are not translated into a language which the accused can understand, that some 20% are not translated in Gaza and that the problem is worse in the West Bank. In Ramallah a military judge stated that translation of charges into Arabic is not automatic for minor offenses but that it is for major offenses, adding that increased workload and other administrative difficulties added to such problems. In Nablus a military judge confirmed that minor charges are not translated, but added that interpretation services are available and that he was aware of no major complaints in this area. In the West Bank (file no. 4563), defense counsel complained that the charges were only in Hebrew, that he learned only the day of the hearing on the plea that the defendant was charged with murder, and that he had not had sufficient time to study the file. According to counsel, the military judge refused to delay the proceedings for more than two hours.

A captain, lawyer in charge of translation services in Gaza told members of the mission that defense attorneys, upon request, can get any document translated into Arabic. A defense attorney in Gaza stated that he knew where the translators were but that there weren't enough. Yet, when-

ever he asked for a postponement because of a translation problem it was granted. The captain in Gaza added that when the file comes in to the secretary of the court it is put into the computer and a date is set for the first hearing (on the plea) and that the name of an attorney known to represent the accused is also entered. He knows personally some 90% of the 50 (out of some 332) lawyers who often practice in the military courts in Gaza and he tries to handle their problems daily.

### *Concerns, Conclusions and Recommendations*

Article 71 of the Geneva Civilian Convention requires that all accused "be promptly informed, in writing, in a language which they understand, of the particulars of the charges preferred against them." Pictet adds: "The nature and grounds for the charge must be notified to the accused without delay; the protected person must know the reasons for his arrest in time to prepare his defence. The notification must give full particulars in a language the person concerned can understand and in writing...."<sup>75</sup> Articles 9 (2) and 14 (3)(a) of the 1966 Covenant mirror these requirements by requiring that anyone arrested "shall be promptly informed of any charges" and informed "in detail in a language which he understands of the nature and cause of the charge against him."<sup>76</sup>

It is obvious that Israeli military officers have not complied fully with the requirements under Geneva and human rights law that the accused be informed personally and promptly, in writing, in a language which he understands, of the particulars of charges against him.<sup>77</sup> Informing an accused through his lawyer at or near the hearing on the plea is hardly adequate "time to prepare his defense." We are also concerned that there is insufficient "detail" or "particulars" to comply with due process requirements in all cases and recommend the use of more detailed charges and specifications.

We also recommend that more translators be assigned to the courts so that Israel, after some twenty-two years of occupation, is more able to fulfill its obligations under Geneva and human rights law. We recommend further that all defense lawyers be made aware of translation services offered and that these services, especially in the West Bank, be checked periodically.

## Attorney Notice, Visits and Time to Prepare

As noted above, attorney access to clients is severely limited by the processes of arrest and interrogation, and in some cases can be denied for weeks and months. Under Military Order No. 1220, detainees are supposedly entitled to see a lawyer immediately after arrest but, as noted above, there are two fifteen day provisions which can lead to an extended denial for thirty days,<sup>78</sup> and there are other orders authorizing secret arrests. Lawyers do not see clients until after interrogation.

Defense attorneys complain that they are not always allowed reasonable access to their clients prior to a hearing or able reasonably to communicate with clients they do see, nor do they always have adequate time and facilities for preparation of the defense of clients. Sometimes they have to wait for hours outside a facility and then have only a few minutes to communicate with each client.<sup>79</sup>

Rules are set by different base commanders as to when a lawyer can visit, how long, with or without guards, and so forth. In Gaza City at Ansar 2, lawyers are apparently allowed to see clients for one hour per week, as worked out in part by an agreement with the local bar association. Even then there can be problems getting through the gate. The camp commander at Ansar 2 affirmed that visits are controlled in accordance with an agreement whereby some ten to fifteen lawyers are admitted each day to see some 120 to 150 prisoners (or about ten prisoners each)—most times at a separate place. We saw one of the defense attorneys seated at a table with his client outside one of the buildings at the camp. At Ansar 2 there is supposed to be a new building built for attorneys to meet with clients, but there were delays in contracting out for such a building. When asked who built the camp commander's air-conditioned office, he stated that it had been built by the army. A military judge in Gaza stated that if he knows that a lawyer is having difficulty seeing a client at Ansar 2 he will phone to ensure access. The Legal Adviser in Gaza stated that the Ansar 2 commander is under orders to allow attorneys access and that one sees them in the camp moving around and signing up clients (also to obtain a "power of attorney" needed to view files located in the court complex).

Defense lawyers also complain about the lack of timely and accurate information concerning hearings. In Nablus defense attorneys complained about notice from a book in the office of the court secretary and that some dates for hearings are left blank. We saw attorneys using such a book in Nablus. There, attorneys also complain that they must talk with clients in a

crowded hallway in the court complex because their room for such courthouse visits was taken for a computer (which was not yet in operation). They also complain that they can't use the telephone. The President of the Military Court in Nablus stated that a public telephone will be installed and that he is open to the Arab Lawyers Committee and to individual complaints. A military judge in Gaza stated that he is also open to talking with attorneys, and the President of the Military Appeals Court stated that he finds it important to talk with defense lawyers and the court judges and that he schedules meetings on a regular basis at 5 p.m. one day every two weeks. A military judge in Ramallah added that he asks local lawyers to talk with him and had met twice with members of the Arab Lawyers' Committee in the last three months. He also stated that soon in Ramallah defense lawyers will have a building or room to meet with clients. At one point in Ramallah we saw a woman defense attorney whispering with her client while leaning against the wall outside the packed one-judge courtroom, within sight and some ten feet of two military guards.

The Legal Adviser in Gaza was aware of the letter from Gaza defense attorneys early in 1989 (in February) but had already had a three-hour meeting with about five attorneys representing the bar association to work on problems (on April 3, 1989). He stated that defense attorneys have access to him, being out in the halls a few yards away to check posted lists in Arabic of clients (names and detainee numbers) and hearing dates, and that they can also call on the phone or see his deputy and six other officers who are available (in rooms off of a long hallway on the second floor where the defense lawyers were seen by members of the mission checking postings or files). A local defense lawyer acknowledged a series of meetings and the posting of "next week's trials" and added that he works with the secretary to re-schedule dates. Another, a representative of the Gaza Bar Association, stated that lawyers see a weekly list which they publish in a newspaper. He added that the process is still difficult for lawyers with several clients, especially visits in the prisons.

In terms of adequate time to prepare a defense, the Advocate General of the IDF stated that the military has had problems orchestrating witnesses (especially reservists), accused, and files but that more speedy trials, within 48 hours, are posed as a solution. The Legal Adviser in Gaza admitted that there had been quick trials because of prior massive arrests. This was confirmed by other military lawyers. One judge in Ramallah, while berating defense counsel for arguing in English, allegedly for "propaganda" purposes (in front of members of the mission), added in open court that in his opinion trial delays are for the benefit of the defense lawyers because they are not always prepared.<sup>80</sup>

## *Concerns, Conclusions and Recommendations*

Article 11 (1) of the Universal Declaration of Human Rights guarantees the right of all persons to a "trial at which he has all the guarantees necessary for his defence." Such guarantees obviously include the right to adequate representation by counsel of one's choice and adequate time and facilities to prepare for a defense. As Article 14(3), sub-paragraphs (b) and (d) declare, an accused has the right "to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right;" and, among other relevant rights, "[t]o have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing."<sup>81</sup> Paragraph 93 of the U.N. Standard Minimum Rules for the Treatment of Prisoners adds that an untried prisoner shall be allowed to apply for legal advice "and to receive visits from his legal adviser with a view to his defence and to prepare and hand to him confidential instructions." The U.N. rules also state that interviews "may be within sight but not within the hearing of a police or institution official."

Article 72 of the Geneva Civilian Convention expresses these guarantees as follows: "They shall have the right to be assisted by a qualified advocate or counsel of their own choice who shall be able to visit them freely and shall enjoy the necessary facilities for preparing the defence."<sup>82</sup> Pictet adds in his commentary:

The defending counsel must be given...all the facilities and freedom of action necessary for preparing the defence. Above all, he must be allowed to study the written evidence in the case, to visit the accused and interview him without witnesses and to get in touch with persons summoned as witnesses.

It will not always be easy for these rules to be observed during an occupation, in view of the psychological atmosphere, but they must nevertheless be observed scrupulously in all circumstances and in all places.<sup>83</sup>

Importantly, the Geneva Convention also adds a notification requirement tied to due process guarantees outlined in Article 71. Although the notification requirement is expressed in terms of notification to a "Protecting Power," which Palestinians do not have under the circumstances, the notification requirement sets a minimum standard of three weeks notification. Article 71 states that such notification shall be at least "three weeks before the date of the first hearing" and that "unless, at the opening of the

trial, evidence is submitted that the provisions of this Article are fully complied with, the trial shall not proceed." The three weeks notice provision includes notice of the accused, place of detention, specification of the charge or charges, and the court and place and date of the "first hearing." These provisions obviously relate to requirements that defense attorneys have adequate notice of charges and time to prepare a defense.

We find it informative of general expectations in this area that the 1953 U.N. Supplemental Rules of Criminal Procedure for Military Commissions of the United Nations Command in Korea contained similar requirements. Rule 26 stated that defense counsel were to have "the reasonably necessary facilities to prepare the defense of the accused" and "may, in particular, freely visit the accused and interview him in private" and "also confer with any witnesses for the defense, including prisoners of war." Rule 27(a) set a limitation on commencement of proceedings "of at least three weeks from the date of the receipt by the accredited Delegate of the International Committee of the Red Cross, the prisoners' representative, and the accused of the notice required" elsewhere to such persons; and Rule 27(b) set another minimum time limit with respect to defense counsel:

No trial shall commence until the Advocate or Counsel conducting the defense on behalf of the accused shall have had at his disposal a period of at least two weeks to prepare the defense of the accused.

It is also informative in terms of due process standards that at the International Military Tribunal at Nuremberg, defense counsel were given at least thirty days to prepare a defense. It is also instructive that Article 146 of the G.C. declares that "in all circumstances, the accused persons shall benefit by safeguards of proper trial and defence, which shall not be less favourable than those provided by Article 105 and those following of the Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949" [GPW], since Article 105 of the GPW provides "a period of two weeks at least before the opening of the trial" as a minimum time "to prepare the defence."

We are concerned that there have been violations of each of the above-mentioned standards in the past. In particular, we are deeply concerned about the denial of access by counsel for some fifteen or even thirty days after arrest, the denial of the right of counsel under Article 72 of the G.C. "to visit...freely" with an accused, the denial of adequate facilities for attorney visits at military prison camps, the denial of adequate facilities for attorney visits and preparation at the military courts, and the denial of adequate time for the preparation of a defense. "Quick trials" within a few



days (or even a week) of formal charges pose a special problem for an adequate defense and, in our opinion, violate a minimum of three weeks notification requirement found within Article 71 of the G.C.

As noted above, we have recommended far earlier access by counsel. We also recommend that more uniform rules concerning attorney visits be set after coordination with the Gaza Bar Association and the Arab Lawyers Committee in the West Bank by the Advocate General and his staff. Defense counsel must be allowed to "visit...freely" with an accused and have the time to prepare a defense. In this regard, we recommend also that the Advocate General ensure that no hearing on the plea occur until after an accused has had notice of three weeks of the formal charges against him and, if represented by counsel, that counsel of his choice has had at least three weeks to prepare a defense.

Further, we recommend that the willingness of both military and defense professionals to explore problems and find solutions be nurtured through regular contacts, at various levels. We are impressed by the desire of persons like the President of the Military Appeals Court to schedule bi-weekly meetings and we feel that such contacts can aid both sides in solving problems like the need for adequate facilities for the preparation of a defense. We are left quite unimpressed with excuses concerning delays in the construction or provision of defense facilities when the army is capable of providing air-conditioned offices for others.

## Family Visits

Family visits to detained persons are obviously limited by problems encountered in locating an arrested person. There are also no family visits until after interrogation. Family visits also appear to be limited by various area commanders and are not so frequent or lengthy when allowed. There are frequent delays at the gate and, in Ramallah, arguments with the guard at the gate.<sup>84</sup> We do not know how families could visit their accused in the case of "quick trials" (in two to four days from the time of arrest).

In Ansar 2 in Gaza, family visits are generally allowed to each prisoner once every two weeks for 15 to 30 minutes in a new visiting building (with plastic sheets with finger-sized holes between them). Visits are limited to the two parents of a prisoner or the wife and two or three children if the

prisoner is married. In the case of the Negev, Ansar 3, families are generally physically too isolated from their accused, a matter protested against by the ICRC and the United States in connection with the movement of detained persons outside of the occupied territories.

In some military courts, for example in Ramallah, the few family members allowed inside the military compound might also be able to talk briefly with their accused outside the court just after a hearing. In Gaza City and Nablus we saw no such practices. In all courts visited we saw family members sitting on the three or more rows of benches provided. There were near silent gestures or brief communications at this point, but far less in Gaza City and Nablus where the courts are a bit more formal or controlled. One sensed feelings of concern, closeness, quiet comforting, and even pride among family members. The audience in a military court typically was composed of fathers and mothers of juveniles and military witnesses and guards. In all cases noise from family members was controlled far more than noise from fellow soldiers (or even fellow guards). We saw no toilet facilities for family members.

### *Conclusion and Recommendations*

Again, we recognize that movement of detained (or sentenced) persons outside the occupied territories is a violation of Article 76 of the Geneva Civilian Convention. We also recommend that, after some twenty-two years of occupation, family visit procedures be more uniform and consistent with Israeli practices inside Israel. We urge especially that visits to unsentenced prisoners and to those below 18 years of age be more frequent than once every two weeks.

We also recommend that the court guards, especially in Gaza City, show more respect for family members. Respect for fellow human beings does not have to interfere with one's ability to maintain needed formality in a court setting. We recommend further that adequate public toilet facilities be made available in all military courtrooms and at prison visiting areas.

return. We saw young prisoners in court who had been released earlier and several whose requests in court for release on bail were denied although they had been in prison for several months.

### *Recommendation*

We recommend that bail be granted more frequently and that release on bail after three months become common. We find no right to release on bail as such in the laws of war; but given a military occupation for some twenty-two years, we find the situation closer to that contemplated in Article 9 (3) of the 1966 Covenant, which states: "It shall not be the general rule that persons awaiting trial shall be detained in custody." The amount fixed for bail should not be so relatively high as to effectively deny bail.

## **Hearing on Pleas and "The Deal"**

As noted previously, members of the mission were informed by military officers and defense counsel of the high percentage of confessions and then guilty pleas made during the first formal hearing on the plea. We were told that in general there are some ninety percent pleading guilty in the military courts, as compared with about eighty percent in the ordinary Israeli courts. In fact, most of the hearings that we observed involved pleas of guilty by an accused.

In such cases, there is often a "deal" made with the prosecutor with respect to punishment, either at the hearing or before the hearing on the plea. We witnessed such deals being made just before the start of a hearing or even while the hearing was in progress as files were brought up by the military judge. We had the impression that military judges mostly approved such deals, although at times the judges sought greater or lesser punishment, the latter usually at the request of defense counsel who would also argue other points about delays in procedure, family problems of the accused, the approach of holidays, and so forth. No real restrictions of defense counsel were observed during these processes and, in fact, some judges seemed rather tolerant of the deal-making procedures during the initial stages of the day's hearings. Defense counsel were generally able to

Speak with their clients in the courtrooms or, as explained earlier, just outside, while apparently considering "deals."

The main complaint of defense lawyers is that "the deal" is unrealistic or coerced because of the circumstances surrounding the event, *e.g.*, coerced confessions, missing files, other delays in hearings and a final trial on the evidence, inability to counter military witness testimony. We are convinced that delays in reaching the first hearing and a trial on the evidence add undue pressure on the accused to accept a deal, especially as time in a military prison approaches an average sentence for an alleged offense.

We are also concerned that some judges add to the coercive nature of the process by claiming that they will "reduce a detainee's sentence if the defendant pleads guilty."<sup>89</sup> One member of the mission attended a hearing on pleas in Ramallah during which a military judge advised defense counsel to obtain guilty pleas, not because trials on the evidence will result in greater penalties, but because guilty pleas can result in lesser penalties.

## Sentencing on Guilty Pleas

If a guilty plea is accepted, the defendant is usually sentenced at the hearing on the plea. As explained by Al-Haq and the Gaza Centre for Rights and Law (in connection with sentencing at this hearing or after a finding of guilty following a trial on the evidence):

both prosecution and defence may address the court on the question of sentence. For instance, the prosecution is likely to present the court with details of firstly the detainee's previous convictions, secondly aggravating circumstances in the detainee's case and thirdly comparable cases in which the court imposed a harsh sentence. Whereas the defence, in its plea of mitigation, may adduce evidence on the detainee's character, health, economic situation or other special circumstances, as well as details of comparable cases in which the court imposed a lenient sentence.<sup>90</sup>

We saw examples of such requests being made in Gaza, Nablus and Ramallah, and the military judges usually gave extended oral findings or bases for their judgments.

We were also told that an average punishment for stone-throwing could be four months (if there was no damage) but that such had been increased to eight months, each with other portions of time as a suspended sentence and each with a fine. We saw such penalties being imposed, especially six month penalties, but we also witnessed the sentence of a young first-offender to three months imprisonment (with an additional nine month suspended sentence and a fine of 500 Israeli shekels), partly because of the age of the accused and a showing of repentance.

It has been claimed that military judges "have an unofficial sentencing 'tariff' which they apply more or less rigidly,"<sup>91</sup> and/or that they follow instructions of superiors as to sentencing. We observed the passing of somewhat different sentences and were told by military officers that there are no such instructions (which would interfere with the independence of military judges). Nonetheless, it is not contested that since the Intifada, average sentences have increased.

## **Trial "On the Evidence"**

If there is no confession and plea of guilty or the confession is revoked, the trial is postponed for taking evidence. In most of these cases witnesses are to be heard. These witnesses are mostly soldiers who were involved in the arrest of the accused. A high percentage of the soldiers in the occupied territories are reservists who are in the territories only a limited time. This leads to the problem in practice that the soldiers, having finished their active duty, are not available when trials or hearings are scheduled. Often the summons is disobeyed by such witnesses because they are not willing to come back to the territories. Thus, many trials are postponed several times with the consequence that delays occur while the accused remains in a military prison. The Advocate General admitted that the orchestrating of witnesses and files and the postponements are a problem.

In general, military authorities affirmed that they are not interested in having these delays, which aggravate the workload, and stressed that they are looking for effective methods to assure that all witnesses are brought before the courts within a reasonable time after the arrest of an accused. One defense lawyer complained that for March 27, 1989, one military judge in Ramallah had a list posted concerning 67 files set "for Mention" (or a

hearing on the plea), 2 files set for bail hearings, and 73 files set for trials on the evidence, adding that "of those 14 (10 for Mention and 4 for Evidence) had a star indicating (according to the secretary) that the file of the Court was not found" and would not be taken up that day. We saw several cases delayed and cases which had been delayed for various reasons. Again, we are concerned that there be no undue delays in violation of Geneva and human rights law.<sup>92</sup>

Military trials are in principle open to the public, unless closed sessions are required in the opinion of the court for security reasons or "the defence of morals or the well-being of a minor."<sup>93</sup> Yet there are in reality several limitations on access by the public and, as explained earlier, by family members. In particular, only limited access is allowed into the military compounds and courtrooms cannot accommodate many of the relatives of the number of accused tried a given day. Lawyers, however, seem to have easy access through the military gates. In one case, the father of an accused who had not been admitted by gate-guards was brought in by the order of a judge after a request by the defense counsel.

All trials are conducted in Hebrew with simultaneous translation into Arabic (and vice-versa). Sometimes a judge spoke partly in Arabic and even in English during our visits. As noted by Al Haq and others: "The detainee has the right to translation and may object to an interpreter and request a replacement."<sup>94</sup> Such is required by Geneva and human rights law.<sup>95</sup> In one case, we witnessed the waiver of a translation by a defense lawyer.

In general, we noticed no undue restrictions of defense counsel during hearings in open court. The procedures followed in the courtroom appeared satisfactory and, in some cases, correct. Both prosecutors and defense counsel seemed to be familiar with the procedures. In one case, it was observed that an intelligence officer was cross-examined in some detail and was allowed to continue answering questions that had generally been repeated by the defense. During a military trial (as opposed to hearings on administrative detention) there is to be no use of secret evidence.<sup>96</sup>

## Operation of the Military Appeals Court

An important change in the military justice system began in April of 1989 with the creation of the Military Appeals Court.<sup>97</sup> The Court of Appeals was established following a recommendation of the Israel High Court of February 1988. The Court's seat is in Ramallah. It can hear appeals from all Military Courts in the West Bank and the Gaza Strip. Prior to April of 1989, the accused had no right to appeal to a higher court but only had the right of petition to the IDF commander of the region, who had authority to pardon, reduce the sentence, or order a new trial.<sup>98</sup> As the mission was informed, such petitions had rarely been successful.

The Court sits as a court of three and, in special cases, (as decided by the President or the Chief Military Prosecutor) as a court of five judges. A judgment of a court of first instance from a three-judge bench can always be appealed. A judgment from a single-judge court can be appealed if permission to do so was given in the body of the judgment or by the President or the President of the Military Appeals Court. In this context, "judgment" means not only all decisions concluding a hearing in the first instance, but also other decisions (such as that to cancel the charge).

The detainee-appellant will appear in person at the appeal-hearing unless, having signed a waiver of appearance and a power of attorney in favour of his lawyer, the defendant need not appear. Military lawyers will only allow such also if the defendant's sentence was relatively light and the remaining portion of the sentence to be served is short (for example, "only a few weeks"). Nonetheless, according to relevant military orders, the detainee is not present during consideration of a request for permission to appeal.

The Court of Appeals will not normally hear evidence, and it may send a case back to the Court of first instance for a re-hearing. The mission also was informed that a "*reformatio in peius*" is a restraint, *i.e.*, if only the accused has appealed for a decrease in punishment, an increase of the penalty is not allowed. Prosecutors, however, can appeal in certain instances. It should also be mentioned that military judges were in favour of the establishment of the Appeals Court. They expect that some standards will be set, especially on sentencing, and that there will be a contribution to unification of jurisdiction in the framework of an independent military judiciary.

The members of the mission were informed that by July 5, 1989, forty requests for appeals had come to the Court, 22 from military courts in the West Bank (19 from defendants and 3 from prosecutors) and 18 from the

Gaza Strip. Altogether 32 requests for "permission" came from the defense and 8 from the prosecution. By then, not all of those requests had been checked for "permission" by the President, but of those finished, the President had granted seven from defense requests and one from the prosecution requests (out of seventeen requests). On June 27, 1989, we saw a hearing before the Appeals Court in Ramallah on whether an appeal should be granted, and during which three defendants and their families were adequately cautioned to seek a lawyer. Such a hearing was conducted in a professional manner yet in practice there is an apparent boycott of the Appeals Court by Arab lawyers. Since no cases proceeded to a full appeal before the Appeals Court, the mission cannot make remarks concerning the Court's exercise of jurisdiction. However, it seems that by the establishment of the Appeals Court Israel has made an important step toward fulfillment of the generally accepted principles of international law.<sup>99</sup>

## Role of the Supreme Court

Residents of the occupied territories have the right to bring petitions to the Israeli Supreme Court, sitting as High Court of Justice, relating to measures and decisions of the occupying power. There is no such rule in the written law, but the Israeli Supreme Court had recognized this right very soon after the occupation, when petitions were first brought to the Court. Since that time, the High Court has in fact dealt with a great number of petitions brought by residents of the occupied territories (e.g., some 180 in the last two years).

Until the establishment of the Military Appeals Court, recourse to the High Court was the only possibility to get a revision of a military court's decision by a higher court. Indeed, the intervention of the High Court is still limited to a procedural review, which leads in practice to the result that the Court generally overrules a military court only if a gross violation of the law or abuse of discretion is found.

As mentioned above, the Military Appeals Court was established following a recommendation by the High Court. The subject matter of the judgment was a petition filed in 1985 by two West Bank residents who had been convicted by a military court and who had complained about the absence of any right of judicial appeal. The High Court did not follow the ob-



jections of some (*i.e.*, not of all the IDF authorities), it rejected especially the argument that a court of appeal "would undermine the efficiency of the military justice in the territories," and it noted *inter alia* that the right of appeal is "essential to a strengthening of the rule of law." With this point, we agree.<sup>100</sup>

In our discussion with Palestinian defense lawyers, objections against this decision were frequently expressed, and against the establishment of the Military Appeals Court. But it could be noticed that the objections were directed against the existence of military justice on the whole and not against a right of appeal as such.

It must also be mentioned that very often such lawyers complain that the Israeli High Court has assumed a competency concerning the occupied territories. The reason for this complaint is, without doubt, the fear that a prolongation and maintenance of the occupation could thereby be furthered. It cannot be denied also that an expression of the President of the High Court, made in a discussion with the members of the mission might also be understood to support such fears. The President stated that after a certain period of occupation, a "normalization" of justice and an equalization among the residents should ensue and, therefore, the Palestinians in the territories must also have the right to bring claims to the High Court.

It was not possible for the mission to deal extensively with all relevant questions, especially political questions, but we recognize that involvement of the High Court can be quite important concerning respect for the rule of law and the protection of fundamental human rights.<sup>101</sup>

## Administrative Detention

Administrative detention (internment) is a procedure by which governmental authorities detain individuals without charges and without judicial trial. The practice is surprisingly too common. According to the International Commission of Jurists, at least 85 countries had legislation permitting internment and many of them utilized it in the early 1980's.<sup>102</sup> Article 43 of the 1907 Hague Regulations obligates a belligerent occupant to take all necessary measures to maintain security, public order and the civil life of the population, while Article 27 of the Fourth Geneva Convention (G.C.) reads: "...the Parties to the conflict may take such measures of control and

security in regard to protected persons as may be necessary as a result of the war." It is within this legal framework (and, more specifically, the requirement of necessity) that an occupant is authorized to adopt administrative detention. Thus, according to G.C. Article 78, "If the Occupying Power considers it necessary, *for imperative reasons of security*, to take safety measures concerning protected persons, it may, at the most, submit them to assigned residence or to internment" (emphasis added). The G.C. then covers the procedure in question in considerable detail in its Articles 42- 43, 49, 68 and 78-135. The emphasis on the need for imperative reasons of security was affirmed by President Shamgar of the High Court of Justice when he held in *Ibrahim Al Hamid Sejira et al. v. The Minister of Defence*,<sup>103</sup> that administrative detention was "a ... step which the law permits only under circumstances in which it is absolutely *necessary* because of definite security reasons" (emphasis added). We agree that whenever detention is not necessary (either generally or with respect to specific individuals) it is unlawful.<sup>104</sup>

It should also be noted that under Article 133 of the G.C. internment "shall cease as soon as possible after the close of hostilities." Such reflects the general international view that internment is of possible importance during the early (first post-hostilities) months of belligerent occupation, but not thereafter. Israel's continued practice of administrative detention has therefore become the subject of extensive criticism as being illegal,<sup>105</sup> and thus also a "grave breach" of the G.C. under Article 147 (as an "unlawful confinement of a protected person").

We did not have an opportunity to visit the Ketziot Detention Centre which (to our knowledge) houses virtually all administrative detainees, but we discussed administrative detention with a number of Arab defense lawyers and also received a considerable quantity of foreign and Palestinian documentation both about the detention procedure and about the Ketziot Centre.<sup>106</sup> Members of the mission also interviewed a military lawyer (a lieutenant) in Gaza who stated that he personally reviewed every file of those subject to administrative detention from Gaza.

Administrative detention, as applied by Israel in the occupied territories, is based on the British Defence (Emergency) Regulations of 1945 (Articles 108 and 111) and on a series of Military Orders issued by the Israeli Defense Forces (IDF). The rules of British origin were applied in the occupied territories following the outbreak of the 1967 war. They were replaced (in April 1970) by MO No. 378 (Order Concerning Security Regulations) together with its numerous amending orders.

Internal and external criticism led to the gradual abandonment of internment, even while the process underwent procedural changes, and in

1982 the then last remaining administrative detainee was released from custody after almost seven years. Military authorities had by then turned increasingly to the practice of restricting individuals to their towns, villages or residences (See G.C., Art. 78).

Administrative detention was resumed on August 4, 1985 and was applied primarily to "terrorists" when "security reasons" prevented the disclosing of relevant information in a Military Court trial. The use of administrative detention increased greatly following the beginning of the Intifada on December 9, 1987, at which time an estimated total of 50 persons was said to be administratively detained. By the time we arrived in the occupied areas, some 5,500 Palestinians had been subjected to the practice, and of that total some 1,500 were still in custody by the end of June, 1989, according to statements by a number of Palestinian defense lawyers and the Legal Adviser of the West Bank.<sup>107</sup>

The actual procedures involved in administrative detention have, in the course of time, undergone specific and significant changes through both new and amended MOs. Initially, an IDF Area Commander could order the detention of any person for not longer than six months, and always only for *imperative security reasons*. It should be noted, however, that then and now administrative detention orders are reported to be always issued on the basis of data in a file compiled by the General Security Service (GSS), the Shin Bet. The arrest order is therefore issued at the initiative of the GSS and the "evidence box" used recently in conjunction with the GSS file during detention hearings also originated with the GSS. We were told by defense lawyers that both the file and the box at times contain data gathered from Palestinian informers.

Detention orders are renewable for an indefinite number of six-months increments. The Area Commander could not delegate his authority, but a District Commander could issue a detention order if he believed that his superior would have had reason to do so. An order of a District Commander was valid for not more than 96 hours and could not be renewed by him.

Limited judicial review of a detention order did exist under MO No. 378, and in 1980 an expanded review and appeal procedure was provided under MOs Nos. 815 and 1059 (West Bank) and MOs Nos. 628 and 807 (for the Gaza Strip). A detainee had to be brought before a legally-qualified military judge within 96 hours after detention, regardless of the origin of his detention order. The judge had to confirm or cancel the detention order or shorten the length of detention. The order then had to be reviewed again by a military judge not later than three months from the date of the original confirmation, and that review had to be undertaken at least every 90 days.

Articles 87 (C) and 87 (B)(a) of MO No. 378 provided that if either review failed to start within the specified time limits, the detainee had to be released. The detainee had the right to appeal the decision of the military judge within 30 days to the President of the relevant Military Courts or to a military judge appointed by the latter. A possible final appeal was to the Supreme Court of Israel sitting as the High Court of Justice. It appeared to us that the appeal provisions cited would have satisfied the requirements of G.C. Articles 73 and 78.

It is interesting to note, in connection with the reference to the Supreme Court of Israel, that, as Playfair pointed out,<sup>108</sup> the Court, in *Rabbi Kahane et al. v. Minister of Defence* (1981)<sup>109</sup> ruled that the issuing of an administrative detention order is an administrative act even though it is reviewable by the Supreme Court.

MO No. 815 of 1980 introduced a number of procedural changes, such as the rule that a military judge reviewing a detention order did not have to observe the normal rules of evidence if he believed that such would help in reaching the truth. If such a deviation did take place, it had to be recorded. The judge could also examine "evidence" in the absence of both the detainee and the latter's lawyer and did not have to disclose the evidence to them if he believed that such a disclosure would endanger state security or public safety. All review proceedings had to be held *in camera*. The review hearings, always closed to the public, involve a military prosecutor, a representative of the General Security Service, a legally trained military judge, the detainee, and the latter's lawyer.

During a hearing on an appeal, the reasons for the detention, stated only generally on the detention order, are subject to scrutiny by the detainee and his lawyer, *as long as the reasons are not classified*. Classified or "secret" evidence is studied only by the judge. On completion of this study, the judge's decision is made. The sequence of events is therefore as follows: presentation of the army's unclassified arguments for detention; response by the detainee's counsel and the detainee if he so desires; study by the judge of classified material, not in the presence of the detainee and his lawyer; return of the latter two persons to make additional comments if desired; announcement by the judge of his decision or of the date on which the decision will be handed down.

According to Military Order No. 1229, every detainee is granted the right to appeal, and according to Military Order No. 1236, Order Concerning Administrative Detention (temporary) (amendment) (West Bank 1988), the appeal is to be brought before a military judge.

MO No. 1236 provides that any case of a person arrested in accordance with an order from a military commander will undergo judicial examina-

tion only *after* the person has presented an appeal and *when* his appeal is heard before a judge. The length of time between arrest and a hearing of the appeal is important, since it is only before a judge that the detainee can state his claim to be released. By mid-August of 1988, 28% of the appeals heard resulted in release or in a shortening of the term of detention. Justice Shamgar, in the *Sejira Case* cited earlier, stated that an appeal *should* be heard at the most within two or three weeks following the date of presentation of the first appeal of the arrest or of a decision concerning extension of the detention. He opined that if the number of detainees is large, additional judges should be used to hear appeals.

On March 17, 1988, Military Orders Nos. 1229 (West Bank) and 941 (Gaza), the Order Concerning Administrative Detainees [Interim Provisions], introduced substantial changes in detention procedures, presumably in consequence of the start of the Intifada. Authority to issue detention orders for up to six months was extended to all IDF officers with the rank of colonel or above; the quick automatic review of detention orders was suspended; and detainees could now appeal to a three-member Advisory Appeals Committee, able only to make *recommendations* to the Area Military Commander. The Advisory Appeals Committee sat only between May 1st and the middle of June, 1988, for on June 13th of that year MO No. 1236 was issued. The committee was replaced by a single legally-qualified judge who passed on the detainee's detention. Defense lawyers complained to us that this change brought about an even greater lack of precise information at the detention hearings and that the latter became too brief for any comprehensive discussion of a given case, lasting normally only 10 to 15 minutes. We were told by one of the defense lawyers that when attorneys asked to see the evidence against their clients such requests have been denied routinely.<sup>110</sup> Several Arab defense lawyers asserted, without documentation, that arrest warrants were no longer being issued, hence were absent from detainees' files. One of the lawyers in question commented: "Arrest was proof enough that the detainee had done something wrong," a statement somewhat reminiscent of one allegedly made by the Military Governor in the well-known case of the physicist Taysir al-Aruri in 1974: "It is not what he has done, but what he was thinking of doing."<sup>111</sup>

Official figures stated that by August 23, 1988, more than 2,600 appeals from detention orders had been submitted and over 1,400 had been heard, with slightly over 400 orders having been reduced or cancelled.<sup>112</sup> In 145 additional cases the appeal process had been terminated when the periods of detention had been shortened. Members of the mission were also told in Gaza (by the lieutenant who reviews each file) that most detainees from Gaza appeal their administrative detention, that detention is usually for

three to four months (not six months), that extensions are "very rare" (reportedly at 20% according to the 1989 U.S. Country Report, for 1988), and that about half get out earlier (for example, because of family reasons, which raised a question in our mind why "security" reasons justified detention at all of persons who could be released for "family" reasons). He also stated that he personally would not approve administrative detention without charges of children less than 16 years old.

We were informed by defense lawyers that currently two legally qualified military judges separately hear appeals in the Ketziot Detention Centre, sitting five days each week and hearing, on average, 200 appeals per week. We also were told by a defense lawyer, without substantiating evidence being cited, that on a few occasions a military prosecutor, either because of weakness in the evidence for trial or because of recalcitrance of an arrested person, had asked a Military Court judge to dismiss the case in question and that then the military had the detainee placed (by a detention order) in administrative detention. The lawyer in question phrased it as: "in fact" the string was pulled by the Shin Bet, "in law" by the Area Commander. Such practices were denied by members of the IDF. It should also be stressed that one member of the mission feels strongly that confirmations and subsequent extensions of administrative detention by relevant military judges "acting as courts" but without trials (and without charges and on secret evidence) constitute violations of Article 71, paragraphs 1 and 2, of the G.C., which include the prohibition of any "sentence... pronounced by the competent courts of the Occupying Power except after a regular trial." The same member feels strongly that such practices constitute "grave breaches" of the Convention within the meaning of Article 147, because they include practices "willfully depriving a protected person of the rights of fair and regular trial prescribed in the...Convention." Additionally, since persons are not prosecuted for these types of breach, Israel violates Article 146 of the Convention, which imposes the duty "to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches" and to "bring such persons...before its own courts" or "hand such persons over for trial to another" party to the Conventions. The other members of the mission feel that such an argument must ultimately be either against the permissibility of internment as such (which, perhaps unfortunately, is permitted in accordance with Articles 27, 42-43, 49, 68, 78 and 79-135 of the G.C.) or against an alleged practice of wilfully using internment as a substitute for the trial and sentencing of persons subjected to internment. If the latter, the other members feel, we simply have been unable to confirm that internment has been used (or misused) in order wilfully to deprive a protected person of the rights to a fair and regular trial.

We believe that Israel's administrative detention practices include violations of G.C. 78, according to the voluminous testimony available from ex-detainees, defense lawyers, and existing literature. Jean Pictet, the official commentator on the Fourth Geneva Convention of 1949, held that internment under belligerent occupation should be an exceptional practice: "In occupied territories the internment of protected persons should be even more exceptional than it is inside the territory of the Parties to the conflict...such measures can only be ordered *for real and imperative reasons of security*; their exceptional character must be preserved".<sup>113</sup> Pictet also commented that Article 78 relates only to persons not charged with any offense, hence precautionary detention represents only preventative, not punitive, action.<sup>114</sup> We also believe that certain uses of administrative detention in the occupied territories have violated certain standards laid down, for example, in Article 9 of the International Covenant on Civil and Political Rights, dealing with arrest and detention, as well as Principles 11.2 and 32.1 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by the U.N. General Assembly on 9 December 1988, dealing with hearings and consultation with counsel. While it is true that Israel has only signed but has not ratified the Covenant<sup>115</sup> and the Principles are not a treaty, they represent standards or behaviour backed by an impressive proportion of the nations of the world.

The administrative detainees from the West Bank and the Gaza Strip currently are held at the Ketziot Detention Centre in the Negev Desert. The Centre was intended from its beginning on March 1988 for administrative detainees from the occupied territories, as well as for convicted persons from the Gaza Strip. As previously noted, its location outside of the occupied territories, in Israel proper, represents a clear violation of G.C. Articles 49 (concerning internment) and 76 (concerning persons "accused of offences" or convicted), which call for detention of protected persons in the occupied territory. At one time, an IDF Chief of Staff, General Dan Shomron, acknowledged this violation of Article 76.<sup>116</sup> As such, it constitutes an "unlawful confinement" of protected persons within the meaning of Article 147 and thus a "grave breach" of the Convention.

As noted, we were unable to visit the Ketziot Detention Centre, but conditions at that installation have been described and criticized by several defense lawyers as well as in the reports of other foreign missions and in the news media.<sup>117</sup> Article 87 (G) of Military Order Concerning Security Regulations of 1970 was duplicated, even as the practice of administrative detention was declining, by MO No. 378, Article 87 (G), of 21 January 1982, in which was laid down a detailed list of provisions concerning the conditions under which administrative detainees were to be kept. The list cov-

ered many of the specific points listed in G.C. Articles 79-131.<sup>118</sup> The weight of evidence supplied indicates that implementation of the 1982 Military Order has occurred, at best, only in part.

The following list, correlating *reported* conditions with the requirements laid down in the Fourth Geneva Convention of 1949, outlines our great concern about compliance with G.C. standards at Ketziot: G.C. 76 (detention in occupied country; food and hygienic conditions at least equal to those held in prisons in the occupied country); G.C. 78 (appeals to be decided with least possible delay); G.C. 83(3) (detaining state to provide support of dependents of detainees if such needed); G.C. 85 (adequate hygiene and health facilities and protection against climate; adequate heating and lighting; suitable bedding and sufficient blankets, adequate sanitary facilities, sufficient water and soap for personal and laundry use, adequate facilities for personal toilet and laundry, showers or baths); G.C. 87 (canteens for the sale of food and needed articles); G.C. 89 (food rations sufficient to keep detainees in good health, sufficient drinking water); G.C. 90 (facilities to obtain clothing, footwear, etc.— if need be, to be provided by the Detaining Power); G.C. 91 (an adequate infirmary under qualified medical staff); G.C. 92 (monthly medical inspections, including, at least once a year, X-ray examinations); G.C. 93 (religious services); G.C. 94 (encouragement of intellectual, educational and recreational pursuits, sports and games); G.C. 98 (all detainees to receive regular allowances sufficient to purchase goods and articles, such as tobacco, toilet requisites, etc. Such allowance may take the form of credits or purchase coupons); G.C. 100 (no prolonged standing and roll-calls, punishment drill, etc.); G.C. 102 (election by secret ballot every six months of a committee to represent detainees before the Detaining Power, the ICRC and any other organization which may assist them); G.C. 106 (as soon as interned, or at least not more than a week after arrival at place of detention—and in case of transfer to another place—the right to send an internment card to family and to a Central Agency, according to Article 140, informing them of his location; the cards not to be delayed in any way); G.C. 116 (the right to receive visitors, especially close relatives, at regular intervals and as frequently as possible); G.C. 128 (in the event of transfer, internees are to be officially advised of departure and of a new address, in time to pack belongings and to inform next of kin); G.C. 133 (internment shall cease as soon as possible after the close of "hostilities").<sup>119</sup>

Arab defense lawyers in Gaza asserted that one feature of practices at Ketziot was particularly unfortunate: an alleged failure to notify the lawyers of the location of detained clients. It was claimed that a lawyer would arrive at the detention centre with a list of, say, fifteen clients, but would be



able to see only ten of them. The whereabouts of the rest were said to be unknown to the Centre authorities. It was also charged that in some instances clients were spirited to another detention centre before the arrival of their lawyers. Israeli military authorities denied those charges, and in Gaza pointed out that computers were being used increasingly to locate detainees.

## Quasi-Judicial Tribunals

The Israeli military government in the West Bank and the Gaza Strip has created, since 1967, a number of quasi-judicial military tribunals called Objections Committees. These bodies, staffed by military officers, handle a surprisingly extensive variety of civil matters in the occupied territories.

As early as 1967, Military Order No. 172 established the first Objections Committee. Originally designated as an appeals tribunal against decisions of the Custodian of Absentee and State Property, the jurisdiction of the Committee has been expanded until it now has authority to hear cases in 28 different categories.<sup>120</sup> Some of these involve appeals against decisions of the military government, but others deal with matters originally within the jurisdiction of local courts but subsequently transferred by Military Order to the Objections Committee. For example, appeals against tax and customs duty assessments were shifted by Military Order No. 406 to the Objections Committee.

Decisions of the Objections Committee represent recommendations to the IDF Area Commander who may accept or reject them, with no further appeal possible.

Similar committees have been created since 1967 to deal with specific civil matters. Among them are the Claims Committee (Military Order No. 271, as amended), which considers claims for compensation arising out of damages due to military operations certified by the Area Commander as having been undertaken "because of security needs;" the Objections Committee Concerning Vehicle Licensing (Military Order No. 56); the Special Appeal Committee to hear appeals against regional and road planning schemes; and the Special Committee under Military Order No. 1060 (28 June 1983) Concerning Disputes over Unregistered Land. The jurisdiction

of the last-named body had previously been within the competence of local courts.<sup>121</sup>

While the assumption of increasing authority formerly lodged in the local courts represents an undeniable growth in the exercise of quasi-judicial functions by the occupant, the Objections Committees do not appear to us to constitute an integral part of the Israeli Military Court System. Hence these quasi-judicial tribunals appeared to us to lie beyond the mandate set for our mission. Similarly, Paul Hunt, author in part of an Al-Haq study of the military court system, eschewed coverage of the Objections Committees.<sup>122</sup> We therefore decided to exclude analyses of the operations of these military bodies, even though Al-Haq had suggested to the Secretary-General of the ICJ that the Objections Committees be included in the mission's study. It should be emphasized that an investigation of even one major aspect of these committees, such as land titles and land acquisition, would have entailed far more time than was allotted to our mission.

One obvious issue posed by such an assumption of jurisdiction relates to the requirement under Article 43 of the Hague Regulations that the occupant must respect, "unless absolutely prevented, the laws in force in the country" and, thus presumably also, the legal institutions in such country. Under Article 64 of the G.C. it is recognized that "the tribunals of the occupied territory shall continue to function in respect of all offences covered by the said laws," subject "to the necessity for ensuring the effective administration of justice" and application of the Geneva Conventions.<sup>123</sup>

## Notes

1. See, e.g., *Jamyat Askhan al-Ma'alim v. The IDF Commander in the Judea and Samaria Region*, P.D. 37 (4) 785, 793 (Israel High Court of Justice 1982, H.C. 393/82); *Dvikat v. Government of Israel* P.D. 34 (1) 1 (H.C. 390/79, 61/80); *Ayob v. Minister of Defence*, P.D. 33(2) 113, 120 (H.C. 606/78, 610/78); *Hilu v. Government of Israel*, P.D. 27 (2) 169, 180 (H.C. 302/72, H.C. 306/72); and *The Attorney General v. Sylvester*, 1 Psakim Elionim 513 (Sup. Ct. Israel, Cr. App. I/48) (to the effect that the 1907 Hague Convention is customary international law). See also R. Shehadeh, *Occupier's Law—Israel and the West Bank* (rev. ed. 1988), at xiii and the cases cited in n.9 therein; Pach, "Human Rights in West Bank Military Courts," 7 *Israel Yrbk of Human Rights* (1977), 222, 228-229.
2. See, e.g., U.N. S.C. Res. 607, 5 January 1988 (which reaffirmed that the G.C. was applicable to Palestinian and other Arab territories occupied by Israel since 1967, including East Jerusalem); U.N. G.A. Res. 3092 (1973); and, most recently, a statement by U.N. Secretary-General Javier Perez de Cuellar (29 June 1989) in which he referred to the deportation of eight Palestinians from occupied areas as "a clear violation of the Fourth Geneva Convention," *Jerusalem Post*, June 30, 1989, at 1. See also Bisharat, "Palestine and Humanitarian Law: Israeli Practice in the West Bank and Gaza," 12 *Hastings Int'l & Comp. L. Rev.* 325, 340, 343-44 (1989), and references cited.
3. See, e.g., I.C.R.C., *Annual Report*, at 83-84 (Geneva, 1987); I.C.R.C., *The ICRC Worldwide 1988*, at 18 (Geneva 1989); I.C.R.C., *Bulletin No. 160*, at 1 (Geneva, May 1989).
4. See, e.g., U.S. Department of State, *Country Reports on Human Rights Practices for 1988* (Feb. 1989) [hereinafter cited as 1989 U.S. Country Report]; see also the 1987 edition of the same publication, at 1189, where the Department of State had asserted that the United States "recognizes Israel as an occupying power" and in consequence considers its rule in the territories "to be subject to the Hague Regulations of 1907 and the 1949 Fourth Geneva Convention..." See also 61 *Department of State Bulletin* 76 (U.S., 28 July 1969).
5. See, e.g., M. Shamgar, *Legal Concepts and Problems of the Israeli Military Government—The Initial Stages*, 13, at 32-33, in Shamgar (ed.), *Military Government in the Territories Administered by Israel 1967-1980, The Legal Aspects* (Vol. I), Jerusalem: Hebrew University Faculty of Law, 1982; Bisharat, *op. cit.* n. 2, at 337, 339.
6. See, e.g., M. Shamgar (then Attorney-General of Israel), "The Observance of International Law in the Administered Territories," 1 *Israel Yrbk on Human Rights* 262 (1971).
7. See also *International Review of the Red Cross* (August 1970), 426-27 ("where a territory under the authority of one of the parties passes under the authority of an opposing party, there is 'occupation' within the meaning of Article 2"); Bisharat, *op. cit.* n. 2, at 337-38 & ns. 69 and 72; Dinstein, "Judgment of Pithat

- Rafiah," 3 *Eyunai Mishpat* (Legal Studies) 934, 938 (1978) (G.C. is not contingent on recognition of property rights).
8. See Jean Pictet, *Commentary, Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, IV, 21 (1958).
  9. IV J. Pictet, *id.*, at 21-22 (emphasis added).
  10. *Id.* (emphasis added). See also *id.* at 22 (application "to territories which are occupied at a later date, in virtue of...a capitulation...[follows] from paragraph 1.").
  11. *Id.* at 60 (emphasis added). See also Bisharat, *op. cit.* n. 2, at 338.
  12. See, e.g., G.C., Art. 1 ("undertake to respect and to ensure respect for the present Convention in all circumstances"), Art. 2 ("shall apply to all cases of declared war or of any other armed conflict which may arise"); see IV J. Pictet, *op. cit.* n. 8, at 13-17. The norms are not merely contractual or of an ordinary nature, but are *obligatio erga* all other signatories if not also customary *obligatio erga omnes*. See IV J. Pictet, *id.* That much of Geneva Protocol I is customary, see, e.g., W. T. Mallison, *The Palestine Problem in International Law and World Order* 400 n. 437 (1986); panel, "Customary Law and Additional Protocol I to the Geneva Conventions for Protection of War Victims," 81 *Proc., Am. Soc. Int'l L.* (forthcoming, 1987) (remarks of Meron, Carnahan, Matheson).
  13. See, e.g., U.S. Department of the Army Pamphlet No. 27-161-2, II *International Law* 159, 165, 169 (1962). These powers include the power to operate a military justice system.
  14. See, in general, M. McDougal and F. Feliciano, *Law and Minimum World Public Order* (1961), 739-41, 745-46, 766-67, 790-91, 793-94, 796-800, 808; G. von Glahn, *The Occupation of Enemy Territory: A Commentary on the Law and Practice of Belligerent Occupation* (1957), 33-34.
  15. See H. Cohn, foreword, in *The Rule of Law in the Areas Administered by Israel*, vii-viii (Israel National Section of the International Commission of Jurists, 1981); see also *id.* at 1; M. Shamgar, *op. cit.*, *supra*, n. 6, *loc. cit.*; Israel (Security) Proclamation No. 3, Art. 35 (1967); 1989 U.S. Country Report, *op. cit.*, *supra*, n. 4. See also *infra* note 18; but see *Hilu v. Government of Israel*, P.D. 27 (2) 169, 180 (H.C. 302/72, 206/72).
  16. Section 3, quoted in Hillel Somer, "The Application of the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 1949, as Israeli Law," 11 *Eyunai Mishpat* (Legal Studies) 263 (1986). Somer quoted the Chief Military Advocate of the IDF as stating: "The Geneva Convention is one of the orders of the army and its provisions have been adapted in...appendix 61 of the general staff orders." *Id.* at 268.
  17. See, e.g., *Military Prosecutor v. Halil Muhammad Muhammad Halil Bakhis and Others*, Israel Military Court in Ramallah (1968), 47 I.L.R. 484, 485-86 (1974); *Military Prosecutor v. Raid Salman el Hassan el Hatib*, Israel Military Court in Ramallah (1968), 47 I.L.R. 487, 488-89 (1974), quoted in Israel National Section of the I.C.J., *supra* n. 15, at 28. See also *Abu Awad v. The Regional Commander of Judea and Samaria*, P.D. 33 (3) 309 (H.C. 97/79); Blum, "The Missing Reversioner: Reflections on the Status of Judea and Samaria," 3 *Israel L. Rev.* 279, 280-81

- (1969). But see *Jerusalem Region Electricity Co. v. The Minister of Energy*, P.D. 35 (2) 673 (H.C. 351/80), and *Dvikat v. Government of Israel*, P.D. 34 (1) 1, 29 (H.C. 390/79).
18. See, e.g., *Ibrahim Sagidia and Others v. Minister of Defence*, Israel High Court of Justice, 258/88, App. H. Ct. J. 323/88 (1988); *Suliman v. Minister of Defence*, Israel High Court of Justice, P.D. 33 (2) 113 (1979); *Military Prosecutor v. Halil Muhamed Halil Bakhis and Others*, supra note 17, 47 I.L.R. at 486. See also the *Jamyat Askham al- Ma'alim* case cited supra note 1, at 793, and *Dvikat v. Government of Israel*, P.D. 34 (1) 29 (H.C. 390/79), opinion of Witkon, J.: the G.C. "does apply...even though it is not within the jurisdiction of this court" as mere treaty law not based also in legislation. See also *Qawassmah et al. v. Minister of Defence*, P.D. 35(1) 617, 627 (H.C. 698/80), in which Cohen, J. attempted in his dissent to apply the G.C. Article 49 as part of customary international law.
  19. On estoppel, see generally *Nuclear Tests (Australia v. France)*, [1974] I.C.J. 253; cf. Rubin, "The International Legal Effects of Unilateral Declarations," 71 *Am. J. Int'l Law* 1 (1977).
  20. We note also that a signatory must take no action inconsistent with the main purposes of a treaty awaiting ratification. See, e.g., Vienna Convention on the Law of Treaties, May 22, 1969, art. 18, U.N. Doc. A/CONF. 39/27, at 289 (1969). One of the main purposes of a human rights treaty obviously is to assure the protection of human rights and a signator at a minimum, must not itself deny such rights or allow their violation. Thus, we consider Israel to be bound not to deny relevant due process guarantees contained in the 1966 Covenant.
  21. The G.C., in its Articles 67-78, contains specific rules for the operation of such military courts.
  22. See, e.g., Graber, *Development of the Law of Belligerent Occupation - 1863-1914*, 119, 140, 150-52, 273-76 (1949); 2 Oppenheim, *International Law* 347 (Lauterpacht's 6th ed., 1940); Spaight, *War Rights on Land* 357-59 (1911); Garner, *International Law and the World War* 85-7 (1920); Nobleman, *Military Government Courts in Germany* (1953).
  23. We do not take sides concerning the controversy whether the British Regulations remained in effect, were void ab initio or were voided by the British. On such a question, see, e.g., R. Shehadeh, *Occupier's Law*, op. cit. n. 1, at xiv-xv. Further, such regulations were prior to the Universal Declaration of Human Rights and developments in human rights law in the 1960s, 70s and 80s, and were also prior to the 1949 Geneva Conventions. In case of any inconsistency, the requirements, rights, and duties under international law will, in any event, prevail. See, e.g., U.N. Charter, art. 103 (in connection with arts. 55(c) & 56); G.C. arts. 1, 2, 148; IV J. Pictet, op. cit. n. 8, at 15-18, 592, 602-03; Principles of the Nuremberg Charter and Judgment, prins. II & IV, 5 GAOR, Supp. 12, at 11-14, para. 99, U.N. Doc. A/1316 (1950).
  24. On Israeli military courts in general, see *The Rule of Law in the Areas Administered by Israel* (Israel National Section of the I.C.J., 1981), 27-33; Pach, op. cit. n.

- 1, at 222-251; Al-Haq & Gaza Centre for Rights and Law, *Justice?—The Military Court System in the Israeli-Occupied Territories* (Feb. 1987).
25. On all of these categories, see Pach, *op. cit.* n. 1, at 245-47.
26. Military Order Concerning Security Instructions No. 378 (1970), art. 78(A).
27. See, Al-Haq, Briefing Paper No. 12 (May 11, 1988); Al-Haq & Gaza Centre for Rights and Law, *Justice?—The Military Court System in the Israeli-Occupied Territories*, *op. cit.* n. 24, at 7; Al-Haq, *Punishing A Nation—Human Rights Violations During the Palestinian Uprising* 328 (American ed. 1988) [hereinafter cited as *Punishing A Nation*].
28. The ICRC reports that they have visited more than 40,000 "detainees" since the end of 1987. See ICRC, *Bulletin No. 163*, at 3 (Aug. 1989).
29. Military Order No. 132 (West Bank Region), sec. 3, does not require such separation from adults in all cases. Such separation is required, however, under Article 10 (2) (b) of the 1966 Covenant. See also 1969 American Convention on Human Rights, art. 5(5). Of further interest are Article 76 of the G.C. and the 1959 Declaration of the Rights of the Child, U.N. G.A. res. (20 Nov. 1959).
30. *Op. cit.* n. 4.
31. *Id.*
32. "Lawyers' Strike," trans. by the Arab Lawyers Committee. Another one-month strike occurred on July 20th of 1989. See, e.g., *San Francisco Chronicle*, July 21, 1989, at A24, col. 3. A letter of June 27, 1989, from Attorney Jonathan Kuttub to the Jerusalem District Committee of the Israeli Bar added:

The elements of this situation have been the subject of repeated protests and complaints which lawyers individually and collectively have presented to all the relevant authorities, both verbally and in writing, repeatedly and over a long period of time...These conditions were also a subject of a written protest sent by attorneys on 14.5.88 to the relevant military authorities and to the Israeli Bar Association itself warning that it will be impossible for us to serve our clients before these courts under the prevailing conditions. These conditions were also detailed again in a statement issued by lawyers appearing before military courts, consisting of 22 separate articles of which I also enclose a copy as part of our reply.
33. See Military Order No. 1220, 78 d (a) 1 & 2 (1988).
34. ICRC, *Bulletin No. 163*, *op. cit.* n. 28, at 3.
35. *Op. cit.* n. 4.
36. *Id.*
37. *Id.* See also "Lawyers' Strike," *op. cit.* n. 32; Lawyers Committee for Human Rights, *Boycott of the Military Courts by West Bank and Israeli Lawyers* 17-20 (Background Memorandum, July 1989).
38. See, e.g., *Punishing A Nation*, *op. cit.* n. 27, at 23-32, 328-34.
39. See, e.g., *id.*; Amnesty International, *Israel and the Occupied Territories: Amnesty International's Concerns in 1988* (1989); M. Bassiouni & L. Cainkar (eds.), *The Palestinian Intifada—December 9, 1987-December 8, 1988: A Record of Israeli Repression* 19-23 (1989) [hereinafter cited as *Palestinian Intifada*]; 1989 U.S. Coun-

try Report, *op. cit.* n. 4 ("There was widespread beating of unarmed Palestinians in early 1988...On January 19, the Minister of Defense announced a policy of 'force, might, and beatings' to put down the uprising. He later said there was no policy of 'beating for beating's sake' and that some soldiers were exceeding orders.").

40. See generally *Al-Ittihaad*, June 25, 1989; *id.*, July 6, 1989. A U.S. mother was also arrested three days, until U.S. intervention, because her three-year old daughter gave a "V" sign near Ramallah. See *San Francisco Chronicle*, July 21, 1989, at A24, col. 3.
41. See, e.g., Military Orders Nos. 132 and 311 (West Bank Region), secs. 6 & 7; and Military Orders Nos. 1235 (April 1988) and 1256 (Oct. 27, 1988) (West Bank Region). Military Order No. 1235 applies to conduct of "minors" under 12 years of age ("any person that could not be convicted of criminal offences because of his age") which prosecutors consider to be "a criminal offence and implies a threat to the security and public order in the area." Parents who do not comply "shall face one year imprisonment" (art. 5) and can lose a posted bond if the child commits another such act because, at that point, "the parent shall be considered as if he did not halt the minor from committing additional acts...unless the parent proves to the court that he has done everything possible to prevent the minor from committing an additional act."
42. See also "Lawyers' Strike," *op. cit.* n. 32.
43. See, e.g., 1966 Covenant on Civil and Political Rights, art. 9(1); Universal Declaration of Human Rights, art. 9 (see also *id.*, arts. 2, 3, 7, 10-11); 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 5; 1969 American Convention on Human Rights, art. 7; see also G. C. arts. 41-43, 68, 78-79, 147.
44. See also *Punishing A Nation*, *op. cit.* n. 38, at 334-36; *Palestinian Intifada*, *op. cit.* n. 39, at 32-3, 61-2.
45. Such a requirement is mirrored in the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 5(2); and the 1969 American Convention on Human Rights, art. 7(4) (see also *id.* art. 7 paras. 3, 5 and 6). See also *Al-Matawakal Said Dachar Nazal v. The Military Court in Ramallah, et al.*, 726/88 (Israel High Court of Justice) ("It is proper to ensure...that a detainee be given *on his detention* an accurate and detailed statement of the reasons for his arrest.") (emphasis added).
46. *Op. cit.* text at n. 31.
47. Adopted by the First U.N. Congress on the Prevention of Crime and the Treatment of Offenders in 1955, approved by ECOSOC res. 663 C (XXIV) C, 24 U.N. ESCOR, Supp. (No. 1) 11, U.N. Doc. E/3048 (31 Jul. 1957) and res. 2076 (LXII) (13 May 1977).
48. For evidence of such, see, e.g., G. C. art. 33; Paust, "Human Dignity As A Constitutional Right: A Jurisprudentially Based Inquiry Into Criteria And Content," 27 *Howard L. Rev.* 145, 192-93 n. 206 (1984). See also 1989 U.S. Country Report, *op. cit.* n. 4 (illegality of practice of demolishing or damaging houses of families of a defendant—prohibition of collective punishment);

- ICRC, *Bulletin No. 164*, at 3 (Sept. 1989) ("Collective punishment or reprisals; as well as the destruction of property, is prohibited too, but dozens of houses have been dynamited, bulldozed or walled up.").
49. See, e.g., G. C. arts. 3, 16, 27, 31-33, 147; Geneva Protocol I, art. 75 (4)(f) (1977).
  50. See, e.g., 1966 Covenant on Civil and Political Rights, arts. 7, 10(1) and 14; Universal Declaration of Human Rights, art. 5; 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 3; 1969 American Convention on Human Rights, art. 5; African Charter on Human and Peoples' Rights, art. 5; 2 *Restatement (Third) of the Foreign Relations Law of the United States* 161, 164, 702(d) (1987).
  51. See, e.g., U. S. Department of the Army Field Manual 27-10, *The Law of Land Warfare* 178, 499 (1956).
  52. See Somer, *op. cit.* n. 16. Israeli soldiers are also under an obligation to refuse to obey manifestly illegal orders.
  53. Or, alternatively, to extradite such a person. See, e.g., G. C. art. 146; Paust, "Universality and the Responsibility to Enforce International Criminal Law: No U.S. Sanctuary for Alleged Nazi War Criminals," 11 *Houston J. Int'l L.* 337 (1989).
  54. On the fundamental right to a remedy, see, e.g., 1966 Covenant on Civil and Political Rights, arts. 2(3) and 9(5); Universal Declaration of Human Rights, art. 8; Paust, "On Human Rights: The Use of Human Right Precepts in U.S. History and the Right to an Effective Remedy in Domestic Courts," 10 *Michigan J. Int'l L.* 543, 611-28 (1989). Also, violations of international law must not be entitled to any immunity. See, e.g., Paust, *id.* at 618-20, 634-36, 642 & n. 579. On complicity and command responsibility, see, e.g., Paust, "My Lai and Vietnam: Norms, Myths and Leader Responsibility," 57 *Military L. Rev.* 99, 166-68, 175-84 (1972), and references cited.
  55. See also Al-Haq & Gaza Centre for Rights and Law, *Justice?—The Military Court System in the Israeli-Occupied Territories*, *op. cit.* n. 24, at 14.
  56. See also 1989 U.S. Department of State Country Report, *op. cit.* n. 4 ("which many defendants are unable to read"); Al-Haq & Gaza Centre for Rights and Law, *Justice?—The Military Court System in the Israeli-Occupied Territories*, *op. cit.* n. 24, at 12 and 14.
  57. Section 78 c (c) 1.
  58. Section 78 c (c) 2. See also *id.*, Section 78 d (b) 3 & 4. It is not clear whether Section 78 d(b) allows an extension of such time beyond 30 days in any particular case or only when secret arrests have been made, nor is it clear as to how long such a delay can be extended; but it appears possible that 78 c(c) 1 & 2 allows 30 days, that 78 d(b) 3 allows another 30 days, and 78 d(b) 4 allows an additional 30 days (for a possible total of 90 days) if each condition is met.
  59. Section 78 c (d). Thus, the investigation is of primary importance.
  60. See also Al-Haq & Gaza Centre for Rights and Law, *Justice?—The Military Court System in the Israeli-Occupied Territories*, *op. cit.* n. 24, at 12 and 21; U.N. Special Committee Report, U.N. Doc. A/31/218 (1976), p. 62, para. 352.
  61. *Punishing A Nation*, *op. cit.* n. 27, at 337. See also Al-Haq & Gaza Centre for



- Rights and Law, *Justice?—The Military Court System in the Israeli-Occupied Territories*, *op. cit.* n. 24, at 10-11, 19-21.
62. See, e.g., 1989 U. S. Department of State Country Report, *op. cit.* n. 4; *Punishing A Nation*, *op. cit.* n. 27, at 341-45, also quoting from the Israeli Landau Report of 1987; *The Palestinian Intifada*, *op. cit.* n. 39, at 35-9; Quigley, "International Limits on Use of Force to Elicit Confessions: A Critique of Israel's Policy on Interrogation," 14 *Brooklyn J. Int'l L.* 485 (1988).
  63. See also note 54 *supra*; *United States v. Altstoetter (The Justice Case)*, III Trials of War Criminals Before the Nurnberg Tribunals 3 (1950).
  64. See notes 49-51 *supra*. In particular, we disagree with any implication in the Israeli "Landau Report" of 1987 that "moderate physical pressure" is to be tolerated under international human rights law or, in particular, Articles 31 ("No physical or moral coercion") and 32 (no "physical suffering") of the G. C. See also Quigley, *op. cit.* n. 62, at 485, 491-96. On the impermissibility of coerced (or, indeed, use of any) confessions in older Jewish law, see I. Rosenberg & Y. Rosenberg, "In the Beginning: The Talmudic Rule Against Self-Incrimination," 63 *N.Y.U. L. Rev.* 955 (1988).
  65. See also note 54 *supra*.
  66. See also 1989 U.S. Country Report, *op. cit.* n. 4 ("The great majority"); Al-Haq & Gaza Centre for Rights and Law, *Justice?—The Military Court System in the Israeli-Occupied Territories*, *op. cit.* n. 24, at 11-12 and 28; *Palestinian Intifada*, *op. cit.* n. 39, at 63; R. Shehadeh, *op. cit.* n. 1, at 87; Quigley, *op. cit.* n. 62, at 488.
  67. We were also told by a prosecutor in the West Bank that murder cases must go to trial on the evidence.
  68. See also *Punishing A Nation*, *op. cit.* n. 27, at 345.
  69. See also *id.*; Al-Haq, Briefing Paper No. 12 (1988); Al-Haq & Gaza Centre for Rights and Law, *Justice?—The Military Court System in the Israeli-Occupied Territories*, *op. cit.* n. 24, at 28-29.
  70. See also Al-Haq & Gaza Centre for Rights and Law, *Justice?—The Military Court System in the Israeli-Occupied Territories*, *op. cit.* n. 24, at 29; Jenin case, file no. 2091/75, in *Selected Judgements of the Military Courts*, vol. D, p. 209, 211; Pach, *op. cit.* n. 1, at 244-45.
  71. See Amnesty International, Report and Recommendations of an Amnesty International Mission to the Government of the State of Israel, 3-7 June 1979, including the Government's Response and Amnesty International Comments 43 (1980).
  72. See notes 49-50, 64 *supra*.
  73. See, e.g., Universal Declaration of Human Rights, art. 11 (1); 1966 Covenant on Civil and Political Rights, art. 14 (2); 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 6 (2); 1969 American Convention on Human Rights, art. 8 (2); African Charter on Human and Peoples' Rights, art. 7 (1)(b); G. C. art. 71 (together with IV J. Pictet, *op. cit.* n. 8, at 354); Geneva Protocol I, art. 75 (4)(a), (e) & (g); see also 1953 U.N. Supplemental Rules of Criminal Procedure for Military Commissions of the United Nations Command, rule 32 ("The accused shall be presumed innocent until

his guilt is established by legal and competent evidence beyond a reasonable doubt.”).

74. See also Al-Haq & Gaza Centre for Rights and Law, *Justice?—The Military Court System in the Israeli-Occupied Territories*, *op. cit.* n. 24, at 25-6.
75. See IV J. Pictet, *op. cit.* n. 8, at 354. See also G.C. art. 146 (in connection with G.P.W. art. 105); Geneva Protocol I, art. 75 (3) and (4)(a); note 76 *infra*.
76. See also 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, arts. 5 (2) and 6 (3)(a); 1969 American Convention on Human Rights, arts. 7 (4) and 8 (2)(b); 1953 U.N. Supplemental Rules of Criminal Procedure, rules 22 (a) and 25 (a).
77. See also note 74 *supra*.
78. See text at notes 57-60 *supra*.
79. See also “Lawyers’ Strike,” *op. cit.* n. 32.
80. This occurred on June 28, 1989, in Ramallah.
81. See also 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 6 (1) and (3); 1969 American Convention on Human Rights, art. 8 (2)(c), (d) and (e); African Charter on Human and Peoples’ Rights, art. 7 (1)(c) (“right to defence”).
82. See also G. C. arts. 3 (1)(d), 49, 76, 146 (in connection with G.P.W. art. 105) and 147; Geneva Protocol I, art. 75 (4)(a).
83. See IV J. Pictet, *op. cit.* n. 8, at 356-57.
84. “Lawyers’ Strike,” *op. cit.* n. 32, adding: “The relatives...stand before the gates of the detention centers without any care for their human and physical need for many hours waiting for visits which may or may not materialize. Frequently the authorities prohibit all relatives from visiting detainees which is a form of continuous and collective punishment....”
85. See also 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, arts. 5 (3) and (4) and 6 (1); 1969 American Convention on Human Rights, art. 7 (5) and (6); African Charter on Human and Peoples’ Rights, art. 7 (1)(d).
86. See IV J. Pictet, *op. cit.* n. 8, at 354.
87. See also “Lawyers’ Strike,” *op. cit.* n. 38; Al-Haq & Gaza Centre for Rights and Law, *Justice?—The Military Court System in the Israeli-Occupied Territories*, *op. cit.* n. 24, at 17-18; “Civil Rights Group to Check Situation in Area’s Prisons,” *Jerusalem Post*, Jan. 8, 1988.
88. See also “Lawyers’ Strike,” *op. cit.* n. 32.
89. See also Al-Haq & Gaza Centre for Rights and Law, *Justice?—The Military Court System in the Israeli-Occupied Territories*, *op. cit.* n. 24, at 31.
90. *Id.* at 31.
91. See *id.* at 32.
92. See text accompanying notes 85-86 *supra*.
93. See MO No. 378.
94. See Al-Haq & Gaza Centre for Rights and Law, *Justice?—The Military Court System in the Israeli-Occupied Territories*, *op. cit.* n. 24, at 27.
95. See, e.g., G.C. arts. 72, 146 (in connection with G.P.W. art. 105); 1966 Covenant

- on Civil and Political Rights, art. 14 (3)(f).
96. Others have missed this point. See Bisharat, *op. cit.* n. 2, at 365. Some members of Al-Haq claim nonetheless that secret evidence has been used in such trials. Such claims are denied by the Advocate General and other Israeli officers.
  97. See Military Order No. 1265, Order Regarding Security Instructions (Amendment No. 58, 1 January 1989).
  98. See also art. 73, para. 2, of the Geneva Civilian Convention (right of petition "to the competent authority of the Occupying Power"); IV J. Pictet, *op. cit.* n. 8, at 369 (re: G.C. art. 78 appeals "either to a 'court' or 'board' ...[but] never [to] be left to one individual"); cf. G.C. art. 146 (in connection with G.P.W. art. 106—right to appeal "in the same manner as the members of the armed forces of the Detaining Power").
  99. See art. 73, paras. 1 and 2 of the G.C.; art. 14, para. 5 of the 1966 Covenant on Civil and Political Rights; art. 2 (1) of the European Protocol No. 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms; art. 8 (2)(h) of the 1969 American Convention on Human Rights; art. 7 (1)(a) of the 1981 African Charter on Human and Peoples' Rights.
  100. See also note 99 *supra*.
  101. With respect to civilian-judicial oversight, see also H. Stern, *Judgment in Berlin* (1984); *United States v. Tiede*, Crim. Case No. 78-001 A (U.S. Court for Berlin, March 14, 1979), 85 F.R.D. 227 (1979), reprinted in 19 *Int'l L. Mats.* 179 (A.S.I.L. 1979)); Paust, "An Introduction to and Commentary on Terrorism and the Law," 19 *Conn. L. Rev.* 697, 721-35 (1987).
  102. ICJ Newsletter No. 24, January/March 1985, at 53.
  103. Israel High Court of Justice (H.C. 253/88, App. 14 August 1988, November 1988).
  104. See also Paust, "Political Oppression in the Name of National Security: Authority, Participation, and the necessity Within Democratic Limits Test," 9 *Yale J. World Pub. Order* 178 (1982); text at note 113 *infra*.
  105. See, e.g., U.N. Special Committee Report, U.N. Doc. A/8089 (1970), para. 110, at 50; the annual U.S. Department of State Reports on Human Rights (especially 1977, at 39; 1978, at 637); U.N. Human Rights Commission, Resolution, Sec. 4(e), of 15 February 1977; see also G. C. art. 6; Amnesty International, *Israel and the Occupied Territories: Administrative Detention During the Palestinian Intifada* (June 1989). At least one member of the mission feels that "hostilities" between states is what is referred to in Article 133, that such hostilities ended in 1967, and, thus, that the continued practice of administrative detention is illegal. Another member of the mission recognizes that hostilities between belligerents are covered by Article 2 of the Convention (and thus Article 133); that insurgent- "hostilities" may be implicated as well under Article 133; and that the general status of some of the parties to the violence occurring inside Israel, inside the occupied territories, and elsewhere is not so clear as to exclude the possibility that "hostilities" are still occurring within the meaning of Article 133.

106. For a detailed historical analysis of administrative detention, see Emma Playfair, *Administrative Detention in the Occupied West Bank* (Occasional Paper No. 1, Al-Haq/Law in the Service of Man, the West Bank affiliate of the International Commission of Jurists, Ramallah, 1986); *Punishing A Nation*, *op. cit.* n. 27, at 211-18; see also Amnesty International, *op. cit.* n. 105; 1989 U.S. Country Report, *op. cit.* n. 4.
107. See also Amnesty International, *op. cit.* n. 105, at 1. A member of ACRI added that the number is probably 1,500 now. A lieutenant who reviews detention files in Gaza thought the number was over 1,000.
108. Playfair, *op. cit.* n. 106, at 23.
109. P.D. 35 (2) 253, A.A.D. 1/80.
110. See, e.g., *Abu Sarour, Abu Zeid, Abu Yassin v. IDF Commander in Gaza Strip and IDF Commander in West Bank*, High Court of Justice, 42/88, Petition of plaintiffs, on detainees' lack of knowledge of the reason(s) for their detention. See also 1989 U.S. Country Report, *op. cit.* n. 4. At least one military judge used the word "terrible" in connection with the use of secret evidence.
111. See National Lawyers Guild, *Treatment of Palestinians in Israeli-Occupied West Bank and Gaza: Report of the National Lawyers Guild 1977 Middle East Delegation* (1978), 81. Al Aruri was finally deported to France on August 27, 1989, after having appealed to the High Court of Justice and having claimed that he would be killed if he were sent to Lebanon. See *Duluth News-Tribune* (Duluth, Minn.), Aug. 28, 1989, p. 5-A.
112. See Amnesty International, *op. cit.* n. 105, at 7.
113. IV J. Pictet, *op. cit.* n. 8, at 367-68 (emphasis added). See also text accompanying n. 103 *supra*. Compare 1989 U.S. Country Report, *op. cit.* n. 4 ("Israel defines 'security' very broadly, and in many cases individuals appear to have been detained for political activities which the authorities regard as a security threat. Many individuals, including academics, journalists, and human rights workers, who have not engaged in or advocated violence or other acts threatening security, have been detained...."); Bisharat, *op. cit.* n. 2, at 365-67.
114. See IV J. Pictet, *op. cit.* n. 8, at 368.
115. See also note 20 *supra*.
116. See National Lawyers Guild, *International Human Rights Law and Israel's Efforts to Suppress the Palestinian Uprising* (1988); *The Washington Post*, June 3, 1988.
117. *Id.*, at 55-69, with copious documentation; *Punishing A Nation*, *op. cit.* n. 27, at 378-82. See also 1989 U.S. Country Report, *op. cit.* n. 4. In the *Sejira* case, *supra* n. 103, the Israeli High Court of Justice recognized in 1987 that the problem of overcrowding "must be solved," and Justice Shamgar stated that he was unwilling to allow certain disciplinary measures found to be in use at Ketziot.
118. See Playfair, *op. cit.* n. 106, at 27-28, 43-51.
119. See also the detailed account of conditions at the Ketziot Center in A.M. Rosenthal, "On Prisons, Israel Is in The Wrong" (taken from *The New York Times*), in the *International Herald-Tribune* (Sat/Sun), 8 July-9 July, 1989, at 4. See also 1989 U.S. Country Report, *op. cit.* n. 4.

120. See the complete list in R. Shehadeh, *Occupier's Law—Israel and the West Bank* (1985 and rev. ed. 1988), 88-89 (in both editions).
121. *Id.*, at 33.
122. Al-Haq & Gaza Centre for Rights and Law, *Justice?—The Military Court System in the Israeli-Occupied Territories*, *op. cit.* n. 24, at 2.
123. See also IV J. Pictet, *op. cit.* n. 8, at 335-36.

## Prison Camp Card

<h1>Postcard</h1>		<h1>גלוית דואר</h1>		<div> <div> מדינת ישראל  Postage free </div> </div>	
Sender: שם שליח Full name: שם השולח الاسم الكامل: الاسم الكامل		To: Full name الاسم الكامل		את אל	
Family: משפחה / عائلة Grandfather: الجد Father: الأب First: الأول		Family: عائلة / أسرة Grandfather: الجد Father: الأب First: الأول		Street: الشارع Place: المكان / القرية District: قضاء Area: منطقة	
Detainee no.: رقم السجل Identity card: بطاقة هوية رقم هوية		Place: المكان / القرية District: قضاء Area: منطقة		Street: الشارع Place: المكان / القرية District: قضاء Area: منطقة	
Place of detention: مكان الاعتقال مكان الاعتقال		Area: منطقة		Area: منطقة	

Date ..... תאריך  
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The card is similar to those recommended as a correspondence card for prisoners of war in G.P.W., Annex IV, C, and for civilian internees in G.C., Annex III, III.

## Appendix B

### References in International Instruments Relevant to Selected Topics in the Report (Excluding the Fourth Geneva Convention of 1949 and Geneva Protocol I of 1977)

#### *Charges, etc. in a Language Understood by Defendant:*

Covenant, Arts. 9(2), 14(3)(a)  
American Convention, Arts. 7(4), 8(2)(b)  
European Convention, Arts. 5(2), 6(3)(a)  
U.N. Supplemental Rules, Rules 22(a), 25(a)

#### *Access to an Attorney:*

Universal Declaration, Arts. 10, 11(1)  
Covenant, Arts. 14(3)(b) & (d)  
American Convention, Arts. (8)(2)(d) & (e)  
European Convention, Art. 6(1) & (3)  
African Charter, Art. 7(1)(c)  
U.N. Supplemental Rules, Rules 25(c)(1) & (2), 26

#### *Time and Facilities to Prepare:*

Covenant, Art. 14(3)(b)  
American Convention, Art. 8(2)(c) & (d)  
European Convention, Art. 6(3)(b)  
African Charter, Art. 7(1)(c)  
U.N. Supplemental Rules, Rule 26

#### *No Delay in Trial:*

Covenant, Arts. 9(3) & (4), 14(3)(c)  
American Convention, Art. 7(5) & (6)  
European Convention, Arts. 5(3) & (4), 6(1)  
African Charter, Art. 7(1)(d)

*No Secret Evidence:*

Covenant, Art. 14(3)(b) & (e)  
American Convention, Art. 8(2)(f)  
European Convention, Art. 6(3)(d)  
U.N. Supplemental Rules, Rule 25(g)

*Presumption of Innocence—Burden of Proof:*

Universal Declaration, Art. 11(1)  
Covenant, Art. 14(2)  
American Convention, Art. 8(2)  
European Convention, Art. 6(2)  
African Charter, Art. 7(1)(b)  
U.N. Supplemental Rules, Rule 32

*No Coerced Confession:*

Universal Declaration, Art. 5  
Covenant, Arts. 7, 10(1), 14(3)(g)  
American Convention, Arts. 5(2), 8(3)  
European Convention, Art. 3  
African Charter, Art. 5  
Convention Against Torture, Arts. 1(1), 2(2), 13, 15, 16

*Challenge of Judge(s):*

U.N. Supplemental Rules, Rules 25(f), 30

*Right to Appeal:*

Covenant, Art. 14(5)  
American Convention, Art. 8(2)(h)  
European Protocol No. 7, Art. 2(1)  
African Charter, Art. 7(1)(a)

*Identification of Instruments:*

Universal Declaration: Universal Declaration of Human Rights  
U.N. Charter: United Nations Charter  
Covenant: International Covenant on Civil and Political Rights



American Convention: American Convention on Human Rights  
European Convention: European Convention for the Protection of  
Human Rights and Fundamental Freedoms  
African Charter: African (Banjul) Charter on Human and Peoples'  
Rights  
U.N. Supplemental Rules: 1953 U.N. Supplemental Rules of Criminal  
Procedure for Military Commissions of the United Nations Com-  
mand (Korea)  
Convention Against Torture: Convention Against Torture and other  
Cruel, Inhuman or Degrading Treatment or Punishment

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## RECENT ICJ PUBLICATIONS

### **The Harassment and Persecution of Judges and Lawyers January 1988 to June 1989**

*A report of a CIJL study.*

*Published by the ICJ, Geneva 1989.*

*Available in English. Swiss Francs 12, plus postage.*

The report, which will be published annually, lists 145 judges and lawyers who have been harassed, detained or killed in 31 countries between January 1988 and June 1989. It includes 35 lawyers who were killed, 37 detained, and 38 who have been attacked or threatened with violence. Another 13 were professionally sanctioned (disbarment, removal, banning, etc.).

### **South Africa and the Rule of Law**

*A report of an ICJ Mission to South Africa in February 1987 by Geoffrey Bindman,*

*Jean-Marie Crettaz, Henry Downing and Guenter Witzsch.*

*Published by Pinter Publishers, London, 1988.*

*Available in English in paperback. 160 pp. Swiss Francs 25, plus postage.*

The report gives a detailed and comprehensive account of the elaborate legislation with which, over the years, the South African government has undermined all human rights of the black and coloured population.

### **Will Namibia's Elections Be Free and Fair?**

*A report of a Mission to Namibia in August 1989, by Geoffrey Bindman.*

*Published by the ICJ, Geneva, 1989*

*Available in English. Swiss Francs 10, plus postage.*

This report questions whether the Namibian election due to be held on 7 November 1989 will be free and fair. Complaints of intimidation have been brought to the authorities by, inter alia, the Legal Assistance Centre, and powerful evidence has been given that the South Africa-controlled police are still using illegal means to deter SWAPO voters. In a Supreme Court trial, which Mr. Bindman attended as an observer for the ICJ, the government challenged the Legal Assistance Centre's right to bring complaints before a court. Other violations are described in the report.

### **The Independence of the Judiciary and the Legal Profession in English-Speaking Africa**

*A report of two CIJL seminars in Lusaka (December 1986) and Banjul (April 1987).*

*Published by the ICJ, Geneva, 1988.*

*Available in English. Swiss Francs 20, plus postage.*

The seminars were organised as part of a series of regional seminars to examine how norms to protect the independence of the legal profession and the judiciary are being developed at the international level and how such norms should be applied and adhered to in different regions, and make recommendations for their implementation.

## INTERNATIONAL COMMISSION OF JURISTS