

ISRAEL AND THE OCCUPIED TERRITORIES

@The military justice system in the Occupied Territories: detention, interrogation and trial procedures

I. INTRODUCTION

The Israel Defence Force (IDF), the armed forces of the State of Israel, has occupied and administered the territories of the West Bank and Gaza Strip since 1967. Under orders effective since then, military courts have been established in the territories to try Palestinian civilians accused of offences defined mostly as "security offences".

Tens of thousands of Palestinian civilians have been tried before such military courts, including over 30,000 since the Palestinian *intifada* (uprising) began in December 1987. Most of them have been charged with violent offences such as throwing stones, although some have been tried for offences involving only the non-violent expression of political opinions. Many have been convicted after confessions allegedly coerced by torture or other forms of ill-treatment, which are systematic during interrogation. Those convicted often serve their sentences in Israel, many in the harsh conditions of the Ketziot detention camp in the Negev desert. The camp contains some 5,000 to 6,000 tried prisoners, in addition to administrative detainees, and visits by relatives do not take place.

The human rights context and Amnesty International's concerns

Concerns about the military justice system in the Occupied Territories were raised by lawyers and human rights organizations well before the outbreak of the *intifada*. These concerns have since become more acute, particularly in light of the large number of Palestinian civilians brought to trial since December 1987 and the persistent failure of the Israeli authorities to ensure respect of internationally recognized standards for fair trial, including those relating to the treatment of detainees.

Amnesty International is aware of the context in which the Israeli authorities have been operating in recent years. Since the *intifada* began in December 1987, Palestinians throughout the West Bank and Gaza Strip have adopted many methods to protest against the Israeli occupation of the territories. There have been widespread and regular

commercial and transport strikes, organized tax boycotts and other non-violent forms of protest. There have also been riots, sometimes on a large scale. Israeli forces and civilians have been attacked with stones and other means such as petrol bombs. More recently, a few Palestinians have carried out knife attacks, mostly in Israel. Many Israelis, both civilians and members of the armed or security forces, have been injured in attacks by Palestinians, and several have died as a result. Scores of Palestinians have been killed apparently by other Palestinians, the vast majority of them on suspicion of collaborating with the Israeli authorities.

While being aware of this context, Amnesty International has argued that in handling the situation in the Occupied Territories, the Israeli authorities have effectively condoned if not encouraged human rights violations by Israeli forces. In recent years Amnesty International has been concerned about a pattern of human rights violations suggesting that the Israeli Government is not willing to fully implement international human rights standards in the territories it occupies.

Amnesty International's reports and actions since the beginning of the *intifada* have focused on specific human rights violations within the organization's mandate. Amnesty International opposes outright the detention of prisoners of conscience, that is people who are held "by reason of their political, religious or other conscientiously held beliefs or by reason of their ethnic origin, sex, colour or language, provided they have not used or advocated violence". With regard to political prisoners accused of having used or advocated violence, Amnesty International opposes their detention "without trial within a reasonable time or any trial procedures relating to such prisoners that do not conform to internationally recognized norms". Amnesty International opposes torture, the death penalty and extrajudicial executions without reservation.

Amnesty International has published several reports on Israel and the Occupied Territories since the *intifada* began. In June 1988 two reports raised concerns relating to the use of live ammunition by Israeli forces, which by then had caused some 160 fatalities, and the deliberate misuse of tear-gas, which was reported to have caused the deaths of Palestinians. In August that year another report looked at torture and ill-treatment of prisoners in the hands of the Israeli forces (what became known as "the beatings policy"). In June 1989 a report detailed the organization's concerns about the widespread practice of administrative detention, without charge or trial, of thousands of Palestinians. In January 1990 a further report focused in detail on the killings of hundreds of Palestinian civilians by Israeli forces using firearms. Amnesty International's concerns about these various categories of human rights violations in the Israeli Occupied Territories remain, although the scale of these violations has varied with time. The organization continues to act on individual cases as they arise.

This latest report by Amnesty International addresses another of the organizations' concerns – the operation of the Israeli military justice system in the Occupied Territories, including detention and interrogation procedures. While Amnesty International opposes absolutely the use of the Israeli military justice system to imprison prisoners of conscience, as well as the use of torture or ill-treatment to extract confessions or other evidence, it does not challenge the right of the Israeli Government to bring to justice those who have used or advocated violence. In bringing such people to justice, however, the Israeli Government is obliged under international law to ensure that they are afforded prompt and fair trials.

Amnesty International has been concerned in recent years by criticisms levelled within the country and by outside observers at the operations of the Israeli military courts in the Occupied Territories. In particular, defence lawyers representing clients before the military courts – both Israeli and Palestinian – have repeatedly condemned procedures which they say fundamentally prejudice the fairness of proceedings. They have pointed to the divergence between the protections inherent in the Israeli criminal justice system and those afforded to Palestinians in the military justice system of the Occupied Territories.

Local and international human rights groups have issued studies of the military justice system. The groups include the Geneva-based International Commission of Jurists (ICJ); the Association for Civil Rights in Israel; *al-Haq*, the West Bank affiliate of the ICJ, which has published material on this subject on its own and in conjunction with the Gaza Centre for Rights and Law, also an affiliate of the ICJ; *BTselem* – the Israeli Information Centre for Human Rights in the Occupied Territories; and the New York-based Lawyers Committee for Human Rights.

Amnesty International's monitoring of the military justice system

This report is based on information gathered by Amnesty International over several years in which it followed various aspects of the operations of the military justice system in the Occupied Territories. During these years Amnesty International delegates have regularly visited Israel and the Occupied Territories in order to gather information, discuss matters with relevant officials, and observe trials. They have always obtained access and the cooperation of the Israeli authorities.

Most recently, an Amnesty International delegate observed trial sessions of military courts and the Military Court of Appeals in the Occupied Territories during a stay in Israel and the Occupied Territories in October and November 1990. In order to get as broad and diverse an experience as possible of the operation of these courts, he attempted to attend court sessions in a variety of locations. In the Gaza Strip, he spent one day each in the two facilities of the military court in the area, one located in Gaza City and the other on the coast (called the "Beach" court). In the West Bank, he attended court sessions on three separate days in Ramallah and on other days in Hebron (al-Khalil) and Jenin. Attempts to attend

sessions of the military court sitting in Nablus were thwarted on two occasions by the imposition of curfews in the city.

In each case the Amnesty International delegate arrived unannounced at the military compound where the court was located and sought admission to the compound and the courtroom with a trilingual English-Hebrew-Arabic interpreter. In general, gaining admission to the trials was not difficult although on three occasions soldiers monitoring entry to the military compounds expressed initial reluctance to grant admission to the delegate or, more particularly, his interpreter who was a Palestinian citizen of Israel. In each such case, however, the soldier involved relented after the delegate insisted on his right to attend trials which were said to be open and public.

During his stay the Amnesty International delegate discussed matters relating to the military justice system with a number of Israeli officials. In Tel Aviv he met Brig. Gen. Ilan Shiff, then the IDF's Deputy Military Advocate General, and Col. David Yahav, then Head of the International Law Section of the Military Advocate General's Corps (who have since taken up positions as, respectively, Military Advocate General – the IDF chief legal officer – and Deputy Military Advocate General). In Ramallah he held discussions with Brig. Gen. Uri Shoham, President of the Military Court of Appeals, who has overall responsibility for the administration of the military justice system, and Col. Ahaz Ben-Ari, then the IDF Legal Adviser for Judea and Samaria (the West Bank) and currently Head of the International Law Section of the Military Advocate General's Corps. In Gaza City a similar meeting was held with Lt. Col. Yaacov Hassidim, the IDF Legal Adviser for the Gaza Strip. He also met officials of the Ministry of Justice in Jerusalem and had informal discussions with a number of military prosecutors at military courts.

In addition, the Amnesty International delegate met around 30 Palestinian and Israeli lawyers acting as defence counsel at trials before the military courts. He had discussions with officials of lawyers' associations, including the Arab Lawyers' Committee, the Gaza Bar Association, the Israeli Bar Association and representatives of human rights organizations operating both in Israel and in the Occupied Territories. He also met relatives of those appearing before the military courts as well as defendants themselves.

II. SUMMARY OF AMNESTY INTERNATIONAL'S CONCERNS AND RECOMMENDATIONS

This report outlines the operation of the military courts in the Occupied Territories (with the exception of East Jerusalem) focusing on some of the main issues which appear to deprive defendants of their fundamental rights to a prompt and fair trial, including issues relating to the treatment of detainees. The report includes recommendations to the Israeli Government aimed at ensuring full respect of relevant international standards.

Amnesty International's concerns

1. People arrested are normally not informed in sufficient detail and at the time of arrest of the reasons for the arrest, thus curtailing their right to a proper defence.
2. Once arrested, detainees are held in prolonged incommunicado detention. They are normally not brought before a judge for 18 days. They may be prevented any meaningful contact with their lawyers and relatives well after that, in any case until interrogation is over, which is often 20 or 30 days after arrest. The first contact with the outside world for a detainee under interrogation is likely to be a visit by a delegate from the International Committee of the Red Cross (ICRC), whose role is restricted, and this does not happen before the detainee has spent 14 days in total isolation.
3. Incommunicado detention is facilitated by the significant delays in notifying families of the arrest of a relative, with consequent delays in retaining a lawyer. In the absence in practice of *habeas corpus* proceedings which would permit lawyers to challenge before a judge the grounds of their clients' detention, lawyers attempt to gain prompt access to their clients at extension of detention or bail hearings. However, such procedures are not operating adequately: lawyers are often not notified and therefore not present at such hearings, or are prevented from having contact with the detainees once in court.
4. Such institutionalized practice of prolonged incommunicado detention is a fundamental flaw of the military justice system. It encourages the possibility of arbitrary arrest and deprives detainees of crucial safeguards against torture or ill-treatment, which usually occur during the first hours and days of detention, as well as safeguards for a fair trial.
5. Confessions obtained under interrogation during this period of incommunicado detention are often the primary evidence against defendants appearing before the military courts. Many defendants claim that these confessions are false and have been obtained by

the use during arrest and interrogation of torture or other forms of cruel, inhuman or degrading treatment or punishment.

6. The lack of safeguards in the system to protect against torture and ill-treatment, as well as the evidence accumulated over the years, lends credibility to these claims. The very existence of the legal power to hold suspects incommunicado for lengthy periods seems calculated to facilitate such treatment, as does the existence of an official government policy which sanctions not only "non-violent psychological pressure", but also "a moderate measure of physical pressure" during interrogation.

7. While judges in the military courts can consider whether a confession has been obtained duress and are permitted to exclude any such confessions, they seem unwilling to exercise this option. Defendants are reluctant to ask for such an exclusion of their statements: torture and ill-treatment are difficult to prove, as they occur in isolation from the outside world, and if the application for such a ruling is unsuccessful, defendants are likely to face substantially longer sentences.

8. Numerous improper pressures are exerted on defendants to plead guilty and enter into a plea bargain with the prosecution, which is the resolution of the vast majority of cases. Many defendants have already made confessions which cannot be effectively challenged by the time a case comes to court. A defendant who wishes to contest charges is likely in many cases to find his or her trial delayed for months and sometimes for over one year. The normal practice is to keep defendants in detention until the end of the proceedings, in conditions inferior to those of tried prisoners. Under such circumstances, many defendants plead guilty to avoid a period of pre-trial detention which would exceed the likely sentence were they to plead guilty. The much heavier sentences imposed on those convicted after a full trial also deter many from contesting charges. The fundamental right under international law to a prompt and fair trial to prove guilt or innocence is clearly prejudiced under such circumstances.

9. A vicious circle is created between the practice of plea bargaining and torture or ill-treatment – the pressures to plea bargain and therefore not to raise any allegations of torture or ill-treatment encourage the use of torture or ill-treatment to extract confessions. In this way the military justice system effectively endorses torture or ill-treatment as well as the violation of a defendant's legal rights.

10. While "quick trials" appear to be utilized to avoid some of these problems, defendants are often tried without legal assistance as their lawyers are given insufficient notice of such trials, or none at all.

11. Lawyers operating in the military courts face various obstacles which seriously hamper their ability to provide adequate legal assistance. In addition to the impossibility of gaining

access to their clients during the critical period of interrogation, they often have inadequate opportunity to consult their clients during the period of preparation for trial. Visits to detainees are often difficult to arrange and take place in conditions usually allowing for little time and limited confidentiality. The interpretation in court proceedings can be extremely poor, thus further undermining defendants' right to a fair trial. Finally, episodes of abuse or harassment of lawyers are not unusual. Under these circumstances many lawyers feel more like social workers or market traders rather than legal practitioners.

Amnesty International's recommendations

Amnesty International is calling on the Israeli Government to implement the following recommendations in order to ensure that defendants before the military courts in the Occupied Territories are safeguarded against torture and ill-treatment and afforded their right to a prompt and fair trial:

1. Amnesty International recommends that the Israeli Government ensure that all those arrested in the Occupied Territories be adequately informed at the time of arrest, in writing and in a language they understand, of the reasons for their arrest and detention.
2. Amnesty International recommends that the Israeli Government implement a system whereby those detained in the Occupied Territories, like detainees in Israel, are brought before a judge within 48 hours. The judge must assess the lawfulness and necessity of the detention, as well as the treatment received by the detainee, and authorize any continuation of detention.

The Israeli Government should also ensure that any detainee who faces or could be facing charges before a military court is entitled at any time to have access to a judge empowered to decide without delay on the lawfulness and necessity of the detention and to order the release of the detainee if appropriate.

3. Amnesty International recommends that the Israeli Government implement a system whereby the families or friends of detainees are notified immediately of the arrest and whereabouts of their detained relatives. In particular, it should seek to implement the proposal that such notification, where feasible, should be by telephone, or by other appropriate means where telephones are not available. Alternative rapid forms of providing this information, such as the establishment of a centralized telephone inquiry office, should be considered.
4. Amnesty International recommends that the Israeli Government carry out a fundamental review of the law and practice in the Occupied Territories relating to a detainee's right of access to a lawyer. Any deprivation of this right should be exceptional and justifiable only on the basis of very special circumstances and for a very limited period of time, as

required by international standards. As a minimum, it should not exceed the maximum period for denial of access allowed by Israeli law. The decision to deprive a detainee of this right should not be left in the hands of the interrogating authorities but should be authorized and under the continuous supervision of a judge.

Amnesty International further recommends that the Israeli Government ensure that lawyers are afforded adequate and confidential access to their clients for preparation of their cases in all detention facilities. Written minimum rules consistent with internationally recognized standards for such visits should be prepared, made public and enforced in all detention facilities.

5. Amnesty International recommends that the Israeli Government ensure that lawyers representing detainees are given adequate notification of all extension of detention hearings relating to their clients, and the opportunity to attend such hearings. Before and during such hearings lawyers and their clients should be given sufficient information regarding the reasons for the arrest and continued detention, and adequate access to each other, so that they have an effective opportunity to exercise their right to challenge the detention and raise any complaint of torture or ill-treatment.
6. Amnesty International recommends that the Israeli Government make public the written guidelines relating to the procedure for bail applications in the military courts. In particular these guidelines should ensure that, once a bail application has been made with respect to a newly arrested detainee, a hearing should be held within a maximum of three days, with the detainee and the detainee's lawyer being given adequate notice and opportunity to attend.
7. Amnesty International recommends that the Israeli Government take all necessary steps to ensure that force is used only when strictly necessary to arrest suspects, and then only to the extent required to carry out the arrest. An effective system of investigations should be established to deal with those arresting officials who are alleged to have violated such standards, leading to effective criminal or disciplinary measures against anyone found responsible. The results of the investigations should be made fully available to the public.
8. Amnesty International recommends that the Israeli Government make a clear public commitment at the highest level to adhere to relevant international standards which absolutely and unconditionally forbid the use of torture and all other forms of cruel, inhuman or degrading treatment or punishment. To this end it should make public all existing guidelines relating to the use of physical and psychological pressure during interrogation and review them to ensure that they are in compliance with such international standards. Prompt, independent and impartial investigations into

evidence of abuses should be conducted. The results should be made fully available to the public and any official found responsible brought to justice.

9. Amnesty International recommends that the Israeli Government institute an independent and impartial review of the procedures operating in the military courts relating to the exclusion of confessions allegedly obtained under duress. In particular, steps should be taken to ensure that no defendant making such allegations is penalized by prolonged pre-trial detention or a punitive sentence for having exercised the right to challenge the admissibility of a confession. Prosecutors should be forbidden from suggesting that a less favourable plea bargain will ultimately be made available to people who challenge the admissibility of their confessions. Judges should investigate rigorously any evidence of torture or ill-treatment of defendants that come to their knowledge regardless of whether a complaint is made. They should also consider bail applications more positively in cases where a confession is suspected to have been coerced.
10. Amnesty International recommends that the Israeli Government carry out a prompt review of the use of plea bargaining in the military courts. While recognizing that plea bargaining is an element of many judicial systems and to an extent can facilitate the processing of large numbers of cases, Amnesty International is concerned that unduly coercive features connected with plea bargaining in the military courts combine to deprive defendants of an effective right to a prompt and fair trial. Such a review should address in particular the undue delays which appear endemic in the military justice system, often caused by the absence of defendants, prosecution witnesses, files and lawyers. It should also consider more extensive granting of bail, particularly in cases where delays in the trial of defendants contesting their charges may result in periods of pre-trial detention longer than any likely sentence. Finally, it should consider the issue of whether unduly punitive sentences are being imposed on individuals because they have chosen to exercise their right to a prompt and fair trial rather than accept a plea bargain.
11. Amnesty International recommends that the Israeli Government ensure that whenever "quick trials" are used, defendants' relatives are given sufficient notice to arrange legal representation and to be present at such proceedings if they wish. No "quick trials" should take place unless defendants have had adequate opportunity to consult their lawyers beforehand and to be represented by their lawyers at the actual hearings. Lawyers should be given adequate opportunity to examine prosecution evidence prior to any such hearing and to arrange for attendance by defence witnesses.

III. MILITARY COURTS IN THE OCCUPIED TERRITORIES: BACKGROUND

A. International Law and the Military Courts

This report refers where appropriate to the relevant laws and procedures operative in Israel and East Jerusalem (annexed by Israel in 1980). These provide an indication of how the State of Israel has defined the concept of a fair trial when seeking to ensure that its own citizens and residents of East Jerusalem are afforded the guarantees due to them under international law. Law and practice in Israel and East Jerusalem often differ radically from the situation prevailing in the Occupied Territories.

However, the fundamental standards for fair trial used as terms of reference by Amnesty International with respect to all countries are those contained in international law. This includes provisions of humanitarian law, particularly relevant to the Occupied Territories, as well human rights law. The report examines whether such minimum standards are respected in the military justice system of the Occupied Territories.

International humanitarian law

The primary international legal standards relating specifically to the operation of courts in Occupied Territories are set out in the body of humanitarian law composed by the Regulations annexed to the 1907 Hague Convention IV Respecting the Laws and Customs of War on Land and in the 1949 Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War.

The Israeli Government accepts that the Hague Regulations form a binding obligation on all states as declaratory of customary international law (the body of international rules which states consider binding even though not in the form of treaties). It also ratified the Geneva Convention IV in 1951, but does not consider it part of customary international law, only part of conventional international law (international law embodied in treaties).

Israel maintains that the Geneva Convention IV is not applicable to the territories of the West Bank and Gaza Strip. Its main argument is that the Convention aims at protecting the rights of a legitimate sovereign state whose territory has been occupied and that no power had such legitimate sovereignty over the territories in question when Israel occupied them in 1967. While maintaining that the Convention is not legally binding on Israel with regard to the Occupied Territories, however, the government has repeatedly declared that it would respect in practice its "humanitarian provisions", without clearly specifying such provisions.

The Israeli High Court of Justice, which has affirmed and exercised its jurisdiction over the Occupied Territories from the early days of the military government, has endorsed this official view of humanitarian law. It has considered the Hague Regulations applicable directly by Israeli courts, as declaratory of customary international law, unless conflicting with specific Israeli provisions. As for the Geneva Convention IV, it has considered that as conventional international law it would become applicable in court only if and when incorporated into the Israeli legal system by a specific law. Such a law has not been enacted, although relevant proposals have been submitted to the Knesset (the Israeli Parliament).

The international community has long accepted that the Hague Regulations are part of customary international law. It also considers that the Geneva Convention IV fully applies to the Israeli Occupied Territories, mainly on the grounds that the Convention aims at protecting the rights of people under military occupation irrespective of sovereignty claims. The ICRC, which is the guardian of the Geneva Conventions, as well as the General Assembly and the Security Council of the United Nations (UN), have consistently stated that Convention applies in full to the Occupied Territories and have often condemned acts by the Israeli authorities considered to be breaches of the Convention.

Article 43 of the Hague Regulations allows the occupying power to "take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country". The Hague Regulations do not lay out specific provisions for the trial of civilians by the occupying power.

Article 64 of the Geneva Convention IV makes clear that an occupying power shall, subject to security considerations and the provisions of the Convention itself, maintain in force penal laws existing at the time immediately prior to occupation and the pre-existing tribunals established to administer these laws. The second paragraph of Article 64 authorises the occupying power, under certain circumstances, to promulgate further legal provisions for the administration of the territories occupied:

"The penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention. Subject to the latter consideration and to the necessity for ensuring the effective administration of justice, the tribunals of the occupied territory shall continue to function in respect of all offences covered by the said laws.

"The Occupying Power may, however, subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfil its obligations under the present Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the

occupying forces or administration, and likewise of the establishments and lines of communication used by them."

Article 66 of the Geneva Convention IV authorises the establishment of "properly constituted, non-political military courts" to enforce provisions enacted by an occupying power:

"In case of a breach of the penal provisions promulgated by it by virtue of the second paragraph of Article 64, the Occupying Power may hand over the accused to its properly constituted, non-political military courts, on condition that the said courts sit in the occupied country. Courts of appeal shall preferably sit in the occupied country."

The establishment of military courts in the Israeli Occupied Territories and the promulgation of military orders defining certain security offences to be tried before such courts are consistent with these provisions. However, not all local laws and courts, pre-dating the Israeli occupation, have been maintained, and the surviving local institutions for the administration of justice in the Occupied Territories have been marginalised. Security-related matters have been removed from their jurisdiction by the military courts considered in this report, and other military tribunals have been established to take over local court jurisdiction in civil matters.

While international humanitarian law permits the establishment of military courts in Occupied Territories for the trial of security offences, it also defines certain minimum standards for their operation. The "properly constituted, non-political military courts" permitted by the Geneva Convention IV are meant to ensure that at every stage, from arrest to final resolution of judicial proceedings, an accused person is afforded certain minimum rights. Relevant provisions of the Convention are referred to later in this report. The Convention itself makes clear, in Article 147, that the wilful deprivation of "the rights of fair and regular trial prescribed in the present Convention" as well as "torture or inhuman treatment" constitute "grave breaches" of the Convention.

International human rights law

Detailed safeguards for a fair trial have also been articulated in a number of international human rights instruments. They draw on provisions of the Universal Declaration of Human Rights, which was adopted by the UN General Assembly on 10 December 1948 as the authoritative guide to the interpretation of the human rights provisions in the UN Charter. Respect of the procedural and other safeguards contained in those standards is essential if a trial is to be fair.

Most relevant are the internationally recognized standards contained in human rights treaties such as the 1966 International Covenant on Civil and Political Rights (ICCPR), which entered into force in 1976. Israel signed the ICCPR in 1966 but has not ratified it. However, under customary international law, recently codified in the Vienna Convention on the Law of Treaties, it is obliged to refrain from acts which would defeat the object and purpose of the ICCPR. Also relevant are the requirements of the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, an authoritative set of internationally recognized standards adopted by consensus by the UN General Assembly on 9 December 1988, and the UN Basic Principles on the Independence of the Judiciary, adopted by the Seventh UN Congress on the Prevention of Crime and the Treatment of Offenders and endorsed by the UN General Assembly in 1985.

This report also refers to the Declaration on the Protection of All Persons from being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted without a vote by the UN General Assembly on 9 December 1975; the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by consensus by the UN General Assembly on 10 December 1984 and in force since 1987, which again has been signed but not ratified by Israel; and to other standards such as the UN Standard Minimum Rules for the Treatment of Prisoners and the Code of Conduct for Law Enforcement Officials.

It is important in this context to stress what the Human Rights Committee, the body of experts established under the ICCPR to monitor the implementation of that treaty, said in April 1984 in its General comment 13 (21) on Article 14 of the ICCPR with regard to trials of civilians by military or special courts:

"The provisions of article 14 apply to all courts and tribunals within the scope of that article whether ordinary or specialized. The Committee notes the existence, in many countries, of military or special courts which try civilians. This could present serious problems as far as the equitable, impartial and independent administration of justice is concerned. Quite often the reason for the establishment of such courts is to enable exceptional procedures to be applied which do not comply with normal standards of justice. While the Covenant does not prohibit such categories of courts, nevertheless the conditions which it lays down clearly indicate that the trying of civilians by such courts should be very exceptional and take place under conditions which genuinely afford the full guarantees stipulated in article 14."

B. Structure of the Military Courts

The Israeli Government has entrusted the IDF with both military and administrative control of the West Bank and the Gaza Strip since Israel occupied these territories in 1967.

Military orders first issued in 1967, replaced in 1970 and amended several times since then, authorize the formation of military courts before which civilians can be tried in each of the territories. The same orders also regulate the operations of the courts. Separate but virtually identical military orders exist for the two territories. The military order used for reference in this report is the Order Concerning Security Provisions No. 378 of 1970 (with its over 50 amendments) issued for the West Bank. The military order issued for the Gaza Strip is not numbered.

Courts of first instance

These orders authorize the formation of both single-judge and three-judge military courts. Any judge sitting in a single-judge court and the President of a three-judge court must be a "legal judge", that is legally trained. The IDF Regional Commanders appoint them, by recommendation of the IDF Military Advocate General (the chief legal officer of the armed forces), and they must be officers of the rank of captain or above. Military prosecutors are similarly appointed. Both permanent army personnel and those on reserve duty can and do serve as judges and prosecutors. Non-legally qualified judges sitting in three-judge courts are appointed by the presidents of such courts from the ranks of the IDF.

Single-judge courts, before which the vast majority of cases are tried, do not have the authority to pass sentences of more than five years' imprisonment or impose a fine greater than a specific amount. Convictions and sentences passed by these courts, where no appeal has taken place, are final.

Three-judge courts can pass any sentence, including the death sentence (although it is Israeli prosecution policy not to ask for the death sentence for "security offences"). Convictions and sentences of a three-judge court, where no appeal has taken place, need to be endorsed by the Regional Commander. The Regional Commander has the power to confirm the verdict, reduce the sentence, or cancel or reduce any obligation to pay damages.

Until April 1989, there was no judicial appeal. Convictions and sentences of a single-judge court were valid immediately, although a military commander was entitled to review them on his own initiative or upon request of the prisoner, and had the power to acquit and release the prisoner, reduce the sentence or order a retrial. Convictions and sentences of a three-judge court required the approval of the Regional Commander who had the power to confirm them or exercise the other options available to a military commander as described above. At any time the Regional Commander was entitled to review the verdicts with powers of pardon or mitigation.

Military Court of Appeals

In January 1989 Military Order No. 1265 was issued in the West Bank as amendment No. 58 of Military Order No. 378. It established the Military Court of Appeals in the Occupied Territories, with effect from 1 April 1989. The establishment of this court followed a recommendation in 1988 of the Israeli Supreme Court, sitting as the High Court of Justice, that there ought to be a right of judicial appeal (decision 87/85). The court ruling was prompted by a petition of an East Jerusalem lawyer submitted in 1985.

The Military Court of Appeals generally sits with a panel of three judges, although there is a provision for a five-judge court in specific circumstances. All judges must be IDF officers and, in a court of three, at least two must be "legal judges" of the rank of lieutenant colonel or above. In a court of five judges, at least three must be "legal judges" of such rank. The President must be a legal judge of the rank of colonel or higher. The court is based in Ramallah in the West Bank, but sits in Gaza City on a weekly basis.

Both defendants and prosecutors may seek to appeal against conviction or acquittal, or against any sentence imposed. There are no restrictions on the right of appeal from judgments made by a three-judge court. A judgment of a single-judge court can only be appealed against if permission to do so is given in the body of the judgment or by the President or acting President of the Military Court of Appeals.

Convictions and sentences of the Military Court of Appeals must be endorsed by the Regional Commander, who exercises in this instance the same powers as with regard to verdicts of three-judge courts that have not been appealed. The Regional Commander, or a military commander in the case of a single-judge court, is entitled at any time to pardon a prisoner or reduce the sentence.

Brig. Gen. Uri Shoham, President of the Military Court of Appeals since its establishment in April 1989, told Amnesty International's delegate in November 1990 that some 60 to 70 per cent of the court's case load related to appeals against sentence, brought both by the prosecution and defence lawyers. A number of defence lawyers told the Amnesty International delegate that the prosecution almost invariably appeals against relatively low sentences imposed by judges, for example after there has been a failure to reach a plea bargain, and that higher sentences are often then imposed by the Military Court of Appeals. Defence lawyers say that they are reluctant to appeal against sentences to the court because of the possibility of bad precedents on sentencing being set.

Appointment of judges

Appointments are made by the IDF Regional Commander upon the recommendation of the Military Advocate General, who is in turn advised by a special committee. The committee is composed of the President of the Military Court of Appeals, a representative of

the Israeli Bar Association, the Deputy Military Advocate General and the two presidents of the military courts in the West Bank and Gaza Strip. Those appointed include full-time professional military judges and reservists who work as judges during their periods of reserve duty.

Military court judges and prosecutors belong to the same IDF unit. Judges are in fact promoted almost exclusively from the ranks of prosecutors, although the then Deputy Military Advocate General told the Amnesty International delegate in November 1990 that an individual would not be appointed directly from prosecutor to judge but would be required to spend a "cooling off period" in another position. Once appointed, judges have no right of tenure and the Regional Commander retains the power to remove them.

In light of the close links between military judges and prosecutors, and the lack of tenure of such judges, concerns have been expressed at the independence and impartiality of the judges in the military justice system operating in the Occupied Territories.

As articulated in all basic international human rights standards relating to the right to a fair trial, the existence of an independent and impartial judiciary is critical to guaranteeing this right. Article 14(1) of the ICCPR states that "everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law". The scope of these standards are elaborated in the UN Basic Principles on the Independence of the Judiciary. Amnesty International believes that the independence and impartiality of the judiciary in the military courts would be strengthened by the creation of a separate unit for judges independent of the prosecution and by ensuring tenure for all military judges.

Rules of procedure and evidence

Trials before Israeli military courts follow broadly the tradition of common law adversarial courts. In each case there are two contending parties – the prosecutor representing the state, and the defendant, usually represented by a lawyer. Prosecution and defence have the right to call and cross-examine witnesses. Defendants have the right to attend their trial and be assisted by an interpreter. Trials are open to the public, unless for reasons of security or morals the court decides to hold hearings *in camera*. The judge makes findings of fact and conclusions of law and, in the event of conviction, imposes a sentence, which can be suspended in whole or in part.

Article 10 of Military Order No. 378 allows the military courts "in any matter of procedure not prescribed in this order" to "give directions as to procedure as it deems most suitable for dispensing law and justice". The indirect source from which military courts draw to supplement procedures are the 1955 Military Justice Law and the Israeli procedural law in general.

Article 9 of Military Order No. 378 provides that, with regard to rules on evidence, military courts shall "proceed according to the rules prevailing in courts-martial trying soldiers", but entitles them to "deviate from the rules of evidence for special reasons that shall be recorded – if it deems it just to do so". This provision introduces in the military courts the whole body of the Israeli law on evidence, since the Military Justice Law require courts-martial to apply the rules contained in that body of laws.

Other tribunals and courts

In addition to military courts, the Israeli authorities have established in the Occupied Territories military tribunals which have taken over matters previously within the jurisdiction of local courts. Particularly significant is the Appeals Committee, which hears appeals on matters relating to land, natural resources, taxes, pensions and other matters. It is only advisory to the Regional Commander.

This report focuses exclusively on the operation of the military courts before which civilians in the Occupied Territories are being tried. It does not address the different procedures applicable to Israeli soldiers appearing before courts-martial in the separate military tribunals set up for that purpose.

This report also does not address the operation of the single military court in Israel, located at Lod, before which civilians from Israel and East Jerusalem may be tried. In practice, only Palestinian citizens of Israel and residents of East Jerusalem are brought to trial in this court. Israeli officials told Amnesty International that this was because only such categories of people were committing security offences in Israel or East Jerusalem. The safeguards operating with respect to trials in the Lod Military Court are far removed from the prevailing situation in the military courts of the Occupied Territories, since those tried in Lod are afforded the various procedural safeguards provided to criminal defendants by the Israeli Criminal Procedure Law.

C. Jurisdiction of the Military Courts

Territorial and personal jurisdiction

Military courts try offences committed in their region (the West Bank or Gaza Strip) or outside the region if the offence affects or was intended to affect the security or public safety of the region. With regard to the personal jurisdiction of the military courts, the 1984 report of the Israeli State Comptroller (which supervises the operations of the government at various levels) defines it as follows:

"Under instruction of the Israeli Police, issued by authorization of the Attorney General and the Military Advocate General, any of the following may be tried before a military court:

- (1) a local resident who committed an offence under the security legislation in the region;
- (2) a local resident who committed an offence under local law and the offence by its nature compromises the security of the IDF in the region, Israelis employed in or visiting the region, a local resident because of his activity in the service of the IDF or collaboration with it, or those who grievously damage the authorities' rule in the region;
- (3) a visitor from Israel (including a tourist) who had committed an offence under local law or security legislation, and the act does not constitute an offence under Israeli law;
- (4) a person who had committed an offence in the region and the head of the police investigation department in the region believes his case should be tried before a military court, and the legal adviser of the region agrees."

In practice, it is almost exclusively Palestinians from the Occupied Territories who are tried in the military courts. Jewish settlers in the Occupied Territories and Israeli citizens residing in Israel seem to be invariably tried under Israeli law by the regular civilian courts in Israel.

Offences tried before military courts

The exact limits of the military courts' area of jurisdiction, with regard to the offences tried before such courts, cannot easily be described with precision. Military legislation in the territories ostensibly aims at protecting military interests as well as regulating areas of civilian life. Military Order No. 378 and other military orders define a large number of security offences which are to be tried within the system. In addition, the Defence (Emergency) Regulations, enacted by the British Mandatory authorities in Palestine in 1945 and revoked by those authorities prior to their departure in May 1948, are still used by the Israeli authorities in Israel and the Occupied Territories and define certain security offences.

Offences punished by Military Order No. 378, as amended, include murder, for which the death penalty is provided. Throwing objects such as stones in order to harm a person, property or traffic is punishable with up to 10 years' imprisonment. The penalty is increased to up to 20 years' imprisonment if the object is thrown with harmful intent at a moving vehicle. Arson is punishable with up to 10 years' imprisonment. Acts which harm or "are liable to harm public safety or public order", as well as acts carried out specifically against the IDF, such as insulting, injuring and obstructing the work of soldiers, are also offences under this order. Other offences include sabotage, punishable by life imprisonment, as well as

espionage and unauthorized possession or manufacture of weapons. Perjury before a military court is punishable with up to five years' imprisonment.

Another military order of particular relevance is the Order Concerning the Prohibition of Incitement and Hostile Propaganda No. 101 of 1967, as amended. In sweeping terms this order criminalizes and makes punishable by up to 10 years' imprisonment almost every form of political expression in the Occupied Territories, including non-violent forms of political activity. Activities which are prohibited unless a licence is obtained by a military commander include meetings or marches of 10 people or more when the purpose is political or could be interpreted as political; the display of flags or emblems; and the publication of any document or image with a politically significant content. Also punishable are verbal and other manifestations of support or sympathy for the activities or aims of a "hostile organization" such as the Palestine Liberation Organization (PLO) or one of its factions.

Armed attacks against people and property, including by an "incendiary article" such as a petrol bomb, as well as the unauthorized carrying of such articles or other weapons, are punishable by death or a term of imprisonment "as the Court may think fit", under the terms of Regulation 58 of the Emergency (Defence) Regulations. Acts of interference with or damage to means of transport or communication are punishable with up to life imprisonment under Regulation 64. The provisions of Regulation 85 are often used. These punish offences such as membership and possessing material of, or performing a service or other activities for, an "unlawful association". An unlawful association is described as any body of people which aims to overthrow the authorities or is engaged in political violence, or which is simply declared to be unlawful by the authorities. Regulation 88, as well as military orders issued subsequently, provide for punishments for offences relating to censorship and banned publications.

In addition, local Jordanian and Egyptian laws, which were in effect at the start of the Israeli occupation in 1967, continue to be applied by local courts in the West Bank and Gaza Strip respectively. Under applicable international law, the Israeli authorities have the obligation to preserve such pre-existing laws and institutions. To the extent, however, that such pre-existing penal laws apply to offences which have been deemed "security offences", the military justice system has tended to take over jurisdiction. The IDF Legal Adviser in a territory (whose functions include the drafting of military orders and supervising the legality of the operations of military bodies in the territory) has the right to take such a matter out of the jurisdiction of the local court system on a case-by-case basis or by category of cases. Military courts are competent to try any criminal offence.

Increasingly, offences which would not seem to fit into the security category have been brought before the military courts, including cases related to the non-payment of taxes, fraud and other economic crimes, and motor vehicle offences. Israeli officials explain this

development by referring to a diminished will on the part of the local legal system since the beginning of the *intifada* to enforce legislation in such areas.

The sweeping wording of emergency and military provisions in force in the Occupied Territories and the way they are applied in practice are often inconsistent with the right to freedom of expression and association. This has led to the imprisonment of prisoners of conscience. For example, Palestinians have been imprisoned for peacefully manifesting their national aspirations in non-violent, symbolic ways, such as raising the Palestinian flag, wearing its colours or making the "V" sign. The Israeli authorities consider display of the Palestinian flag an automatic expression of support for the PLO, rather than first and foremost as an expression of national identity. The flag is in fact a symbol of the Arab Revolt against the Ottomans in 1916 and was used by Palestinians long before being adopted by the PLO when it was established in 1964.

Amnesty International believes that under no circumstances should people be imprisoned solely on account of their peaceful political views or activities. The body of legislation in force in the Occupied Territories and the practice of its application by the military courts should be reviewed to ensure that no one is imprisoned solely for the peaceful exercise of the rights to freedom of expression and association, including the right peacefully to manifest one's national identity.

IV. PROCEDURES RELATING TO ARREST AND INITIAL DETENTION

Under international law a person is entitled to certain minimal rights from the moment he or she is arrested which help to ensure that any eventual trial will be fair. These rights relate mainly to the judicial supervision of detention and the detainee's access to the outside world.

A. Information on the Reasons for Arrest

Legislation and practice

Article 21 of Military Order No. 378 requires that a charge sheet, containing the charge and details of the alleged offence, be prepared before the beginning of the trial, and that "[a] copy of the charge sheet be given to the defendant before his trial". Article 12 provides for translation of the trial proceedings. There is no requirement for detainees to be informed promptly and in writing, in a language they understand, of the reasons for their arrest.

In practice, at the time of arrest detainees are usually not told the alleged offences for which they are being arrested. In most cases they can only surmise the reasons for their arrest as interrogation gets under way. Lawyers often do not find out such reasons themselves until in court. Even when charge sheets are filed, they are usually available only in Hebrew, a language that many Palestinian detainees do not speak. Such practices are inconsistent with a recommendation of the High Court of Justice (decision 726/88) that detainees be given at the time of arrest an accurate and detailed statement of the reasons for the arrest.

Relevant international standards

The practices are also inconsistent with international law. Article 9(2) of the ICCPR requires that "[a]nyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him." The same provision is included in Principle 10 of the UN Body of Principles. Article 71 of the Geneva Convention IV requires that "[a]ccused persons who are prosecuted by the Occupying Power shall be promptly informed, in writing, in a language which they understand, of the particulars of the charges preferred against them".

Amnesty International's recommendations

Amnesty International recommends that the Israeli Government ensure that all those arrested in the Occupied Territories be adequately informed at the time of arrest,

in writing and in a language they understand, of the reasons for their arrest and detention.

B. Judicial Supervision of Initial Detention

Legislation and practice

The prevailing procedures in the Occupied Territories allow for a person to be detained for up to 18 days without a detention order issued by a judge. Article 78(a) to (e) of Military Order No. 378 authorizes a soldier to arrest and detain any person suspected of committing a security offence for 96 hours without a warrant. After this, two seven-day extensions may be granted by police officers before the detainee need be brought before a judge for the first time.

This contrasts starkly with the law applied in Israel and East Jerusalem, which stipulates that a person "shall be brought before a Judge as soon as possible, but not later than forty-eight hours after his arrest", as required by Article 27(b) of the 1982 Criminal Procedure Law, or should be released. According to Article 16(b) of the 1969 Criminal Procedure (Arrest and Searches) Ordinance (New Version), a further maximum period of 48 hours may be granted "if owing to the temporary absence or illness of a Judge or for other adequate cause it is impossible" to bring the detainee before a judge within the original 48 hours.

The lengthy period of detention without any judicial supervision in the Occupied Territories affords opportunities for serious abuse of the rights of the suspect. In particular, it exposes people to the risk of arbitrary arrest and deprives detainees of a crucial safeguard against torture and ill-treatment.

Risk of arbitrary arrest

Such prolonged detention without judicial supervision provides the arresting authorities with the freedom to arrest people arbitrarily and detain them for up to 18 days. It appears that many of those who are detained in the Occupied Territories are freed without charge in the period between the first and 17th day of arrest, some without having been interrogated.

From the point of view of the Israeli authorities, these could be cases where adequate grounds existed to justify the initial arrest but subsequent investigation showed insufficient evidence to bring charges. Critics of the system, however, maintain that many such cases amount to punitive measures against Palestinians in the aftermath of incidents which have angered the authorities, or that the arrests are a means of harassing targeted individuals with periods of short term detention, or that they help to secure the arrest of specific individuals by detaining their relatives as "hostages".

Although Amnesty International is not in a position to assess the overall scale of the problem, it has learned of individual cases where such violations appear to have occurred. For example, while attending the military court in Jenin in the West Bank in November 1990, the Amnesty International delegate observed the latter stages of the trial by a single-judge court of three young men charged with stone throwing. It transpired that the three had been among a group of eight young men who had been arrested in Jenin on 25 October 1990 during a raid by IDF soldiers on the house of a blacksmith. The blacksmith's 17-year-old son, Mahmud Shaker Lahluh, had been shot dead by the IDF three days earlier. In the days after his death, relatives and friends were visiting the family's home to offer condolences in accordance with local custom. On the afternoon of 25 October, IDF soldiers entered the home and arrested the eight men present.

The eight young men were alleged to have been involved in an earlier stone throwing incident. They were held in tents in a detention centre near Afula. Five of them were not identified during two identity parades conducted by the IDF. Yet all five were held in detention for four days before their release, without any evidence against them. The other three, who included the surviving son of the blacksmith, were acquitted without comment by the military judge. While no explanation was offered by the judge, it appeared clear to the Amnesty International observer that convictions on the evidence presented would have been an obvious miscarriage of justice. The two IDF witnesses for the prosecution gave blatantly contradictory evidence about the time and whereabouts of the two identity parades at which the defendants had allegedly been identified, as well as other testimony which cast serious doubts on their credibility. There was a four-day discrepancy in their testimony with respect to events which had allegedly occurred the previous week. One of the witnesses made the extraordinary claim that he could remember and identify the faces of every one of some 15 youths allegedly involved in the stone throwing incident.

One case in which an apparently arbitrary arrest survived the initial judicial supervision was observed by the Amnesty International delegate in the Hebron military court. The case also related to a charge of stone throwing. The defendant was said to have been among 20 youths watched by a soldier through binoculars from an observation post said by the soldier to be some 1,600 meters from the alleged stone throwing. The soldier claimed to have heard what was being said by the youths and incorrectly identified the clothing and hairstyle of the defendant on the day. He further admitted that he did not actually see the defendant throwing stones. More than a month had elapsed since the incident and no effort had been made for the soldier to identify the youth in an identity parade or any other identification process, although the youth had been in custody throughout. The trial was the first occasion when he saw the youth close-up. He made an identification in the courtroom only after the youth, in the soldier's presence, had been required to stand at the beginning of the proceedings. The judge's terse verdict was: "After reviewing the case, there is doubt on the charge. The defendant should be released on the spot".

The quality of the prosecution evidence presented in these cases was so poor as to be indicative either that there was very serious negligence in bringing the charges or that there had been an intentional attempt to frame innocent individuals. A prompt and rigorous examination of the grounds for detention by a judge could have led to the immediate release of the accused, sparing additional hardship to the detainees as well as saving time for the courts.

Incidents such as these strengthen claims that the IDF uses its ability to detain a person without judicial supervision for up to 18 days to arbitrarily harass particular groups and individuals. The most effective way to counter such claims would be for the Israeli Government to introduce in the Occupied Territories the same kind of judicial protections which operate within Israel and East Jerusalem.

The Landau Commission recommendation on judicial review of detention

Prompt judicial review of detention is a safeguard which the Israeli authorities themselves appear to have recognized as lacking in the present system in the Occupied Territories, although they have not yet taken remedial action. In 1987 the Israeli Government established a commission of inquiry, headed by Justice Moshe Landau, to look into interrogation methods of security detainees. In its final report, which is examined in detail below, the Commission concluded that detention without judicial supervision for a period of 18 days was not acceptable. It stated (in paragraph 4.17):

"We support the proposal to shorten this period and recommend that the question of prolonging the detention be brought before a judge no later than the eighth day after the day of his arrest."

Although the Commission's report was endorsed by the Israeli Government, the proposal to shorten the period of detention without judicial access was not implemented. The Military Advocate General has since stated his reluctance to implement the reduction of the 18-day period in the face of the *intifada*.

As set out in greater detail later in this report, allegations are consistently made of torture and ill-treatment of those detained and facing criminal charges in the Occupied Territories. With equal consistency, the Israeli authorities seek to deny or minimize such allegations. So long as a system continues to exist in the Occupied Territories which seems so clearly designed to remove from judicial supervision those in the initial stages of detention, Israeli officials' denials are likely to be treated with great scepticism.

Amnesty International notes that even the proposed eight-day maximum period of detention without judicial supervision falls far short of the safeguards provided for by Israeli law in this respect. It is also inconsistent with international standards of judicial access.

Habeas corpus

In many countries detainees are allowed at any time to challenge before a judge the lawfulness and necessity of their detention. In these countries such a right, which is protected by international standards, is exercised by application for a writ of *habeas corpus* or *amparo*.

Article 78(i)(1) of Military Order No. 378 authorizes a military court, as well as a police officer, to order the release of a person detained under the provisions of the order. The procedure in question, commonly known as "*bet shii*" (from *bakashot shonot*, miscellaneous applications), allows in principle for requests for release to be presented at any time to a military court. Although the order apparently allows for such requests to be made simply on the grounds that the arrest was illegal or unnecessary, requests made under this procedure appear to be invariably treated by the military courts as requests for release on bail.

In practice, therefore, there is no *habeas corpus* remedy available to detainees in the Occupied Territories. In Israel, by contrast, request for release on grounds of illegal arrest can be filed to a Magistrates' Court even before the expiry of the maximum period of 48 hours within which a detainee must be brought before a judge.

Relevant international standards

International human rights standards forbid arbitrary arrest or detention and require that all people deprived of their liberty, including any person charged with a criminal offence, be brought promptly before a judge.

Article 9(1) of the ICCPR provides that "[n]o one shall be subjected to arbitrary arrest or detention". Article 9(3) provides that "[a]nyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power".

Principle 11.1 of the UN Body of Principles states that "[a] person shall not be kept in detention without being given an effective opportunity to be heard promptly by a judicial or other authority" with the strongest possible guarantees of competence, impartiality and independence.

The Human Rights Committee has expressed the view in its General Comment 8 on Article 9 that delays in bringing a detainee before a judge "must not exceed a few days".

International standards also require that anyone in detention has the right at any time to institute proceedings in a court to obtain a ruling on the lawfulness of the detention and to be released if the detention is unlawful (right of *habeas corpus*). Article 9(4) of the ICCPR states that "[a]nyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful".

Principle 37 of the UN Body of Principles requires that "[a] person detained on a criminal charge shall be brought before a judicial authority provided by law promptly after his arrest. Such authority shall decide without delay upon the lawfulness and necessity of detention". Principle 32.1 states that "[a] detained person or his counsel shall be entitled at any time to take proceedings according to domestic law before a judicial or other authority" with the strongest possible guarantees of competence, impartiality and independence, "to challenge the lawfulness of his detention in order to obtain his release without delay, if it is unlawful".

In his 1991 report, the UN Special Rapporteur on torture (an expert appointed by the UN Commission on Human Rights) stressed that the provisions of Article 9(4) and Principle 32 are applicable "also under a state of siege or emergency".

Amnesty International's recommendations

Amnesty International recommends that the Israeli Government implements a system whereby those detained in the Occupied Territories, like detainees in Israel, are brought before a judge within 48 hours. The judge must assess the lawfulness and necessity of the detention, as well as the treatment received by the detainee, and authorize any continuation of detention.

The Israeli Government should also ensure that any detainee who faces or could be facing charges before a military court is entitled at any time to have access to a judge empowered to decide without delay on the lawfulness and necessity of the detention and to order the release of the detainee if appropriate.

C. Notification to Detainees' Families

In order for a detainee to obtain access to legal advice and assistance, it is generally a requirement that the detainee's family members or friends be informed of the detainee's arrest and whereabouts so that a lawyer can be retained.

Legislation

Article 78A(b) of Military Order No. 378 (as amended by Military Order No. 1220 issued in March 1988) appears to protect this right and Article 78A(c) states that such notification shall also be given to a specific lawyer on request:

"(b) If a person is arrested, a relative will be notified without delay of his arrest and place of detention, unless the detainee has requested otherwise.

(c) Upon the detainee's request, an advocate whom he mentions by name will also be notified of the facts stated in sub-clause b."

However, Article 78D(b)(6) allows a judge to permit that notification of an arrest be withheld for up to 12 days if convinced "that this is necessary for the security of the region or the purposes of the investigation".

In Israel and East Jerusalem, according to Article 28(a) of the Criminal Procedure Law, notification of arrest and place of detention shall also be made to relatives, unless the arrested person requests otherwise, and to a lawyer if the arrested person so requests, "without delay". However, Article 30(a) and (c) allow a District Court judge to permit that the arrest of a person accused of certain security offences be kept secret for a maximum period of 15 days if the Minister of Defence certifies in writing that reasons of state security so require.

The High Court of Justice recommendation

In November 1989 the High Court of Justice in decision 670/89 reviewed adherence by the authorities to the relevant provisions of the military orders in the Occupied Territories and acknowledged that they protected a basic natural right:

"(1) The duty to notify according to Article 78A(b) ... stems from a person's fundamental right, after he has been lawfully arrested by the competent authorities, that those authorities will inform his relatives of his arrest and whereabouts, so that they will know what has become of their arrested relative and how to give him the necessary assistance in order to protect his freedom.

(2) This is a natural right, based on human dignity and general principles of justice, and is given to both the arrested person and his relatives."

This view was expressed by the High Court of Justice in a ruling on a petition of Musa Yunes Muhammad 'Udah, Ahmad Jaber Yusuf Shahin and 'Aziza Jum'a Sulayman Abu Shakra, relatives of young Palestinians who were arrested on 5, 6 and 13 July 1989. After a month spent in vain attempting to find the detainees, they presented their case to the High Court of Justice on 10 August 1989. Yet it was only on 30 August 1989 that the legal representative of the relatives was informed of the whereabouts of the detainees and, in the words of one of the justices, "it is likely that the appeal in this case has done its share in the ultimate notification of the relatives". The petition was also brought by the Association for Civil Rights in Israel, seeking a ruling to compel compliance with the relevant provisions on notification to families.

In the end the court ruled on the case of the three Palestinians, ordering the authorities to pay the court costs. However, it dismissed the petition by the Association for Civil Rights in Israel because two days before it was to be heard in September 1989 the State Attorney's office informed the court that new instructions regarding notification of families about arrests and places of detention were being issued.

These new instructions included provisions for special postcards to be given to detainees to fill out and then to be mailed daily to their relatives informing them of the detainees' whereabouts. They also provided for lists, including lists in Arabic, to be posted on notice boards in each district's Civil Administration office and updated daily, showing prisoners held in the district's detention facilities and providing information on transfers of detainees during the previous week. These instructions further provided that in "extraordinary cases" (for example, when a detainee needs special medicine), notification to a detainee's family should be made by telephone. A control centre established earlier should continue to collect data on the detainees held in the various facilities of the IDF or the Prison Service in order to facilitate the process of notification.

It is important in this context to note that the High Court justices, although they dismissed the petition by the Association for Civil Rights in Israel, expressed reservations about the adequacy of these arrangements for family notification. Justice Theodor Or wrote a separate opinion concurring with the conclusion of Justice Menachem Elon, Vice President of the Court, that the appeal should be dismissed in light of the State Attorney's proposals, but warned of the likely inadequacy of these proposals. He was supported in a second concurring opinion by Justice Eliahu Mazza who called upon the authorities to pay serious attention to Justice Or's remarks in their efforts "to improve as much as possible the previous procedures".

Justice Or stressed in his opinion that, under Article 78A(b), the responsibility to notify relatives promptly rests with the authorities. He concluded that this responsibility is not

likely to be adequately met by a postcard system alone and suggested that wherever feasible relatives should be notified by telephone:

"I saw fit to emphasize this [that it is the duty of the detaining authority to ensure notification to relatives], although in most cases the detainee himself will avail himself of the postcard he is provided with and will fill it out, and if it is sent by the detaining authorities, his arrest and whereabouts will be made known to his relative. Sometimes it does not happen this way. Occasionally the detainee is in such a physical or mental condition that one cannot rely on his being properly aware of his right, and might therefore not act to exercise it. Sometimes it may happen that his postcard does not reach its destination, due to reasons beyond his control. Therefore, the detention authorities must not only ensure that the detainee is provided with a postcard. They must also take the reasonable required steps to ensure that in those cases where there are grounds to believe that the postcard does not suffice to ensure that the notification is delivered, the relative of the detainee is actually notified ...

"... The duty to notify the relative of a detainee should be carried out 'without delay', as stated in the above-mentioned Article 78A(b). It seems to me that under normal circumstances, when it is possible and does not entail restrictions or difficulties – of a technical or security nature – it is appropriate to fulfil the duty through a telephone call informing the relative of the detainee, and thus prevent needless delay of the notification".

Justice Or in his opinion cited a statement given on 29 June 1989 to the Speaker of the Knesset (the Israeli Parliament) by Minister of Defence Yitzhak Rabin in which he said that the possibility of notifying families by telephone was being examined. Justice Or concluded:

"... Perhaps the expansion of this simple and quick mode of notification ought to be considered for all cases where such mode of notification is feasible, where the above-mentioned restrictions and difficulties do not apply, and not only in exceptional circumstances."

The practice

Information collected by Amnesty International indicates that these instructions are not operating effectively. Relatives of detainees interviewed by Amnesty International indicated that they had received postcards from detainees but that these postcards had arrived at a minimum of one to two weeks after arrest. In general, the posting of detainees' lists in Arabic in Civil Administration offices appeared not to be taking place. In places such as Bethlehem where lists were being produced, errors meant the lists were unreliable. In any event, it was not always feasible for relatives of detainees to travel to administrative centres in order to examine such lists.

The result has been that in the vast majority of cases families continue to rely on rumour and second-hand information regarding the whereabouts of their detained relatives. The primary sources of information about detainees are released detainees and those appearing in court, lawyers who have visited detention facilities to see other detainees, and the ICRC.

The delays necessarily inherent in such a defective system of notification increase the vulnerability of detainees. To the extent that family members and lawyers might try to protect the rights of detainees during the critical period immediately after arrest, their attempts are bound to be frustrated where it is impossible to determine the whereabouts of the detainee.

The task of collecting and disseminating information about the large number of individuals detained in the Occupied Territories requires considerable resources, particularly as many Palestinian families do not have telephones. Nevertheless, the IDF operating in the territories clearly possesses such resources.

When, for example, Amnesty International's delegate raised with the IDF Legal Adviser for the Gaza Strip a number of individual cases of detainees, including some in the West Bank who had no connection with Gaza, the Legal Adviser was able with relative ease to respond to the queries using computerized records and the telephone. The combination of sophisticated technical record keeping, communications systems and very substantial human resources available to the IDF in the Occupied Territories makes it an entirely reasonable proposition that the families of detained individuals should be notified immediately of the whereabouts of their detained relatives.

Relevant international standards

International standards require prompt notification of the arrest and whereabouts of detainees to their families and friends. Principle 16.1 of the UN Body of Principles requires:

"Promptly after arrest and after each transfer from one place of detention or imprisonment to another, a detained or imprisoned person shall be entitled to notify or to require the competent authority to notify members of his family or other appropriate persons of his choice of his arrest, detention or imprisonment or of the transfer and of the place where he is kept in custody."

Principle 16.2 includes special provisions for the notification of diplomatic missions in the case of detained foreigners and for the automatic notification by the authorities themselves of parents or guardians where juveniles or other detainees with special needs are

involved. Principle 16.3 permits a delay in notification only "for a reasonable period where exceptional needs of the investigation so require."

Rule 92 of the UN Standard Minimum Rules requires immediate notification to families and friends:

"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, and for receiving visits from them, subject only to such restrictions and supervision as are necessary in the interests of the administration of justice and of the security and good order of the institution."

The UN Special Rapporteur on torture, recognizing the importance of prompt notification to families as a safeguard against torture, stated in his report for 1989 that the relatives of any person who is arrested "should be informed promptly of his arrest and the place where he is detained".

Amnesty International's recommendations

Amnesty International recommends that the Israeli Government implement a system whereby the families or friends of detainees are notified immediately of the arrest and whereabouts of their detained relatives. In particular, it should seek to implement the proposal that such notification, where feasible, should be by telephone, or by other appropriate means where telephones are not available. Alternative rapid forms of providing this information, such as the establishment of a centralized telephone inquiry office, should be considered.

D. Regular Access by Lawyers

Prompt and regular access by lawyers is an important safeguard which may effectively protect detainees against abuses during the critical initial stages of their detention. Lawyers give detainees necessary legal advice relevant to any investigation which is taking place and any eventual charge. Access by lawyers also provides a degree of protection against the physical and psychological abuse of detainees. The detaining and interrogating authorities are less likely to torture or otherwise ill-treat detainees if they know that the detainees' legal advisers have prompt access to them and will be able to hear their complaints, note any injuries and take appropriate action.

Yet the relevant military orders in the Occupied Territories permit a detainee to be deprived of this right to access to a lawyer for up to 90 days. Perhaps most significantly, these orders provide that the interrogating authorities themselves have the authority to withhold this right during the first 30 days of detention. Thus the same institutions against whom any eventual allegations of torture or ill-treatment may be lodged have the authority to deprive detainees of one of the primary safeguards against such treatment.

Legislation

Article 78C of Military Order No. 378, as amended, begins from the premise that "[i]f a detainee requests to see a lawyer, or a lawyer appointed by a relative of the detainee requests to see the latter, the person in charge of the investigation will allow the meeting". However, Article 78C also states that this same person in charge of the investigation may issue written orders to prevent a detainee from exercising this right for up to 15 days "if in his opinion it is necessitated by the security in the region or for the sake of the investigation". The person in charge of the investigation is defined as a police officer of a certain rank, the head of a GSS team of interrogators or an IDF officer appointed by the IDF Regional Commander. Access to a lawyer can be prevented for similar reasons for a maximum of a further 15 days by a police, GSS or IDF officer of rank higher than the person in charge of the investigation.

Under Article 78D, a military court legal judge may grant a further 30-day deprivation of this right on the same grounds. The president of the court or an acting president may extend this deprivation for an additional and final 30 days if the IDF Regional Commander certifies in writing that "special reasons of security in the region" require such a measure.

In Israel and East Jerusalem, according to Article 29(f) of the Criminal Procedure Law, a meeting between an individual suspected of certain security offences and a lawyer may be prevented by the person in charge of the investigation for a maximum of 15 days. According to Article 30(c), this can be extended for a further 15 days with the authorization of a District Court judge if the Minister of Defence certifies in writing that reasons of state security so require. The exercise of these powers appears to be rare.

The practice

In the Occupied Territories, the far more extensive powers with regard to lawyers' visits appear to be exercised as a matter of routine by the interrogating authorities. Detainees appear to be denied access to lawyers during the entire period of interrogation. Generally, interrogation is completed within the initial 30-day period, although lawyers note that, even in cases where interrogation ends after a few days, access may still be denied for up to 30 days.

Lawyers in Gaza, for example, told Amnesty International that they routinely expected to be denied access to their clients until some 20 to 30 days after arrest, even in cases where

interrogation had been completed much earlier. Detainees appear to be often kept incommunicado in the interrogation wing of Gaza Central Prison for considerable periods after interrogation has been completed. Lawyers are virtually never shown written authorization for the deprivation of this right. There are also cases where access to lawyers is denied for periods significantly longer than 30 days.

The deprivation of the basic human right of a detainee to see a lawyer must be considered against the backdrop of continuing allegations that the interrogating authorities in the Occupied Territories engage in serious psychological and physical ill-treatment of detainees, including torture, to obtain confessions. When such a fundamental safeguard prescribed by international law against the torture and ill-treatment of detainees is ignored so systematically, the integrity of the entire judicial system is undermined.

In addition to these legally permitted prohibitions on lawyers visiting their clients, many lawyers are confronted with numerous practical impediments when they seek access to their clients. In some detention centres, such as the Dhahiriya detention centre in the West Bank, visits must be booked by telephone weeks in advance and the centre's telephone is usually engaged. Visiting hours are extremely limited. Detainees are frequently transferred, causing difficulties in locating and therefore visiting them. Visits to detainees held in "holding facilities" awaiting transfer to longer-term detention facilities are not allowed.

A further cause for concern is that access to detainees by lawyers, when finally granted, is often inadequate in terms of time and conditions. Lawyers can be left waiting exposed to the elements for an hour or more for a pre-arranged visit. When the actual visit takes place, time is often insufficient for proper consultation, let alone for taking detailed affidavits, particularly if the detainee alleges torture or ill-treatment. In the Gaza Central Prison, lawyers reportedly see their clients typically for 10 minutes. In other detention facilities detainees may be brought out together in batches of five or six for a joint meeting with their lawyers. A new batch is not introduced until all those in the first one have completed their consultation. This obviously creates pressure on lawyers to speed up their meetings. In addition, the necessary conditions of confidentiality are not always guaranteed, for example during joint meetings with lawyers and detainees crammed together. This makes a lawyer's job even more difficult.

By contrast, lawyers note the better visiting conditions at Israeli prisons where their clients are sometimes held, such as Ashkelon prison, and at some detention centres in the Occupied Territories, such as in Hebron in the West Bank. Appointments can be booked easily by telephone and when necessary are available on short notice. Adequate private individual consultations with clients are possible.

Relevant international standards

International standards protect the detainees' fundamental right to have adequate access to their lawyers. They also stress that for this right to be effective, access to lawyers must be prompt.

Article 14(3)(b) of the ICCPR requires that any defendant charged with an offence shall have "adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing".

Principle 17.1 of the UN Body of Principles provides that a "detained person shall be entitled to have the assistance of a legal counsel" and "shall be informed of his right by the competent authority promptly after arrest and shall be provided with reasonable facilities for exercising it."

Principles 18.1 and 18.2 require that any detainee or prisoner "be entitled to communicate and consult with his legal counsel" and "allowed adequate time and facilities for consultations with his legal counsel". Principle 18.3 sets out further minimum standards including the following:

"The right of a detained or imprisoned person to be visited by and to consult and communicate, without delay or censorship and in full confidentiality, with his legal counsel may not be suspended or restricted save in exceptional circumstances, to be specified by law or lawful regulations, when it is considered indispensable by a judicial or other authority in order to maintain security and good order."

Notwithstanding the exception in Principle 18, however, Principle 15 provides that "communication of the detained or imprisoned person with the outside world, and in particular his family or counsel, shall not be denied for more than a matter of days".

The UN Special Rapporteur on torture, recognizing that access to lawyers is an important safeguard against torture, stated in his report for 1989 that "[a]ny person who is arrested should be given access to legal counsel no later than 24 hours after his arrest".

Finally, Principle 18.4 provides that interviews between lawyers and their clients "may be within sight, but not within the hearing, of a law enforcement official". This last provision is also contained in Rule 93 of the UN Standard Minimum Rules for the Treatment of Prisoners.

Article 72 of the Geneva Convention IV provides that accused people "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".

Amnesty International's recommendations

Amnesty International recommends that the Israeli Government carry out a fundamental review of the law and practice in the Occupied Territories relating to a detainee's right of access to a lawyer. Any deprivation of this right should be exceptional and justifiable only on the basis of very special circumstances and for a very limited period of time, as required by international standards. As a minimum, it should not exceed the maximum period for denial of access allowed by Israeli law. The decision to deprive a detainee of this right should not be left in the hands of the interrogating authorities but should be authorized and continuously reviewed by a judge.

Amnesty International further recommends that the Israeli Government ensure that lawyers are afforded adequate and confidential access to their clients for preparation of their cases in all detention facilities. Written minimum rules consistent with internationally recognized standards for such visits should be prepared, made public and enforced in all detention facilities.

*C. Other Opportunities for Access by Lawyers:
Extension of Detention Hearings and Bail Applications*

The various factors cited thus far suggest that those arrested in the Occupied Territories are being intentionally isolated from contact with the outside world during the initial stages of their detention. In the absence in practice of *habeas corpus*, lawyers have in principle two other opportunities to obtain access to their clients and check on their safety prior to charges being brought. Such opportunities, often the first that lawyers have to meet their clients and learn about the reasons for their arrest and detention, are presented by hearings for extension of detention and for release on bail.

However, although at these hearings lawyers can in principle see their clients, at least in court, the presence of both detainee and lawyer is not ensured. Once in court lawyers may still be prevented from speaking to their clients. Failure by the courts to ensure that such procedures operate adequately to provide opportunities for contact between detainees and their lawyers can only heighten concern at the conditions of incommunicado detention in which arrested individuals are held.

1. Extension of Detention Hearings

The provisions for extension of detention in the Occupied Territories, to the extent that they do provide for a hearing before a judge on or before the 18th day of detention and on

subsequent occasions, encompass an element of safeguard for the detainee. However, the substantial delay before a detainee is brought before a judge, as well as the lengthy periods of detention which can be authorized – indefinite since detention until the end of the proceedings is ordered – are a cause for serious concern.

In addition to the judge having the opportunity to see the detainee and assess both the physical condition and the basis of detention of the detainee, an extension of detention hearings ought also to afford the detainee's lawyer access to the client for the same purposes. As already indicated, this is particularly important in a system in which a lawyer is unable to seek a writ of *habeas corpus*.

Legislation

As described, a detainee in the Occupied Territories can initially be held for up to 18 days before being brought before a judge. Once the detainee is brought before a judge, the judge may, under Article 78(f) of Military Order No. 378, issue a further detention order for up to six months in the absence of any charges. Generally, this will be done in a succession of orders adding up to a maximum of six months.

Once a charge sheet has been produced, the judge may, under Article 78(g), authorize detention until the end of the trial, whenever that may be. This provision is of particular concern in light of the Israeli High Court of Justice's decision that stone throwing is an offence for which suspects should be detained until the end of all legal proceedings (decision 24/88).

This contrasts with the situation in Israel and East Jerusalem where a detainee must be brought before a judge within 48 hours and, according to Article 17(b) and (c) of the Criminal Procedure (Arrest and Searches) Ordinance (New Version), a judge may authorize extension of detention for investigative purposes for two periods of up to 15 days each. On rare occasions, where a request has been made by the Attorney General, this extension for investigative purposes may exceed 30 days.

Further, Articles 51 to 52 of the Criminal Procedure Law provide that a detainee must be released unconditionally if a charge sheet has not been filed within 90 days, or after the filing of a charge sheet the trial has not begun within 60 days. Article 53 provides that an individual who has been charged and brought before a court of first instance shall be released unconditionally after one year of detention if the court has yet to hand down a verdict. Only a Supreme Court justice may authorize an extension of detention beyond these limits, for renewable periods of up to three months, according to Article 54. No parallel provision exists for the Occupied Territories.

The practice

In practice, the implementation of existing procedures is seriously flawed. Extension of detention hearings, if heard in court, are held in the judge's chambers. Amnesty International's delegate was admitted to such a hearing in a judge's chambers at the Ramallah military court. However, more often such hearings are held within detention facilities, with large numbers of detainees lined up near the judge's room for a hearing that sometimes appears to be a mere formality.

It also appears to be a very frequent practice that lawyers who are on record as representing detainees are not notified when and where a hearing is to take place. In these circumstances detainees are not represented. The President of the Military Court of Appeals told the Amnesty International delegate that he was unaware that this was a serious problem and invited lawyers to raise specific cases. However, a large number of lawyers are concerned about this problem and have repeatedly complained to the Israeli authorities.

Even when lawyers are able to attend such hearings, the procedures followed often leave them unable to challenge the legality and necessity of their clients' continued detention. In cases where a client has not made a confession and is still being interrogated at the time of being brought to such a hearing, the client might be prevented from speaking to the lawyer altogether. The representative of the police or any other interrogating authority at the hearing who is seeking to justify continued detention must present the judge with evidence of the detainee's alleged involvement with some offence. However, the representative can and in practice often does present secret evidence which is not disclosed to the detainee and lawyer.

The presence and active involvement of the lawyer, in addition to that of the detainee, are crucial if these and other judicial hearings are to serve their purpose of safeguarding detainees' rights rather than function as mere formal compliance with procedural requirements. This is particularly so considering that any statement made by detainees at such hearings can be used against them.

Also, in response to allegations of torture or ill-treatment, the Israeli authorities often point out that complaining detainees did not raise the issue of their treatment when brought before a judge for such hearings. However, this is not surprising. Detainees are typically not aware of the possibility of complaining to the judge about their treatment, or are too intimidated to do so, and lawyers are not present to advise their clients of such a right and assist them in exercising it.

Relevant international standards

Principle 11.1 of the UN Body of Principles requires that "[a] detained person shall have the right to defend himself or to be assisted by counsel as prescribed by law". Principle 11.2

prescribes that "[a] detained person and his counsel, if any, shall receive prompt and full communication of any order of detention, together with the reasons therefor."

Amnesty International's recommendations

Amnesty International recommends that the Israeli Government ensure that lawyers representing detainees are given adequate notification of all extension of detention hearings relating to their clients, and the opportunity to attend such hearings. Before and during such hearings lawyers and their clients should be given sufficient information regarding the reasons for the arrest and continued detention, and adequate access to each other, so that they have an effective opportunity to exercise their right to challenge the detention and raise any complaint of torture or ill-treatment.

2. Bail Applications

Legislation

Article 79(a) and (b) of Military Order No. 378 provides that a military court may grant bail to any detainee. Even if released on bail, however, a person can be rearrested by a soldier, without a warrant, "if he has reasonable basis to believe that the released person is going to evade trial", in the wording of Article 79(c).

In Israel and East Jerusalem, according to Articles 33 to 50 of the Criminal Procedure Law, an uncharged detainee may apply for release on bail to a Magistrates' Court. Detainees and prosecution may appeal to the decision to higher courts, including the Supreme Court. Detainees and lawyers should attend the hearing. As in the Occupied Territories, a police officer may rearrest without a warrant a person released on bail on the belief that the person intends to evade justice. However, the person will have to be brought again within 48 hours before a judge for a decision on the grounds of detention.

The practice

Official statistics provided by the IDF to the Israeli human rights organization *BTselem* in November 1989 indicated that in the Occupied Territories bail was granted in 314 cases between 1 May and 30 October 1989, although the number of releases on bail showed a consistent and remarkable decreasing trend (from 142 releases on bail in May to 24 in October). Other official statistics relating to successful bail applications were not available to Amnesty International by the time of preparation of this report. Based on other information, however, it seems clear that only a small percentage of bail applications are successful and that virtually no bail applications made soon after arrest are successful.

In the Occupied Territories an application for bail can be made at any time after arrest. Lawyers have made such applications soon after arrest in an attempt to have prompt access to their clients to ensure their well-being. Such an application should also lead to a judge seeing the detainee concerned more quickly than the normal 18-day period. However, the detainee need not be brought to court. As in the case of extension of detention hearings, even if the detainee is brought to court, contact with the lawyer may be prevented, and the prosecution can submit classified evidence to the judge without revealing it to the detainee or lawyer.

Brig. Gen. Uri Shoham, President of the Military Court of Appeals, told the Amnesty International delegate that he viewed it of the utmost importance that bail hearings in such cases take place promptly in the presence of the detainees and their lawyers. He explained that written instructions have been issued to judges relating to the procedures to be followed when bail applications are made, including bail applications relating to newly arrested individuals. The written instructions have not, however, been made public.

According to Brig. Gen. Shoham, these written instructions stipulate that once a bail application has been filed at the court with respect to a newly arrested individual, a judge must, within three days from the request for bail, go to the detention facility where the individual is held to preside at a bail hearing. The detainee's lawyer must be given notice of this hearing and the right to attend. While Brig. Gen. Shoham said that these procedures were perhaps not followed in all cases, he added: "I want to believe that they are followed in most cases".

In discussing bail proceedings with a large number of defence lawyers, Amnesty International's delegate did not receive information regarding a single bail hearing which took place within this three-day time limit. Indeed, during at least part of 1989 and 1990, there appeared to have been a policy whereby at least some courts refused to hold any bail hearings at all in large numbers of cases.

The procedure for bail in these courts was that a lawyer wishing to make a bail application on behalf of a client had to do so in writing and hand it in to a court clerk at the lawyers' window of the court. A judge would then consider it and reach a decision without the presence of the lawyer or the detainee. Virtually all applications were rejected. Lawyers protested strongly against this procedure and by late 1990 it appeared to have ceased. Nonetheless, there were long delays between the time of a written bail application and the hearing.

Several lawyers in Gaza told the Amnesty International delegate in 1990 that they generally expect to wait two to three weeks before a hearing is scheduled. Bethlehem lawyers explained that detainees from that city were held initially in a military base in Bethlehem for at least five to seven days, during which interrogation took place, and were then transferred to Hebron. No matter how quickly a bail application was made, it was not likely to be considered at a hearing until at least a week after this transfer. Lawyers in Ramallah reported similar delays. Many of the lawyers with whom the delegate spoke stated that this was an area where there had been a great deterioration in the rights afforded to detainees. It appears that some years ago bail hearings had been scheduled relatively quickly, as they still are in Israel and East Jerusalem, where a detainee can expect a bail hearing within 24 to 48 hours of a bail application.

Bail applications made soon after arrest are virtually never successful and the hearings held with respect to such applications are generally scheduled too late to afford the detainee any form of protective contact with the outside world during the course of interrogation. Even when held, either the detainee may not be brought to court, or the lawyer may not be present, or contact between detainees and lawyers may still be forbidden. For these reasons, most lawyers working in the military courts rarely make such bail applications. This represents another example of how institutions which might afford protection of the human rights of detainees are being curtailed during the period of the detainees' maximum vulnerability.

The Landau Commission's recommendation on bail hearings

The Landau Commission was "impressed" by the testimony of personnel of the General Security Service (GSS) -- the main internal security agency -- who said that lawyers were submitting bail applications close to the date of arrest "even though there is no chance that the Court will grant the request at such an early stage". In the view of these GSS personnel, this caused "serious disruption" to the interrogation because of the need to bring suspects to court, sometimes at a considerable distance from the place of detention. "Since in any case no contact is permitted at this early stage between the detainee and his lawyer", the Commission concluded, "we propose that a regulation be made whereby in the territories it will not be necessary to bring a person under interrogation for [Hostile Terrorist Activity] before a judge to hear a request for his release on bail, until seven days after his detention" (para 4.17).

Relevant international standards

The existing practice relating to bail hearings in the Occupied Territories appears inconsistent with Article 9(3) of the ICCPR, which states that "[i]t shall not be the general rule that persons awaiting trial shall be detained in custody", and Principle 39 of the UN Body of Principles, which states:

"Except in special cases provided for by law, a person detained on a criminal charge shall be entitled, unless a judicial or other authority [with the strongest possible guarantees of competence, impartiality and independence] decides otherwise in the interest of the administration of justice, to release pending trial subject to the conditions that may be imposed in accordance with the law. Such authority shall keep the necessity of detention under review."

Amnesty International's recommendations

Amnesty International recommends that the Israeli Government make public the written guidelines relating to the procedure for bail applications in the military courts. In particular these guidelines should ensure that, once a bail application has been made with respect to a newly arrested detainee, a hearing should be held within a maximum of three days, with the detainee and the detainee's lawyer being given adequate notice and opportunity to attend.

V. ALLEGATIONS OF CONFESSIONS OBTAINED BY DURESS: TORTURE AND ILL-TREATMENT DURING ARREST AND INTERROGATION

Excessive force and punitive beatings have been used on a large scale in recent years by Israeli forces in the process of arresting suspects and while taking detainees to detention centres. Once brought into detention centres for interrogation, detainees are typically subjected to forms of torture or ill-treatment, with the aim of obtaining information as well as a confession.

In a number of cases criminal or disciplinary measures have been taken against those responsible. However, torture or ill-treatment seem to be virtually institutionalized during the arrest and interrogation procedures preceding the detainee's appearance before a military court. The practices relating in particular to interrogation procedures have been officially endorsed or are generally condoned, and therefore effectively encouraged, by the authorities. They clearly have a direct impact on the possibility of having a fair trial, mainly by leading to coerced confessions which are difficult to challenge in court.

A. Treatment at the Time of Arrest

Former detainees and prisoners, lawyers acting for Palestinians appearing before the military courts and independent observers have described to Amnesty International how over the past few years suspects have been routinely subjected to beatings at the time of arrest, usually with clubs or rifle butts, as well as while being transported to detention facilities and upon arrival there. Such assaults have occurred in the absence of any resistance to arrest or of any level of resistance that may have justified them.

Official rules on the use of force and the practice

During the early months of the *intifada*, Israeli forces made massive use of punitive violence against Palestinian suspects apprehended during riots or demonstrations. This was also apparent in the implementation of what has been described as the "beatings policy" attributed to the then Minister of Defence Yitzhak Rabin. Victims were beaten with instruments such as truncheons and rifle butts, many suffering multiple fractures among other injuries. By the end of February 1988 six people had reportedly died as a result. Among them were 'Iyad 'Aql and Khader Tarazi, both killed in Gaza.

Iyad 'Aql, aged 17, died in hospital after having been punitively beaten on 7 February 1988 together with his brother by members of the *Givati* Brigade of the IDF. In October 1989 one soldier was sentenced to two months' imprisonment and three received suspended sentences of up to five months in connection with his death.

According to eye-witnesses, Khader Tarazi, aged 19, died after he was severely beaten on 9 February 1988 by four soldiers while held in a house. He was taken to a detention centre and, according to fellow detainees, left unattended for several hours. He was finally taken to Soroka hospital where he died late that night. A doctor who examined the body said that Khader Tarazi had a fractured spine, a right frontal skull fracture, fractures of each arm and right hand, and multiple lacerations on the back, stomach, face and limbs. The results of any investigation into his death are not known to Amnesty International.

In the same month the Attorney General wrote to the Minister of Defence stating that beating suspects in order to punish or humiliate them was illegal, and that soldiers had a duty to disobey any order to do so. Following this, on 24 February, the then Chief of the General Staff, Lt. Gen. Dan Shomron, issued a letter to all IDF commanders to "emphasize and clarify existing orders" on the use of force.

The Chief of the General Staff's letter stated that, "however difficult it may be", it was necessary to maintain "the principles of the law, morals and discipline with which we have all been imbued". The letter stressed that the use of force was allowed to fulfil lawful tasks, such as overcoming resistance to arrest, but that its use must be reasonable and stop "once the objective had been attained". It specifically forbade under any circumstances the use of force as a means of punishment. It also directed soldiers to "refrain as much as possible from hitting anyone on the head or other sensitive parts of the body".

Despite such clear orders, excessive force and physical ill-treatment, including torture, continued to be inflicted on Palestinians by Israeli forces, leading to further fatalities. In August, also in the Gaza Strip, Hani al-Shami died while in the custody of the IDF. Four soldiers belonging to the *Givati* Brigade were convicted in May 1989 for beating him at the time of arrest. They received sentences of up to nine months' imprisonment, later reduced leading to the release of all of them by September. Hani al-Shami was apparently beaten again while in detention by other soldiers, but the IDF decided not to investigate the case further. His injuries reportedly included a cracked sternum, several broken ribs and punctured lungs.

The IDF Chief of the General Staff implicitly acknowledged continued reason for concern some 19 months after his first dispatch when he issued another letter to IDF commanders on 12 September 1989. He reiterated that only reasonable force should be used and that force should not be used after the objective has been attained, for example

"after a suspect has been arrested and is not resisting". He said that as much as possible blows to "the head or other sensitive parts of the body" should be avoided, and "under no circumstances is force to be used intentionally to inflict injuries, such as breaking bones".

In a letter to Amnesty International in January 1990, the Israeli authorities referred to the use of force by Israeli forces at the beginning of the *intifada* stating the following:

"At the outset of the rioting, large numbers of IDF members were thrust into a position of having to contend with mobs of rock-throwing rioters. The soldiers' training in conventional warfare did not prepare them for this challenge. Short of using their rifles, the soldiers' main tool to protect life and to restore order in the streets was their night-sticks (billy clubs). The IDF command believed that charging rioters with night-sticks, while more dangerous to the soldiers involved, would ultimately inflict fewer fatalities. This was in fact the case and the number of fatalities dropped. In the meantime, other methods of riot control, such as the use of tear-gas and 22-caliber, rubber and plastic bullets, were introduced on a wider scale.

"The initial order to use night-sticks whenever possible as an alternative to opening fire, was issued orally. In the absence of clearly written rules, the order was given different interpretations by various IDF units in the field. While on the whole, troops acted with restraint, some interpretations of the oral directives did not correspond to the original intent. Unfortunately, some soldiers and even some officers understood their orders to authorize excessive force, including the use of force as a punitive or deterrent measure."

The Israeli authorities' letter then referred to the Chief of the General Staff's instructions of February 1988 and maintained that proper measures, including courts-martial, had been taken to redress abuses. It also maintained that, "considering the volume and intensity of the violence and provocation with which the IDF soldiers are faced each day" in the Occupied Territories, "the number of violations has been minuscule".

However, persistent and consistent allegations of excessive force and other forms of unjustifiable harassment and violence against Palestinians being arrested continue to be made, suggesting that in many cases the IDF official standards are ignored in the field. Courts-martial have taken place in some of the worst cases, but the most "ordinary" forms of ill-treatment during arrest appear to go largely unpunished. They are believed to occur so pervasively that lawyers and victims have come to take them for granted and see little point in making formal complaints, sometimes even in cases of torture.

In November 1990 the Amnesty International's delegate came face to face with this attitude at the trial in Jenin described above, relating to eight young men who had been arrested at the home of a blacksmith. While none of the eight young men was eventually

convicted of stone throwing – the alleged offence for which they were arrested – there was testimony that they had been beaten with the butts of soldiers' weapons at the time of their arrest and while being taken to a detention centre. The evidence was not contested. Soldiers testifying at the trial confirmed that two of the eight were taken to hospital in Afula for treatment of the injuries suffered. During the course of the trial proceedings no adverse comment was offered regarding these assaults by the prosecution or the judge or, indeed, the lawyer acting for the defendant. As far as Amnesty International is aware, no investigation into the incident was asked for or has been carried out. All concerned seemed to accept such assaults at the time of arrest as the norm.

Relevant international standards

International standards prohibit all forms of torture and ill-treatment and set out strict rules on the use of force. Article 3 of the 1979 UN Code of Conduct for Law Enforcement Officials requires that "[l]aw enforcement officials may use force only when strictly necessary and to the extent required for the performance of their duty."

The Code's Commentary to this article makes clear that the use of force by law enforcement officials should be "exceptional" and that officials may be authorized to use force only "as is reasonably necessary under the circumstances for the prevention of crime or in effecting or assisting in the lawful arrest of offenders or suspected offenders". It continues: "[N]o force going beyond that may be used".

Amnesty International's recommendations

Amnesty International recommends that the Israeli Government take all necessary steps to ensure that force is used only when strictly necessary to arrest suspects, and then only to the extent required to carry out the arrest. An effective system of investigations should be established to deal with those arresting officials who are alleged to have violated such standards, leading to effective criminal or disciplinary measures against anyone found responsible. The results of the investigations should be made fully available to the public.

B. Treatment During Interrogation

Torture or ill-treatment of people facing charges before the military courts does not normally end after arrest. In fact, it tends to intensify during the period of interrogation with the aim of obtaining information on alleged offences as well as confessions.

On the basis of its experience, Amnesty International believes that immediate notification to families and prompt access to lawyers, relatives, doctors and judges are

essential to safeguard against torture and ill-treatment and ensure a fair trial. Torture and other forms of serious ill-treatment most often occur during the first hours and days of detention, while the victim is in the total control of his or her interrogators with no access to the outside world. The fact that detainees under interrogation in the Occupied Territories are systematically deprived of these protections necessarily increases the credibility of allegations of human rights violations committed by the interrogating authorities and must remain a cause of great concern.

Allegations relating to torture or ill-treatment in the Occupied Territories are directly relevant to an assessment of the fairness of military court trials, particularly because of the large role which confessions seem to play and the apparent reluctance by judges to investigate claims of coerced statements. Statistical information regarding the percentage of cases in which the prosecutor relies on a confession by the defendant were not available to Amnesty International, but most sources agree that confessions are the primary evidence in the great majority of cases.

Legislation: the prohibition of torture

Israeli law applicable to all law enforcement officials in Israel and the Occupied Territories forbids the use of violence or threats to extract confessions. Article 277 of the 1977 Penal Law provides for up to three years' imprisonment for a public servant who does any one of the following:

- "(1) uses or directs the use of force or violence against a person for the purpose of extorting from him or from anyone in whom he is interested a confession of an offence or information relating to an offence;

- "(2) threatens any person, or directs any person to be threatened, with injury to his person or property or to the person or property of anyone in whom he is interested for the purpose of extorting from him a confession of an offence or any information relating to an offence."

Also relevant are Articles 378 to 382, which provide for punishments for physical assault of up to three years' imprisonment if actual bodily harm is caused; Article 415 prescribes the same maximum penalty for someone who "obtains a thing by deceit" and Article 416 makes a person who "obtains a thing by a trick or by deliberately taking advantage of another person's error" liable to imprisonment for two years. "Blackmail by means of threats" is punishable under Article 428 with up to three years' imprisonment.

Article 65 of the 1955 Military Justice Law provides for up to three years' imprisonment for "[a] soldier who strikes or otherwise maltreats a person committed to his custody".

Article 130 makes forms of "unbecoming conduct" on the part of soldiers of or above the rank of sergeant punishable with a reduction in rank.

The Israeli Government maintains that these standards are to be respected. However, Israeli official policy on interrogation methods, as represented by the Landau Commission Report, endorses a degree of psychological and physical "pressure" during interrogation the exact nature of which is kept secret. Such a policy is of the gravest concern.

1. The Landau Commission Report

On 31 May 1987 the Government established the "Commission of Inquiry into the Methods of Investigation of the General Security Service Regarding Hostile Terrorist Activity", headed by former Supreme Court Justice Moshe Landau and including two other members. The GSS, also known as *Shin Bet* or *Shabak*, is the security agency responsible for the interrogation of many of those ultimately tried before the military courts, particularly those suspected of more serious offences. The Commission was asked to look into "the investigation methods and procedures of the GSS on Hostile Terrorist Activity, and the giving of testimony in Court regarding these investigations" (para 1.6 of the Commission's report).

The establishment of the Commission was prompted by the case of Izzat Nafsu, an IDF officer arrested in 1980 and imprisoned for offences including treason mainly on the basis of a confession that he alleged was coerced by the GSS. The GSS interrogators denied his allegations at his court-martial. During an internal inquiry in 1987 they admitted the validity of most of his claims, which led to his conviction on lesser charges and release. They stated, however, that the methods used as well as their giving false testimony in court were part of accepted practice within the GSS.

Confidence in GSS methods had also been "badly shaken" by the "Bus No. 300 affair", as acknowledged by the Landau Commission itself. In the incident, two Palestinian hijackers of a bus in April 1984 died as a result of torture while in the custody of Israeli forces. GSS personnel conspired to cover up the killings, including by misleading official investigations into the incident. The "affair" was closed when in 1986 the President of Israel pardoned 11 GSS members involved in it.

The final report of the Commission was published on 30 October 1987 and endorsed by the Israeli Cabinet on 8 November 1987. It was based on evidence gathered at hearings, visits to detention premises and other evidence. The Commission had also requested written information from the public. Amnesty International, among others, submitted written evidence and recommendations.

The Landau Commission's recommendations

The Landau Commission found that in the previous two decades some 50 per cent of GSS interrogations led to trials, and that the "overwhelming majority of those tried were convicted on the basis of their confession in court" (para 2.20). During this period, interrogators were permitted "from time to time to employ means of pressure, including physical pressure", a measure which most of them considered "unavoidable" (para 2.21), "an interrogation tool of the utmost importance" without which "effective interrogation is inconceivable" (para 2.37).

Until 1971, GSS members were not required to testify in court as to how confessions were taken. Confessions used to be taken down by police officers – after the GSS interrogation was completed – who could then testify in good faith that the confessions had been given freely and voluntarily. However, pressure from defence lawyers led to GSS interrogators being called to take the stand as of 1971.

The Commission reported that GSS interrogators, faced with the "dilemma" between revealing methods of interrogation which could have been "expected to appear to the court as violating the principle of the person's free will, and thus causing the rejection of the confession" (para 2.26), and lying in order to ensure the conviction of suspects they ostensibly believed to be guilty on the basis of other, classified, evidence, "simply lied, thus committing the criminal offence of perjury" (para 2.27), punishable with up to seven years' imprisonment. "False testimony in court soon became an unchallenged norm which was to be the rule for 16 years" (para 2.30).

In 1982 a written "guideline as to the nature of the lie to be told", with regard to a specific "method of physical pressure", was also issued by the highest GSS authorities (para 2.31). The Commission remarks: "There is no doubt that for years the method drew encouragement and viability from the Courts' trust in the interrogators who appeared before them as witnesses" (para 2.36). The practice of committing perjury was finally forbidden in June 1987, about two weeks after the conclusion of the Nafsu case, and the Commission expressed its belief that it had in fact been "completely discontinued" (para 2.33).

Searching for a different solution for the future on how to balance interrogation needs and rights of suspects, the Landau Commission applies to the acts of the GSS interrogators the provisions of Article 22 of the Penal Law, which exempts from criminal responsibility the author of an act committed in conditions of "necessity". Article 22 states:

"A person may be exempted from criminal responsibility for any act or omission if he can show that it was only done or made in order to avoid consequences which could not otherwise be avoided and which would have inflicted grievous harm or injury on his person, honour or property or on the person or honour of others whom he was bound to protect or on property placed in his charge:

"Provided that he did no more than was reasonably necessary for that purpose and that the harm caused by him was not disproportionate to the harm avoided."

The Commission argued that GSS interrogators fulfil the requirements of Article 22 since, in its opinion, they act to protect the security of the state, which includes preventing grievous harm or injury to its citizens. This was the case as the suspect's confession is the only source of information on such harmful activities and, with respect to what is "reasonably necessary", in light of "the concept of the lesser evil", the use of "actual torture ... would perhaps be justified in order to uncover a bomb about to explode in a building full of people" regardless of "whether the charge is certain to be detonated in five minutes or in five days" (para 3.15). In the Commission's own words, in the same paragraph:

"To put it bluntly, the alternative is: are we to accept the offence of assault entailed in slapping a suspect's face, or threatening him, in order to induce him to talk and reveal a cache of explosive materials meant for use in carrying out an act of mass terror against a civilian population, and thereby prevent the greater evil which is about to occur? The answer is self-evident."

However, the Commission itself goes on to emphasize (para 3.16):

"It is true that strict care must be taken, lest a breach of the structure of prohibitions of the criminal law bring about a loosening of the reins, with each interrogator taking matters into his own hands through the unbridled, arbitrary use of coercion against a suspect. In this way the image of the State as a law-abiding polity which preserves the rights of the citizen, is liable to be irreparably perverted, with it coming to resemble those regimes which grant their security organs unbridled power. In order to meet this danger, several measures must be taken: first, disproportionate exertion of pressure on the suspect is inadmissible; the pressure must never reach the level of physical torture or maltreatment of the suspect or grievous harm to his honour which deprives him of his human dignity. Second, the possible use of less serious measures must be weighed against the degree of anticipated danger, according to the information in the possession of the interrogator. Third, the physical and psychological means of pressure permitted for use by an interrogator must be defined and limited in advance, by issuing binding directives. Fourth, there must be strict supervision of the implementation in practice of the directives given to GSS interrogators. Fifth, the interrogator's superiors must react firmly and without hesitation to every deviation from the permissible, imposing disciplinary punishment, and in serious cases by causing criminal proceedings to be instituted against the offending interrogator."

The Commission sums up its views as follows:

"4.6 We are convinced that effective activity by the GSS to thwart terrorist acts is impossible without use of the tool of the interrogation of suspects, in order to extract from them vital information known only to them and unobtainable by other methods.

"The effective interrogation of terrorist suspects is impossible without the use of means of pressure, in order to overcome an obdurate will not to disclose information and to overcome the fear of the person under interrogation that harm will befall him from his own organization, if he does reveal information.

"Interrogation of this kind is permissible under the law (*sic*), as we interpreted it above, and we think that a confession thus obtained is admissible in a criminal trial, under the existing rulings of the Supreme Court.

"4.7 The means of pressure should principally take the form of non-violent psychological pressure through a vigorous and extensive interrogation, with the use of stratagems, including acts of deception. However, when these do not attain their purpose, the exertion of a moderate measure of physical pressure cannot be avoided. GSS interrogators should be guided by setting clear boundaries in this matter, in order to prevent the use of inordinate physical pressure arbitrarily administered by the interrogator."

The means of pressure which the Commission finds to be permissible are described in a "code of guidelines for GSS interrogators which define, on the basis of past experience, and with as much precision as possible, the boundaries of what is permitted to the interrogator and mainly what is prohibited to him." The Commission expresses the conviction that "if these boundaries are maintained exactly in letter and in spirit, the effectiveness of the interrogation will be assured, while at the same time it will be far from the use of physical or mental torture, maltreatment of the person being interrogated, or the degradation of his human dignity". The Commission stresses "that no investigation is to be opened against a person unless information exists giving reasonable grounds to suspect that he is involved in some manner in ["Hostile Terrorist Activity"], or in political subversion which is prohibited by law in Israel or the territories." (para 4.8).

The guidelines of the Landau Commission are contained in the second part of its report, which remains secret to this day "for understandable reasons" (para 4.8). The Commission believes that these guidelines would "pass the test of the prohibitions contained" in international standards, and finds it "certain that the substance of the means of pressure permitted under these guidelines is less severe than the 'techniques' used by British forces in Northern Ireland (para 4.13). Such techniques included hooding; wall standing (standing against a wall in painful positions); sleep and food deprivation; and holding someone in a room exposed to a loud hissing noise. These five methods were found by the European

Court of Human Rights in 1978 not to constitute "torture" in the meaning of the European Convention on Human Rights but, "as applied in combination", amounted to "inhuman and degrading treatment". The ruling of the European Court reversed an earlier finding of torture made by the European Commission on Human Rights in 1976.

The Landau Commission recommends that such a code be reviewed annually by a "small Ministerial Committee" empowered to make "whatever changes it deems fit, according to changing circumstances", and "be made known to the Services Subcommittee of the Knesset's Defence and Foreign Affairs Committee" (para 4.8).

The debate surrounding the Report

The Landau Commission Report has been the subject of study, particularly within the Israeli legal, academic and human rights community. The Faculty of Law of the Hebrew University in Jerusalem, and more recently the Israeli human rights groups *BTselem* and the Public Committee Against Torture in Israel, have issued publications focusing on the Report and on the treatment of Palestinian detainees in practice.

Published material on the Report often acknowledges the difficult task assigned to the Commission, but most contain criticisms of its findings, conclusions and recommendations. Such criticisms relate mainly to the use by the Commission of the legal concept of "necessity" and to the dangers inherent in allowing the use of "pressure" on suspects as found permissible by the Commission.

With regard to the concept of "necessity", questions have been raised about the use of a norm created to deal with actions committed by individuals faced by extraordinary situations to justify in advance actions by state agents faced with persistent issues.

Furthermore, questions have been raised in two respects about the use of the concept of "necessity" solely to justify "moderate" pressure. First, if it is "necessary" in order to prevent a greater harm such as a massacre (because, for instance, there are no other ways to obtain vital information except from the suspect), then why not justify any kind of treatment, even the most savage form of torture? After all, even the Commission itself suggested that the use of "actual torture ... would perhaps be justified in order to uncover a bomb about to explode in a building full of people" (para 3.15).

Second, if it happens to be "necessary", why could perjury not be justified along the same lines? The Commission has stated that here "the investigator cannot rely on the defence of necessity ... since perjury is a grave criminal offence and manifestly illegal" (para 4.22). However, if "necessity" is not enough to justify perjury, why should it be enough to justify the offence of assault?

It has also been pointed out that the use of "moderate" pressure for the purposes of interrogation, if properly applied, would not work with the most hardened and dangerous suspects, who are likely to know from the Landau Commission Report itself and from the collective experience of other detainees that the interrogators are limited in the degree of pressure they are allowed to use. Therefore, according to the logic of the report, in order to be effective, pressure should be allowed without limits. The alternative is not to allow pressure at all.

When assessing the "balance of evils", the Commission has been criticized for failing to take into account a number of factors which weigh against the use of even "moderate" pressure. For instance, any form of coercion – which by its very nature cannot but humiliate a suspect or worse – may turn an innocent person wrongly arrested and "pressured" into a potential future offender. In this context, the Commission itself found that one in two of those interrogated by the GSS were never brought to trial. Questions have been asked about what such former detainees felt about the Israeli justice system after their interrogation experience.

When assessing the "balance of evils", the Commission has also been criticized for failing to take into account the reality that, even before the outbreak of the *intifada* in December 1987, the overwhelming majority of people arrested for "terrorist" offences and interrogated by the GSS were not detained for cases of the "ticking bomb" type. In fact, the Commission itself does not mention a single case concerning such a situation. In Amnesty International's experience, most Palestinian detainees arrested for "terrorist" activities, when brought to trial, have been accused of offences such as membership of unlawful associations or throwing stones. They have also included prisoners of conscience such as people arrested solely for raising a flag. This is particularly true of the more than 75,000 Palestinians arrested since the beginning of the *intifada*, around the same time that the Landau Commission Report was issued. Thus, in elaborating guidelines for the use of "pressure", the Commission appears to have ascribed a gravity to the activities the GSS is confronting that is rarely matched in reality.

Other critics have argued that, in breaking the absolute prohibition of harming the physical integrity of a detainee, a real danger has been introduced that "moderate" pressure would easily escalate into "immoderate" pressure and ultimately straightforward torture. The Landau Commission itself seemed aware of this risk when it observed that "a security service ... is always in danger of sliding towards methods practised in regimes which we abhor" (para

4.2). It has been argued that a similar phenomenon developed from statements by former Minister of Defence Rabin in January 1988, when he declared that "force, power and blows" should be used to deal with rioters. The period immediately following this statement witnessed punitive beatings on a massive scale. Subsequent official statements attempted to confine the use of force but without great success, testifying to the difficulty of containing force once it appears to have been allowed or condoned by the highest authorities.

Of particular relevance to the assessment of the fairness of trials in the Occupied Territories are concerns relating to the effect of the interrogation practices allowed by the Commission on the criminal justice system as a whole. Allowing coerced confessions – irrespective of how they were coerced – to be introduced as evidence violates the basic rights of defendants. In addition, allowing detainees to be held in total isolation from the outside world for prolonged periods prevents judges from assessing the reliability of confessions alleged to have been coerced except by balancing the word of detainees against that of interrogators. Unreliable confessions can also easily lead to the conviction of innocent people other than the suspects who confessed, for example if a detainee makes up a confession implicating others. The entire judicial system is thus corrupted.

In this context, the Landau Commission found that judges and prosecutors – and presumably other people such as police and medical personnel – were unaware of the systematic perjury committed by GSS interrogators for 16 years (para 2.43 to 2.46). Although the Commission seems in other instances willing to readily accept the GSS' claims, it is particularly emphatic in dismissing the suggestion by some GSS personnel that judges were "part of the game": "Even though no judges were called to appear before us and we heard no explicit denial, we find this allegation to be baseless, and wholly unacceptable" (para 2.45).

The fact remains that this failure to detect systematic perjury for such an extraordinarily long period constitutes a worrying failure on the part of the judicial system, at least in terms of its fact-finding ability. Whatever the reasons, the end result will not help to develop confidence in the fairness of the system, particularly when the rights of defendants have been further curtailed by the legitimization of "moderate" pressure.

Finally, the Landau Commission Report has been criticized for recommending that a governmental body, which is likely to receive significant advice from the GSS, is to review the secret guidelines on the use of "pressure" with the power to amend them. Some have also argued that such secrecy is unnecessary, as former detainees are bound to inform others on the methods of interrogation used, as in fact happens. By contrast, such secrecy may place medical and other personnel who visit GSS interrogation wings in a position of unwanted complicity. Critics have called for the guidelines to be published so as to allow their examination in light of international standards on the treatment of detainees and allow proper monitoring of their application.

2. The Practice

Depending on the perceived seriousness of the alleged security offence, interrogation may be carried out by the police, the IDF or the GSS, in detention facilities administered by the IDF or the Prison Service. The GSS investigates the most serious offences, sometimes over a period of many weeks. In some cases detainees have been allegedly tortured by "collaborators" held in the same cell. When a confession is made, it is usually taken down by a police officer in Hebrew, a language not commonly known to detainees from the Occupied Territories.

With respect to each of these agencies, repeated and consistent allegations of torture and ill-treatment have been made. Over the years, Amnesty International has collected scores of affidavits and testimonies from a variety of detainees, lawyers and local human rights groups, backed in some cases by medical reports and the results of official investigations. Throughout the 1980s, for instance, the Palestinian human rights group *al-Haq* gathered and published numerous detailed affidavits alleging torture. In March 1991 the Israeli human rights group *BTselem* published a report on the methods of interrogation and treatment of detainees based on interviews with 41 alleged victims. The IDF and other agencies announced in May that they were starting investigations into the allegations.

Amnesty International believes that the substantial evidence available indicates the existence of a clear pattern of systematic psychological and physical ill-treatment, constituting torture or other forms of cruel, inhuman or degrading treatment, which is being inflicted on detainees during the course of interrogation.

Methods used on a systematic scale include hooding with a dirty sack, sometimes wet, which often hinders breathing, and sleep and food deprivation while held in solitary confinement. Also typically used are prolonged bondage in plastic or metal hand-cuffs, usually in painful positions (a practice called *shabah*), and being confined in very small and darkened cells referred to as "closets" or "coffins", as well as in small cold cells called "refrigerators". Beatings all over the body, often severe and sometimes concentrated on sensitive areas such as genitals, are also inflicted with relative frequency. Other methods include burning with cigarettes; prolonged denial of access to toilets; verbal abuse and threats of various kind; and forms of sexual harassment, particularly with regard to women detainees.

A description of what is a common experience for Palestinian detainees is provided by the following affidavit given in Gaza Central Prison on 2 January 1990 by Khaled 'Abd al-Rahman Matar. He was arrested on 21 November 1989 and interrogated by the GSS in

the interrogation wing of the prison on 4 and 19 December. This is how he relates his interrogation of 4 December:

"I was taken immediately to the interrogation room. When I refused to answer I had my hands tied up and was made to lie down on the floor on my back, and they started hitting me all over my body. They put a damp sack on my head and shoved it up my nostrils so that I could not breathe. While beating me they would close my nostrils, and also grab my genitals. This was repeated about six times.

"In between times they only asked me whether I would talk about my relations with someone whose name they mentioned. They alleged that I was in charge of that person within the framework of the *intifada*. I do not remember how long this went on. I was kept in the interrogation wing for 11 days. I thought I was there for five days. I completely lost any sense of time.

"In between sessions I was made to sit on a chair, with the sack. I do not know when I confessed to whatever they wanted me to confess.

"During those 11 days I was put in the "refrigerator". I do not know exactly for how long, for my condition was like that.

"I lost all sensitivity in three fingers on my left hand: thumb, forefinger and middle finger. I noticed it when I was taken away from the interrogation after 11 days. I cannot lift any weight. I have pains in the chest on the left side. I told a doctor who said it would clear up.

"During the 11 days I slept twice, in the same chair, in between interrogations.

"I was interrogated by Jack, Abu 'Isa and Musa. In the state I was, I could not see the details of their looks.

"I confessed that I had acted as a coordinator. I did not confess to being the Popular Front leader in Gaza as they wanted me to do, but I confessed that I was in charge of Shati camp and Naser suburb. I did not confess to any violent activity."

Khaled 'Abd al-Rahman Matar's lawyer submitted a formal complaint about his allegations of torture in January 1990. In March 1991 the Israeli authorities responded, saying that they were satisfied that his interrogation had been properly conducted and pointed out that he had not complained when brought before a judge for extension of detention hearings. His lawyer replied in April 1991 asking for details of the investigation apparently conducted into his allegations. Khaled 'Abd al-Rahman Matar has been charged

with offences including membership and holding a position in an unlawful association, the Popular Front for the Liberation of Palestine. He is still awaiting trial.

An example of how incommunicado detention and the treatment of detainees have direct implications for trials that have been concluded is the case of 'Abed al-'Ajrami. A nurse at the Ahli Hospital in the Gaza Strip, he was arrested on 26 November 1989. His family was not informed of his arrest until 21 December and, despite repeated requests, his lawyer was not allowed to see him until 8 January 1990. 'Abed al-'Ajrami informed his lawyer that he had been beaten and had signed a false confession as a result. He said that he was beaten several times while held in Gaza Central Prison. He also said that on one occasion interrogators jumped on his stomach and squeezed his testicles, and that he was held for prolonged periods in the "refrigerator". He eventually made a confession, but was reportedly still kept tied to a chair and in solitary confinement for a few additional days.

He was charged mainly on the basis of his confession. His trial was resolved by plea bargain, whereby some of the charges were dropped. He pleaded guilty to being a senior member of *al-Fatah* and to providing a service to *al-Fatah* by distributing *intifada* leaflets. He was convicted and sentenced in March 1990 by the Gaza military court to 15 months' imprisonment and 21 months' suspended, in addition to a fine of 2,000 shekels (about 1,000 US dollars). However, the prosecution appealed against the sentence and the appeal took place in May. His lawyer had not been informed of the date, but happened to be in the court that day. On his client's insistence he agreed to defend him even though he had no time to prepare. 'Abed al-'Ajrami's sentence was increased by the Military Court of Appeals to four years' imprisonment, two of which were suspended.

In April 1990 Amnesty International expressed concern at the allegations of torture of 'Abed al-'Ajrami, and subsequently learned that 'Abed al-'Ajrami was questioned about his treatment by an investigator in July or August 1990 in the Ketziot detention camp where he is still imprisoned. 'Abed al-'Ajrami apparently gave a detailed statement about his treatment, but his lawyer has not been able to obtain it from the authorities. A fact sheet sent to Amnesty International by the Israeli authorities in September 1990 stated:

"[T]he findings of an investigation into his allegations regarding maltreatment during interrogation concluded that Al-'Ajrami's interrogation was conducted in accordance with the accepted procedures. Thus, Al-'Ajrami's claim that his confession was the result of maltreatment is baseless. Significantly, when Al-'Ajrami appeared in court for the extension of his detention and during a second court appearance at his trial, he did not make use of these opportunities to complain about any maltreatment."

The Israeli authorities did not provide details of the "accepted procedures" according to which 'Abed al-'Ajrami was interrogated and of how the investigation reached the conclusion that his claims were "baseless". They also failed to describe the conditions of his hearing for

extension of detention, particularly that he was not assisted by a lawyer and was not in a position to raise the issue of his allegedly coerced confession once he had decided to plead guilty.

Another case is that of Riad Shehabi, a shop owner from East Jerusalem arrested on 17 July 1990 at his shop in the Old City. He was taken to the Kishle Police station in Jerusalem, where he was allegedly slapped and told of other detainees who had incriminated him. He made a confession apparently admitting that he had thrown stones. The next day he was taken before a judge and his detention was extended for 12 days. No lawyer was present to assist him. He was then left alone until 21 July, when he claims that he was interrogated again and tortured. The interrogator, whom he knew as Rami, apparently wanted him to confess to other offences, such as throwing petrol bombs. Riad Shehabi says he denied having committed any such offence and as a result was subjected to several sessions of severe beatings with sticks all over the body, particularly on the head and hands, while blindfold and tied to a chair. He said that several sticks broke on his body and that at one point he continued to be beaten after he had fallen on the floor, still tied to the chair. His condition was such that the interrogator took him to Hadassah hospital the same day for treatment. Riad Shehabi was eventually released on bail on 24 July, after spending the rest of his detention in the Moscobiyeh detention centre in Jerusalem. According to medical reports, Riad Shehabi suffered cracks in the bones of both arms requiring plaster casts, in addition to other injuries. He is reportedly still being treated for a psychological condition apparently caused by the beatings on the head.

In response to appeals sent by Amnesty International while Riad Shehabi was in detention, the Israeli authorities sent a fact sheet in April 1991 stating that he had been charged with three others on 22 July 1990 with "supporting a terrorist organization" and "participating in a riot". On the issue of his confession, the authorities stated the following:

"Significantly, Shehabi gave a confession in Arabic on 18 July, and the next day he gave an even more detailed confession. Shehabi's confession preceded by several days the alleged maltreatment on 21 July 1990. This fact further casts doubt on his allegations that he was mistreated to coerce a confession."

However, the Israeli authorities said that a police officer had been charged for assault causing bodily harm, under Article 380 of the Penal Law, in connection with Riad Shehabi's allegations that he was tortured on 21 July. Both trials were still pending at the time of writing.

Deaths under interrogation

In a number of cases since 1987, detainees have died in custody either as a direct result of torture or in circumstances where torture or ill-treatment played a contributory role. Two of the most recent victims died in the GSS interrogation wing of Gaza Central Prison in 1989.

Mahmud al-Masri died of a perforated stomach ulcer on 6 March, three days after he was arrested on suspicion of belonging to an illegal organization and providing weapons to people apparently involved in the killing of Palestinians suspected of collaborating with the Israeli authorities. According to a fact sheet sent to Amnesty International by the Israeli authorities in March 1991, the director of the Institute of Forensic Medicine who carried out an autopsy found that Mahmud al-Masri's death was the result of a chronic natural illness and not attributable to an injury. A foreign forensic pathologist who reviewed the autopsy material stated that the stress caused by the interrogation, including physical violence, and inadequate medical attention were contributory factors. As a result of an official investigation, the GSS interrogators involved were disciplined for "their lack of coordination with the Prison Service Personnel" and because "al-Masri's medical condition had been neglected". A medic was punished by 10 days of actual imprisonment, a reduction in rank and a severe reprimand "for negligence and unbecoming behavior."

On 19 December, Khaled Shaikh 'Ali died in the same prison, 12 days after he had been arrested on suspicion of belonging to an illegal organization and possession of weapons.

One month earlier, two soldiers had been killed in an armed attack. According to a fact sheet sent to Amnesty International by the Israeli authorities in March 1991, during "his interrogation, Ali disclosed the location of some weapons, which were hidden in his courtyard" and included two sub-machine guns and a hand grenade. However, "[d]espite information from other sources that additional weapons, including the murder weapon, were in Ali's possession, he refused to furnish the interrogators with any further information or to hand over the weapons."

A second foreign forensic pathologist who performed an autopsy with the director of the Institute of Forensic Medicine found that he died from internal bleeding as a result of blows to the abdomen. Two members of the GSS were brought to trial and found guilty of causing death by negligence, under Article 304 of the Penal Law. They were sentenced to six months' imprisonment and suspended from their employment in the GSS. According to the Israeli authorities:

"The opinion of the judge of the Jerusalem District Court stated that the goal of the interrogators had been to obtain vital information regarding the whereabouts of the remaining weapons in Ali's possession in order to prevent the carrying out of additional murders. The opinion also stated that the interrogators did not intend to bring about Ali's death."

Amnesty International notes that Article 304 makes liable to imprisonment for three years "[A] person who by want of precaution or by rash or careless act, not amounting to culpable negligence, unintentionally causes the death of a person". This provision basically applies to accidents and appears badly suited to punish people who have tortured someone to the point of death, even if they did not intend to cause his death.

The practice in light of the Landau Commission's Report

In a letter forwarded to Amnesty International in April 1991, Justice Landau expressed his "personal protest" at a statement delivered by Amnesty International in January 1991 to the UN Commission on Human Rights in Geneva. In its statement Amnesty International said that at least some of the methods described above might be consistent with the secret guidelines of the Landau Commission. Justice Landau said that Amnesty International's statement implied that the "Commission authorized the use of torture against persons being interrogated". By way of rebuttal, he pointed out several passages of the Commission's Report which emphasize that "pressure must never reach the level of physical torture or maltreatment of the suspect or grievous harm to his honour which deprives him of his human dignity" (as in para 3.16).

Justice Landau says in his letter that it is not for him "to enter into the correctness or otherwise of the allegations of physical violence" relayed by Amnesty International, but points out the Commission's observation that "false complaints" and "gross exaggerations" by suspects "are common as part of the systematic campaign conducted by terrorist organizations against the GSS".

Amnesty International notes that Justice Landau and the other members of the Commission repeatedly stress in their Report that pressure must never amount to torture or other forms of ill-treatment. However, although the actual guidelines are secret, the Landau Commission clearly endorsed in the public part of its report "slapping a suspect's face, or threatening him" (para 3.15). At the very least such methods constitute cruel, inhuman or degrading treatment or punishment, and as such are absolutely forbidden by international law. Slapping is degrading treatment at the very least. If sustained and severe, and if the blows are aimed around the ears and eyes, it could lead to serious injury. A threat, depending on its nature and the circumstances in which it is made (for example, a credible death threat) may also constitute torture. Amnesty International finds it inconsistent that this kind of treatment is endorsed by the same people who are clearly at pains to stress that "pressure" should not reach the level of "torture or maltreatment of the suspect or grievous harm to his honour which deprives him of his human dignity".

With regard to the techniques of interrogation found by the European Court of Human Rights in 1978 to constitute inhuman and degrading treatment but not torture (hooding, wall standing, sleep and food deprivation, and holding someone in a room exposed to a loud

hissing noise), Amnesty International regrets that the Landau Commission did not absolutely rule them out as impermissible, although it did stress that "the substance of the means of pressure permitted" under its guidelines to the GSS "is less severe" than such techniques (para 4.13). Amnesty International is also concerned at the striking similarity of the first four techniques to methods used by the GSS, often in combination.

Amnesty International expressed disappointment and concern at the European Court's ruling at the time, particularly because the court had reached its conclusion despite its own stated opinion that:

"[T]he five techniques were applied in combination with premeditation, and for hours at a stretch. They caused, if not actual bodily harm, at least intense physical and mental suffering ... and also led to acute psychiatric disturbances during interrogation."

Amnesty International reiterates that it considers any technique that causes "intense physical and mental suffering" leading to "acute psychiatric disturbances during interrogation" to constitute torture, wherever they are applied.

In conclusion, Amnesty International believes that the existing interrogation practices, which amount to torture or ill-treatment, are either consistent, at least in part, with the Landau Commission's secret guidelines, or they constitute evidence that since 1987 the GSS has been massively violating such guidelines in addition to international standards for the treatment of detainees. In both cases urgent measures of redress are required. These include the publication of the secret guidelines on interrogation to compare them with the international legal prohibition of torture and ill-treatment and to ensure that anyone violating their provisions can be identified and punished.

Relevant international standards

Article 1 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment prohibits torture. It defines it as:

"... any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession ... when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."

International law makes a distinction between torture and other forms of ill-treatment. Article 1 (2) of the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment states that

"[T]orture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment."

It should be emphasized that although international law makes a distinction between torture and other forms of ill-treatment, it absolutely and unconditionally prohibits *all* of them. Article 7 of the ICCPR states unequivocally:

"No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."

Furthermore, these provisions can *never* be derogated from. The Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment specifically states in Article 3:

"No state may permit or tolerate torture or other cruel, inhuman or degrading treatment or punishment. Exceptional circumstances such as a state of war or a threat of war, internal political instability or any other public emergency may not be invoked as a justification of torture or other cruel, inhuman or degrading treatment or punishment".

Torture and other forms of coercion and brutality are also forbidden by Articles 31 and 32 of the Geneva Convention IV. Article 31 states that "[n]o physical or moral coercion shall be exercised against protected persons, in particular to obtain information from them or from third parties". Any measures "of such a character as to cause the physical suffering", including torture and "any other measures of brutality" are prohibited by Article 32.

In this context and in light of the justification of "moderate physical pressure" as "necessary" for law enforcement, it could be argued that "necessity" would certainly require the use of "pressure" in the case of a prisoner of war whose information may save large numbers of lives or even determine the course of a battle. Yet international standards absolutely prohibit any form of torture or ill-treatment even of prisoners of war in all circumstances. Such a prohibition has not been challenged by the Israeli authorities.

The Geneva Convention III Relative to the Treatment of Prisoners of War states in Article 17 that every prisoner of war is bound to give only his name and rank, date of birth and "army, regimental, personal or serial number". Article 17 continues:

"No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted or exposed to any unpleasant or disadvantageous treatment of any kind".

The Human Rights Committee in its General comment 7 on Article 7 of the ICCPR (which prohibits torture and cruel, inhuman or degrading treatment or punishment) recognizes that among the safeguards which make control of torture or ill-treatment effective are provisions against incommunicado detention.

The UN Special Rapporteur on torture has recommended in his report for 1989 that "[s]ince a great number of the allegations received ... referred to torture practised during incommunicado detention, incommunicado detention should be prohibited". In particular, he recommended that "[a]ny person who is arrested should be given access to legal counsel no later than 24 hours after his arrest; his relatives should be informed promptly of his arrest and the place where he is detained". In his 1991 report he specifically recommended: "The blindfolding or hooding of detainees during interrogation should be absolutely forbidden".

Amnesty International's recommendations

Amnesty International recommends that the Israeli Government make a clear public commitment at the highest level to adhere to relevant international standards which absolutely and unconditionally forbid the use of torture and all other forms of cruel, inhuman or degrading treatment or punishment. To this end it should make public all existing guidelines relating to the use of physical and psychological pressure during interrogation and review them to ensure that they are in compliance with such international standards. Prompt, independent and impartial investigations into evidence of abuses should be conducted. The results should be made fully available to the public and any official found responsible brought to justice.

C. Use of Confessions Allegedly Obtained by Duress: "Trials within a Trial"

Admissibility of confessions

Confessions obtained under torture or other forms of cruel, inhuman or degrading treatment are unacceptable and, by their very nature, usually unreliable. Article 12 of the 1971 Evidence Ordinance (New Version) provides:

"Evidence of confession by the accused that he has committed an offence is admissible only when the prosecution has produced evidence in relation to the circumstances in which it was made and the court is satisfied that it was free and voluntary".

In reviewing judicial precedents, including Supreme Court rulings, the Landau Commission summed up Israeli jurisprudence on the issue of the admissibility of confessions as follows (para 3.19):

"It may be said that at present judicial precedent allows the admissibility of a confession, even if it was obtained from the accused by means of pressure or by misleading him, as long as the interrogator did not use extreme means which contradict accepted basic values or are degrading."

"Trials within a trial"

In theory, protection against the use of confessions obtained by duress exists in the military courts of the Occupied Territories. If a defendant maintains that a confession was so obtained, the defendant's lawyer can challenge the confession in a so-called "trial within a trial" or "mini-trial". In his proceeding, generally held *in camera*, the prosecutor is meant to prove the voluntary nature of the confession. The prosecutor calls witnesses involved in obtaining the confession and the defendant in turn gives evidence of the alleged abuses used to coerce a confession. If the prosecution fails to prove that the confession was made voluntarily, it becomes inadmissible and must be disregarded by the court in the subsequent full trial.

This safeguard, however, fails to operate effectively in practice. Amnesty International does not know of successful challenges in the Occupied Territories to a confession by the use of this procedure, although it has been informed of successful cases in Israel. Lawyers maintain that in a "trial within a trial", judges often automatically accept the testimony of witnesses of the prosecution forces and reject that of defendants. Defendants who have been held in prolonged incommunicado detention – in practice all those being interrogated, as seen earlier – have no witnesses to call on their behalf.

Other factors deter lawyers from seeking "trials within trials". The invocation of such a proceeding necessarily delays the hearing of a case. For a defendant charged with a relatively minor offence, therefore, the choice of a "trial within a trial" may mean that he or she will be kept in detention awaiting such a procedure for a longer period than might be expected to be served as a sentence were a guilty plea entered from the start.

In addition, defendants correctly believe that any unsuccessful attempt to challenge such a confession will lead to less favourable treatment during any eventual plea bargaining or full trial. Judges, as well as prosecutors, reportedly often remind defendants and their lawyers that pleading guilty and saving the court the time and effort of a "trial within a trial" would be considered a mitigating factor in sentencing.

The "Tamir Law"

Even in cases where defendants have not signed confessions, they may face prosecution and conviction on the basis of out-of-court written confessions of third parties. This is irrespective of whether such parties are brought to court to be examined or whether, when brought to court, they stand by their statements or retract them. This is allowed by Article 10A of the 1971 Evidence Ordinance, as amended in 1979 (the so-called "Tamir Law," named after Shmuel Tamir, Minister of Justice in office when it was enacted), which is in use in the Occupied Territories.

According to paragraph (a) of Article 10A, a written statement made by a witness out of court is admissible as evidence in a trial even if the testimony given subsequently in court by the same witness differs from the earlier written statement, or "the witness denies the contents of the statement or alleges that he does not remember its contents", provided that the witness is examined in court. However, paragraph (b) allows the court to admit any such statement even if the person who made it refuses or is unable to testify, provided that the court is satisfied that he received, for example, threats, or that other "improper means have been used to dissuade or prevent the person who made the statement from giving testimony." It also allows such statements if the person who made them has died or cannot be found.

The court may base its findings on such a statement and may "prefer such statement to the testimony of the witness, if it sees fit to do so in view of the circumstances of the case", according to paragraph (c). Paragraph (d) stipulates that a defendant "shall not be convicted on the basis of a statement admitted under this section unless the evidential material provides corroboration", as in the official English text of the law. There is, apparently, disagreement in the legal profession about the level of such corroboration: the Hebrew word is *hizzuk*, defined by jurists as less than *seyu'* (interpreted to mean full corroboration) but more than *dvar ma* (a "scintilla" or spark or evidence). In practice, lawyers representing defendants who were convicted by military courts in proceedings involving the use of such provisions maintain that the level of corroboration was often minimal and sometimes absent.

In many legal systems, such third-party statements – usually confessions taken under interrogation – would be considered hearsay evidence, inadmissible to use against someone other than the person making the confession. However, they are admissible in both Israel and the Occupied Territories. Such a provision necessarily adds to the concern about the use of duress to obtain confessions in the Occupied Territories and the effect on the fairness of trials before the military courts.

Torture ignored in court

Amnesty International's delegate witnessed a graphic illustration of the problems surrounding defendants' confessions during his attendance at the military court in Hebron on 4 November 1990. A young Palestinian man, 'Aziz Muhammad Hamed Abu 'Asheh, was

brought into the courtroom along with two other young men, apparently under the "quick trial" procedure described below. All three had been arrested two days before and charged with throwing stones while masked. Of the three, only 'Aziz 'Asheh had signed a confession and only he was represented by a lawyer, since a lawyer who had been contacted by his family happened to be in the court when the three were brought in. While the other two refused to proceed in the absence of lawyers (despite pressure by the court for them to "finish their cases" immediately), the case of 'Aziz 'Asheh went ahead.

'Aziz 'Asheh was brought into the courtroom with obvious injuries suggesting that he had been tortured. His shirt was torn and bloody. There were open wounds and contusions on his left upper arm and injuries on his chest. He later lowered his trousers for his lawyer to show numerous contusions on his right thigh, which was almost completely black and blue. The case first came to the attention of Amnesty International's delegate when the young man, on being taken out of the holding cell, began to shout at a soldier. He claimed that he had been beaten by this soldier and others both at the time of his arrest and while being detained in a tent near Hebron. He said that he had been hit on the head, arm and body with rifle butts and batons and that he had been kicked repeatedly on the leg. He said that it was only as a result of this treatment that he had signed a confession.

When the young man's case came up in court, the judge said that he was only interested in knowing whether he "wants to finish his case today". Despite repeated attempts by the lawyer to raise the issue of the injuries, the judge said that this was not relevant and that he would not look at them. He said further: "If we conduct the hearing today and we conclude the case, he will get a lesser sentence." Ultimately the lawyer felt compelled in the client's interest to plead guilty. The judge then said that in light of the confession and "under the circumstances of the medical condition" he would sentence the defendant to one year in prison, suspended for two years, plus a fine of 1,500 shekels (or three months' imprisonment if this could not be paid).

Amnesty International's delegate was most concerned that in a case such as this no effort was made to investigate the defendant's injuries. Nor was any opportunity given to question the credibility of a confession made under such circumstances. When the delegate raised this case in a meeting with Lt. Col. Yaacov Hassidim, Legal Adviser for the Gaza Strip, on 7 November 1990, Lt. Col. Hassidim suggested that the injuries might have been suffered prior to the arrest. However, he subsequently checked on the medical records relating to the young man at the time of arrest. He found that they apparently indicated that on his arrival at the place of detention, 'Aziz 'Asheh showed no obvious signs of injury.

Amnesty International subsequently sought further information on this case from the Israeli authorities but none was made available by the time this report was written. The case clearly indicates, however, the inadequacy of procedures within the military justice system to investigate and redress the problem of unreliable confessions obtained under duress.

Relevant international standards

International human rights legal standards have made clear that coerced confessions ought not to be admissible evidence against a defendant and that the authorities have a duty to impartially investigate whenever there is ground to believe that torture has occurred. Article 12 of the UN Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the UN General Assembly on 9 December 1975 "as a guideline for all States", declares:

"Any statement which is established to have been made as a result of torture or other cruel, inhuman or degrading treatment or punishment may not be invoked as evidence against the person concerned or against any other person in any proceedings."

This standard is included in Article 15 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

The UN Special Rapporteur on torture concluded in his report for 1989 that "evidence obtained by torture should under no circumstances ... be admitted in court, nor should it be accepted as supplementary evidence. No one should be convicted on the basis of evidence which has allegedly been obtained by torture, unless the allegation is manifestly ill-founded".

The Human Rights Committee, in its General comment 7 on Article 7 of the ICCPR, has said that safeguards against torture and ill-treatment should include "provisions making confessions or other evidence obtained through torture or other treatment contrary to article 7 inadmissible in court".

Under both the UN Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Articles 8 and 9) and the Convention against Torture (Articles 12 and 13), competent authorities such as judges have a duty to investigate not only when there are complaints of torture or ill-treatment but wherever there is reasonable ground to believe that torture may have occurred.

Amnesty International's recommendations

Amnesty International recommends that the Israeli Government institute an independent and impartial review of the procedures operating in the military courts relating to the exclusion of confessions allegedly obtained under duress. In particular, steps should be taken to ensure that no defendant making such allegations is penalized by prolonged pre-trial detention or a punitive sentence for having exercised the right to challenge the admissibility of a confession.

Prosecutors should be forbidden from suggesting that a less favourable plea bargain will ultimately be made available to individuals who challenge the admissibility of their confessions. Judges should investigate rigorously any evidence of torture or ill-treatment of defendants that come to their knowledge regardless of whether a complaint is made. They should also consider bail applications more positively in cases where a confession is suspected to have been coerced.

D. Role of the International Committee of the Red Cross

The ICRC plays an important role in protecting individuals detained in the Occupied Territories. Since 1967 it has maintained a large delegation in the country. In accordance with the ICRC mandate, ICRC delegates visit and provide humanitarian assistance to security detainees, providing them in particular with a measure of safeguard against ill-treatment.

Since the beginning of its operations in the Occupied Territories, the ICRC has been allowed access to prisons and detention facilities on 48 hours' notice, in addition to its regular schedule of visits. As a general rule, when inside a detention facility ICRC delegates can ask to see any security detainee awaiting trial (provided this detainee is not being interrogated), or any prisoner sentenced for security offences, in the cell where the detainee or prisoner is being held. Until 1979 the ICRC did not have access to security detainees held in the interrogation wings of detention centres.

Under an agreement concluded in 1979 with the Israeli Government, the ICRC must be notified within 12 days of every arrest of a security detainee in the Occupied Territories, and can have access to any such detainee held under interrogation. However, there are the following important restrictions:

1. The ICRC may have access to security detainees held under interrogation within 14 days of arrest, which has meant in practice on or after the 14th day. Should the detainee remain under interrogation, access can then be withheld for a further 14 days until the interrogation is completed. Visits to security detainees undergoing interrogation do not take place in their cells but in other areas of the detention facility.
2. On their first visit to a security detainee held under interrogation ICRC delegates are restricted to raising issues such as identity and health. They may not on their own initiative advise detainees regarding their legal rights, including their basic right to a lawyer.

3. The ICRC can notify family members of their relatives' detention. In fact, in many cases in the Occupied Territories the first notification to families of a relative's detention comes from the ICRC, thus further showing the inadequacy of the current postcard system. The ICRC, however, cannot assist relatives in other ways by ensuring that the detainees' legal rights are respected.

4. According to the ICRC's international working procedures, the ICRC can report only to the Israeli Government with respect to violations of humanitarian law which it discovers and must maintain its representations confidential, although in exceptional cases it has made them public.

Given that all of the other factors described above contribute to ensure that the detainee is held incommunicado and denied access to the courts, a lawyer and family members during the critical initial stage of detention, this access by the ICRC must be welcomed, and the overall role of the ICRC in the Occupied Territories should be preserved and enhanced. However, it should by no means be considered a substitute for the basic recommendations set out above to ensure that detainees are afforded their fundamental rights under international law. In particular, it should be stressed that in practice the most vulnerable detainees – those undergoing interrogation – remain in total incommunicado detention for a minimum of 14 days.

VI. THE PRESSURE TO PLEAD GUILTY: PREVALENCE OF PLEA BARGAINS IN THE MILITARY COURTS

Plea bargaining is a method of resolving trials whereby an agreement is reached between the defendant and the prosecutor on the charges and the sentence. In its typical form, the defendant agrees to plead guilty to all or some of the charges, sometimes slightly modified, in exchange for the prosecutor's agreement to request a sentence more lenient than one that would be expected at the end of a full trial in which the defendant pleads innocent but is found guilty. Judges normally have the power to disregard such deals, but usually endorse them in the overall interest of the parties and the judicial system's workload.

Plea bargaining is allowed in several countries. In the United States, for example, the vast majority of criminal cases are resolved in this way. In other countries, however, plea bargaining is illegal because it is thought that it can lead to defendants pleading guilty to avoid the risk of a harsher sentence.

In the Israeli Occupied Territories plea bargaining is allowed and is in fact responsible for the outcome of the vast majority of cases (over 90 per cent according to some lawyers). Once the defendant has decided to plead guilty, his or her lawyer enters into negotiation with the military prosecutor regarding the charges and the sentence which the prosecutor will recommend to the court. Generally, they reach agreement and the court respects the bargain struck. There is no obligation on the court to do so, however, and it may impose a different sentence, although this is an option rarely followed. Occasionally there is no agreement on the sentence and the court is left to decide an appropriate sentence on its own.

A. The Possibility of Acquittal: Assessing the Risks

For the defendant who asserts his or her innocence and wishes to consider the possibility of contesting charges at trial, the starting point must be a realistic appraisal of the likelihood of acquittal and the costs in terms of prolonged detention awaiting the end of the proceedings.

Statistics provided by the IDF to the Israeli human rights organization *BTselem* in March 1990 indicated that about four per cent of the cases heard by the military courts for offences relating to "disturbing the peace" since the beginning of the *intifada* in December 1987 ended in acquittals. According to these statistics, 40,000 Palestinians had been arrested in the Occupied Territories during the first two years of the *intifada* and over 17,800 Palestinians were brought before the military courts. Of these, some 10,000 had been convicted and 400 acquitted. More recent statistics on the rate of acquittals were not available to Amnesty International.

It is not possible from these statistics to determine what percentage of those found guilty had been convicted on the basis of a guilty plea rather than following a full trial. As a result, the percentage of acquittals of cases going to full trial could not be determined. Defence lawyers indicate to Amnesty International, however, that the large majority of full trials end in convictions, another reason for lawyers to prefer plea bargains. Most such cases come down to weighing up the credibility of IDF, police and security service witnesses on the one hand and that of the Palestinian defendant and the defendant's family and friends on the other. Defence lawyers believe that in this court system there is an in-built bias: IDF officers acting as judges are more likely to believe the testimony of their colleagues in the IDF and other governmental services than the testimony of members of a community under occupation and generally regarded as the enemy.

As already indicated, one of the key pressures towards plea bargaining is that many defendants, perhaps the majority, have already made a confession by the time their case comes to court or have been informed of the existence of a confession by another person implicating them. While many such confessions are suspect because of the conditions under which they have been taken, they cannot be effectively challenged.

One lawyer practising in Bethlehem suggested to Amnesty International that a relatively serious charge which might attract a plea bargain of a two-year prison sentence at the initial hearing might escalate to a plea bargain of a five-year sentence following an unsuccessful "trial within a trial". Given such pressures, lawyers often believe that it is generally in the interest of their clients not to challenge confessions in the military courts, regardless of the way they have been obtained.

Even in cases where defendants have not made a confession, however, there are likely to be considerable pressures exerted to plead guilty and enter into a plea bargain. A defendant who has not confessed and wishes to contest charges is likely in many cases to find his or her trial delayed for a variety of reasons for months and sometimes for over a year. Bail is rarely granted. Under such circumstances, many individuals plead guilty to avoid a period of pre-trial detention which may exceed likely sentences were they to enter into a plea bargain. The much heavier sentences imposed on those convicted after a contested trial also deter many from contesting charges.

It should not be surprising therefore if some defendants refuse to run the risks of a full trial and agree to a plea bargain despite their innocence. An illustrative case, reported by the Israeli human rights group *BTselem*, is that of 10 residents of Ramallah who were arrested on 7 March 1989 for allegedly participating in an illegal demonstration. Their case was heard by the Ramallah military court nine months later in December 1989. The sole prosecution witness was a soldier who had filled out a brief arrest form alleging that he had arrested them after he identified them as participating in a demonstration that day.

Generally, such a straightforward accusation by a single witness is difficult to attack by cross-examination and nine of the 10 defendants chose to plead guilty rather than contest the case. They were convicted and sentenced. The lawyer for the 10th, however, entered a plea of not guilty and asked that the soldier be required to write down a fuller account of the alleged demonstration. The judge agreed to this request and the case was adjourned. Subsequently, however, the soldier contacted the defence lawyer and the prosecutor and stated that after checking he found that the demonstration described in the charge sheet had taken place on a different date and in a different place. The court instructed that the case be closed and the defendant who had pleaded not guilty be acquitted.

Plea bargain "tariffs"

In late 1990 the prevailing "tariff" in a plea bargain for a first offence of stone throwing was apparently a severe fine of 2,000 or 3,000 shekels (about 1,000 or 1,500 US dollars) without imprisonment (other than the period spent in detention prior to resolution of the case, which could be several months). A decision to fight such a case, however, could have resulted in a prison sentence of one or two years if conviction resulted. With respect to more serious charges, the differential between the sentence imposed on a plea bargain and that imposed after conviction at a full trial may have been a number of years. In the Gaza Strip in mid-1991 typical sentences for stone throwing were reported to be about three months' imprisonment with a guilty plea and nine to 12 months' imprisonment if convicted after a full trial. "Tariffs" for similar offences vary according to the courts.

B. Delays in Trial

As already noted, another factor pushing defendants towards a plea bargain is the likelihood that a decision to contest charges will often mean a delay of months if not years before a case is completed. In the interim, bail is likely to be denied and the defendant may find himself or herself serving a period of pre-trial detention which would exceed the sentence likely to apply in the context of a plea bargain.

Lawyers representing clients in the military courts have repeatedly complained in recent years about obstacles to holding trials promptly. During his attendance of court proceedings in October and November 1990, Amnesty International's delegate came across numerous examples of each of the following problems causing delay in a trial.

Defendants not brought to court

Defendants or one or more co-defendants were not produced. This seems to happen frequently because of a lack of coordination between the courts and the detention centres. During one morning's session of a three-judge court in Gaza City on 31 October 1990, at

least one co-defendant was missing for this reason in virtually every multi-party case presented. In the Ramallah military court on 29 October 1990, the military prosecutor drew to the attention of Amnesty International's delegate the fact that he had just agreed a plea bargain which was very favourable towards a defendant who, until that day, had inadvertently not been brought to court for well over a year and had been detained for more than two years.

One extreme case that has gained notoriety in the West Bank is that of 'Abdullah, Yusuf and Muhammad 'Anqawi and 'Abd al-Razzaq al-Haj, four co-defendants arrested on 5 February 1988 and charged with offences including preparing petrol bombs and torching a vehicle. All made confessions, but the defence asked for a "mini-trial" as they alleged that they had been tortured. However, one of them was never produced in court for up to 32 sessions stretching over almost two-and-a-half years. The others, according to their lawyer, had become "desperate" to finish their case. In the end they were all convicted by the Ramallah military court on 11 July 1990, without proper debate on the evidence, receiving sentences of between five to 12 years' imprisonment. The defence appealed against the sentences arguing that a proper trial had not taken place and that the sentences were too harsh given that no one was injured as a result of the defendants' alleged actions. On 21 May 1991 the Military Court of Appeals reduced their sentences to between three-and-a-half to 10 years' imprisonment.

Prosecution witnesses not produced

In those cases where the defendant had asked for a full trial, prosecution witnesses were often not present. This appears to be a particularly prevalent problem, as prosecution witnesses are often reserve soldiers who, since the time of the alleged offences, have returned to civilian life in Israel and are often reluctant to return to the Occupied Territories to testify.

Files missing

The prosecutor's or the court's files relating to a particular case have often gone missing. A Bethlehem lawyer gave Amnesty International's delegate a number of examples of cases which had been delayed for this reason. One client, 'Amer Sharawi of Hebron, had been arrested on 3 January 1990 for public order offences but had only been brought to court once in the intervening 10 months because his file could not be found. Another, Zaki 'Abd al-Rahman, had been arrested on 18 October 1989 for stone throwing and insisted on a trial.

Some witnesses were heard on 22 March 1990 and the trial was then adjourned until 10 May 1990. On that date, he was produced in court but his file had disappeared. It was found again only in November 1990. By that time he had been moved to Megiddo Prison in northern Israel and the case was to continue in the military court in Jenin rather than in

Ramallah where it had started, a matter of considerable inconvenience to a Bethlehem-based lawyer.

Absence of lawyers

The defendant's lawyer was not in attendance. While this is obviously sometimes the fault of the lawyer, the system is often to blame. In some courts, lawyers are said to be given virtually no notice of even serious cases. In Gaza, for example, notification to lawyers of cases to be heard is through notice of trials published in newspapers on the actual day of the trial. The Gaza Bar Association pointed out to Amnesty International's delegate that this procedure applies even for the most serious cases.

For a defendant who wishes to contest his or her case at a full trial, such delays and repeated calls by judges and prosecutors to "finish your case today", together with the threat of a much heavier sentence, can represent inappropriate pressure to plead guilty. The fundamental right under international law not to be compelled to confess guilt and to receive a prompt and fair trial in order to prove guilt or innocence seems clearly prejudiced under such circumstances.

Relevant international standards

Article 14(3)(g) of the ICCPR states that anyone charged with a criminal offence shall be entitled to minimum guarantees including "[n]ot to be compelled to testify against himself or to confess guilt."

The right to a prompt trial is recognized in international law. Article 14(3)(c) of the ICCPR requires that everyone charged with a criminal offence "be tried without undue delay". Article 71 of the Geneva Convention IV also requires that accused people "be brought to trial as rapidly as possible."

Amnesty International's recommendations

Amnesty International recommends that the Israeli Government carry out a prompt review of the use of plea bargaining in the military courts. While recognizing that plea bargaining is an element of many judicial systems and to an extent can facilitate the processing of large numbers of cases, Amnesty international is concerned that unduly coercive features connected with plea bargaining in the military courts combine to deprive defendants of an effective right to a prompt and fair trial. Such a review should address in particular the undue delays which appear endemic in the military justice system, often caused by the absence of defendants, prosecution witnesses, files and lawyers. It should also consider more extensive granting of bail, particularly in cases where delays in the trial of

defendants contesting their charges may result in periods of pre-trial detention longer than any likely sentence. Finally, it should consider the issue of whether unduly punitive sentences are being imposed on individuals because they have chosen to exercise their right to a prompt and fair trial rather than accept a plea bargain.

C. "Quick Trials"

Military courts in the Occupied Territories appear to be making considerable use of so-called "quick trials", particularly with respect to alleged stone throwing offences. In a "quick trial" a charge sheet is likely to be drawn up within 24 to 48 hours of arrest and a court hearing scheduled to take place any time after that, often within a matter of days or a week.

Such "quick trials" do address some of the concerns about the promptness and fairness of trials in the Occupied Territories. For example, defendants are likely to be held close to the place of arrest and therefore will be more easily found and brought to court. IDF witnesses, even if reservists, are still likely to be on duty nearby and available at the time of trial. The facts are likely to be fresh in the minds of prosecution and defence witnesses.

"Quick trials" also address the problem of lengthy pre-trial detention in cases where defendants choose to fight a case. When the ordinary plea bargain offered for a first stone throwing offence is a fine without a term of imprisonment, as was apparently the case at the end of 1990, it would be absurd to require a defendant who refused a plea bargain to be held in detention for weeks or indeed months until the case was heard. Nevertheless, holding such defendants until the time of trial has been the practice in the Occupied Territories.

A fundamental flaw in the way "quick trials" have been carried out is that no serious attempt appears to have been made to remedy the inherent shortcomings in the system relating to the notification of detainees' relatives and lawyers. Relatives and lawyers in many cases remain ignorant of the whereabouts of the detainee until they learn that the detainee has already appeared in court for a "quick trial". Detainees are not normally informed of their right to ask for a lawyer, although some do and sometimes obtain a brief postponement after insisting. The result is that the detainee may be unrepresented at the crucial first court appearance. Even if a lawyer happens to be in court at the time and agrees to take on the client, as sometimes is the case, the lawyer will be unprepared and will not have had the opportunity to discuss options with the new client.

Amnesty International's delegate in 1990 observed first-hand instances where both the prosecution and the judge put pressure on unrepresented defendants and on freshly appointed lawyers "to finish the case now" with a plea bargain. While an adjournment seems to be granted in cases where the defendant or lawyer is insistent, in other cases the individuals

involved submit to the pressures exerted to plead guilty on the spot. This was the result, for example, in the case of the young man brought to court in Hebron showing obvious signs of serious ill-treatment and having made a confession which he said had been coerced. Under such circumstances the fundamental right to have access to legal advice is violated.

Amnesty International's recommendations

Amnesty International recommends that the Israeli Government ensure that whenever "quick trials" are used, defendants' relatives are given sufficient notice to arrange legal representation and to be present at such proceedings if they wish. No "quick trials" should take place unless defendants have had adequate opportunity to consult their lawyers beforehand and to be represented by their lawyers at the actual hearings. Lawyers should be given adequate opportunity to examine prosecution evidence prior to any such hearing and to arrange for attendance by defence witnesses.