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JUSTICE ?

THE MILITARY COURT SYSTEM IN THE ISRAELI–OCCUPIED TERRITORIES.

Jointly prepared by:

AL–HAQ / LAW IN THE SERVICE OF MAN
West Bank affiliate of the
International Commission of Jurists.

and

GAZA CENTRE FOR RIGHTS AND LAW
Gaza Strip affiliate of the
International Commission of Jurists.

JUSTICE ?

THE MILITARY COURT SYSTEM IN THE ISRAELI-OCCUPIED TERRITORIES.

Including an introduction to relevant international human rights and humanitarian law.

by Paul Hunt

The author is a solicitor and volunteer researcher with Al-Haq/LSM and the Gaza Centre for Rights and Law.

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PREFACE

This paper describes the Israeli military court system, beginning with arrest and including interrogation, charge, trial and sentence. Also, it compares the actual rights available to detainees in the military court process with some international human rights and provisions of humanitarian law. The account is designed for people with little or no legal background, especially those unfamiliar with the Occupied Territories.

The paper is based mainly but not exclusively upon interviews with defence lawyers who practise, or used to practise, in the Israeli military courts. Some of them described the military courts as a "sham", "charade" or "theatre". All believed that the military court process may have the superficial appearance of a fair system of justice but is, in reality, weighted overwhelmingly against the detainee. Many of those interviewed doubted defence lawyers have any significant constructive role to play in the legal process and feared their participation only lent legitimacy to an intrinsically unjust system. Indeed, a few of the interviewees had been persuaded by these considerations to give up altogether their work in military courts.

The Israeli military courts referred to and described herein operate throughout the territories occupied by Israel after the 1967 war, with the exception of East Jerusalem and the Golan Heights which were subsequently annexed by the State of Israel.

In the West Bank the Military Order regulating most of the military court process is M.O. 378, as amended; in the Gaza Strip it is a parallel unnumbered Military Order of 1970 found in Volume 19 of the 'Proclamations, Orders and Announcements' issued by the Israeli military authorities, as amended. Military Order 378 and its unnumbered Gazan equivalent are the Israeli Military Orders referred to in this

paper, unless stated otherwise.

Israel's use of administrative detention, that is detention without charge or trial, is not considered in this paper. Administrative detention is discussed very thoroughly in LSM's Occasional Paper No.1 written by Emma Playfair.

Since 1967 the Israelis have created military tribunals called Objections Committees to consider numerous civil matters in the Gaza Strip and West Bank. For instance, these quasi-judicial bodies, staffed by Israeli army officers, adjudicate upon critical issues of land ownership. This paper does not consider these very important military tribunals which are discussed in Occupier's Law by Raja Shehadeh (Institute for Palestine Studies, 1985); their widening jurisdiction raises significant issues of international law.

INTRODUCTION

This Introduction considers firstly a few general features of Israeli military courts and secondly the background to the international human rights and humanitarian law relied upon subsequently.

i) Israeli Military Courts: General Features

Israeli military courts have jurisdiction to try all cases which the authorities consider to be security cases. Also, the military courts have concurrent jurisdiction with local, non-military criminal courts to try all alleged criminal offences. The military authorities decide whether or not a particular criminal case or class of cases should be heard by a military or local court.

The military court legal system is based loosely upon the common law. However, judges in the military courts, unlike the judiciary in most common law legal systems, are not bound to follow precedents, meaning the decisions of previous cases. Nevertheless, in practice, some military court judges choose to consider precedents as persuasive authority; in particular, a judge is likely to regard as persuasive one of his own earlier decisions or the previous decision of another judge arising from the same facts. The absence of legally binding precedents tends to promote a lack of uniformity in military court decisions and a feeling of arbitrariness amongst defendants and lawyers alike.

Normally, the decisions of an appeal court encourage a consistent interpretation of the law; but, in breach of the law of international human rights (see page 32), there is no appeal court in the military court system.

The quality of justice dispensed in any legal system depends upon the independence and impartiality of the judges. In the Israeli military courts all judges are serving Israeli army officers, some of whom are without legal qualifications. Inevitably these features affect profoundly the perceived and

actual justice available in Israeli military courts. The military court judiciary is considered in more detail on page 34.

One characteristic of common law legal systems is that proceedings are adversarial, meaning that in a case there are two contending parties, firstly the prosecution representing the State and secondly the accused.

ii) International Human Rights and Humanitarian Law.

This study compares some of the rights available to detainees in the military courts of the Occupied Territories with some of the rights enumerated in the Universal Declaration of Human Rights ("UDHR"), the International Covenant on Civil and Political Rights ("ICPR") and the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 1949, ("the Fourth Geneva Convention"). UDHR and ICPR are in the attached Appendix C and D.

The provisions of UDHR, ICPR and the Fourth Geneva Convention under consideration, are those not guaranteed in the Israeli military courts; of course, there are other provisions, for instance, a detainee's right to call evidence, which are found in the law and practice of Israeli military courts.

a. The Universal Declaration of Human Rights (UDHR)

The United Nations' first catalogue of human rights and fundamental freedoms was declared by the United Nations General Assembly in December 1948. Although the Universal Declaration of Human Rights tends to be general rather than specific, it is a document of immense significance in the field of international human rights. Israel became a member of the United Nations in May 1949, thereby adopting UDHR.

There are at least three schools of thought on the legal status of the UDHR. One argues that, however great its moral

or political authority, the UDHR does not itself create binding obligations under international law. The second argues that the UDHR today creates binding obligations for member states of the United Nations because they have expressly accepted these obligations. The third school of thought argues that over the 37 years since its adoption, the UDHR has become part of customary international law and therefore is binding on all states, whether or not they are members of the United Nations. According to this view, UDHR is directly applicable in those states, such as Israel, whose domestic legal systems incorporate customary international law.

This paper adopts UDHR as a model for comparison because, according to these views, it is at least a document of great moral and political authority and, arguably, part of customary international law.

b. International Covenant on Civil and Political Rights (ICPR)

In 1947 work began on the drafting of detailed Covenants on human rights designed to become legally binding on United Nations member states. Two Covenants, the International Covenant on Civil and Political Rights (ICPR) and the International Covenant on Economic, Social and Cultural Rights (ICES), were adopted by the United Nations General Assembly and signed by Israel in 1966. Both Covenants elaborate many of the rights declared in UDHR . For instance, while UDHR declares simply a defendant's right to be tried with "all the guarantees" necessary for his defence, ICPR lists the "minimum guarantees" to which "everyone shall be entitled" in 7 paragraphs. ICPR, which is the only one of the 2 Covenants relevant to this paper, did not come into force until March 1976. However, negotiating and signing states, such as Israel, do not become legally bound by the Covenant unless and until they ratify it. Israel has yet to ratify the Covenant and accordingly is not legally bound by its terms.

Despite Israel's failure to ratify ICPR, comparisons with the Covenant remain apposite because, firstly, Israel's signature of the Covenant indicates the importance Israel once attached to it, and secondly ICPR is a detailed and authoritative elaboration of principles declared in UDHR.

c. The Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War (1949)

International humanitarian law is intended to regulate hostilities in order to reduce useless hardships. The main body of humanitarian law is found in the four Geneva Conventions of 1949 which seek to protect members of the armed forces who are wounded, sick or shipwrecked (the First and Second Geneva Conventions), prisoners of war (the Third Geneva Convention), and civilians (the Fourth Geneva Convention). In 1951 Israel ratified all four Geneva Conventions of 1949.

The status under international law of the territories occupied by Israel after June 1967 has been much debated, the discussion centring upon the applicability of the Fourth Geneva Convention to the Occupied Territories. This paper will not contribute to the debate because Israel declares it observes the humanitarian provisions of the Fourth Geneva Convention, even though it disputes its legal obligation to do so under international law.

The text of the Fourth Geneva Convention is published by the International Committee of the Red Cross with a detailed Commentary written under the general editorship of Dr. Jean Pictet, the leading authority on humanitarian law. The interpretations of the Convention expressed in the Commentary, passages from which are quoted in this paper, are neither binding nor conclusive, but they are considered to be of persuasive authority.

THE MILITARY COURT SYSTEM

1. Powers of Arrest

Under the Israeli Military Orders relating to the Occupied Territories, a soldier may arrest any person who has, or is suspected of having, committed a security offence. Many activities are defined as " security offences" including participating in a demonstration, stone throwing and failing to carry appropriate identification papers (hawiyas).

Arrests are made at any time of the day or night. They occur at innumerable places: in homes, at the Allenby Bridge when travelling between Jordan and the Occupied Territories, on a university campus following a "disturbance", at road-blocks and after individuals have been "stopped-and-searched" by soldiers in the street. Some people receive letters instructing them to report to the military authorities at a given time and place, and when they comply some are arrested. Students have been arrested in the examination hall and on one occasion a lawyer was arrested when visiting clients in prison.

According to UDHR 9 and ICPR 9(1): "No one shall be subjected to arbitrary arrest or detention." Arbitrary means without legal cause; it implies bad faith and randomness. In the Occupied Territories after an "incident" it is the military's practice to make large scale arrests. For instance, in September - October 1986, two Israelis in Gaza Town were fatally stabbed. Amongst its very numerous, repressive responses, the military arrested and searched some two hundred young, male Palestinians in the central square of Gaza Town, seven days after the second stabbing. From the writer's personal observations, it appeared that all young, Arab males passing through or working in the square, or its immediate vicinity, were arrested and placed in the middle of the square where they were searched; some of the soldiers' conduct was gratuitously harsh, including the kicking of "suspects". The arrests were made and searches conducted in the busiest part of Gaza Town, where neither stabbing

occurred, one week after the second attack. It is suggested that such arrests made in these circumstances, as well as being contrary to Article 33 of the Fourth Geneva Convention (prohibition of collective punishment and intimidation), are "arbitrary" in breach of UDHR 9 and ICPR 9(1).

ICPR Article 9(2) states: "Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest...". If this requirement is applied it is likely to deter arbitrary arrests, for instance those based upon prejudice or a personal grudge. However, in contradiction of ICPR 9(2), Israeli Military Orders do not require arrested persons to be informed at the time of arrest the reasons for arrest. This breach of ICPR 9(2) tends to encourage soldiers to arrest at their personal whim thereby making those arrested feel helpless subjects of an arbitrary system. In short, this contravention of international human rights seriously undermines the rule of law.

However, it seems the new Legal Advisor to the Military Government of the West Bank is aware of the problems created by failure to comply with ICPR 9(2). In late 1986, he informed a Palestinian lawyer associated with al-Haq, that he had issued instructions requiring soldiers to give the arrested person, at the time of the arrest, the reasons for arrest. These instructions, assuming they are followed, will ensure practical compliance with ICPR 9(2), despite the absence of supporting Israeli Military Orders. Such developments are warmly welcomed by al-Haq which will continue to monitor the situation.

According to the Israeli Military Orders, the arrested person should be taken as soon as possible to a detention centre or the nearest police station. The Military Orders provide that each detainee must be registered on entering a detention centre and given a receipt for possessions taken by the authorities. At first sight it appears that the requirement to register should assist greatly lawyers who are trying to find where a client is detained. However, in practice the registration is less useful because often prison

personnel refuse to say whether or not a particular detainee is registered and sometimes give information which later proves to be false. It seems some detention centres have quarters where Shin Bet, the Israeli security service, interrogates detainees without the detention centre personnel knowing, in all cases, which detainees are in the Shin Bet quarters.

Sometimes a detainee may be traced through the interrogators' office in Nablus or Bethlehem or the Israeli Legal Advisors' Department which is in Beit El in the West Bank and Gaza Town in the Gaza Strip. In the Gaza Strip the more common practice is to locate a detainee through the register of detainees in Gaza Prison, through the International Committee of the Red Cross (ICRC), on the basis of information given by other detainees when they appear in court, or by an application for bail on which occasion the detainee must be brought to court. Once located a detainee may be moved for a number of reasons e.g. to permit a confrontation with a witness from another town. In these circumstances a lawyer's hunt for a detainee resumes.

In recent years there has been an increase in the number of "disappeared" people in the Occupied Territories, namely men and women who go missing under suspicious circumstances. For instance, a man may leave his house for a business appointment, but neither arrive as arranged nor return home. In due course the body of the "disappeared" person may be found; sometimes no trace is ever found of either the person or body.

Again, the new Legal Advisor to the Military Government in the West Bank has issued an instruction which, if complied with, should reduce some of the anxieties generated by the phenomenon of "disappeared" persons. According to the same Palestinian lawyer referred to above, the Legal Advisor in the West Bank has issued instructions requiring that, if a person is arrested away from his home, the person's family must be informed of the arrest. If complied with, one effect of this instruction will be that a family will know more quickly when

someone is not "disappeared"; also, the instruction means that once a person is arrested and the family informed, he or she cannot become a "disappeared" person.

This development, too, will be monitored closely. Unfortunately, there is no indication whether or not either of these recent instructions issued by the Legal Advisor in the West Bank, will be adopted by the appropriate authority in the Gaza Strip.

2. Length of Detention

i) The First 18 Days

Immediately following arrest, a detainee may be detained for up to 18 days without appearing before a court. The 18 days is calculated as follows. Within 4 days of the arrest, the arresting soldier may obtain a Detention Order against the detainee from a police officer. If the Detention Order is not obtained within 4 days, the detainee should be released immediately. The period of detention under the Detention Order may not exceed 7 days. However, the period of detention may be extended for up to a further 7 days by a police officer of a rank not below that of inspector. Therefore, in summary, the arresting soldier may detain for 4 days, a Detention Order may be granted for 7 days and it may be extended for a further 7 days, totalling 18 days.

However, although required by the relevant Military Orders, these procedural steps within the first 18 days have no practical effect. Indeed, it is unclear whether or not they are followed at all. One lawyer's argument that in his client's case the required steps had not been followed was disregarded by the court as totally irrelevant.

ii) After 18 Days

After 18 days, only a Military Court may extend a period of detention. It must not extend the detention for a total period of more than 6 months unless the detainee is charged.

Therefore, a detainee who has been in detention for 6 months without charge must be released. However, once a detainee is charged, the court may, and almost invariably does, extend the period of detention until the end of all legal proceedings against the detainee. This creates pressure on the detainee to plead guilty in order to speed up the proceedings, a case involving a guilty plea normally being heard very much more quickly than one involving a plea of not-guilty.

In addition to the power of the military court to extend detention until the end of all legal proceedings against the detainee, the authorities have the power to detain administratively i.e. detention without charge or trial. Indeed, these two powers of detention may be used consecutively. For instance, in one case, on the day fixed for trial, the authorities withdrew the charge against the detainee and replaced it with a six-month order of Administrative Detention.

In the course of each case there may be several hearings for extensions of detention. What is said and not said at these hearings may have far reaching effects upon the detainees' chances of acquittal. However, it is more convenient to deal with these important hearings later (see page 19), after other issues, such as interrogation and bail, have been discussed.

3. Interrogation

After their arrest most detainees are interrogated. The questioning of detainees is conducted either by military personnel, security personnel (Shin Bet) or members of the police. Security personnel and the police may work in plain clothes often making it impossible to distinguish between them. As we will see, interrogation is the most critical stage of the proceedings against a detainee and it is also when the detainee is the most vulnerable.

In most cases, detainees give a signed confession during interrogation. Usually it is written down by an interrogator

in Hebrew, a language few detainees understand. In most cases the confession is the primary and decisive evidence against a detainee. It is extremely rare for the defence to argue successfully later in court that the confession is inadmissible because it was extracted by improper means. In virtually every case in which a detainee has confessed under interrogation, he or she will be convicted. Thus, the treatment, conditions and rights of a detainee during interrogation are critical to an understanding of the justice or otherwise of the Israeli military courts.

The vulnerability of a detainee under interrogation flows from a number of factors, including the following:

i) no right to consult a lawyer

According to the Israeli Military Orders a detainee has no absolute right to consult a lawyer before or during interrogation. The detainee's access to a lawyer is discussed more fully at page 21; at this stage, suffice it to say that the authorities' practice is to allow a detainee to consult a lawyer only after the interrogation is complete. Consequently, most detainees do not know of their right to remain silent during interrogation.

ii) psychological and physical mistreatment

Many detainees complain of psychological and physical mistreatment during interrogation. This paper is not the place to add to the numerous documented cases of torture and intimidation; such details may be found in, for instance, Amnesty International's 'Report and Recommendations to the Government of the State of Israel' (June 1979), and LSM/al-Haq's two reports of 1984 on the treatment of security prisoners in the West Bank PRISON of al-Fara'a. More recently, in September 1986, Amnesty International published details about Adnan Mansour Ghanem who alleges that during interrogation he was hooded, strangled, made to take repeated cold showers, faced to stand for long periods, deprived of

sleep, beaten, threatened and humiliated.

When asked, the Israeli authorities have been unable to refer to any code of practice for interrogation which could, for instance, forbid certain interrogation methods and regulate the length of interrogation. The authorities stress torture is forbidden by Israeli law and that offenders are punished. However, since the occupation began in 1967 there have been very few convictions for the mistreatment of detainees; in the same period there have been many documented allegations of torture.

iii) no right to an independent, registered doctor

According to Israeli Military Orders a detainee has the right to medical treatment and a written medical report (in the Gaza Strip M.O. 410 (5); in the West Bank M.O. 29 (5)). But the value to the detainee of this right is restricted severely in two ways: firstly the medical treatment and report are provided by prison personnel and secondly the person providing the treatment and report does not have to be a registered doctor.

The example of Adnan Mansour Ghanem, given above, shows how unsatisfactory are a detainee's rights to medical treatment and reports. According to Amnesty International, Adnan Mansour's lawyer "reported that he (Adnan Mansour) had a wound in the middle of his head which was swollen, discharging pus and painted with green iodine, that pus was coming from his right ear, that the bruises around his eyes had disappeared and he was able to move his head a little, although his body as a whole ached from the beatings". Three days later Adnan Mansour was examined in prison by a doctor who, according to Amnesty International, reported Adnan Mansour's condition was good, without sign of injury and that antibiotics and ear drops had been prescribed.

If detainees had access to an independent, registered

doctor their position would be improved appreciably.

On 17th October 1986, the Jerusalem Post reported a staff doctor of al-Fara'a Detention Centre who said he did not visit the cells where detainees are interrogated; he added that detainees are checked medically before and after interrogation.

(On 10th February 1986, after approximately 7 weeks in detention, Adnan Mansour was deported, without charge or trial, to Jordan, in breach of Article 49 of the Fourth Geneva Convention of 1949).

iv) Shin Bet interrogators' conduct concealed

During interrogation, a common practice is for Shin Bet personnel to interrogate a detainee until the detainee agrees to provide a signed statement. At that stage a police officer previously uninvolved in the interrogation will take the detainee's statement. Subsequently, this police officer may testify truthfully in court that the detainee gave the statement to him voluntarily, that is without the police officer applying or witnessing any threats or coercion against the detainee. However, the detainee may have given the statement only as a result of earlier mistreatment by the Shin Bet interrogators or through fear of the Shin Bet's interrogation recommencing. This procedural device tends to conceal the Shin Bet interrogators' conduct.

v) no right to an interpreter.

The Israeli Military Orders do not give specifically a detainee the right to an interpreter during interrogation, even though many confessions are given in Hebrew, a language understood by few detainees. This omission is in breach of Article 72 of the Fourth Geneva Convention (1949): "Accused persons shall, unless they freely waive such assistance, be aided by an interpreter, both during preliminary investigation and during the

hearing in court. They shall have at any time the right to object to the interpreter and to ask for his replacement."

One should add that, according to the Israeli Military Orders, during a military court trial a detainee has the right to translation and may object to an interpreter and request a replacement. However, because this right is confined to a military court trial and does not extend to the "preliminary investigation", the Israeli Military Orders remain in breach of Article 72.

Of course, interrogation of a detainee may continue for up to 6 months, interrupted only by occasional court hearings for bail or extensions of detention. As we shall see, frequently the detainee's lawyer is prevented from speaking with his or her client at these short hearings.

From time to time, when the authorities are challenged about the treatment of detainees during interrogation, they refer to the Israeli-ICRC agreement. The implication is that this agreement protects adequately the interests of detainees. The Israeli-ICRC agreement is considered next.

4. The Israeli-ICRC Agreement

The rights of the ICRC, according to its agreement with the Israeli authorities (as at September 1986), may be summarized as follows:-

i) to receive notification within 12 days of an arrest
ii) to have access to a detainee not later than 14 days after arrest
iii) to have access to a detainee subsequently once every 14 days during interrogation
iv) to request, after a visit to a detainee, the detainee's examination by, for instance, an ICRC doctor; the Israeli authorities shall immediately grant such an examination.
v) to request the authorities, following a doctor's

report, to convene a commission of enquiry.

Thus, at least 3 types of reports may be generated by the Israeli-ICRC agreement. Firstly, the report of the ICRC delegate following a visit to a detainee [(ii) and (iii) above], secondly the ICRC medical report [(iv) above] and thirdly the conclusions of the commission of enquiry [(v) above]. However, because of its principle of confidentiality and its obligations under the Fourth Geneva Convention, the ICRC must communicate these reports to the Israeli authorities directly and cannot release them to the public. Often the Israelis cite the public silence of the ICRC as evidence that a detainee's allegations of torture are unfounded, omitting to mention the restraints upon the ICRC's release of the reports. The Government of Israel has declined to disclose any of these reports when challenged to do so by Amnesty International and the International Commission of Jurists.

The Israeli-ICRC agreement prohibits the delegates from firstly advising detainees that they have the right to consult a lawyer and secondly passing information to a lawyer should a detainee wish to appoint one. The first prohibition seems particularly regrettable when it is recalled that the right to counsel is enshrined in Article 72 of the Fourth Geneva Convention (1949) (see the section on 'Right to a Lawyer', page 21). Thus the ICRC, guardian of the Geneva Conventions, is prohibited from informing detainees of their rights under that provision of the Fourth Geneva Convention.

As we saw, some important terms in the Israeli-ICRC agreement depend upon the ICRC knowing the date when the detainee was arrested; in many cases the ICRC is dependent upon the Israelis for this information. According to some defence lawyers, the Israelis do not always inform the ICRC about each arrested person and sometimes they give the ICRC an erroneous date of arrest, thereby circumventing parts of the agreement. In addition, the ICRC does not automatically visit every detainee on his or her fourteenth day of detention; instead, the ICRC has a routine of visiting certain prisons on

particular days, on which occasion an ICRC delegate will see all detainees in the prison who, since the last ICRC visit, have completed 14 days detention after their arrest. It is alleged the Israelis, knowing of a pending ICRC visit, will transfer a particular detainee who they do not want the ICRC to meet, to another prison; thus, no meeting will occur on that occasion between the particular detainee and the ICRC delegate. Apparently, in some cases, this transfer from prison to prison just ahead of an ICRC visit has been repeated several times, so that the first visit by the ICRC to a particular prisoner has been two months or more after the date of arrest.

Despite the limitations of the Israel-ICRC agreement, the ICRC provides a beneficial service to many detainees. However, the Israeli authorities should not be permitted to use its agreement with the ICRC, and the ICRC's enforced silence, as a cloak of respectability.

5. Habeas Corpus and Bail

A writ of habeas corpus is an application to a court which tests the legality of an individual's detention. Military courts refuse to hear applications for habeas corpus, but are willing to hear applications for release on bail.

At any time during detention the detainee, or a lawyer on his or her behalf, may petition the military court to be released on bail. If the court grants bail it may impose any conditions it sees fit, e.g. a cash deposit with the court. Bail is always conditional upon the detainee appearing for questioning and trial, as ordered.

Bail applications for security detainees are very rarely successful. Frequently a lawyer applies for bail without being allowed to see or speak with the detainee and without knowledge of the nature of the suspicion against the client.

Although bail applications are very rarely successful, their value cannot be measured only by the number of occasions

they result in an immediate grant of bail. A bail application may be helpful for the following reasons:-

i) it may result in a detainee being released not immediately but earlier than would otherwise be likely.

ii) it gives a detainee under interrogation a break from interrogation.

iii) it gives the lawyer an opportunity to see the physical condition of the detainee.

iv) it may give the lawyer an opportunity to briefly advise the client.

v) it gives the defence an early opportunity to retract a confession, to complain of "improper means" used during interrogation and to deny an accusation. (If a detainee does not retract a confession and complain of "improper means" at the earliest opportunity before a judge, in practice he or she is precluded from doing so at a later stage).

It should be noted that sometimes when the defence submits a bail application the military prosecutor seeks to ignore the application and to treat the hearing as one for the extension of detention. Moreover, regrettably, often the prosecution's manoeuvres succeed, despite the representations of the defence lawyer before the military court.

The practice of Israeli military courts regarding bail raises some important issues of international human rights. ICPR 9 (3) states: "It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial....". The striking infrequency of successful bail applications tends to suggest that the general rule applied in security cases is that persons awaiting trial shall be detained in custody; indeed, some military court judges have openly stated this to be the case. Such a practice is directly contrary to the "general rule" laid down in ICPR 9 (3).

Both UDHR 10 and ICPR 14 (1) state: "Everyone is

entitled... to a fair... hearing...". In many Israeli military court cases an advocate is denied the opportunity to see or speak with the client before making a bail application. Indeed, the advocate is frequently not informed of the nature of the suspicion against the detainee before the bail hearing. Bail applications made in such circumstances can be seen as a denial of a person's right to a "fair hearing" as guaranteed in UDHR 10 and ICPR 14(1). An inherent element of a "fair" hearing includes procedural equality between prosecution and defence, what is generally called "equality of arms"; for instance, the presence of the prosecutor without the presence of the defendant or his counsel is a procedural inequality incompatible with the notion of a "fair" hearing. However, there seems no reason why "equality of arms" should be confined to procedural matters at the trial itself; consequently, it is suggested the principle extends also to matters prior to a hearing, such as the provision of adequate information and facilities for the preparation of an application.

Therefore, bail applications made in the circumstances described are not "fair" within the meaning of U.D.H.R. 10 and I.C.P.R. 14 (1). Further, the word "hearing" in both articles is broad enough to include bail hearings as well as trials.

ICPR 14 (3) states: "...everyone shall be entitled to the following minimum guarantees... ...(b) to have adequate time and facilities for the preparation of his defence...". Unless the word "defence" in ICPR 14(3)b is construed as not including a bail hearing, bail applications made in the circumstances described (i.e. inadequate time and facilities for preparation of the application) are clearly in breach of ICPR 14 (3)b.

6. Hearings for Extensions of Detention

As we have seen, immediately following arrest a person may be detained for up to 18 days without appearing before a court. Normally, shortly before or on the eighteenth day, the detainee is brought before a military court and the police or

the military prosecutor requests an extension of detention to permit the authorities to continue their "enquiries". Invariably the judge accedes to the prosecution's request and extends the detention for, say, 30 days at the end of which the authorities may request a further extension. This procedure may repeat itself until the detainee has been held for 6 months. In short, there may be several hearings for extension of detention in every case.

The hearings do not always take place in a military courtroom. Indeed, often the hearing occurs in the detention centre where the detainee is in custody in which case the session will not be open to the public.

A hearing for extension of detention holds the same dangers and opportunities for a detainee as a bail hearing. These have been described already on pages 17-19. However, in addition, at hearings for extension of detention some judges endeavour to obtain from the detainee an admission of guilt, even if the detainee is without legal representation; if an admission of guilt is made it forms part of the court record and is extremely difficult to retract at a later stage.

Also, the absence of a recorded denial of an accusation or charge at a hearing for the extension of detention may be used against the detainee in the subsequent proceedings. As we will see, a detainee's silence at other stages of the proceedings too may be used against him or her, contrary to the international law of human rights and discussed on page 33.

In the preceding section on "Habeas Corpus and Bail", UDHR 10, ICPR 14(1) and ICPR 14(3), concerning the detainee's right to a "fair trial" and "to adequate time and facilities for the preparation of his defence", were discussed. The same considerations apply to a hearing for extension of detention. However, an additional consideration is that sometimes defence lawyers are not informed of the time and place of a hearing for extension of detention in sufficient time for them to attend the hearing; consequently, the detainee may be left

alone to face the experienced prosecutor and the often unsympathetic judge.

In conclusion, a hearing for extension of detention may have important consequences for a detainee. Although in practice a detainee is allowed representation by a lawyer at these hearings, sometimes lawyer and client are prevented from speaking together before, during or after the hearing, assuming the lawyer was able to attend the hearing at all. Again, this raises the important issue of a detainee's right to consult a lawyer; this right is discussed in the following section.

7. The Right to a Lawyer

Israeli Military Orders do not recognize a detainee's absolute right to consult a lawyer. A detainee may meet a lawyer provided that:

i) the Prison Commander "is convinced that the request was made for the purpose of dealing with the legal affairs of the prisoner and..."

ii) "...the meeting will not impede the course of the investigation". (M.O. 410 (ii) in the Gaza Strip; M.O. 29 (ii) in the West Bank).

In other words, when detainees are under interrogation whether or not they receive legal advice is a matter for the Prison Commander. However, in practice, a lawyer is denied access to an accused until the interrogation is complete; the person who denies or permits access is not the Prison Commander but the interrogator himself.

The Legal Advisor's Department liaises between the detainee's lawyer and the interrogators and informs the lawyer when he or she may meet the client. A lawyer is never permitted to attend the interrogation with the accused, in contrast to the common but not invariable practice of many western countries. If and when an interview between the

lawyer and client is permitted, it normally takes place in the interrogator's office within the environs of the detention centre; often a third person is within earshot. As we have seen many bail applications are made without the lawyer having the opportunity to meet the accused.

ICPR 14 (3) states: "Everyone shall be entitled to the following minimum guarantees..... (b) ... to communicate with counsel of his own choosing". Therefore, Israeli law and practice in the Occupied Territories contravenes ICPR 14(3)b.

UDHR 11 (1) states: "Everyone charged with a pénal offence has the right to ... all the guarantees necessary for his defence". It is suggested that one of the "guarantees" protected by UDHR 11 (1) is the absolute right to legal advice, a fundamental human right; if this is so, Israeli law and practice in the Occupied Territories also contravenes UDHR 11 (1).

Under the humanitarian law relevant to the Occupied Territories, the right to counsel is found in Article 72 of the Fourth Geneva Convention: "Accused persons...shall have the right to be assisted by a qualified advocate or counsel of their own choice...".

However, some Israeli jurists argue that Article 72's right to counsel "...is qualified, in that it does not oblige the occupying power to allow communication with a lawyer if the offender is suspected of grave and hostile security offences" (page 30, 'The Rule of Law in the Areas Administered by Israel', published by the Israel National Section of the International Commission of Jurists, 1981). The authority quoted for this proposition is Article 5 of the Fourth Geneva Convention, the second paragraph of which states: "Where in occupied territory an individual protected person is detained as a spy or saboteur, or as a person under definite suspicion of activity hostile to the security of the Occupying Power, such person shall, in those cases where absolute military security so requires, be regarded as having forfeited rights of communication under the present Convention". The following

points deserve special emphasis regarding Article 5's alleged qualification to Article 72's right to counsel. Firstly, forfeiture operates only "...in those cases where absolute military security so requires..."; secondly, with two exceptions, forfeiture occurs only to persons under "...definite suspicion...", in which case mere suspicion is not enough; thirdly, the Commentary to the Fourth Geneva Convention illustrates which rights to communication are forfeited under Article 5 and the right to counsel is not amongst the illustrations.

The Commentary to Article 5 concludes: "It must be emphasized most strongly, therefore, that Article 5 can only be applied in individual cases of an exceptional nature, when the existence of specific charges makes it almost certain that penal proceedings will follow. This Article should never be applied as a result of mere suspicion". It would seem that Article 5's forfeiture of rights of communication is prompted by fears that communication from the detainee to others may include intelligence or other information which could threaten "military security"; however, in practice, Article 5 is used to restrict the communication of information to the detainee concerning his or her rights.

As we have seen, the invariable Israeli practice regarding all security detainees in the Occupied Territories, is to deny them access to a lawyer until the end of interrogation. This practice is applied even in connection with such relatively minor offences as stone-throwing. It is absurd to suggest that in all these cases "absolute military security" requires forfeiture of the detainee's right to counsel. In these circumstances, one is driven to the inevitable conclusion that the Israeli practice in the Occupied Territories abuses Article 5's narrow qualification to Article 72's right to counsel. Consequently, Israeli practice regarding a detainee's right to counsel is in breach of humanitarian law (Articles 5 and 72).

Finally, under the Israeli Military Orders there is no doubt that an accused has the absolute right to a lawyer on

the trial day. Under M.O. 373 in the Gaza Strip and M.O. 400 in the West Bank, the accused is given the choice of either being represented by a lawyer or conducting his or her own defence; however, the court is obliged to appoint a defence lawyer in serious cases when the accused has not and, in that event, the Military Government is responsible for the lawyer's fees.

8. The Military Court Trial

a. The Military Court Rooms

The military courts are found in the Military Government Headquarters of the West Bank towns of Ramallah, Bethlehem, Hebron, Nablus, Jenin, Tulkarem and the Gaza Strip towns of Gaza and Khanyunis.

They adjoin each town's detention centre which is in the same military compound. The courtrooms have a dais for the judge or judges, immediately below which the court interpreter sits. The detainees sit in the dock, guarded by prison personnel. At the rear of the courtroom is the public gallery. The central part of the court contains benches and desks for the prosecution and defence advocates, in addition to a witness stand. The courtroom is usually dominated by a large Israeli flag unfurled and pinned against the wall behind the judge's dais. Armed soldiers constantly wander in and out of the courtroom. The Military prosecution is uniformed and normally armed.

However, a military court may sit at any time or place the President of the court may direct. For instance, if there are "disturbances" leading to mass arrests, a military court may sit at or near the scene of the "disturbances", in a school or other building. In such cases, the proceedings may be expedited and then they are known as "quick trials". In a "quick trial", the time from arrest to sentence may be as little as one day, whereas normally the proceedings take between two and six months. Most "quick trials" constitute a serious breach of a detainee's right "... to adequate time

and facilities for the preparation of his defence..." [ICPR 14(3)b].

b. Charge Sheet

When the authorities have completed the interrogation and their investigations, the detainee is usually charged and if not charged he or she must be released. In almost all cases a detainee who is charged will be held in custody pending trial.

The charge sheet, which is always in Hebrew, sets out the offence with which the detainee is accused, the alleged details of the offence, the statute, Military Order or Regulation which the detainee has allegedly contravened, the number of judges who wil hear the case and a list of prosecution witnesses. A poor Arabic translation of the charge sheet is sometimes also available.

The charge sheet may be presented to the detainee or the detainee's lawyer any time before trial. Often, if the detainee does not have a lawyer, the charge sheet is served upon the defence only within hours or minutes of the beginning of the trial.

Article 71 of the Fourth Geneva Convention states: "Accused persons.... shall be promptly informed in writing, in a language which they understand, of the particulars of the charges preferred against them.....". Israeli practice in the Occupied Territories constitutes a double contravention of Article 71. Firstly, accused persons are not "promptly" informed of the charge and secondly they are not always informed "in writing in a language which they understand."

Article 71 requires the information to be given "promptly" and "in writing" for various reasons, for instance to ensure adequate time for the preparation of a defence and to avoid the possibility of changes being made in the charges preferred.

Before a charge sheet is served upon the defence, the accused may have been informed orally of the charges. However, this does not satisfy the requirements of Article 71.

c. Composition of the Military Court

Military courts may be composed of single judges or a panel of three judges. A single judge and the President of a three judge court must be an army officer with legal qualifications. The other judges of the panel will be army officers who need not have legal qualification.

The military prosecutor decides the composition of the military court. A single judge court may not impose a sentence of more than 5 years imprisonment or a corresponding fine. A three judge court may impose any sentence permitted by the law for the offence, upto and including the death penalty. Although the death penalty has not been imposed in the West Bank or Gaza Strip since 1967, in some serious cases it is used as a threat during negotiations between prosecution and defence lawyers.

The composition of the court decided upon by the prosecution indicates the severity of sentence the prosecution will seek at trial.

d. Trial Procedure

i) Introduction

Detainees have the right to attend their own trial. They cannot be tried in their absence unless the court considers their conduct in court is improper. If the trial proceeds in their absence,they must be informed what is taking place in court. Military court trials should be open to the public, unless in the opinion of the court ".... the security of the I.D.F., the security of the public, the defence of morals or the well-being of a minor..." require the court to sit in closed session (M.O. 378, as amended, in the West Bank and an unnumbered Military Order of 1970, as amended, in the Gaza Strip).

In almost all cases, the trial is conducted in Hebrew. The detainee has the right to translation and may object to an interpreter and request a replacement.

A written record of the proceedings is made by the judge.

ii) Pleas

The trial begins with the reading of the charge sheet. The judge may ask firstly if the detainee understands the charge or charges and secondly how he or she pleads.

If the detainee pleads guilty, the judge may ask if the detainee is aware of the consequences of a guilty plea. Provided the court accepts the guilty plea, the military prosecutor may explain the circumstances of the offence and the detainee, or the detainee's lawyer, mitigates. Then the court passes sentence. Mitigation and sentence are discussed briefly below.

A not-guilty plea places the burden on the prosecution to prove its case against the detainee, adopting the procedure described below.

A detainee who refuses to plead either guilty or not-guilty, is deemed to have pleaded not-guilty and the prosecution must prove its case against the detainee. However, a detainee's refusal to plead to the charge may be used against the detainee, raising issues of international human rights which are discussed on page 33.

iii) Evidence

a. General

Three general points are particularly noteworthy regarding the rules of evidence obtaining in military courts. Firstly, the rules of evidence in military courts are the same as those applying in Israeli courts which try Israeli soldiers i.e courts martial. Secondly, Israeli courts martial apply

the rules of evidence obtaining in criminal courts within Israel's pre-1967 borders (see pages 211 and 216, 'Military Government in the Territories Administered by Israel 1967-80, The Legal Aspects', edited by M. Shamgar, Hebrew University, 1982). Thirdly, and significantly, a military court may "deviate" from these rules of evidence "...for special reasons which shall be recorded, if it deems it just to do so". (M.O. 378, as amended, in the West Bank, unnumbered Military Order of 1970, as amended, in the Gaza Strip).

b. Prosecution Evidence

The prosecution normally gives the defence access to copies of the prosecution statements after the charge sheet has been prepared.

If the detainee pleads, or is deemed to have pleaded, not guilty, the military prosecutor outlines the prosecution case against the detainee, after which he or she calls the prosecution witnesses, usually soldiers, to give evidence. After the witness has been examined-in-chief by the prosecution, the defence may cross examine and the prosecution re-examine the witness.

As we have seen the primary and decisive evidence against a detainee is often his or her signed confession given during interrogation and almost invariably written in Hebrew. If, when the prosecution submits the confession in evidence, the detainee seeks to retract it, on the ground it was obtained by duress or coercion, the prosecution must prove the confession was obtained by proper means. The question of the confession's admissibility is decided in a "mini-trial", also called a "trial within a trial", which is held in camera.

In a "mini-trial" the prosecution calls witnesses, for instance the police officer who took the detainee's statement, to give evidence that the confession was given voluntarily; the detainee will give evidence of the alleged improper means used to extract the confession. After hearing the prosecution and defence evidence on this one issue, the court decides

whether or not the confession was given voluntarily by the detainee. If, as is almost always the case, the court finds the confession was given voluntarily, the confession is admissible; alternatively, if the court finds the confession was extracted by improper means, the confession is inadmissible and the court should disregard it as evidence against the detainee.

It can not be over emphasized that only extremely rarely does the defence ever win a "mini-trial". Almost invariably the court decides the confession was given voluntarily and therefore is admissible. For this reason the period of interrogation is of the utmost importance in a detainee's case: many detainees give a signed confession during interrogation which is virtually impossible to retract subsequently, even if there is evidence that the confession was extracted from the detainee by improper means.

When challenged on this issue, some Israeli commentators point out that a detainee may not be convicted upon his or her confession alone. This is technically correct; some other evidence - "dvar ma" or "scintilla" - must be adduced to support the confession. However, it is equally true that this other evidence may be of negligible weight e.g. the actual existence of a person, place or event mentioned by the detainee in his or her confession. Thus, the requirement that a detainee may not be convicted upon his or her confession unless it is supported by some other evidence is, in practical terms, almost valueless.

According to the Israeli Military Orders, at the conclusion of the prosecution evidence, the court must consider whether or not the defence has a "case to answer" and, if it forms the opinion there is " no case to answer", it must acquit the detainee. However, as a matter of practice, in the Israeli military courts this procedural step is either regarded as a mere formality or entirely overlooked. Although legally obliged to consider the issue of a "case to answer", an Israeli Military Court has no legal obligation to hear the

defence's submissions on the point, in contrast to the law and practice of other common law jurisdictions.

c. Defence Evidence

The defence may call witnesses, one of whom may be the detainee. In practice, the defence must always call the detainee to give evidence, because the detainee's failure to give evidence on oath may be used against him. For instance, the detainee's failure to give evidence on oath may be used as the other evidence - "dvar ma" or "scintilla" - required to support a confession (see preceding section). Also, if the detainee chooses to give evidence but not under oath, the court may treat the detainee as if he chose not to testify at all. Therefore, in practice, there is compelling pressure for the detainee to give evidence on oath. This significant qualification to the detainee's right to silence raises important issues of international human rights which are discussed on page 33.

The procedure of examination-in-chief, cross-examination and re-examination of the detainee, and any other defence witnesses, is the same as for the examination of prosecution witnesses save that, of course, the examination-in-chief and re-examination are undertaken by the defence lawyer and cross-examination by the prosecution.

(iv) Summing-up

When the prosecution and defence have no more witnesses to call the military prosecutor sums-up the case against the detainee. The defence has the right to reply.

(v) Verdict, Mitigation and Sentence

The court then gives its verdict. In theory, before convicting a detainee the judge or judges, all of whom are serving Israeli army officers, must be satisfied "beyond a reasonable doubt" that the accused is guilty.

A detainee who is acquitted is immediately released. If the detainee is convicted, whether after pleading guilty or being found guilty, both prosecution and defence may address the court on the question of sentence. For instance, the prosecution is likely to present the court with details of firstly the detainee's previous convictions, secondly aggravating circumstances in the detainee's case and thirdly comparable cases in which the court imposed a harsh sentence. Whereas the defence, in its plea of mitigation, may adduce evidence of the detainee's character, health, economic situation or other special circumstances, as well as details of comparable cases in which the court imposed a lenient sentence.

At this stage, the detainee is invited to address the court personally regarding sentence; this and a defence lawyer's representations to the court raises political issues for many detainees. On the one hand a detainee may wish to say nothing other than "Revolution to Victory", which is very likely to increase the sentence; and on the other hand a detainee may apologize to the court thereby possibly abusing his or her self-respect. However, it is possible for a lawyer to strike a middle course by informing the court, with dignity, of all legitimate mitigating factors without offending the detainee. This style of mitigation enables a detainee to say nothing other than the phrase, or its equivalent, quite frequently heard in the military courts: "I am satisfied with what my lawyer has said".

After hearing the prosecution's representations and the defence's plea of mitigation, the court passes sentence. If the sentence includes a fine, the defence may ask the court for time to pay in installments. All sentences include either an immediate term of imprisonment, or a suspended term of imprisonment, or a fine, or a combination of all three.

In passing, it might be noted that some judges claim to reduce a detainee's sentence if the detainee pleads guilty (a common practice in other legal systems too), but many practising lawyers doubt that in practice any reduction is

noticeable.

Finally, it seems that Israeli military court judges, again in common with other legal systems, have an unofficial sentencing "tariff" which they apply more or less rigidly. In these circumstances it remains unclear to what extent, if any, a plea of mitigation may influence the court's judgement when it passes sentence.

9. Appeal

There is no court to which a detainee can appeal against a conviction or sentence of a military court. Decisions of a three judge court must be ratified by the Regional Commander who has extensive powers to overrule the three judge court's conviction, vary the sentence or order a re-trial. No ratification of a decision of a single judge court is required.

Detainees may petition the Regional Commander against verdicts and sentences of single judge and three judge courts, in which case he may pardon the detainee or reduce the sentence. However, it is very rare for the Regional Commander to interfere with the decision of a three judge court or to accede to a detainee's petition against sentence or verdict.

The absence of a tribunal to which a detainee may appeal against a military court conviction or sentence is in breach of ICPR 14 (5) which states: "Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law".

Further, it is suggested the absence of an appeal tribunal is in breach of UDHR 11 (1) which states: "Everyone charged with a penal offence has the right to .... all the guarantees necessary for his defence". Judicial errors of fact and law are bound to happen in all courts; however, the

risk of error is likely to be more acute in military courts designed to hear cases of a political complexion in which all the judiciary are army officers, some of whom have no legal training. Also, the absence of an appeal tribunal is likely to induce a laxity in the court's application of law and procedure. In these circumstances, it is suggested the right to an appeal tribunal is a "guarantee" necessary for an accused's defence, the absence of which is in breach of UDHR 11(1).

As the Regional Commander is not a "tribunal", the right of a person convicted by a military court to petition the Regional Commander against verdict and sentence does not satisfy the requirements of UDHR 11(1) or ICPR 14(5). The Regional Commander's power to reduce a sentence or grant a pardon is more akin to an executive's prerogative to grant clemency rather than a form of judicial review or appeal.

10. Reduction of Term of Imprisonment

In Israel, defendants sentenced to more than 3 months in prison may apply to be released after serving two thirds of their sentence. There is no comparable provision in the Occupied Territories. However, it seems that very occasionally such applications are made and processed in the Occupied Territories, although without any legal basis.

11. The Right to Silence

UDHR 11 (1) and ICPR 14 (2) states: "Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law...". The presumption of innocence, a hallowed principle of law, places upon the prosecution the burden of proving every element of a crime. Defendants do not have to prove their innocence. In common law jurisdictions it has frequently been held that the presumption of innocence is imperilled if the prosecution invites the court to draw an adverse inference against a defendant who has chosen to exercise the right to silence. In

brief, the right to silence is a corollary of the presumption of innocence.

However, in proceedings before Israeli military courts, if the defendant exercises his or her right to silence it may be used in support of the prosecution case. For instance, as we have seen, if the detainee declines to deny a charge or accusation in a hearing for extension of detention, the omission may be used against the detainee in the subsequent proceedings (page 20). Also, if the detainee chooses to plead neither guilty nor not guilty, this silence may be used in support of the prosecution's case (page 27). Further, if the defendant chooses not to give evidence, or decides to give evidence but not under oath, this may be used in support of the prosecution's case (page 30).

Therefore, in breach of the presumption of innocence protected by UDHR 11 (1) and ICPR 14 (2), in the Israeli military courts a detainee does not have an absolute right to silence.

12. Israeli Military Courts: "Independent and Impartial"?

As stated in the Introduction, the quality of justice dispensed in any legal system depends upon the independence and impartiality of the judges. "The total independence of the judiciary from everyone else is central to the entire concept of the Rule of Law, for the whole point about a law is that it must be upheld impartially..."(page 89, 'The Lawful Rights of Mankind' by Paul Sieghart, Oxford University Press, 1986).

The international law of human rights recognizes the importance of the judiciary's independence and impartiality; both UDHR 10 and ICPR 14(1) stipulate that everyone is entitled to a fair and public hearing by an "independent and impartial tribunal". The 7th UN Congress on the Prevention of Crime and the Treatment of Offenders, at its meeting in 1985, adopted by consensus "Basic Principles on the Independence of the Judiciary". The Principles have now been passed by the United Nations General Assembly and are the first UN standards in the field (see attached Appendix B taken from the October

1985 Bulletin of the Centre for the Independence of Judges and Lawyers).

Furthermore, it is clear the Israeli authorities are aware that the requirement of judicial independence and impartiality extends to military court judges. On the appointment of ten military court judges to hear cases within Israel's pre-1967 borders, the President of Israel publicly reminded the appointees that even military court judges must be guided only by "the law and their conscience". However, in all legal systems, it is very difficult to guarantee judicial independence and impartiality; it may be equally difficult to prove dependence and partiality.

One important criterion of judicial independence is the procedure of judicial appointment and discharge. However, even technically impeccable procedures do not guarantee independence. In the case of the Israeli military courts in the Occupied Territories, the procedure for judicial appointment and discharge is different for legally qualified judges and for non-legally qualified judges.

According to the Israeli military orders, the appointment procedure for legally qualified judges is as follows: "The Commander of the Region shall, on the recommendation of the Military Advocate General appoint...legally qualified officers of the rank of captain or above to act as legally qualified judges" (M.O. 378, as amended, in the West Bank and an unnumbered Military Order of 1970, as amended, in the Gaza Strip). This procedure raises a number of important points concerning legally qualified judges. Firstly, they are all serving officers in the Israeli army; secondly, they are appointed by the Commander of the Region, who is the executive and legislative authority in the Region; thirdly, the Commander of the Region is required to appoint on the recommendation of the Military Advocate General of the Israeli army; fourthly, the Military Advocate General is the advisor on all legal matters to the Israeli army's Chief of General Staff; fifthly, the discharge procedure for all military court

judges (legally qualified and non-legally qualified) is the same as the appointment procedure (page 181, 'Military Government in the Territories Administered by Israel 1967 - 80, The Legal Aspects', edited by M. Shamgar, Hebrew University, 1982).

This procedure appears to be designed to establish the appearance of a formal 'separation of powers' between, on the one hand, the legally qualified judiciary and, on the other hand, the executive and legislative authority; as we saw, in the Occupied Territories the Commander of the Region is both the executive and legislative authority. However, in the case of legally qualified judges, there is only a 'separation of powers' to the extent that the Commander of the Region is required to make judicial appointments and dismissals on the recommendation of another person, the Military Advocate General. One must note that, of course, both the Commander of the Region and the Military Advocate General are senior members of the Israeli army, answerable ultimately to the Minister of Defence.

The procedure for the appointment and discharge of non-legally qualified judges differs from the procedure described above. According to Col. Joel Singer of the Military Advocate General's Corps, non-legally qualified judges are "...selected by the President (of the court) out of the ranks of the entire IDF, with the exception of officers serving in the military government and its civilian administration" (letter dated 16th June, 1986 to Raja Shehadeh, director of al-Haq). The President of the court is a legally qualified judge appointed by the procedure outlined in the preceding paragraphs. Whatever professional or other considerations apply regarding the appointment of legally qualified judges, no such considerations are required regarding the appointment of non-legally qualified judges, neither as to rank, educational qualifications, experience nor any other matter. Consequently, the risk of total dependence and partiality is even greater in the case of non-legally qualified judges.

In practice, there may be a significant overlap between

dependence and partiality. Professor Pieter van Dijk in 'The Right of the Accused to a Fair Trial under International Law' (published by the Netherlands Institute of Human Rights, 1983), writes "...it is extremely difficult to ascertain by what motives a judge has been prompted. It will therefore only be possible to move that a judge has been partial when this becomes manifest from his attitude during the proceedings or from the contents of the judgment" (page 38). Defence practitioners repeatedly remark upon the questionable manner of many judges in court; apparently, the judicial attitude and courtroom interventions often leave the impression of resolute bias in favour of the prosecution. For instance, if the detainee is without a lawyer, some judges will participate in the prosecution's cross-examination of the detainee, assisting in the extraction of a confession which the judge places on the court record, without either giving the detainee an opportunity to speak for him or herself, or recording the detainee's allegations of mistreatment, or recording any mitigating factors in favour of the detainee. Also, defence practitioners complain that judges almost invariably accept as credible the prosecution evidence tendered by police and soldiers, rejecting defence evidence given by Arab witnesses such as the detainee. Some defence lawyers feel that whatever the official burden of proof is said to be, in practice they need to prove the innocence of their clients beyond a reasonable doubt, if they are to obtain their clients' aquittal. Further, there have been rare occasions when judicial hostility to the defence has even led to the defence lawyer being denied the right to make representations in court (for further details of one such case see Appendix A: letter dated 4th December 1986 from Jonathan Kuttab, advocate and director of al-Haq, to the President of the Military Court, Ramallah). Defence practitioners add that, of course, a judge will endeavour to ensure the court record does not reflect any procedural improprieties or unwanted allegations.

The independence and impartiality or lack thereof of tribunals cannot be assessed by merely considering the procedures for judicial appointment and discharge, or commenting upon judicial behaviour in court. Other matters,

general and specific, must be borne in mind. For instance, the Israeli army dominates the entire governmental apparatus in the Gaza Strip and West Bank, including the military courts. The judges, some of whom have no legal training, are all currently serving army personnel; they hear cases of a political complexion, usually arising out of a conflict between the detainee and the army. Further, the prosecutor, military court staff and most prosecution witnesses, are serving in the Israeli army. The military court system allows for neither a jury nor a court of appeal.

In these circumstances, it seems doubtful whether any military tribunal could maintain complete independence and impartiality. Certainly, all the defence lawyers who were interviewed expressed profound scepticism about the real independence and impartiality of Israeli military courts. Inevitably, the rule of law is jeopardized to the extent that practitioners and detainees seriously doubt the independence and impartiality of the legal process within which they find themselves.

CONCLUSION

Although the Israeli military court system appears to have many of the features of a fair system of justice, in reality the justice it dispenses is seriously flawed.

Most of the defence lawyers who were interviewed, attached special significance to two of the system's defects examined in this paper. Firstly, they emphasized the critical importance and injustice of the prolonged period of interrogation to which a detainee may be subjected without access to independent legal or medical assistance; most detainees give a signed confession during interrogation which it is extremely difficult to retract despite evidence that it was extracted under duress. Secondly, the lawyers stressed the apparent sustained partiality of many military court

judges.

This study is not an exhaustive application of international human rights and humanitarian law to the Israeli military court system. Nonetheless, we have seen that a detainee passing through the system suffers from significant breaches of international human rights and humanitarian law. The rule of law is diminished by all breaches of international human rights and humanitarian law, but especially those, as in the Israeli military court system, which are a routine feature of state practice.

APPENDIX

APPENDIX A: Letter from J. Kuttab to the President of the Military Court, Ramallah.

B: Basic Principles on the Independence of the Judiciary.

C: Universal Declaration of Human Rights.

D: International Covenant on Civil and Political Rights.

APPENDIX A

LETTER FROM JONATHAN KUTTAB, ADVOCATE AND DIRECTOR OF LSM/AL-HAQ, TO THE PRESIDENT OF THE MILITARY COURT, RAMALLAH.

4th December, 1986

To the President of the Military Court
Ramallah

Subject: Permission to represent clients

Dear Sir,

I would like to bring to your attention a serious incident that occurred to me on November 24, 1986 concerning my client Mr. Mahmoud Mustafa Ramahi and Military Court Judge Yuda Oron.

1. This was the first day that I was permitted to speak to this client of mine. He described to me serious allegations of mistreatment which resulted in his hospitalization for 6 days. He also alleged that statements were taken from him under torture.

2. I also learnt that he was going to be brought to court that same day for an extension of his detention since he has been already in detention for 17 days.

3. I entered into the judge's chambers with my client when the police requested the extension of his detention for 60 days. The honorable judge began questioning my client directly and although I tried to stand and represent him, I

was prohibited by the judge from speaking and told that I will be able to talk later.

4. The judge then proceeded to question my client for over 15 minutes. The nature of the questions seemed intended to find some basis for the request of the police and to reject his denial of the charges.

5. Among the questions given were the following:

"If you are innocent how come you were brought to jail?"

"In the police station you said other things than you are saying now?"

"Have you ever possessed weapons? A gun maybe? A handgrenade?"

"When did you go to Amman last?"

"Have you ever been a representative for Fateh?"

"What else can you remember and tell to us?"

"The police talked about a gun and grenade, who was responsible for them?"

- Here my client answered "Musa Amouri".

"What is your relation with Musa Amouri?"

"Is he the one who asked you to join al-Fateh? If not, who is the person who enlisted you?"

"Do you have any previous convictions?"

"Why would the police be after you a respectable citizen?"

8. The sum total of these questions appeared to be an attempt to obtain a confession from my client in court. My repeated attempts to intervene, and to stand up to address the court were prohibited by the judge who instructed me to stay silent until he finished conducting the hearing. At that time, he decided to grant the request of the police and extend the detention of my client for 60 days. He then proceeded to tell my client "you can assist the police by co-operating with them thereby shortening the time of your detention." Then my client was led out of the court at which time only and at my request I was permitted to address the court.

9. I bring the above matters to your attention precisely because it is not normal and usual in terms of my own experience in military courts and because of its strange nature.

10. I believe, and I wish to be corrected if I am mistaken that a defendant has the right to be represented by an attorney during a hearing for an extension of his detention, and this right includes giving the attorney permission to speak on behalf of the client. I also believe that it is not proper for a judge to attempt to obtain a confession from a defendant when his attorney is present and is objecting to the fact especially since the protocol of the extension hearing is often used as evidence in the subsequent trial.

If my understanding is incorrect, I wish for this matter to be clarified. If it is, I trust that you will take the necessary action that you deem appropriate in this case and also ensure that such behavior does not occur in the future, and any other action you may feel appropriate in this case as well.

Yours faithfully,

Jonathan Kuttab
Attorney at law

APPENDIX B

Basic Principles on the Independence of the Judiciary

The 7th UN Congress on the Prevention of Crime and the Treatment of Offenders, at its meeting in Milan, Italy, from 26 August to 6 September 1985 adopted by consensus Basic Principles on the Independence of the Judiciary. Committee I of the Congress, which was charged with the initial consideration of the Principles, engaged in extensive discussions about them; the Secretary of the CIJL actively participated in those discussions. The Principles have now been passed by the UN General Assembly and are the first UN Standards in the field.

The Congress resolution adopting the Basic Principles recommends that they be implemented at the national, regional and inter-regional levels, urges regional and international commissions, institutes and organisations, including non-governmental organisations, to become actively involved in their implementation; requests the Secretary-General to take steps to ensure the widest possible dissemination of the Basic Principles and to assist member states in their implementation.

Below are the Basic Principles adopted by the 7th Congress.

"Whereas in the Charter of the United Nations the peoples of the world affirm, inter alia, their determination to establish conditions under which justice can be maintained to achieve international cooperation in promoting and encouraging respect for human rights and fundamental freedoms without any discrimination,

"Whereas the Universal Declaration of Human Rights enshrines in particular the principles of equality before the law, of the presumption of innocence and of the right to a fair and public hearing by a competent, independent and impartial tribunal established by law,

"Whereas the International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights both guarantee the exercise of those rights, and in addition, the Covenant on Civil and Political Rights further guarantees the right to be tried without undue delay,

"Whereas frequently there still exists a gap between the vision underlying those principles and the actual situation,

"Whereas the organisation and administration of justice in every country should be inspired by those principles, and efforts should be undertaken to translate them fully into reality,

"Whereas rules concerning the exercise of judicial office should aim at enabling judges to act in accordance with those principles,

"Whereas judges are charged with the ultimate decision over life, freedoms, rights, duties and property of citizens,

"Whereas the Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, by its resolution 16, called upon the Committee on Crime Prevention and Control to include among its priorities the elaboration of guidelines relating to the independence of judges and the selection, professional training and status of judges and prosecutors,

"Whereas it is, therefore, appropriate that consideration be first given to the role of judges in relation to the system of justice and to the importance of their selection, training and conduct,

"The following basic principles, formulated to assist Member States in their task of securing and promoting the independence of the judiciary should be taken into account and respected by Governments within the framework of their national legislation and practice and be brought to the attention of judges, lawyers, members of the executive and the legislature and the public in general. The principles have been formulated principally with professional judges in mind, but they apply equally, as appropriate, to lay judges, where they exist."

Independence of the judiciary

1. The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.

2. The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.

3. The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.

4. There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law.

5. Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.

6. The principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected.

7. It is the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions.

Freedom of expression and association

8. In accordance with the Universal Declaration of Human Rights, members of the judiciary are like other citizens entitled to freedom of expression, belief, association and assembly; provided, however, that in exercising such rights, judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary.

9. Judges shall be free to form and join associations of judges or other organisations to represent their interests, to promote their professional training and to protect their judicial independence.

Qualifications, selection and training

10. Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives. In the selection of judges, there shall be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status, except that a requirement, that a candidate for judicial office must be a national of the country concerned, shall not be considered discriminatory.

Conditions of service and tenure

11. The terms of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law.

12. Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists.

13. Promotion of judges, wherever such a system exists, should be based on objective factors, in particular ability, integrity and experience.

14. The assignment of cases to judges within the court to which they belong is an internal matter of judicial administration.

Professional secrecy and immunity

15. The judiciary shall be bound by professional secrecy with regard to their deliberations and to confidential information acquired in the course of their duties other than in public proceedings, and shall not be compelled to testify on such matters.

16. Without prejudice to any disciplinary procedure or to any right of appeal or to compensation from the State, in accordance with national law, judges should enjoy personal immunity from civil suits for monetary damages for improper acts of omissions in the exercise of their judicial functions.

Discipline, suspension and removal

17. A charge or complaint made against a judge in his/her judicial and professional capacity shall be processed expeditiously and fairly under an appropriate procedure. The judge shall have the right to a fair hearing. The examination of the matter at its initial stage shall be kept confidential unless otherwise requested by the judge.

18. Judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties.

19. All disciplinary, suspension or removal proceedings shall be determined in accordance with established standards of judicial conduct.

20. Decisions in disciplinary, suspension or removal proceedings should be subject to an independent review. This principle may not apply to the decisions of the highest court and those of the legislature in impeachment or similar proceedings.

APPENDIX C

TEXTS PREPARED WITHIN THE UNITED NATIONS

1. Universal Declaration of Human Rights[1]

Adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948

Preamble

Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people,

Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law,

Whereas it is essential to promote the development of friendly relations between nations,

Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom,

Whereas Member States have pledged themselves to achieve, in co-operation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms,

1. Text reproduced from : United Nations - Human Rights : A Compilation of International Instruments - ST/HR/1/Rev. 2 (1983), pp. 1/3.

Whereas a common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge,

Now, therefore,

The General Assembly

Proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under this jurisdiction.

Article 1

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

Article 2

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

Article 3

Everyone has the right to life, liberty and security of person.

Article 4

No one shall be held in slavery or servitude ; slavery and the slave trade shall be prohibited in all their forms.

Article 5

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

Article 6

Everyone has the right to recognition everywhere as a person before the law.

Article 7

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

Article 8

Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

Article 9

No one shall be subjected to arbitrary arrest, detention or exile.

Article 10

Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

Article 11

1. Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

2. No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was commited. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.

Article 12

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

Article 13

1. Everyone has the right to freedom of movement and residence within the borders of each State.

2. Everyone has the right to leave any country, including his own, and to return to his country.

Article 14

1. Everyone has the right to seek and to enjoy in other countries asylum from persecution.

2. This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.

Article 15

1. Everyone has the right to a nationality.

2. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

Article 16

1. Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.

2. Marriage shall be entered into only with the free and full consent of the intending spouses.

3. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

Article 17

1. Everyone has the right to own property alone as well as in association with others.

2. No one shall be arbitrarily deprived of his property.

Article 18

Everyone has the right to freedom of thought, conscience and religion ; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

Article 19

Everyone has the right to freedom of opinion and expression ; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

Article 20

1. Everyone has the right to freedom of peaceful assembly and association.

2. No one may be compelled to belong to any association.

Article 21

1. Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.

2. Everyone has the right of equal access to public service in his country.

3. The will of the people shall be the basis of the authority of government ; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

Article 22

Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

Article 23

1. Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.

2. Everyone, without any discrimination, has the right to equal pay for equal work.

3. Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.

4. Everyone has the right to form and to join trade unions for the protection of his interests.

Article 24

Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.

Article 25

1. Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

2. Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.

Article 26

1. Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education

shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.

2. Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.

3. Parents have a prior right to choose the kind of education that shall be given to their children.

Article 27

1. Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.

2. Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

Article 28

Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.

Article 29

1. Everyone has duties to the community in which alone the free and full development of his personality is possible.

2. In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

3. These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.

Article 30

Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.

APPENDIX D

International Covenant on Civil and Political Rights[1]

Adopted and opened for signature, ratification and accession by General Assembly resolution 2200 A (XXI) of 16 December 1966

Entry into force : 23 March 1976, in accordance with Article 49

Preamble

The States Parties to the present Covenant,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

1. Text reproduced from : ST/HR/1/Rev. 2 (1983), pp. 8/16.

Recognizing that these rights derive from the inherent dignity of the human person,

Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights,

Considering the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms,

Realizing that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant,

Agree upon the following articles :

Part I

Article 1

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

Part II

Article 2

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

3. Each State Party to the present Covenant undertakes :

a. To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity ;

b. To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy ;

c. To ensure that the competent authorities shall enforce such remedies when granted.

Article 3

The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.

Article 4

1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly

required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

2. No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.

3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.

Article 5

1. Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.

2. There shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.

Part III

Article 6

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.

3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.

4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.

5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.

6. Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.

Article 7

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

Article 8

1. No one shall be held in slavery ; slavery and the slave-trade in all their forms shall be prohibited.

2. No one shall be held in servitude.

3. *a*. No one shall be required to perform forced or compulsory labour ;

b. Paragraph 3.*a* shall not be held to preclude, in countries where imprisonment with hard labour may be imposed as a punishment for a crime, the performance of hard labour in pursuance of a sentence to such punishment by a competent court ;

c. For the purpose of this paragraph the term "forced or compulsory labour" shall not include :

i. Any work or service, not referred to in sub-paragraph *b*, normally required of a person who is under detention in consequence

of a lawful order of a court, or of a person during conditional release from such detention ;

ii. Any service of a military character and, in countries where conscientious objection is recognized, any national service required by law of conscientious objectors ;

iii. Any service exacted in cases of emergency or calamity threatening the life or well-being of the community ;

iv. Any work or service which forms part of normal civil obligations.

Article 9

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

2. Anyone 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.

3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.

4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

Article 10

1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

2. *a.* Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons ;

b. Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.

3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.

Article 11

No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation.

Article 12

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

2. Everyone shall be free to leave any country, including his own.

3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.

4. No one shall be arbitrarily deprived of the right to enter his own country.

Article 13

An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

Article 14

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The Press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice : but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality :

a. To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him ;

b. To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing ;

c. To be tried without undue delay ;

d. To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing ; to be informed, if he does not have legal assistance, of this right ; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it ;

e. To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him ;

f. To have the free assistance of an interpreter if he cannot understand or speak the language used in court ;

g. Not to be compelled to testify against himself or to confess guilt.

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

Article 15

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

Article 16

Everyone shall have the right to recognition everywhere as a person before the law.

Article 17

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

2. Everyone has the right to the protection of the law against such interference or attacks.

Article 18

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

Article 19

1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression ; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary :

a. For respect of the rights or reputations of others ;

b. For the protection of national security or of public order (*ordre public*), or of public health or morals.

Article 20

1. Any propaganda for war shall be prohibited by law.

2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

Article 21

The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others.

Article 22

1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.

2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.

3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice the guarantees provided for in that Convention.

Article 23

1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

2. The right of men and women of marriageable age to marry and to found a family shall be recognized.

3. No marriage shall be entered into without the free and full consent of the intending spouses.

4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.

Article 24

1. Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.

2. Every child shall be registered immediately after birth and shall have a name.

3. Every child has the right to acquire a nationality.

Article 25

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions :

a. To take part in the conduct of public affairs, directly or through freely chosen representatives ;

b. To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors ;

c. To have access, on general terms of equality, to public service in his country.

Article 26

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 27

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

Part IV

Article 28

1. There shall be established a Human Rights Committee (hereafter referred to in the present Covenant as the Committee). It shall consist of eighteen members and shall carry out the functions hereinafter provided.

2. The Committee shall be composed of nationals of the States Parties to the present Covenant who shall be persons of high moral character and recognized competence in the field of human rights, consideration being given to the usefulness of the participation of some persons having legal experience.

3. The members of the Committee shall be elected and shall serve in their personal capacity.

Article 29

1. The members of the Committee shall be elected by secret ballot from a list of persons possessing the qualifications prescribed in article 28 and nominated for the purpose by the States Parties to the present Covenant.

2. Each State Party to the present Covenant may nominate not more than two persons. These persons shall be nationals of the nominating State.

3. A person shall be eligible for renomination.

Article 30

1. The initial election shall be held no later than six months after the date of the entry into force of the present Covenant.

2. At least four months before the date of each election to the Committee, other than an election to fill a vacancy declared in accordance with article 34, the Secretary-General of the United Nations shall address a written invitation to the States Parties to the present Covenant to submit their nominations for membership of the Committee with three months.

3. The Secretary-General of the United Nations shall prepare a list in alphabetical order of all the persons thus nominated, with an indication of the States Parties which have nominated them, and shall submit it to the States Parties to the present Covenant no later than one month before the date of each election.

4. Elections of the members of the Committee shall be held at a meeting of the States Parties to the present Covenant convened by the Secretary-General of the United Nations at the Headquarters of the United Nations.. At that meeting, for which two thirds of the States Parties to the present Covenant shall constitute a quorum, the persons elected to the Committee shall be those nominees who obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.

Article 31

1. The Committee may not include more than one national of the same State.

2. In the election of the Committee, consideration shall be given to equitable geographical distribution of membership and to the representation of the different forms of civilization and of the principal legal systems.

Article 32

1. The members of the Committee shall be elected for a term of four years. They shall be eligible for re-election if renominated. However, the terms of nine of the members elected at the first election shall expire at the end of two years ; immediately after the first election, the names of these nine members shall be chosen by lot by the Chairman of the meeting referred to in article 30, paragraph 4.

2. Elections at the expiry of office shall be held in accordance with the preceding articles of this part of the present Covenant.

Article 33

1. If, in the unanimous opinion of the other members, a member of the Committee has ceased to carry out his functions for any cause other than absence of a temporary character, the Chairman of the Committee shall notify the Secretary-General of the United Nations, who shall then declare the seat of that member to be vacant.

2. In the event of the death or the resignation of a member of the Committee, the Chairman shall immediately notify the Secretary-General of the United Nations, who shall declare the seat vacant from the date of death or the date on which the resignation takes effects.

Article 34

1. When a vacancy is declared in accordance with article 33 and if the term of office of the member to be replaced does not expire within six months of the declaration of the vacancy, the Secretary-General of the United Nations shall notify each of the States Parties to the present Covenant, which may within two months submit nominations in accordance with article 29 for the purpose of filling the vacancy.

2. The Secretary-General of the United Nations shall prepare a list in alphabetical order of the persons thus nominated and shall submit it to the States Parties to the present Covenant. The election to fill the vacancy shall then take place in accordance with the relevant provisions of this part of the present Covenant.

3. A member of the Committee elected to fill a vacancy declared in accordance with article 33 shall hold office for the remainder of the term of the member who vacated the seat on the Committee under the provisions of that article.

Article 35

The members of the Committee shall, with the approval of the General Assembly of the United Nations, receive emoluments from United Nations resources on such terms and conditions as the General Assembly may decide, having regard to the importance of the Committee's responsibilities.

Article 36

The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee under the present Covenant.

Article 37

1. The Secretary-General of the United Nations shall convene the initial meeting of the Committee at the Headquarters of the United Nations.

2. After its initial meeting, the Committee shall meet at such times as shall be provided in its rules of procedure.

3. The Committee shall normally meet at the Headquarters of the United Nations or at the United Nations Office at Geneva.

Article 38

Every member of the Committee shall, before taking up his duties, make a solemn declaration in open committee that he will perform his functions impartially and conscientiously.

Article 39

1. The Committee shall elect its officers for a term of two years. They may be re-elected.

2. The Committee shall establish its own rules of procedure, but these rules shall provide, *inter alia*, that :

a. Twelve members shall constitute a quorum ;

b. Decisions of the Committee shall be made by a majority vote of the members present.

Article 40

1. The States Parties to the present Covenant undertake to submit reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made in the enjoyment of those rights :

a. Within one year of the entry into force of the present Covenant for the States Parties concerned ;

b. Thereafter whenever the Committee so requests.

2. All reports shall be submitted to the Secretary-General of the United Nations, who shall transmit them to the Committee for consideration. Reports shall indicate the factors and difficulties, if any, affecting the implementation of the present Covenant.

3. The Secretary-General of the United Nations may, after consultation with the Committee, transmit to the specialized agencies concerned copies of such parts of the reports as may fall within their field of competence.

4. The Committee shall study the reports submitted by the States Parties to the present Covenant. It shall transmit its reports, and such general comments as it may consider appropriate, to the States Parties. The Committee may also transmit to the Economic and Social Council these comments along with copies of the reports it has received from States Parties to the present Covenant.

5. The States Parties to the present Covenant may submit to the Committee observations on any comments that may be made in accordance with paragraph 4 of this article.

Article 41

1. A State Party to the present Covenant may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications to the effect that a State

Party claims that another State Party is not fulfilling its obligations under the present Covenant. Communications under this article may be received and considered only if submitted by a State Party which has made a declaration recognizing in regard to itself the competence of the Committee. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration. Communications received under this article shall be dealt with in accordance with the following procedure :

a. If a State Party to the present Covenant considers that another State Party is not giving effect to the provisions of the present Covenant, it may, by written communication, bring the matter to the attention of that State Party. Within three months after the receipt of the communication the receiving State shall afford the State which sent the communication an explanation or any other statement in writing clarifying the matter, which should include, to the extent possible and pertinent, reference to domestic procedures and remedies taken, pending, or available in the matter.

b. If the matter is not adjusted to the satisfaction of both States Parties concerned within six months after the receipt by the receiving State of the initial communication, either State shall have the right to refer the matter to the Committee, by notice given to the Committee and to the other State.

c. The Committee shall deal with a matter referred to it only after it has ascertained that all available domestic remedies have been invoked and exhausted in the matter, in conformity with the generally recognized principles of international law. This shall not be the rule where the application of the remedies is unreasonably prolonged.

d. The Committee shall hold closed meetings when examining communications under this article.

e. Subject to the provisions of sub-paragraph *c*, the Committee shall make available its good offices to the States Parties concerned with a view to a friendly solution of the matter on the basis of respect for human rights and fundamental freedoms as recognized in the present Covenant.

f. In any matter referred to it, the Committee may call upon the States Parties concerned, referred to in sub-paragraph *b*, to supply any relevant information.

g. The States Parties concerned, referred to in sub-paragraph *b*, shall have the right to be represented when the matter is being considered in the Committee and to make submissions orally and/or in writing.

h. The Committee shall, within twelve months after the date of receipt of notice under sub-paragraph *b*, submit a report :

i. If a solution within the terms of sub-paragraph *e* is reached, the Committee shall confine its report to a brief statement of the facts and of the solution reached ;

ii. If a solution within the terms of sub-paragraph *e* is not reached, the Committee shall confine its report to a brief statement of the facts ; the written submissions and record of the oral submissions made by the States Parties concerned shall be attached to the report.

In every matter, the report shall be communicated to the States Parties concerned.

2. The provisions of this article shall come into force when ten States Parties to the present Covenant have made declarations under paragraph 1 of this article. Such declarations shall be deposited by the States Parties with the Secretary-General of the United Nations who shall transmit copies thereof to the other States Parties. A declaration may be withdrawn at any time by notification to the Secretary-General. Such withdrawal shall not prejudice the consideration of any matter which is the subject of a communication already transmitted under this article ; no further communication by any State Party shall be received after the notification of withdrawal of the declaration has been received by the Secretary-General, unless the State Party concerned has made a new declaration.

Article 42

1. *a*. If a matter referred to the Committee in accordance with article 41 is not resolved to the satisfaction of the States Parties concerned, the Committee may, with the prior consent of the States Parties concerned, appoint an *ad hoc* Conciliation Commission (hereinafter referred to as the Commission). The good offices of the Commission shall be made available to the States Parties concerned with a view to an amicable solution of the matter on the basis of respect for the present Covenant ;

b. The Commission shall consist of five persons acceptable to the States Parties concerned. If the States Parties concerned fail to reach agreement within three months on all or part of the composition of the Commission, the members of the Commission concerning whom no agreement has been reached shall be elected by secret ballot by a two-thirds majority vote of the Committee from among its members.

2. The members of the Commission shall serve in their personal capacity. They shall not be nationals of the States Parties concerned, or of a State not party to the present Covenant, or of a State Party which has not made a declaration under article 41.

3. The Commission shall elect its own Chairman and adopt its own rules of procedure.

4. The meetings of the Commission shall normally be held at the Headquarters of the United Nations or at the United Nations Office at Geneva. However, they may be held at such other convenient places as the Commission may determine in consultation with the Secretary-General of the United Nations and the States Parties concerned.

5. The secretariat provided in accordance with article 36 shall also service the commissions appointed under this article.

6. The information received and collated by the Committee shall be made available to the Commission and the Commission may call upon the States Parties concerned to supply any other relevant information.

7. When the Commission has fully considered the matter, but in any event not later than twelve months after having been seized of the matter, it shall submit to the Chairman of the Committee a report for communication to the States Parties concerned :

a. If the Commission is unable to complete its consideration of the matter within twelve months, it shall confine its report to a brief statement of the status of its consideration of the matter ;

b. If an amicable solution to the matter on the basis of respect for human rights as recognized in the present Covenant is reached, the Commission shall confine its report to a brief statement of the facts and of the solution reached ;

c. If a solution within the terms of sub-paragraph *b* is not reached, the Commission's report shall embody its findings on all questions of fact relevant to the issues between the States Parties concerned, and its views on the possibilities of an amicable solution of the matter. This report shall also contain the written submissions and a record of the oral submissions made by the States Parties concerned ;

d. If the Commission's report is submitted under sub-paragraph *c*, the States Parties concerned shall, within three months of the receipt of the report, notify the Chairman of the Committee whether or not they accept the contents of the report of the Commission.

8. The provisions of this article are without prejudice to the responsibilities of the Committee under article 41.

9. The States Parties concerned shall share equally all the expenses of the members of the Commission in accordance with estimates to be provided by the Secretary-General of the United Nations.

10. The Secretary-General of the United Nations shall be empowered to pay the expenses of the members of the Commission, if necessary, before reimbursement by the States Parties concerned, in accordance with paragraph 9 of this article.

Article 43

The members of the Committee, and of the *ad hoc* conciliation commissions which may be appointed under article 42, shall be entitled to the facilities, privileges and immunities of experts on mission for the United Nations as laid down in the relevant sections of the Convention on the Privileges and Immunities of the United Nations.

Article 44

The provisions for the implementation of the present Covenant shall apply without prejudice to the procedures prescribed in the field of human rights by or under the constituent instruments and the conventions of the United Nations and of the specialized agencies and shall not prevent the States Parties to the present Covenant from having recourse to other procedures for settling a dispute in accordance with general or special international agreements in force between them.

Article 45

The Committee shall submit to the General Assembly of the United Nations, through the Economic and Social Council, an annual report on its activities.

Part V

Article 46

Nothing in the present Covenant shall be interpreted as impairing the provisions of the Charter of the United Nations and of the constitutions of the specialized agencies which define the respective responsibilities of the various organs of the United Nations and of the specialized agencies in regard to the matters dealt within the present Covenant.

Article 47

Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources.

Part VI

Article 48

1. The present Covenant is open for signature by any State Member of the United Nations or member of any of its specialized agencies, by any State Party to the Statute of the International Court of Justice, and by any other State which has been invited by the General Assembly of the United Nations to become a party to the present Covenant.

2. The present Covenant is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

3. The present Covenant shall be open to accession by any State referred to in paragraph 1 of this article.

4. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

5. The Secretary-General of the United Nations shall inform all States which have signed this Covenant or acceded to it of the deposit of each instrument of ratification or accession.

Article 49

1. The present Covenant shall enter into force three months after the date of the deposit with the Secretary-General of the United Nations of the thirty-fifth instrument of ratification or instrument of accession.

2. For each State ratifying the present Covenant or acceding to it after the deposit of the thirty-fifth instrument of ratification or instrument of accession, the present Covenant shall enter into force three months after the date of the deposit of its own instrument of ratification or instrument of accession.

Article 50

The provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions.

Article 51

1. Any State Party to the present Covenant may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General of the United Nations shall thereupon communicate any proposed amendments to the States Parties to the present Covenant with a request that they notify him whether they favour a conference of States Parties for the purpose of considering and voting upon the proposals. In the event that at least one third of the States Parties favours such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of the States Parties present and voting at the conference shall be submitted to the General Assembly of the United Nations for approval.

2. Amendments shall come into force when they have been approved by the General Assembly of the United Nations and accepted by a two-thirds majority of the States Parties to the present Covenant in accordance with their respective constitutional processes.

3. When amendments come into force, they shall be binding on those States Parties which have accepted them, other States Parties still being bound by the provisions of the present Covenant and any earlier amendment which they have accepted.

Article 52

Irrespective of the notifications made under article 48, paragraph 5, the Secretary-General of the United Nations shall inform all States referred to in paragraph 1 of the same article of the following particulars :

a. Signatures, ratifications and accessions under article 48 ;

b. The date of the entry into force of the present Covenant under article 49 and the date of the entry into force of any amendments under article 51.

Article 53

1. The present Covenant, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit certified copies of the present Covenant to all States referred to in article 48.

JUSTICE ?

THE MILITARY COURT SYSTEM IN THE ISRAEL–OCCUPIED TERRITORIES

This paper describes the Israel military court system, beginning with arrest and including interrogation, charge,trial and sentence. Also, it compares the actual rights available to detainees in the court process with some international human rights and provisions of humanitarian law. The account is designed for people with little or no legal background and those unfamiliar with the Occupied Territories.

AL–HAQ / LAW IN THE SERVICE OF MAN is an affiliate of the International Commission of Jurists and was formed in 1979 by a group of West Bank Palestinians.

GAZA CENTRE FOR RIGHTS AND LAW is an affiliate of the International Commission of Jurists and was formed in 1985 by a group of Palestinian lawyers from the Gaza Strip.

BOTH ORGANIZATIONS seek to develop and uphold the principles of the rule of law in the Occupied Territories, carry out legal research, and provide legal services for the community.

THE INTERNATIONAL COMMISSION OF JURISTS, whose headquarters are in Geneva, Switzerland, is a non–governmental organization devoted to promoting the understanding and observance of the rule of law and the legal protection of human rights throughout the world.

AL–HAQ / Law in the Service of Man, P.O.Box 1413, Ramallah, West Bank, Via Israel (Tel. 02–952421).

Gaza Centre for Rights and Law, P.O.Box 1274, El Sabra, Imam Building, Omar El Muktar, Gaza, via Israel.

Occasional Paper No.1

ADMINISTRATIVE DETENTION

in the occupied West Bank

LAW IN THE SERVICE OF MAN
West Bank affiliate of the
International Commission of Jurists

ADMINISTRATIVE DETENTION

in the occupied West Bank

Appending relevant extracts from Israeli Military Order 378 and related regulations translated into English by Jonathan Kuttab.

Emma Playfair

A shorter version of this paper was first published in the International Commission of Jurists' Review, December 1985.

Emma Playfair is a Solicitor and a United Nations Association volunteer.

Law in the Service of Man
1986

INTRODUCTION

On 4 August 1985 the Israeli cabinet announced that it was reintroducing administrative detention as well as deportation and other strong measures in the occupied West Bank in order "to clamp down on terrorism and incitement". Within a week, five six-month administrative detention orders had been imposed and confirmed, and by the first week in September a total of 62 people from the West Bank and Gaza were reported to have been administratively detained.

Administrative detention, sometimes called preventative detention or internment, is the imprisonment of individuals by the executive without charge or trial using administrative procedures. Under the Israeli military occupation of the West Bank the executive power is in the hands of the military authorities and it is thus the military authorities who exercise this power.

Israel made use of administrative detention from the first years of the occupation which began in 1967. For many years this practice was a major topic of discussion amongst those concerned with Israel's policies in the West Bank and in Israel itself. Little has been written in recent years on the subject however, because, in response to strong international and internal pressure, Israel began to phase out the use of administrative detention in 1980. The last administrative detainee was released in 1982, and it thus became of historical interest only. With the reintroduction of administrative detention it once again becomes a live issue and of the utmost importance involving as it does a serious infringement of the individual's liberty and right to due process.

The aim of this report is to summarise and discuss the provisions of the law and practice relating to the use of administrative detention by the Israeli authorities in the West Bank. This is

of particular importance since major changes were made to the law and to the related regulations only as the practice of administrative detention was being phased out, and are thus not widely known.

In examining Israel's use of administrative detention in the West Bank three questions must be asked. Firstly whether the introduction of such a measure is justified at all by the present situation in the West Bank, secondly whether the power to detain administratively is being exercised in accordance with local and international law, and thirdly whether, since it is being used, the interests of the detainee are safeguarded adequately.

After a brief summary of the historical background, the first question will be considered in the light of international law and current developments in the occupied West Bank. The law and practice relating to administrative detention in the West Bank will then be examined in detail, concentrating on three aspects - the basis on which the order is issued, the provision for judicial review of the order and the treatment of the detainees while interned - in an attempt to answer the remaining questions.

Although the scope of this report is limited to the West Bank, similar legal provisions apply in Gaza and in Israel itself, and judgments of the Israeli High Court of Justice are treated as precedents in relation to all three areas. Frequent reference will thus be made to Israeli law and precedents. The study takes into account developments to October 1985.

THE HISTORICAL BACKGROUND

Until recently in both the West Bank and Israel the law under which orders of

administrative detention were made was still essentially that used by the British Mandate against both Jews and Arabs before 1948. Many of those who later became members of the Israeli Government or the Knesset were themselves detained under these emergency laws (1) and at that time voiced strong opposition to their use by the British. The laws were not repealed on the establishment of the State of Israel however, since they were found to be a useful method of control both of Arabs and, in the early years, of dissident Israelis. For over 30 years Israel resisted introducing its own laws containing these repressive measures, and even the military orders issued in the West Bank and Gaza were based on the Mandate laws. As late as 1971 when asked whether it would not be better for Israel to enact its own laws than to continue to use the much criticised British Mandate law, the then Minister of Justice, Ya'akov Shapiro replied "It is one thing for the military to use someone else's law. It is quite another thing for the Knesset to enact as its own a preventative detention law" and added that he could not himself vote for such a law (2).

It was an Israeli opposed to administrative detention, however, who pointed out that "a population gets used to 'special rules of war' and has difficulty living without them even when peace returns" (3). Israel finally enacted its own laws authorising administrative detention in 1979. In introducing the bill and explaining the necessity for the law to the Knesset in 1979, Shmuel Tamir, then Minister of Justice, described Israel as "a state under siege" (4), although this was 31 years after the establishment of the State of Israel, 12 years since the start of the occupation of the West Bank, and 6 years after the last war in which Israel was involved.

Except in the first years of the occupation, when, for example, in 1970 there were 1,131

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Except in the first years of the occupation, when, for example, in 1970 there were 1,131

administrative detainees in the West Bank and Gaza according to the then Defence Minister Moshe Dayan, Israel did not make extensive use of administrative detention to effect mass arrests but has applied it on an individual basis. In later years the numbers were much smaller, in general less then one hundred and sometimes fewer than twenty at any one time (5). This is doubtless due in part to the fact that provision exists in the military orders relating to the West Bank for the holding of detainees for a period of up to eighteen days, fourteen of them incommunicado, without bringing the detainee before a judge and up to six months in total without charge (6). It is this provision which is generally used to round up and detain large numbers of Palestinians after disturbances.

During the late 1970s and early 1980s Israel came under increasing public pressure both internally and from abroad to abandon the use of administrative detention, from such varied sources as Amnesty International, the United Nations and Israeli lawyers, journalists and others (7), and in the early 1980s it began to phase out use of the measure. The last administrative detainee in the West Bank at that time, Ali Awwad al-Jammal, was released on 2 March 1982 after spending 6 years and 9 months in prison without charge or trial.

The phasing out of administrative detention did not however mean an end to extra-judicial restrictions being imposed on freedom of movement. It coincided with an increase in the use of 'restriction orders' by which a person is confined to his or her town, village, or house, generally confined to home after dark, and required to report at regular intervals at a police station. Ali Awwad al-Jammal for instance was served with such an order immediately after his release from administrative detention in 1982 and remained

under town arrest until the end of February 1984. These orders themselves have come under similar criticism, since they too are used as an extra-judicial method of control and restrict the individual's right to freedom of movement (8). 81 such orders had been issued by the end of 1982, no reasons being given except for the vague term "security reasons". At the time of writing there are some 34 such orders in force, in addition to the 62 administrative detention orders (9).

The reintroduction of administrative detention in 1985 in the West Bank seems to be in response to intensified pressure on the government in the preceding months from Israeli settlers and other extremists for harsh measures to be taken against Palestinians in the Occupied Territories. These calls were made partly in response to a series of attacks on Israelis in the West Bank and bordering areas of Israel, and partly from anger at the action of the Israeli authorities in releasing 1150 Palestinian political prisoners in May 1985 in an exchange agreement (10). Under the terms of the exchange an amnesty was granted to all those freed, many of whom could choose whether to stay in the West Bank or Gaza or to leave the area. The prisoner exchange was politically a very unpopular move and was heavily criticised by many Israelis, protests being made both about the releases collectively and about individual cases.

The incident which appears to have triggered the reintroduction of the measures was the murder of two Israeli teachers from Afula, a town just inside Israel. Three Palestinian youths were reported to have confessed to the attack. Ironically later reports have indicated that there was no political motive behind the attacks, but the arrests of the youths and the initial reports were sufficient to spark off virulent expression of hatred, racist attacks and demonstrations against Palestinians generally. Mounting demands

were made for the reintroduction of the death penalty, deportations and administrative detention and a few days later the last two measures were introduced. Reintroduction of the death penalty is still under consideration.

The first order of administrative detention made since its use was phased out was issued on 31 July 1985 and confirmed on 2 August, even before the Israeli cabinet's announcement of its decision to reintroduce the measure. The order was made against Ziad Abu 'Ein, a former political prisoner released only three months earlier in the prisoner exchange of May 1985. Four further orders were made on 5 and 6 August against students of al-Najah University who allegedly headed student factions aligned to different Palestinian political groupings. Between 29 August and 4 September 57 more administrative detention orders were made, bringing the total number to 62.

THE LAW

A. International Law

Imprisonment without charge or trial constitutes a serious infringement on the individual's rights to protection from arbitrary arrest and to due process. Not only does it infringe these basic legal principles but it also contravenes international law. Article 9 of the Universal Declaration of Human Rights (UDHR) and Article 9(1) of the International Convention on Civil and Political Rights (ICCPR) both state that "No one shall be subjected to arbitrary arrest or detention...", while the right to due process is protected in Article 10 of the UDHR which states that "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his

rights and obligations and of any criminal charge against him".

Despite these provisions administrative detention is widely used in many parts of the world, especially in times of national emergency - according to the International Commission of Jurists' information at least 85 countries in the world have legislation permitting this practice and have used it within the last 3 or 4 years (11) - and its use in times of war or occupation is sanctioned by international law, albeit in strictly limited circumstances.

The Fourth Geneva Convention of 1949 Relative to the Protection of Civilian Persons in Time of War (12) contains provisions regulating the powers and conduct of an occupying power towards the civilians of the occupied territories. When challenged on the legality of administrative detention procedures under international law, Israel customarily refers to Article 78 of this Convention, which provides that "If the occupying power considers it necessary, for imperative reasons of security, to take safety measures concerning protected persons, it may, at the most, subject them to assigned residence or to internment."

However, Article 6 of the same Convention states that, with the exception of a number of specified provisions, mainly humanitarian in nature and not including Article 78, the provisions of the Convention in the case of occupied territories shall cease to apply "one year after the general close of military operations". The reason for this appears to be that it is expected that by the end of one year the occupying power will have had the opportunity to establish its authority well enough not to need the stringent methods of control provided for by the articles concerned, and that life will to a substantial extent have returned to normal.

Israel's occupation of the West Bank is now in its nineteenth year. With few exceptions the violent acts of resistance by the occupied population are minor and isolated incidents. Such acts of resistance cannot be described as military operations in the meaning of a convention on warfare, and it is submitted that the relevant articles in the convention should have ceased to apply some considerable time ago, and that administrative detention therefore cannot be justified under this section.

Even when administrative detention is permitted by the Convention it is authorised only if considered 'necessary for imperative reasons of security' (emphases added). Jean Pictet states in his commentary to the Convention that "In occupied territories the internment of protected persons should be even more exceptional than it is inside the territory of the Parties to the conflict ... such measures can only be ordered for real and imperative reasons of security; their exceptional character must be preserved." Pictet comments further that Article 78 relates only to those not charged with any offence so that precautions taken against them cannot be in the nature of a punishment, only preventative (13).

Other criteria were proposed for the use of administrative detention by the International Commission of Jurists as long ago as 1962 at an International Conference in Bangkok. One of the principles which it considered should govern the use of administrative detention was that its use "should be lawful only during a period of public emergency threatening the life of the nation" (14). Although equivalent principles have not yet been adopted by other international bodies, it is submitted that the principle quoted presents a reasonable limitation on such a drastic deprivation of individual liberty. The intention would then be to deal with an immediate threat,

and it would not be acceptable for such powers to remain in use except when the life of the nation was under real threat. At no time could the powers be used as a mere adjunct to, or even substitute for, ordinary criminal process.

Are there then either imperative reasons of security necessitating the use of administrative detention or is there an emergency threatening the existence of Israel or the West Bank?

It is recognised that Israel does have a security problem within the Occupied Territories and that this is likely to continue as long as the occupation continues. Attacks by Palestinians should not be minimised. Nevertheless it should be recognised that they occur partly as a direct result of the confrontational situation created by Israel's policy of settling its own citizens in the occupied Palestinian territories, contrary to international law, and by the extremist and racist attitudes of those settlers towards the Arab population.

As to the present extent of the security problem, Vice-Premier Yitzhak Shamir acknowledged in a recent interview, when questioned about the reintroduction of administrative detention, that the present rash of attacks is by no means the worst in the history of the state, "But the more we get used to conditions of normalcy and security, the more such incidents anger and aggravate people. Moreover the pattern of sporadic murders of individuals is particularly disruptive to normal life and emotionally effects so many people". Disruption of normal life and the causing of anger, aggravation and emotion to people, however numerous, cannot amount to imperative reasons of security, nor be a threat to the area as a whole. The level of resistance within the Territories does not justify the claim that Israel is under siege from the Territories. Indeed in 1982 when the level of resistance was much greater

following the invasion of Lebanon the military authorities apparently saw no need to introduce the severe measure of administrative detention.

Extensive powers are available to the military government to prosecute in the military courts those responsible for actual attacks or for incitement and these powers are widely used. It is clear from Article 78 of the Fourth Geneva Convention that administrative detention is only justifiable when it is absolutely necessary for security reasons. This precludes its use either as a substitute for criminal proceedings or as a palliative for the public.

B. The Local Law

The law governing administrative detention in the West Bank is to be found in Article 84A and Article 87 of Military Order 378 of 1970, an Order Concerning Security Provisions, as amended by Military Orders 815 and 876 of 1980. Regulations have also been issued relating to appeal proceedings and conditions of detention, pursuant to Article 87G.

Provision for the imposition of administrative detention existed in Palestine under the British Mandate in the form of Articles 108 and 111 of the Defence (Emergency) Regulations 1945. These provisions authorised a Military Commander to issue such an order but did not limit the duration of the order, nor restrict the discretion of the Commander nor prescribe rules of evidence. They provided only minimal opportunity for judicial review and that to an advisory committee whose opinion the Commander was not bound to follow, although the Supreme Court could theoretically intervene if there was a legal flaw in the order.

The Defence (Emergency) Regulations 1945 were implicitly repealed and not used during

Jordanian rule of the West Bank. Israel, however, considered the Regulations an extant part of the law on its occupation of the area in 1967 and proceeded to make use of many of their provisions. To ensure that this use would not be successfully challenged in court, Article 3 of Military Order 224 of 1968 explicitly provided that the regulations do apply (16). Specific provision for administrative detention was made soon afterwards in 1970 by Article 87 of Military Order 378.

Article 87 of Military Order 378 before amendment authorised a military commander to issue an order of administrative detention on essentially the same basis and using the same procedure as under the Mandate law, thus mirroring the practice in Israel where the Mandate emergency regulations still applied.

Substantial changes were made to the law in Israel in 1979 when a new law was enacted entitled the Emergency Powers (Detention) Law 5739-1979. On 11 January 1980 Military Order 815 was issued relating to the West Bank, which amended Article 87 of Military Order 378 to bring it broadly into line with the new Israeli law. These new provisions specified grounds on which administrative detention orders could be made, introduced a new judicial review procedure, restricted delegation of powers and made other refinements to the law. There are differences between the law in Israel and the Military Orders in the West Bank but wherever the Israeli law is mentioned below without comment it can be assumed that the provisions in the law applicable to the West Bank are equivalent. Articles 84A and 87 of Military Order 378 as amended together with a minor amendment made by Military Order 876 and some regulations issued pursuant to the order constitute the legislation relating to administrative detention at the time of writing.

(i) The Issuing of the Administrative Detention Order

The Defence (Emergency) Regulations 1945 authorised a Military Commander by order

> "to direct that any person shall be detained in such place of detention as may be specified ... in the order" (Regulation 111(1)), if he is of opinion that it is "necessary or expedient to make the order for securing the public safety, the defence of Palestine, the maintenance of public order or the supression of mutiny, rebellion or riot" (Regulation 108).

No limit to the duration of the order was specified, but the place of detention had to be specified in the order (17). The commander was specifically permitted to delegate his powers to any person (Regulation 111(8)).

Military Order 378 as issued in 1970 initially contained essentially the same provisions relating to administrative detention as the Defence (Emergency) Regulations 1945, giving very wide powers to the commander, but the amendments introduced in 1980 by Military Order 815 restricted these powers considerably.

By Article 87(a) of Military Order 378 as amended, an Area Commander of the Israeli Army can order the detention of any person for not longer than six months

> "...if he has reasonable cause to believe that reasons of the security of the area or public security require that (that) person should be held in custody..."

and by Article 84A

> "No Military Commander may exercise (this) authority unless he believes it to be necessary for definitive security reasons".

The amendments thus provide for an objective standard for the decision to detain, since the belief that the order is necessary must be a reasonable one in contrast to the subjective opinion required before.

Although the duration of the original order cannot exceed 6 months, Article 87(b) provides that the order can then be renewed for successive periods of six months. In practice therefore the detention can continue indefinitely.

The Area Commander is not authorised to delegate his power, but by Article 87(c) a District Commander is empowered to order a person to be detained if he believes that the Area Commander would have had reason to make the order. A detention order issued by the District Commander may not be for a period exceeding 96 hours and he has no power to renew the order. This prohibition of delegation leaves ultimate responsibility with one individual only.

Various attempts have been made by Israeli officials closely concerned with the policy and practice of administrative detention to define the circumstances in which the orders can be made.

According to Colonel Hadar, a former Military Advocate-General, the measure is employed only when

> "..no other legal measure exists which could prevent the detainee's dangerous activity ...(and) the extent of the danger of the detainee remaining free is so great that the only appropriate measure against him is administrative detention" (18).

More recently in 1982 the then Israeli Attorney-General Itzhak Zamir issued guidelines concerning the new laws introduced, saying:

> "Administrative detention is meant not as a punitive but only as a preventative measure. In other words a person may not be administratively detained as a punishment for

an act prejudicial to state security or public security. A punishment for such an act may only be imposed by a court in ordinary judicial proceedings. Where there is sufficient good evidence for a conviction in such proceedings this will not by itself justify administrative detention.

Administrative detention is justified only to avert a danger to state security or public security. But even where such a danger exists, administrative detention should not be resorted to if more effective and less severe means of defence against the danger are available, e.g. a criminal action ... or a restricting order... At the same time, the expression of an opinion, even an extreme opinion inconsistent with the ordinary concepts of state security or public security, is not in itself a sufficient ground for administrative detention..." (19).

The assurance that a person will not be detained administratively simply because of an act committed in the past should however be considered in the light of Colonel Hadar's statement that "commission of an offence by the detainee in the past is proof of his inclination to commit such acts again" (emphasis added) (20). In practice, again according to Colonel Hadar, the basis for by far the majority of administrative detention orders is the actual commission of a security offence by the detainee where the government is unable to prove the case under the normal rules of evidence. This may be, for instance, because the information is inadmissible, such as hearsay, or because the witness is involved in espionage and would be endangered if his identity were to be revealed, or because the witness is abroad.

Further clarification of the grounds on which the power to detain administratively may be exercised has been made by the courts. As will be

seen below the courts reviewing administrative detention orders have been reluctant to substitute their own considerations for those of the issuing officer. The courts have however interpreted the grounds on which the Area Commander is entitled to issue administrative detention orders strictly, and have discharged such orders where it is apparent on the face of the order or the request for extension of the order that grounds other than the security of the state or area or the security of the public were paramount.

In the case of Qawasma v. Minister of Defence (1982) (21) the Israeli Supreme Court held that an order of administrative detention had been issued for a reason other than the security of the state or public safety, namely to detain Qawasma pending the prosecution's appeal against his acquittal in criminal proceedings, and it discharged the order. In his decision Justice Kahan stated that:

> "The power vested in the Minister of Defence* is wide and exceptional since it enables the freedom of a person to be denied otherwise than by ordinary legal process. This power should therefore be exercised with great care and only in cases where the danger to state security and public safety is serious indeed and there is no other way to avert it except by the detention of the person... Precisely because the discretion given to the Minister of Defence is wide, this power should be used with extreme caution." (22)

A judge of the District Court* refused, in

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* The Minister of Defence and the President of the District Court in Israel exercise the same powers in relation to administrative detention as the Area Commander and the Military Judge respectively in the West Bank.

the case of Gemayel Bathish v. Minister of Defence (23), to confirm the Minister's order of administrative detention on the ground that it had not been made on objective grounds of public security. Bathish was strongly opposed to the annexation of the Golan Heights and became a leader of the opposition to it, but was not personally involved in violence. The court held that

> "...obviously the outlook and nationalistic opinions of the detainee do not constitute a reason for the imposition of an administrative detention order ...and he must be judged by his actions... Forcing without violence the opinions of a section of the public upon another section of the public does not constitute an infringement on the security of the public as there are no physical assaults upon anyone."

However, this decision does not constitute a precedent for other decisions, since it was made by a District Court and not from the Israeli High Court of Justice.

From the various statements above it is clear that administrative detention is only intended to be used as a preventative not as a punitive measure, and only when no alternative exists and the detainee's freedom poses a serious threat to state and public security. In order to assess whether this is so in practice it may be helpful to consider briefly the first orders of administrative detention imposed after its reintroduction. At the time of writing full details of those most recently placed under administrative detention are not available and so it is not yet possible to draw clear conclusions as to the general principles upon which the current wave of arrests are being made.

The first order made was against Ziad Abu 'Ein, a 26-year-old Palestinian from al-Bireh in

the West Bank, who became known worldwide following his extradition from the USA to Israel in 1979 to stand trial for a bomb attack in Tiberias. He has always denied any involvement in the attack, but he was convicted on the basis of another person's confession, later retracted, and sentenced to life imprisonment. Ziad Abu 'Ein was freed in the prisoner exchange in May 1985 (24). He chose to remain in al-Bireh, and like many of the freed prisoners, threats were made against his life and safety by Israeli settlers. Due to his notoriety and the act of which he was accused his release was one of those most unacceptable to the settlers. Under the terms of the prisoner exchange agreement, which was negotiated through the auspices of the International Red Cross, Israel is unable to rearrest any of the prisoners to whom amnesty was granted for the same alleged activities for which they were imprisoned. There must be a strong suggestion that the measure of administrative detention was here being used to imprison and punish Ziad Abu 'Ein for previous acts in order to satisfy public opinion rather than for preventative reasons.

The four students from Al-Najah University in Nablus who were placed in administrative detention on 5 and 6 August 1985, are each alleged to have headed student factions aligned with three different Palestinian parties outlawed in the Occupied Territories. It is a strange coincidence that leaders of different opposing factions should all simultaneously be found to pose such a serious threat to Israel's security or public safety that their custody is imperative, and yet that it is not possible for the authorities to charge and bring even one of them to trial in the normal way for an offence under the security legislation such as incitement or membership of an illegal organization (25). Again there appears more reason to believe that the four are being held for their

political beliefs and because they are local leaders, and as such 'inconvenient' to the military authorities.

In view of the secrecy imposed on the court procedures, it is not possible to conclude with certainty the motives behind the orders, but certainly there must exist a serious doubt as to whether the orders are not being used to satisfy public demand in the first case and to silence political opposition in other cases rather than for genuine reasons of state or public security.

(ii) Judicial Review of Administrative Detention Orders

Under the Defence (Emergency) Regulations 1945 and Military Order 378 section 87 before amendment the provision for judicial review was very limited. The detainee was entitled to appeal to an advisory committee, which was also required to consider each order at intervals not greater than six months. However the committee could only make recommendations to the Military Commander who could either accept or reject those recommendations. A further appeal could be made to the Israeli High Court.

The amendments made by Military Order 815 in 1980 introduced a more extensive review and appeal procedure. Any person detained under an order of administrative detention must be brought before a military judge for review of the detention order within 96 hours of the initial detention, whether under the order of the Area Commander or the District Commander (Article 87B (a) as amended). The detention order must be reviewed again by the judge not later than three months from the decision, even if the duration of the order itself is for a longer period, and thereafter at least every three months. The detainee must be released

if either review does not start within the time specified. (Articles 87C and 87B (a)).

The decision of the military judge can be appealed against within 30 days to the President of the Military Courts, or to a judge appointed by him (26). The judge of this court has the same powers as the military judge. A final appeal lies to the Israeli Supreme Court since the actions involved are administrative.

Extensive though the provisions made for judicial review appear to be, the ability of the detainee to challenge the order effectively is severely limited both by procedural rules and by limitations placed on the courts' powers.

Military Order 815 introduced a number of provisions as to the procedure to be followed in the review and appeal hearings, the most important of which are the following:

Article 87D (a & b): When reviewing the administrative detention order the judge is not bound to observe the usual rules of evidence if he is satisfied that this will help reveal the facts and reach the truth, but any deviation from the rules must be recorded.

Article 87D (c): The judge may examine evidence in the absence of the detainee and his counsel and need not disclose the evidence to them if he is satisfied that such disclosure could impair state security or public safety.

Article 87F: The review proceedings are to be held in secret.

At the review the military judge must set aside the detention order

> "...if it is proved to him that the reasons for which it was issued were not objective reasons of state security or public security or that it was made in bad faith or from irrelevant considerations." (Article 87B (b)).

The burden of proof is thus on the detainee

to prove that the order was based on improper grounds, and not on the Area Commander to show justification for the order. However, in almost every case neither the detainee nor his lawyer will be shown the evidence.

As explained by the military government of the West Bank in a book issued under the name of the Israeli Section of the International Commission of Jurists ('the IICJ'):

> "...detention orders are in virtually all cases issued on the basis of intelligence information submitted to the regional commander. Such information, by its very nature, is either inadmissable in court under the strict rules of evidence pertaining to hearsay, or consists of classified material, the disclosure of which could lead to exposure of sources of intelligence and endanger the lives of such sources or Israeli operatives." (27).

The reasons which precluded the production of the evidence in the regular military court will also preclude its presentation to the administrative detainee in the review sessions. The review judge will thus in.virtually every case exercise its right not to disclose the evidence and to vary the rules of evidence to accept evidence that could not be relied on in court and may also exclude the detainee from the hearing.

The detainee and his lawyer are thus set the almost impossible task of having to prove to the judge that the order is not required for security reasons, without knowing any details of the evidence on which the order is based.

The recording of deviations from the rules of evidence on the court record does little to protect the detainee against abuse, since those records themselves are secret. There is no requirement that such deviations must be recorded in the decision given to the detainee.

The protection afforded to the detainee is weakened further still by the fact that the proceedings are not open to the public since all review procedures are required to be held in closed session. It should be noted that this is compulsory in all cases of administrative detention not merely where special reasons of state security require the hearing to be secret. Only the detainee and his lawyer may attend the hearings, if not themselves excluded under the above provisions, and they are forbidden from revealing anything that transpires during the session, even the reasoning of the decision.

As required by the military order, all 62 orders of administrative detention recently imposed have been reviewed and confirmed in secret session. There is thus no means of determining whether the review and appeal procedure have any value at all because the basis on which the judge decides whether or not to reveal the evidence and on which he bases his final decision is not known. This is so both to the external world and to the detainee's own lawyer who is not shown the evidence and is excluded from much of the argument. In this way the criteria on which the judge reaches his decision are closed to scrutiny both by the public and by the detainee's lawyer.

Such lack of answerability is prejudicial to justice in any circumstances, but especially in this procedure where both the review and the appeal are heard by military officers inferior in rank to the issuing officer, who is their commander. Thus not only is the review not independent, but it puts the reviewing officer in the invidious position of having to reverse a decision of his military superior if he wishes to quash the order, and such a decision cannot be easily taken.

Furthermore the issuing of the order, the

review and the appeal are all in the hands of individual officers, not a board of two or more which might lessen the pressure on the officers concerned. This is also contrary to the provisions of Article 78 of the Fourth Geneva Convention which requires the administrative detention order to be reviewed by a 'competent body'. The intention behind this provision appears to be that the order be reviewed by more than one person, thus safeguarding the detainee by not leaving his liberty to the discretion of a single person on review.

A potential danger to the reputation and safety of the detainee also arises from the secrecy of the sessions. Clearly when a person is detained and the detention order confirmed by a judge, members of the public may well assume that he has committed some serious offence, or poses a grave threat to the public, and this itself makes him a target for attack by Israeli settlers in the occupied territories on his eventual release. Unlike in military or criminal court hearings the 'charges' will not be made public and the detainee will not have had the opportunity of a fair trial to present his response to the charges and to have his innocence or guilt determined. The detainee's lawyer is bound by the secrecy of the court to disclose no details of the proceedings and is thus unable to defend his reputation against the assumptions of the public if unfounded.

This point is well illustrated in the case of Ziad Abu 'Ein. The order of administrative detention imposed on Abu 'Ein was reviewed on 2 August 1985 in closed session by a military judge. Apart from military personnel only Ziad and his lawyer were able to attend this session, and both were bound by the secrecy of the proceedings. Despite the secrecy of the session the media subsequently reported that he was accused of planning an attack on a bus. Abu 'Ein's lawyer,

Jonathan Kuttab, confirms that he did not reveal details of the proceedings even to Ziad's family, and Ziad himself was immediately returned to detention. Unless the reports were ill founded, and there has been no retraction of them, there seems to be no other explanation for the announcement than that the military themselves released this information, true or false, regardless of the secrecy of the proceedings.

Meanwhile Abu 'Ein's lawyer remained bound by the court and unable to respond to these reports. In the eyes of the Israeli public Ziad is a guilty man and the administrative detention order is justified whatever may be the basis of the charges announced, but never publicly or judicially verified.

In addition, limitations placed by the Supreme Court on its own powers of review and thus on the review and appeal bodies' powers, also severely limit the effectiveness of the review procedures.

In the case of Rabbi Kahane et al v. Minister of Defence (1981) (28) the Supreme Court reviewed proceedings before the District Court* in which the order of administrative detention issued by the Minister of Defence* against Rabbi Kahane was confirmed. The Supreme Court ruled that a review court could not substitute its own considerations for those of the Minister. It stated that the issuing of the order is an administrative action even though reviewable by the court, and that the order will only be set aside if the reasons for which it was made were

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*The Minister of Defence and the President of the District Court in Israel exercise the same powers in relation to administrative detantion as the Area Commander and the Military Judge respectively in the West Bank.

not objective reasons of state security or public security or if the order was made in bad faith or from irrelevant considerations. Justice Kahan did state that the reasons given in s.4(c)* for setting aside the order are not exhaustive, but from the examples given it appears that the only other circumstances in which it could be set aside are if the order is in fact illegal because of procedural defects, such as delegation of power. He emphasised that

> "...it is clear from the provisions of s.4(c)* that the court may not substitute its own considerations for those of the Minister of Defence..." (29).

In an article by Professor Klinghoffer of the Hebrew University in Jerusalem (30) it is argued that this is an incorrect interpretation of the powers of the court. In Professor Klinghoffer's view the act of issuing an administrative detention order is not complete until reviewed and confirmed by the court and it is thus not an administrative act but a joint administrative/ judicial act. The fact that the President of the District Court is authorised to 'confirm' the order implies, he argues,. the use of the President's own discretion. Furthermore the use of the term 'require' in section 2(a)* implies an estimation by the Minister of Defence, not merely a factual finding, with which the President is entitled to disagree, for instance by finding that a restriction or supervision order would be more appropriate and that an administrative detention order was not required. This article was

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**s.2(a) and s.4(c) of the Emergency Powers (Detention) Law 5739-1979 contain provisions in relation to Israel equivalent to Articles 87(a) and 87B (b) of Military Order 378 in relation to the West Bank.

considered and referred to in the appeal decision by the President of the District Court in the case of Gemayel Bathish v. Minister of Defence (1982) (31). The President stated that he was bound by the precedent of the Supreme Court in the Kahane case but that had he not been he would have accepted Professor Klinghoffer's interpretation of the law. In this case however, as mentioned above, the President was still able to set aside the order, since he found that the Minister had used his power to issue a detention order on grounds not justified in law.

Courts in Israel are indeed bound to follow precedents of the Supreme Court by s.33(b) of the Courts Law 5717-1957, and the Kahane case set a precedent which still stands. However there is no system of precedents in the Occupied Territories so that the military judge, in theory at least, is not bound to follow the decision in the Kahane case. However, in practice military judges in the Occupied Territories treat the High Court precedents as highly persuasive and it is thus unlikely that any such military judge would depart from the High Court's decision. This presents another problem for the Palestinian detainee. Since decisions of the Israeli Supreme Court, even those relating to the Occupied Territories, are published only in Hebrew, and not in Arabic or English, many West Bank lawyers appearing before the review or appeal courts will not be aware of those decisions.

So long as the review judges consider themselves bound by the decision in the Kahane case and refuse to substitute their own views for those of the issuing authority, the review is little more than a rubber stamp to the decision of the military commander issuing the order. It can do little to safeguard the rights of the individual detainee.

More generally, it is only very rarely that

the Supreme Court will accept any opinion other than that of the military authorities as to what is required by 'security', even in the regular military court system in the occupied territories. In the case of Amira et al -v- Minister of Defence et al (32) the court held that

> "In a dispute ... involving questions of a military-professional character ... the Court ... will presume that the professional arguments of those actually responsible for security in the occupied territories ... are valid. This presumption may only be rebutted by very convincing evidence to the contrary".

All administrative detention cases are by definition related to 'security', and for the administrative detainee with minimal rights of defence the difficulty of overcoming this obstacle will be greatly magnified.

In summary, as indicated above, there have in the past been cases where an administrative detention order has been revoked at the review or on appeal, but these are cases where an improper reason can be shown on the face of the order or the request for confirmation of the order. On the substantive issues, it is effectively impossible for the detainee to challenge the evidence on the basis of which he is detained or to argue against the Area Commander's view as to what is required for security reasons.

(iv) Conditions of Detention

It has been declared by Itzhak Zamir that administrative detention is used for preventative and not punitive reasons, and that it regrettably involves the infringement of the freedom of the individual for the benefit of the security of the state and the public. It is therefore reasonable to expect that all possible measures will be taken

to ensure that the detainee, convicted of no offence, is subjected to minimal discomfort and kept in conditions as unprisonlike as possible. This would be expected all the more when the number of detainees is small since it would present few practical problems. Jean Pictet in his Commentary to the Fourth Geneva Convention of 1949 says:

> "It is a humanitarian duty to alleviate to the greatest possible extent the effect of internment on the mind and spirits of the internees" (33).

With this point in mind the Fourth Geneva Convention contains extensive provisions in Articles 79-131 relating to the treatment of internees. These provisions relate to such matters as clothing, bedding, light, correspondence, visits, medical care, disciplinary offences, internal organization and transfer of detainees.

The Regulations Concerning Administrative Detention (Terms of Confinement in Administrative Detention) issued by the Israeli military authorities pursuant to Military Order 378 Article 87(g) on 31.1.82, a translation of which appears in the appendix hereto, set out detailed provisions concerning the conditions of administrative detainees covering many of the same points as the Convention. If fully implemented these provide for quite different treatment for administrative detainees from other detainees and prisoners, the following being a summary of some of the main points relating to the detainee:

(i) He shall not be placed with other prisoners detained or sentenced in the normal criminal process;

(ii) He may only be ordered to be held in solitary confinement if the commander is convinced this is necessary for reasons of the security of the area, the maintenance of discipline, to

safeguard the detainee, or at the detainee's own request; such an order must be reviewed at least every two months;

(iii) He has the right to wear his own clothes, unless contrary to proper order or health;

(iv) He shall have the same meals as the prison guards, not the other prisoners and shall be allowed to purchase food from the canteen, if any;

(v) He shall be medically examined at least once a month and whenever else necessary;

(vi) He shall go out for exercise for two hours each day, under the open sky;

(vii) He may receive washing and other hygienic items, any newspapers and books approved by the commander of the prison, and up to 400 cigarettes a month from outside, and may keep items required for religious worship;

(viii) He may be allowed to work for his own benefit;

(ix) He must make his own bed and keep his sleeping place clean (this provision presumably implies that he is to have a bed, and indeed the Fourth Geneva Convention provides that the detainee is to have sufficiently spacious and well-ventilated sleeping quarters and suitable bedding and blankets);

(x) He is entitled to 1/2 hour visits every two weeks from close family members and from any other relative at the prison commander's discretion; the prison commander may also permit 'special' visits or more frequent visits at his discretion;

(xi) He is entitled to see his own lawyer on request, such visit to be arranged as soon as possible, but the prison commander may suspend such visits for up to 15 days for reason of the security of the area.

(xii) He may send up to 4 letters and 4

postcards a month, excluding those to his lawyer and to the military authorities, and may receive unlimited mail through the prison commander, although the commander retains the right to prohibit receipt or sending of mail if necessary for the security of the area.

(xiii) Most importantly, Article 19 provides that the detainee must be informed of these regulations as soon as possible after his internment and he is entitled to see and take a copy of them.

It should be noted that while some of these provisions are subject to the discretion of the Prison Commander and others can be suspended for security reasons, many are mandatory under all circumstances.

Since the regulations were issued only as administrative detention was being phased out in 1982 it is too early to assess fully their effect. Initial indications were that many provisions were not being implemented, as the case of Ziad Abu 'Ein illustrates.

The detainee Ziad Abu 'Ein's lawyer, Jonathan Kuttab, visited him in Hebron prison where he was being held, seven days after his initial detention. He reports that when he spoke of the regulations he found that Abu 'Ein had no knowledge of them and on going into further detail it was clear that few of the regulations concerned with differentiating between administrative detainees and ordinary prisoners were being observed, other than his being kept isolated from other such prisoners.

Abu 'Ein was indeed being kept apart from other prisoners of different status, but since there were no other administrative detainees in the prison he was in effect being held in solitary confinement at the time of writing. This situation was quite unnecessary since it would require little effort to transfer either him or one or

more of the other detainees in the West Bank to ensure that none were confined alone.

His living accomodation was a cell without a bed or any other comforts. His food was the same as that given to other prisoners, not as that provided to the jailers as required by the regulations. Far from being allowed to exercise in the open air for 2 hours daily, he was permitted one hour of exercise per day inside. Neither he nor his family were informed of the special provisions entitling them to supply him with items from outside.

Mr Kuttab states that he asked the prison guards why these provisions had not been complied with and was told that it was "for security reasons". When he pointed out that many of these provisions are mandatory and cannot be suspended, they referred him to the Prison Commander. When he asked the Prison Commander why Abu 'Ein had not been shown a copy of the regulations and why they were not being complied with and asked him to rectify the situation, he was told to write to the Prison Services Authorities, the central body in charge of prisons conditions. This he did, and at the time of writing he is still awaiting a reply.

The initial failure to implement the new conditions may however be in part due to bureaucratic failure to communicate the new regulations to the prison authorities. Some of those more recently detained report that their conditions are now better than those of other detainees. They do now have two hours or more of exercise daily; they have been allowed to receive clothes from their families, though some bedding sent by families has been returned; fortnightly visits are allowed, but the detainee is always closely attended by guards and separated from his visitors by bars; medicine may not be brought in, but families are requested to provide a medical certificate if they think medicine is required and

this will be considered by the prison doctor; the food provided is still that given to other prisoners not that provided to the guards. Since there are now large numbers of administrative detainees they are not in general being kept in solitary confinement, but Ziad Abu 'Ein remains isolated.

Although conditions thus seem to have improved to some extent, the generally punitive attitude of the authorities to the administrative detainee is illustrated by their reaction to a request made on compassionate grounds to the authorities by Ziad Abu 'Ein's family. On Abu 'Ein's re-arrest his mother suffered a major stroke and was admitted to hospital. While she was still conscious but in a rapidly worsening condition Abu 'Ein's brother asked permission for Ziad to be allowed to visit her in hospital. This request was rejected. A repeated request for a visit, as his mother went into a coma, was under study for about three days until she finally died. An urgent appeal for permission for Ziad to attend the funeral was supposedly granted, but despite this Ziad was never in fact released from the prison for the funeral.

It is clear that the practical problems in escorting a single prisoner to hospital for such a visit or to a funeral does not present insurmountable obstacles, and in the light of the claim that Israel regrets impinging on the freedom of the individual the decision seems extraordinary and even vindictive. Furthermore it contrasts strangely with the treatment accorded to the accused in the Jewish terrorist trials in 1984/5, who were charged with serious criminal offences. One of the accused was released to attend his son's Bar Mitzvah ceremony, while another was allowed out for the Rosh Hashana festival and several were taken for a swim by their guards after a court hearing.

The initial impression is that some administrative detainees are now receiving better treatment than that accorded to other prisoners. Some provisions specified in the military regulations remain to be implemented however, and at least one detainee, and possibly more, are effectively suffering the punitive measure of solitary confinement, possibly over a long period of time, and that in a situation where the detainee knows of no limit to the duration of his imprisonment.

CONCLUSION

Administrative detention was described by the then Attorney-General, Yitzhak Zamir, as "an exceptional measure of great severity because of its harsh impact on the freedom of the person". He added that the decision to implement it was arrived at as a result of balancing "the need to defend state and public security and the need to respect the freedom of the individual person" (34).

In this report an attempt has been made to assess whether the reintroduction of administrative detention to the West Bank is justified in the light of that balance, and whether, in view of the admitted severity of the measure, the detainee's interests are adequately safeguarded by the military orders in force in the West Bank. These questions were considered in the light of local and international law.

Although Article 78 of the Fourth Geneva Convention authorises the use of administrative detention in limited circumstances, Article 6 of the Convention provides that this article shall cease to apply one year after the general close of military operations. It is argued that this article cannot therefore be used to justify the

use of administrative detention in the West Bank where the occupation is in its 19th year.

Even where the Fourth Geneva Convention permits administrative detention it can only be imposed for 'imperative reasons of security' and this is echoed in the Military Orders in force in the West Bank, which authorise it only when required 'for reason of the security of the area or public security'. In addition both courts and Israeli sources concerned with implementing the law have repeatedly stated that it is to be used only as a preventative, not as a punitive measure.

Israel does undoubtedly have a security problem arising out of its occupation of the West Bank, but, as admitted by the Israeli Vice-Premier, the present level of unrest is by no means the worst in Israel's history. Acts of resistance during the 1982 invasion of Lebanon were much greater but far from making use of such stringent measures, the use of administrative detention was actually phased out. On the other hand the pressure on the Israeli government from settlers to take repressive measures against the Palestinian inhabitants of the territories is ever-increasing. It seems likely that it is at least partly in response to these demands that administrative detention has been reintroduced, and not to satisfy immediate imperative security needs. If this is so, however expedient a measure it be, it is not justifiable in international law.

The review procedure provided by the military orders appears on the face of it to provide considerable opportunity for the detainee to challenge the order, but there are many features which together combine to render the review in most cases little more than a formality.

The detainee is faced throughout the proceedings by 'security reasons' behind which he cannot look, and which he is effectively unable to challenge. Security reasons justify his initial

detention; it is security reasons which justify the refusal to allow him to see the evidence, and which justify also the refusal to allow him to examine the informant or even to know the nature of the evidence against him; it is also security reasons which allow the judge to vary the rules of evidence, and security reasons allow the detainee's exclusion from the court. Finally it is presumably security reasons that dictate the inevitable secrecy of the session and of the proceedings so that the need for security cannot be assessed by others.

Despite the disadvantages suffered by the detainee, the burden of proof is on him to prove that the order is not required for reasons of public security or the security of the area, both in the review session and on appeal. The Area Commander is not required to prove that the order is justified. The detainee and his lawyer are thus set the task of shadow-boxing, arguing against an order while knowing only rudimentary details of the information which is before the judge and on which he will base his decision.

The judges charged with reviewing the order and hearing any appeal are not only not independent, being military officers themselves, but are actually officers of a lower rank than the Area Commander who issues the orders. They are thus placed in the unenviable position of having to assess the actions of their military superiors; it can be surmised that many an officer would wish to avoid having to say that his superior officer had misjudged the security situation, and indeed it is indicative that to date not one of the 62 orders of administrative detention made since its reintroduction has been reversed on review.

In any case, as explained above, decisions of the High Court have strictly limited the scope of the review, most importantly by stating that the review court may not substitute its own

considerations for those of the issuing authority. The review judge is thus limited in effect to considering whether there is a technical flaw in the order or whether the reasons for which it was issued are prima facie improper, and the power is left substantially in the hands of one individual, the Area Commander.

Finally, there is no public scrutiny of the proceedings since all hearings must be held in closed session. Such lack of public accountability, especially as a routine measure, gives dangerous opportunity for abuse of the process. The lawyer himself is forced to choose between participating in lending an appearance of judicial respectability to these proceedings and leaving his client without representation; the path which is not open to him is to criticise in public the procedures followed by the court in any one case, since this would violate the secrecy imposed on him by the court.

Because of the secrecy of the proceedings it is generally impossible to say whether justice is done or not in any one case. Neverthless, what is very clear is firstly, that there exists considerable potential for abuse of the process by any one of the individuals involved at each stage, and secondly, that justice is most certainly not seen to be done.

Israel is jealous of its claim to be a democratic country, observant of the rule of law. The reintroduction of administrative detention and the inadequacy of the legal safeguards for those subject to these draconian orders makes this claim difficult to substantiate.

REFERENCES

1. Golda Meir, Moshe Dayan, and Meir Shamgar, the present President of the Israeli Supreme Court, were all held under administrative detention during the British Mandate.
2. Quoted by Dershowitz, Alan in 'Preventative Detention of Citizens during a National Emergency - A Comparison between Israel and the United States', Israeli Yearbook on Human Rights Vol.1 (1971) p.313.
3. Professor Y.H. Klinghoffer quoted by Alan Dershowitz in op.cit. p.314.
4. See explanatory memorandum issued on the tabling of the Emergency Powers (Detention) Law 5739-1979 before the Knesset: (1977/78) Hatzaot Hok (Bills of the State of Israel)(no.1360)294.
5. See National Lawyers Guild, 'Treatment of Palestinians in the Israeli-Occupied West Bank and Gaza', (New York, 1978) p.81/2 and Shtereet, Simon 'A Contemporary Model of Emergency Detention Laws: an Assessment of the Israeli Law', IYHR Vol.14 (1984) p.187 both of which cite numbers of those administratively detained at various dates obtained from different sources.
6. Military Order 378 Article 78.
7. See for example Amnesty International Report 1980 p. 339, the National Lawyers Guild, op.cit. p.79-82, UN General Assembly Resolution 36/147 C7(g) of 16.12.81 and UN Commission on Human Rights Resolution No. 1A,B, (XXXVII) of 11.2.81, as well as Israeli individuals such as the journalist and writer Amos Kenan and the lawyer Felicia Langer.
8. In October 1984 Amnesty International published a report entitled 'Town Arrest Orders in Israel and the Occupied Territories' in which they concluded that "Although town arrest orders may only be issued when they are deemed by the military authorities to be essential for reasons of security, Amnesty International believes that the curtailment of these people's freedom of movement is in many cases a punishment for their non-violent political activity. Amnesty International is also concerned that they are restricted without being formally charged or brought before a court of law."
9. Law in the Service of Man maintains a regularly updated list of all those subject to such restriction orders. See also a report by Amnesty International 'Town Arrest Orders in Israel and the Occupied Territories', (London, 1984).
10. On 20 May 1985 Israel released 1150 political prisoners in exchange for the release of 3 Israelis captured in Lebanon by the DFLP-GC.
11. MacDermot, Niall (Secretary-General of the International Commission of Jurists), Draft Intervention on Administrative Detention to the UN Commission of Human Rights, ICJ Newsletter No. 24, Jan/March 1985, p.53.
12. The General Assembly of the United Nations and most governments in the world, including that of the United States, hold that the Fourth Geneva Convention of 1949 Relative to the Protection of Civilian Persons in Time of War is applicable to the occupation of the West Bank. Israel however maintains that the Convention is not applicable to the occupation, but declares that it voluntarily observes the humanitarian provisions of the Convention.
13. Pictet, Jean, 'Commentary to the Fourth Geneva Convention', (ICRC, Geneva, 1958), p.367.
14. MacDermot, Niall, op. cit. p.52.
15. The Jerusalem Post, 6 September 1985.
16. See Shehadeh, Raja and Kuttab, Jonathan, 'The West Bank and the Rule of Law', (Geneva, 1980), p.24-5.

17. In the case of Al-Khouri v. the Chief of Staff, HC 94/49 4 P.D. 34A, 4b, an administrative detention order was rescinded solely because it did not specify the place of detention.
18. Hadar, Col. Zvi, 'Administrative Detention Employed by Israel', IYHR 1 (1971) p.285.
19. Zamir, op.cit. p.158-9.
20. Hadar, op.cit. p.285.
21. A.A.D. (Appeal Against Administrative Detention) 1/82, 36 (1) P.D.666.
22. supra p.669
23. A.A.D. 18/82
24. supra, note 10.
25. Article 85(1)(a) of the Defence (Emergency) Regulations 1945 makes it an offence to be a member of an illegal organization and Military Order 101 Article 7A makes incitement an offence. Both provisions are freely used by the military authorities to imprison youths in the occupied territories.
26. Regulations concerning Administrative Detention (Rules of Legal Trials and Dates for Presenting Appeals), 1981.
27. Israeli Section of the International Commission of Jurists, 'The Rule of Law in the Areas Administered by Israel', (Jerusalem 1981), p.73.
28. A.A.D. 1/80 35(2) P.D.253.
29. ibid p.258.
30. Klinghoffer, Prof.Y.H., 'Preventative Detention for Security Reasons' 11(2) Mishpatim (The Hebrew University of Jerusalem Law Review) 286 (Hebrew 1981).
31. supra, note 15.
32. HC 258/79, 34(1) PD 90
33. Pictet, Jean, op.cit. p.380.
34. Zamir, Itzhak (Israeli Attorney-General), Opinion on Administrative Detention, Israel Law Review, Vol.18, No 1, Winter 1983, pp.158-9.

MILITARY ORDER 378 - AN ORDER CONCERNING SECURITY REGULATIONS 1970 (extracts)

Chapter 5. Restriction and Surveillance Orders

Restriction on Exercise of Powers

Article 84 (a) No military commander may exercise his authority under Chapter 5 unless he believes that the order is necessary for imperative reasons of security.

Administrative Detention

Article 87 (a) If the area commander has reasonable cause to believe that reasons relating to the security of the area or public safety require that a particular person be detained he may, by order under his hand, direct that such person be detained for a period stated in the order, provided that it shall not exceed six months.

(b) If the area commander has a basis for believing at the end of the period stated in the order issued according to sub-paragraph (a) (hereafter 'the original detention order'), that reasons related to the security of the area or public safety continue to require the detention of that person, he may, by order signed under his hand, order from time to time the extension of the period of the original detention order for a period not exceeding six months, and the extension order shall be considered for all purposes as the original detention order.

(c) If any military commander who is a district commander has reasonable grounds for believing that the conditions under which an area commander may order the detention of a person under sub-paragraph (a) are in existence he may by order signed under his name order the detention of that person for a period not exceeding 96 hours,

which cannot be extended except by an order of a military commander.

(d) An order under this article may be issued in the absence of the person to whose detention it relates.

Execution

Article 87A The detention order under this chapter may be executed by a soldier or a policeman and shall serve as a document for the confinement of the detainee in the place of detention specified in the order or in any subsequent order.

Judicial Supervision of the Detention Order

Article 87B (a) If a person is arrested according to an order issued by an area commander under this chapter, he shall be brought within 96 hours of his arrest, and if he was immediately before that time under detention by virtue of an order issued by a military commander who is a district commander, then within 96 hours of his arrest according to the order of the military commander who is a district commander, before a legally-qualified judge as defined in Article 3(c)(i) of this order and such a judge may confirm the detention, revoke it or reduce the period of detention stipulated, and if the detainee is not brought before the legally-qualified judge and he does not begin to deliberate on the matter during the said 96 hours he shall be released unless there is other reason for his detention under any law or security legislation.

(b) The legally-qualified judge shall cancel the detention order if it is proven to him that the reasons for which the order was issued were not objective reasons relating to the security of the area or the public safety or that the order was not issued in good faith, or that it was issued for irrelevant considerations.

Periodic Review

Article 87C After the confirmation of the arrest order issued under this chapter with or without any charges being made thereto, as long as the detained person has not been released the legally-qualified judge shall review his detention within a period not exceeding three months from the confirmation of his arrest under Article 87B or after the issuance of the decision according to this Article or during a shorter period specified by the legally-qualified judge in his decision and if the review before the judge is not initiated during the said period such detainee shall be released unless there is another reason for his arrest under any law or security legislation.

Deviation from the Rules of Evidence

Article 87D (a) In the proceedings taken under Articles 87B and 87C, it shall be permitted to deviate from the rules of evidence if the legally-qualified judge is convinced that such a deviation is useful for the purposes of revealing the truth and achieving justice.

(b) If it is decided to deviate from the rules of evidence the reasons for such deviation shall be recorded.

(c) In proceedings taken under Article 87B and 87C, the legally-qualified judge may accept evidence even in the absence of the detainee or his attorney, or without revealingsuch evidence to them, after he has examined the evidence or heard contentions even in the absence of the detainee or his attorney and was convinced that revealing such evidence to the detainee or his attorney is likely to harm the security of the area or the public safety. This text shall not reduce or derogate from the right not to present evidence under Article 9A of this order.

Appeal

Article 87E (a) The decision of the legally-qualified judge to confirm the detention order, with or without introducing any amendments to it or cancelling it, and also his decision under Article 87C, shall be subject to appeal to the president of the court, as defined in Article 3C or before a president appointed under Article 3C(ii), and the president of the court or the delegated president shall have all the authorities of the legally-qualified judge under this article.

(b) An appeal does not delay the execution of the order unless the legally-qualified judge or the president of the court determine otherwise.

(c) The detainee may be present in all the proceedings under Article 87 and 87C to 87E, taking into consideration the provisions of Article 87D(c).

Secrecy of Proceedings

Article 87F Proceedings under this chapter shall take place behind closed doors and in secret.

Rules of Proceedings

Article 87G The area commander may issue regulations for carrying out this chapter, including regulations regarding the rules of procedure for any proceeding under this chapter, the date for presenting an appeal, and any other action undertaken under this chapter.

Non-delegation of Powers

Article 87H The powers given to the area commander under this chapter may not be delegated.

Article 87J The text of Articles 87H shall not derogate from the authority of the area commander to cancel any detention or order issued under these articles whether before it is confirmed under Article 87B or thereafter.

ORDER CONCERNING SECURITY REGULATIONS 1970

REGULATIONS CONCERNING ADMINISTRATIVE DETENTION (TERMS OF CONFINEMENT IN ADMINISTRATIVE DETENTION)

According to the authority vested in me in article 87G of the Order Concerning Security Regulations for the year 1970 I hereby issue as follows:

Definitions

1. In these regulations:

"The commander" - as defined in the order concerning the operation of prison institutions (West Bank) (Number 29) for the year 1967.

"The commander of a military institution" - hereafter

"military institution" - when the detainee is held in a military institution.

"The place of detention" - the place stipulated as the place of detention for the detainee in the detention order issued under the order.

"The detainee" - the person detained under the order.

Isolation

2. The detained person shall be isolated in the place of detention from others who have been sentenced or are being detained pending trial.

Solitary Confinement

3. (a) The commander may order that a detained person be held in isolated confinement if he was convinced that that is necessary for reasons required by the security of the area or the maintenance of discipline in the prison or the safeguarding of the health or safety of the detained person or of other detainees.

(b) The commander may also, at his discretion, order the detention of the person in solitary

confinement based upon his own request.

(c) If the commander orders that the detained person be held in solitary confinement he must reconsider this order at least once every two months, or before that if he is requested to do so by the detained person and he finds that there is reason for the reconsideration.

(d) After a detained person has been kept in solitary confinement for a period exceeding three months he shall have the right to object before the commander of the area to the last decision taken by the commander for his solitary confinement, and in such a case the commander of the area may, at his own discretion either order the continuation of the solitary confinement or its cancellation.

(e) The commander shall not order the solitary confinement of a detainee for a period exceeding six months except after obtaining a confirmation from the commander of the area.

Clothing

4. (a) The detainee may not wear any badges or symbols other than those used for religious purposes. Such items must be made of material and be of a size that is reasonable and common.

(b) The detainee shall not wear any official uniform.

(c) The detainee has the right to wear his private clothes in prison unless there is something in them that is contrary to proper order or health.

(d) A person who is detained in a military compound shall wear the clothes that are given to him by the commander.

Receiving Clothes and Foodstuffs

5. (a) A person detained in a prison shall be given the meals that are offered to the jailers there.

(b) If there is a canteen in the place of

detention the commander may permit the detainee to buy his materials from there.

(c) Food shall not be prepared for the detainee in a manner other than is provided in this article except with permission from the commander.

Medical Examination and Care

6. (a) The detainee shall be examined once a month by the doctor who is appointed by the commander and also at any other time when it is necessary.

(b) The detainee has the right to receive medical care and medical items that are necessitated by his medical condition.

(c) If the doctor determines that the health of the detainee or his life is in danger and the detainee refuses to receive the care which is decided on by the doctor the necessary force may be used to carry out the doctor's instructions in the presence of the doctor.

Exercise

7. (a) The detainee shall go out to exercise under the open sky for a period of not less than two hours daily. However the commander may, based on the request of the detainee, relieve him of the obligation to go out for exercise if he finds that there is a reasonable reason for that.

(b) The commander may order that the person not go out for exercise for a period not to exceed three consecutive days at a time, if he is convinced that that is necessary for reasons dictated by the security of the area or the discipline in the prison or the care for the safety or health of the detained person.

(c) The commander shall specify the manner of the exercise.

The Right to Receive Personal Possessions

8. (a) The detainee may receive from the commander personal items from the items that he deposited

when he entered the prison, if he needs to use them. There is also a right to receive bathing and hygienic equipment which is necessary for his use provided that it shall not consist of items which it is prohibited to possess in prison.

(b) The detained person shall have the right to keep with him a Bible, Qur'an or New Testament or whatever he needs of worship material to carry out ceremonies of worship according to his religion.

(c) The detainee shall be permitted to receive the newspapers and books which are approved by the commander for reading.

Work

9.(a) The commander may according to his discretion and based on the request of the detainee, permit him to carry out the work which is specified in the permit within the premises of the place of detention in return for pay. The commander may also permit him to carry out any other work for his own private benefit.

(b) The detainee must arrange his own bed and keep it clean and the room in which he is in order, but beyond that he shall be exempted from the obligation to do any work.

Receiving Cigarettes

10.(a) The detainee who has proven to the commander that he is a habitual smoker shall have a share of cigarettes equal to that usually given to prisoners in the prison.

(b) The detainee may receive from a person outside the prison an amount of cigarettes not exceeding 400 cigarettes a month if he has convinced the commander that he is a habitual smoker.

(c) If the commander is convinced that the detainee is using the cigarettes in a manner which infringes upon discipline, he may deny him or limit his right to receive cigarettes.

Visits to the Detainee

11. (a) The detainee shall have the right to be visited in the place that is specified by the commander for a period of half an hour as follows:

(i) one visit to members of his family once every two weeks; members of his family in this article shall include any of his parents, grandparents, spouse, siblings and children

(ii) a visit from a person in any other degree of consanguinity or any visitor to whom Article 12 applies - by means of a special permission given by the commander according at his discretion.

(b) The commander may, at his discretion, permit visitors mentioned in Article (a)(i) to conduct a special visit or more frequent visits to a particular detainee.

(c) The number of visitors during a single visit, other than the spouse and the children shall not exceed three except by special permission given by the commander at his discretion.

(d) Despite what is mentioned in subparagraph (a), the commander may prohibit visitors generally or prohibit a particular visitor from visiting a particular detainee if he is convinced that that is necessary for reasons required by the security of the area. And in this case the prohibition shall be relayed to the detained person and if the prohibition shall exceed 2 months, the detained person may appeal that decision before the commander of the area who shall have the right to confirm the prohibition, limit it or cancel it.

(e) If the commander prohibits visits according to subpara graph (d) he shall reconsider such an order at least once every 2 months, or if the detained person or the visitor requests that he shall reconsider this decision at an earlier time and the commander finds that there is reason for such reconsideration.

(f) Nothing in this article shall derogate

from the text of article 12 concerning visits by a lawyer to the detained person.

Visits to a Detainee by a Lawyer

12. (a) If the detained person asks to meet a lawyer to conduct his legal affairs, the commander must permit that as soon as possible and in the place that is appointed by him.

(b) The commander, with the approval of the area commander may prohibit any meeting with the lawyer for a period not exceeding 15 days if he is convinced that there are reasons of the security of the area that require such a prohibition.

(c) The provisions of Article 13 shall not apply to a visit by a lawyer under this article.

Presence During a Visit to the Detainee

13. (a) Any person delegated by the commander shall be present throughout the visit if the commander is convinced of the necessity of his presence for reasons required by the security of the area, public safety, or security in the prison.

(b) A person who is so authorized, may halt the conversation of the visitor with the detained person if he is convinced that such conversation must be interrupted for reasons required by the safety of the area, public safety or security in the prisons and he may take all other reasonable measures to prevent any harm to them occasioned by the visit.

(c) The detained person may present an appeal against the interruption of his conversation to the commander who may, at his discretion, decide whether to permit the continuation of the conversation or its termination.

Letters

14. (a) A letter under this article shall mean

anything written or typed or drawn, or calligraphy, or the use of any other means to transmit numbers, words or figures.

(b) The detained person shall not issue or receive any letter except through the commander.

(c) The detained person may send four letters and four postcards every month to a person outside the prison and he may send them more frequently by a permission issued by the commander at his discretion.

(d) The number of letters mentioned in subparagraph (a) shall not include letters sent by the detainee to the authorities of the area command, the authorities of the State of Israel or to his lawyer.

(e) Despite what is written in subparagraph (a) the detained person may not send the books and newspapers which he has received to outside the prison except by permission given by the commander at his discretion.

(f) The detained person may receive letters sent to him from outside the prison.

(g) The commander may exercise censorship over the letters.

(h) The commander may prohibit the sending of any letter, all of it or part of it, by the detained person, or his reception of it if he is convinced that the security of the area so requires and he may do with the letter whose sending or reception he has prevented, as he deems fit.

(j) The commander may refrain from informing the detainee that he has failed to send or deliver to him a letter if he is convinced that the security of the area requires it, except for a letter that is sent to or from one of his relatives mentioned in Article 11(a)(i).

(k) The provisions of subparagraphs (g)(h)and (j) shall not apply to letters sent to the lawyer who is the legal representative of the detainee

verified under Article 12(a).

Prohibition on Receiving or Paying Money

15. The detained person may not receive or pay to others any sum of money except by a special permission from the commander who may give it at his total discretion.

Crimes in Prison

16. Any detainee who commits one of the following actions shall be considered to have committed a crime in his place of detention:

(i) if he carries out any action against the proper discipline and the orderliness of the prison.

(ii) if he has refused to obey a legal order issued by a guard or some other person acting on behalf of the commander.

(iii) if he contacts in writing, verbally or in any other way a person outside the prison, contrary to these regulations.

In that case the commander may impose a punishment of solitary confinement for 14 days.

Escape from Lawful Detention

17. If the detained person has escaped or conspired to escape, or assisted another to escape, the commander may impose upon him the punishment of solitary confinement for a period not exceeding one month. However this article shall not derogate from the provisions of any other law or security regulation.

Delegation of Authority

18. The commander of the area may delegate in writing his authority under these regulations with respect to a particular matter except his authority under Article 3.

The Right to Know

19. (a) As soon as possible after a detained person is brought to a prison he shall be informed of the contents of these regulations.

(b) The detained person may see these regulations and copy them at any reasonable time based upon his request.

Date of Commencement

20. These regulations shall commence 60 days after they have been signed.

The Title

21. These regulations shall be entitled Regulations Concerning Administrative Detention (Conditions of Detention) (West Bank) 1982.

Issued on 31/1/1982

Benyamin Ben Eliezer
Area Commander

LSM PUBLICATIONS

Bi-monthly NEWSLETTERS

JNAID: The New Israeli Prison in Nablus: An Appraisal, LSM 1984. 1.00 A,E

ISRAELI PROPOSED ROAD PLAN FOR THE WEST BANK: A Question for the International Court of Justice by A.,F.and R.Shehadeh including Report of Assessment of Damage by A.Masri and T.Jabbarin. LSM, 1984. 3.00 A,E,F

TORTURE AND INTIMIDATION IN THE WEST BANK The Case of Al-Fara'a Prison. The International Commission of Jurists and LSM, 1985. French available from the International Centre on Palestinian and Lebanese Prisoners, Deportees and Missing Persons, Paris. 3.00 A 4.00 E

"THE LEGAL SYSTEM OF ISRAELI SETTLEMENTS IN THE WEST BANK" by Raja Shehadeh, 'Review' International Commission of Jurists, December 1981, No.27, pp 59-74. 1.00 E

"THE LEGAL STATUS OF THE OCCUPIED TERRITORIES" by Raja Shehadeh. Hawliat Siasieh, Spring 1982 pp. 51-73. 1.00 A

THE WEST BANK AND THE RULE OF LAW by Raja Shehadeh and Jonathan Kuttab. LSM, 1980. 3.00 A English version available on microfiche from the Inter-Documentation Centre, Poststrasse 14, 6300 Zug, Switzerland. French version available from Sycamore Press,Paris.

ANALYSIS OF MILITARY ORDER NO.854 AND RELATED ORDERS CONCERNING EDUCATIONAL INSTITUTIONS IN THE OCCUPIED WEST BANK by Jonathan Kuttab. LSM, 1981. 1.00 A,E

CIVILIAN ADMINISTRATION IN THE OCCUPIED WEST BANK: ANALYSIS OF ISRAELI MILITARY GOVERNMENT ORDER NO.947 by Raja Shehadeh and Jonathan Kuttab. LSM, 1982. 3.00 A,E

ADMINISTRATIVE DETENTION IN THE OCCUPIED WEST BANK by Emma Playfair. LSM, 1985. French photocopy available from LSM or the Paris Centre. 5.00 E

IN THEIR OWN WORDS: Human Rights Violations in the West Bank. Affidavits collected by LSM. Commission of the Churches on International Affairs, World Council of Churches, Geneva, 1983. 4.00 E

"ANALYSIS OF LEGAL STRUCTURE OF ISRAELI SETTLEMENTS IN THE WEST BANK" by Raja Shehadeh. From Palestinian Rights: Affirmation and Denial edited by Ibrahim Abu-Lughod. Medina Press, Illinois, 1982. 1.00 E

"THE CHANGING JURIDICAL STATUS OF PALESTINIAN AREAS UNDER OCCUPATION" by Raja Shehadeh. From Occupation: Israel Over Palestine edited by Naseer H. Aruri, Association of Arab-American University Graduates, Massachusetts, 1983. 1.00 E

"THE ACQUISITION OF PROPERTY IN THE WEST BANK" by Jonathan Kuttab. Translated from Le Monde Diplomatique, 1983. 1.00 E

"THE LAND LAW OF PALESTINE": An Analysis of the Definition of State Lands" by Raja Shehadeh. From Journal of Palestine Studies, X1:No.2, Winter 1982, pp82-99. 1.00 E

RULE OF LAW AND HUMAN RIGHTS. First published by The International Commission of Jurists, 1966. Arabic translation for LSM by Wadi' S. Khoury, 1985. 3.00 A

PALESTINE, THE LEGAL BACKGROUND. A collection of sources published on microfiche from the collection of LSM available from IDC, Poststrasse 14, 6300 Zug, Switzerland.

Availibility: A-Arabic, E-English, F-French

Occasional Paper No.1

ADMINISTRATIVE DETENTION IN THE OCCUPIED WEST BANK

This paper examines the legality of the use of administrative detention against Palestinians in the occupied West Bank by the Israeli military authorities, in the light of international and local law.

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Law in the Service of Man, P.O.Box 1413, Ramallah, West Bank, via Israel (tel. 02-952421).

EXCESSIVE SECRECY, LACK OF GUIDELINES

A REPORT ON MILITARY CENSORSHIP IN THE WEST BANK

Israel's
West
Bank

by Virgil Falloon

AL – HAQ
LAW IN THE SERVICE OF MAN

West Bank affiliate of the
International Commission of Jurists

EXCESSIVE SECRECY, LACK OF GUIDELINES

A REPORT ON MILITARY CENSORSHIP IN THE WEST BANK

Second Issue

(Appending related correspondence)

by Virgil Falloon

Virgil Falloon was a legal research volunteer with AL–HAQ Law in the Service of Man.

AL–HAQ/ LAW IN THE SERVICE OF MAN

West Bank affiliate of the International Commission of Jurists

P.O.Box 1413 Ramallah, West Bank, Via Israel.

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PREFACE TO THE SECOND ISSUE

The following article by Virgil Falloon, "Excessive Secrecy, Lack of Guidelines: A Report on Military Censorship in the West Bank", first appeared in the August 1984 issue of the London-based Index on Censorship. LSM/al-Haq published a reprint of this article in January 1985, and made it available to its associates. Al-Haq has now decided to reprint once more the article since the topic is still as current as it was in the Summer of 1984. It will be necessary, however, to provide the reader with a short update of the situation, since the Israeli authorities introduced some changes in the prevailing law regarding censorship at the beginning of 1985, and again in June 1986.

On 21 April 1985, the Chief Censor of the military government of the West Bank announced that a change had been made in Military Order No. 101 of 1967, the "Order Regarding Prohibition of Acts of Incitement and Hostile Propaganda." In this amendment, Amendment No. 69 (the "Order Regarding Prohibited Publications"), the Chief Censor authorized a reduction of the existing list of publications (issued in 1977) that are explicitly banned in the West Bank, from over 1,000 down to 350 titles.

What are the implications of this reduction? It is al-Haq's perception that, first, the new list does in fact constitute a reduction of the hitherto existing list of publications banned in the West Bank, but, secondly, that this is not a complete list of prohibited publications. As Virgil Falloon pointed out in the article, the Israeli military authorities have made it "illegal to possess any publication in the West Bank without a permit regardless of whether or not the publication is contained in the prohibited publications list." The relevance of the list that existed before April 1985 is merely that no publications contained in that list could receive a permit. The significance of the updated Israeli list of 1985 is that the number of books for which no permit can be obtained has been reduced.

But this is beside the point. The real issue is one of selective enforcement, of requiring a permit for publications not appearing on the list when this is convenient to the military authorities. Al-Haq has documented several cases where West Bank Palestinians were arrested and prosecuted after April 1985 for possession of books which do not appear on the updated list. They are said to have violated the law for the simple reason that they had failed to obtain a permit for these books, which included in one case "It Is Your Right To Remain Silent" by Lea Tsemel (in Arabic), and the historical work "Palestine Between Mandate and Zionism, 1917-1948" by 'Issa Siferi. In this particular case, the authorities searched the house of a Palestinian villager, and when they could not find what they appeared to have been looking for, they took the villager and confiscated a number of the books he had in his house. He was then interrogated about activities which stood in no relation to the books, but was subsequently tried and sentenced to prison for the period of pre-trial detention on the charge of possessing illegal publications. From this and similar cases it seems that the Israeli authorities apply the censorship regulations arbitrarily, at times detaining Palestinians, about whom they may have certain suspicions but against whom they have no evidence, merely on the basis of their possessing books for which they do not have a permit, i.e. in all likelihood all the books in their possession.

In addition, it now appears to al-Haq that in fact a growing number of West Bank Palestinians are being subjected to prosecution under Military Order No. 101, but in the majority of cases not for their possession of books, but for possession of magazines and newspapers - even those published in East Jerusalem, which are fully legal there.

In June 1986, the list of banned publications was again increased to include sixty-seven new titles. Military Order 101 was adjusted through Amendments 70-76 to ban such books as "An Arab in Israel" (in Arabic) by Fawzi al-Asmar, "The Daboia Operation in the Words of Those Who Carried it Out" (Arabic) by Jerusalem lawyer Darwish Naser who defended the accused in

court, collections of poems by Mahmoud Darwish, as well as the introductions to the Arabic editions of Ezer Weizman's "The War for Peace" and Aluph Hareven's "Is There a Solution for the Palestinian Problem?", and the entire fourteen volumes of the "Palestinian Encyclopedia", edited by Ahmed al-Mar'ashali.

In light of the above, Al-Haq came to the conclusion that Israel's policy of censorship in the occupied West Bank has remained substantially unaltered. It was therefore decided to carry out a second printing of Virgil Falloon's article, including the correspondence that ensued in the pages of the Jewish Chronicle (London) following the publication of Mr. Falloon's article in Index on Censorship. There is appended one letter sent by al-Haq to the editor of Index on Censorship which has not previously been published, to respond in detail to some of the charges made in the Jewish Chronicle.

Al-Haq hopes that the following article will serve as a resource for those who oppose censorship, in the Occupied Territories or anywhere else in the world.

Al-Haq
Ramallah, November 1986

INTRODUCTION

An expanding collection of military orders has governed the West Bank since the Israeli Defense Forces assumed control of the area following the 1967 Israeli-Arab War. Among them are a number of military orders that institute an extensive and complex system of censorship. Taken together, the orders cover most methods of expressing or communicating ideas, giving Israeli military censors restrictive control over all publications which they consider to have any political meaning. Israeli soldiers have been granted broad warrantless search and arrest powers to uphold these orders. These military orders instituting censorship in the West Bank are part of a more comprehensive system of censorship that also includes a corpus of pre-1967 censorship law still enforced within the West Bank as well as within Israel proper and annexed East Jerusalem. While this system of censorship applies to all forms of public expression, its most commonplace application is in restricting the publication and distribution of printed material.

This article outlines the practice of censorship as applied to importing, distributing, publishing, and possessing printed materials in the West Bank. While the international community holds East Jerusalem to be part of the occupied West Bank, Israel has unilaterally extended Israeli law to East Jerusalem. This situation necessitates a brief introduction of the distinct system of censorship applied in East Jerusalem and Israel, where the offices of all of the West Bank's licensed Arabic-language newspapers are in fact located and where most other publications directed to the West Bank readership originate. Censorship practices with regard to other forms of public expression, including assemblies, demonstrations, strikes, plays, music, and art demand a separate discussion.

I. CENSORSHIP IN ISRAEL AND ANNEXED EAST JERUSALEM

Current censorship practices in Israel and annexed Jerusalem are based on the 1945 mandatory British Defense (Emergency) Regulations (hereafter, the Regulations). The Regulations were enacted on the termination of World War II by the British Mandatory Government of Palestine "in order to safeguard public security, the defense of Palestine, the preservation of public order and the suppression of uprisings, rebellions and disturbances."(1) They have been incorporated into Israeli law and are applicable throughout Israel and annexed Jerusalem.

Part 8 of the Regulations (Articles 86-101) serves as the legal basis for the institution of censorship. Article 88 provides in part:

> (1) The censor may by order prohibit the importation or exportation or the printing or publishing of any publication (which prohibition shall be deemed to extend to any copy or portion of such publication or of issue or number thereof), the importation, exportation, printing or publishing of which, in his opinion, would be or be likely to be or become, prejudicial for the defense of Palestine or to the public safety or to public order.
>
> (2) Any person who contravenes any order under this regulation and the proprietor and editor of the publication, in relation to which the contravention occurs, and any person (unless in the opinion of the court he ought fairly to be excused) who has in his possession or his control or in premises of which he is the occupier, any publication prohibited under this regulation or who posts, delivers or receives any such prohibition, shall be guilty of an offense against these regulations.

Articles 94-100 of the Regulations govern the publication of newspapers. Both Arab and Israeli newspapers published in Israel and East Jerusalem are subject to these regulations despite repeated attempts by some Knesset members to have these regulations repealed. Permits to publish and pre-publication censorship are the most significant subjects of the articles. Requiring a permit to publish is highly contested by both Israelis and Palestinians as a prior restraint on the press. Secrecy continues to surround the criteria used in granting or denying permits to publish despite appeals to the Israeli High Court to have the criteria revealed. Pre-publication censorship manifests a distinctly different set of standards for the Arab press.

Article 94 forbids printing or publishing any newspaper without a permit. A permit to publish may be granted, refused, or revoked by the District Commissioner at any time without giving a cause or explanation. The Israeli High Court upheld the "no cause" rule in October 1982 when Dr. Najwa Makhoul petitioned the Court to require the Jerusalem District Commissioner to show cause why he had refused to grant her a permit to publish an Arabic weekly.(2)

Article 97 grants the censor the power to review materials before publication. A Chief Censor and a number of other censors under his direction have been appointed and authorized to censor materials submitted to them.

Each night, the Arab newspapers published in Jerusalem must submit to the Israeli censor at the Government Press Building in Beit Agron two copies of every news article they intend to print the following day. This includes sports news, advertisements, comics, obituaries, announcements, and weather reports. Feature articles that could appear at a later date may be submitted to the censor during regular office hours. The newspapers may pick up the reviewed materials before midnight. In the event a late news item appears, after midnight or during a Jewish holiday when the censorship office is closed, the item may be cleared for publication the following day by calling the censor at his home.

Israeli newspapers, right and left alike, are not subject to the same strict censorship that Arab newspapers must undergo. In an agreement worked out with the Chief Censor and the Committee of Editors of Daily Newspapers, Hebrew language newspapers and the Israeli English daily, The Jerusalem Post, are only required to submit articles about "military security" matters. Other news, political commentaries, and feature stories are not sent to the censor.

Entire news articles from the East Jerusalem Arabic-language press are commonly stricken by the censor. News articles of events in the West Bank that do appear in the Arabic-language newspapers frequently have details expunged. Curfews, strikes, protests, Israeli seizure of water supplies, settler violence against West Bank Arabs, and police brutality are typical of the stories that are reduced to a single paragraph simply recognizing that the event took place.

On the other hand, the Israeli press freely publishes news about the West Bank without having to clear the stories through the censor. In light of this, Arab journalists often supply Israeli journalists with daily reports of events on the West Bank. News of the West Bank published in the Hebrew-language newspapers or in the English-language Jerusalem Post may in turn be translated into Arabic and republished in Arabic-language newspapers at a later date. However, there is no guarantee that a story translated from the Hebrew-language press for publication in the Arabic-language press will pass the censor's editing.

Articles that are censored from the Arabic-language press may be challenged by appealing to the Chief Censor. In a few rare instances, the Chief Censor has allowed the articles in question to be published.

An internal appeals system has, however, been established to challenge any censoring of materials in the Hebrew-language press or in the Jerusalem Post. Under the appeal system, the article in question is discussed among the censors and the editors of the Israeli press, with the Chief of Staff of the

Israeli Defense Forces having the final say.

Article 100 empowers the Censor to prohibit the operation of a newspaper's printing press for any length of time. Unlike their Israeli counterparts, Arabic-language newspapers have been prohibited from printing their newspapers a number of times throughout the years as punishment for allegedly breaching the Chief Censor's directives.

II. CENSORSHIP UNDER WEST BANK MILITARY RULE

Following the 1967 War, the Commander of the Israeli Defense Forces adopted many of the Regulations in formulating the military orders instituting censorship in the West Bank. One group of orders affecting printed media restrict the import and distribution of publications originating outside the "enclosed area"(3) of the West Bank. Newspapers, books, and magazines published in occupied East Jerusalem as well as in Israel fall under these restrictions. Another group of orders restrict publishing within the "closed area" of the West Bank. Through one of the same military orders, the Commander granted himself, or anyone appointed by him, the powers of "Inspector" under the Regulations, effectively making Articles 86-101 of the Regulations applicable to the West Bank as well.

Typical of the whole corpus of Israel military legislation, the military orders concerning censorship incorporate preambles declaring the purpose of such orders to be the preservation of "public order and security." Despite this limited stated purpose, Israeli military censorship practices have aimed at suppressing unapproved comments, interpretations of events, and expressions of Palestinian national identity.

A. Importing Into and Distributing Within the West Bank

The most striking feature of the orders restricting the import and distribution of printed matter is the extreme breadth of the prohibition. No printed matter of any sort may legally be brought into the West Bank, whether as single copies for personal use or in bulk for public distribution, without the military government having first issued a permit for the specific printed matter in question.

Military Order No. 50, as originally enacted in 1967, forbids the import and distribution of newspapers into the West Bank without a permit from the "person responsible" who is appointed by the military commander of the area. To obtain a permit, the publication is first subjected to strict censorship through a special department of the military government. This permit must be renewed every three months. Palestinians importing and/or distributing any publication in the West Bank without a permit are deemed criminal offenders and risk prosecution in an Israeli military court.

The order defines "newspaper" to include "any pamphlet containing news, information, events, occurrences, or explanations relating to news or news-items, tales, or any other item of public interest, which may be printed in any language or any country, whether for sale or free distribution at specific periods or unspecified times."

Military Order No. 379, issued on April 3, 1970, expanded Order No. 50 to include a provision granting the "person responsible" the power to confiscate any publication, whether a single copy in the possession of a single individual or copies of a publication under distribution, in the West Bank without a permit. The order authorizes the "person responsible" to take all necessary measures to confiscate the material and dispose of it.

Arab newspapers published in East Jerusalem and cleared by Israeli censors are sent to distribution outlets in the West Bank. The military government in the West Bank need not

see the newspaper before distribution. However, the newspapers on the stands remain subject to seizure by the military authorities should they consider materials in the newspapers threatening to "security" or "public order" in the area.

Importing and distributing other publications such as books is subject to restriction as well. Under the Regulations, Article 88(1), the military authorities issue orders prohibiting the importation or distribution of certain books deemed a risk to "public order and security." The Israeli military censorship authorities maintain a listing of prohibited books and distribute listings periodically to the legal profession. A master list was last issued in September, 1982. The list contains over 1,000 titles including books on Muslem and Arab histories, geography, economics, and poetry. It also included a book about the Israeli Defense Forces by Ha'aretz correspondent Ze'ev Schiff and a similar book by former Deputy Prime Minister Yigal Allon, Of Blessed Memory, as well as, The Jew of Malta by Christopher Marlow, George Antonius' The Arab Awakening, a biography of Theodor Herzl by Desmond Stewart, and many literary works by individuals identified with the Palestinian national movement.(4)

Many lawyers in the West Bank have complained to the authorities that they have not received nor have they been able to obtain a copy of the list upon request. Consequently, West Bank Palestinians usually have no way of knowing what books are permitted until they are arrested and charged with possessing a prohibited book under Article 88(2) of the Regulations. Palestinians caught possessing books not on the list, but nonetheless considered a risk to the "public order and security" in the area are prosecuted under Military Order No. 50, as amended by Military Order No. 862 issued on August 6, 1980. Order No. 862 changed Order No. 50 in several important ways.

It redefined the word "newspaper" to include "any publication," making it illegal to import and distribute any publication in the West Bank without a permit.

It also added a new paragraph effectively making it illegal to possess any publication in the West Bank without a permit regardless of whether or not the publication is contained in the prohibited publications list. The new paragraph states:

> 2(B) For purposes of clarification, any publication which has NOT been entered in the list of prohibited publications issued in the appendix of the order regarding prohibited publications, by virtue of Article 87(1) or 88(1) of the British Emergency Regulations of 1945, shall NOT be considered a publication PERMITTED to be brought into or published in the Area unless a permit has been issued for it. (Emphasis added).

B. Publishing in the West Bank

Printing or publishing in the West Bank is restricted by Military Order No. 101 (1967), as amended by Order No. 718 (1977) and No. 938 (1981), "concerning the prohibition of incitement and adverse propaganda." Article 6 of this order provides:

> It is forbidden to print or publish in the area any publication, advertisement, proclamation, picture, or any other document which contains any article with political significance except after obtaining beforehand a licence from the military commander in the area where the printing or publishing is to be carried out. (Emphasis added).

Definitions of key words in the paragraph above are contained in the preamble of the order. They appear purposefully open-ended to facilitate the broadest judicial interpretation of the order, making it possible to bring the maximum number of people within the order's scope.

"Printing" is defined in the order to include "lithography, typing on a typewriter, copying, photographing or any other manner of representation or of communicating expressions, numbers, symbols, pictures, maps, painting, decorations, or any other similar material."

"Publishing" is defined to include "broadcasting, distributing, handing over, announcing, supplying or submitting to any person whatsoever."

In accordance with the above definition, "publishing" has been interpreted broadly by the military courts. In a 1978 Military Court case in Ramallah, a librarian was convicted of "publishing" when he purchased what he thought was a permitted publication for the Ramallah public library and made it available for the public to check out. He was convicted of "publishing" the work on the basis that he was "supplying" others with an illegal publication. Retail book salespeople have been convicted of "publishing" by selling unpermitted publications to customers.

A "publication" is defined to include a "newspaper, scroll, series or book, or any other document which has been published or is prepared for publication even if only once, and the document shall be presumed prepared for publication unless the contrary is proven."

Notably absent from the text of definitions contained in Military Order No. 101 is any description or demarcation of what in fact the military authorities consider "political significance" to mean. Without such definitive legal guidelines, military court judges responsible for applying the military orders are placed in an extraordinary quasi-legislative role of deciding on an ad hoc basis the criteria for "political significance," and only then determining whether the particular publication in question fits those criteria. Under the terms of Order No. 101, "political significance" need not be further evaluated as "hostile" or "inciting" to enable conviction. However, if the court ultimately finds that the "political significance" is of a

nature that incites the reader to actions violating the "security and public order" of the area, the accused may also be convicted of incitement. Military court judges have differed in their interpretation of these questions, and have issued an inconsistent body of decisions. The grounds for prosecution and conviction are so ill-defined as to make almost any publishing activity undertaken without a permit vulnerable to prosecution.

Although "political significance" has yet to be officially defined, there are many military court decisions that reveal what in fact the military censors consider it to be: any suggestion that West Bank inhabitants are suffering under occupation, any talk of love and loyalty to the homeland, or any representation of national aspirations. Common examples of illicit "political content" have included pictorial representations of Israeli soldiers assaulting Palestinian civilians, schools surrounded by barbed wire, calendars depicting the Palestinian massacres in Sabra and Shatila, the use of Palestinian colors of red, green, black and white, or pictures of Palestinian political figures. Leaflets produced by Israelis protesting Israel's invasion of Lebanon, maps of Palestine, or the words "Palestine," "homeland," "return," or the "PLO" have also been declared illicit, as have Christmas cards that contain the message, "Greetings from the Occupied Holy Land."

Works by West Bank literary writers, most notably poets, are closely scrutinized by the censorship authorities for "political content." Publication of poetry alluding to steadfastness, national pride, endurance, the right of refugees to return to their land, opposition to occupation, and torture in prison frequently result in prosecution. For example, the Israeli military authorities have brought a case of incitement against Palestinian poet Sami Kilani. Kilani, now under town arrest in his village of Ya'abad, was taken to the military court in Nablus on May 15, 1983 for publishing a collection of poetry entitled, "A New Promise to Iz al-Din al-Qassam." The military prosecutor called the book "inciting", basing his charge on a report by the Israeli army. The report

considered the symbols of the collection and its meanings "inciting" because they refer to the first leader of the Palestinian revolution in 1935, Iz al-Din al-Qassam who was killed in a clash with British troops in Ya'abad. Kilani refers to al-Qassam in only one of 14 poems and mentions al-Qassam only to criticize Arab regimes for backstabbing the Palestinian people. A decision of the case is still pending.

C. Powers of Search, Seizure, and Arrest

While the military prosecutor may bring criminal proceedings against alleged violators of the Regulations and/or Military Order No. 50 and No. 101, the Israeli soldier posted in the West Bank is given broad warrantless search and arrest powers on the possibility that any resident, household, or institution may be in possession of an illicit publication. Soldiers have the authority to search and arrest any Palestinian in the West Bank at anytime.

Under Order No. 101, every soldier has the power to use all necessary force to implement any of the censorship orders. The soldier is also at liberty to utilize, at his individual discretion, the powers granted him in Section 4 of Security Provisions Order No. 378 (1970), namely warrantly arrest, search, and seizure of materials. Section 4 allows any soldier to search any person or premise at any time in the West Bank, without warrant, on the suspicion that an individual, organization, or business may be in possession of an unpermitted publication. It also allows any soldier to arrest, without warrant, anyone suspected of possessing, publishing, or distributing unpermitted publications. Victims of such arrests have often alleged that during the ensuing interrogation, information on friends, associates, family members, and organizational affiliations was pursued, and the publications themselves were ignored.

Military Order No. 378 offers a readily available legal pretext for random searches of persons, homes, and offices and selective and arbitrary arrest and prosecution. A highly

irregular situation of indeterminate criminal liability irreconcilable with accepted norms of civilian or military justice is created in which local residents possessing libraries in their homes are vulnerable to arrest and prosecution for possessing illegal publications if any book found in their collections happens not to have been expressly permitted, regardless of the nature of the book or the date of its acquisition. Consequent to this military order, virtually every individual possessing a private library is technically in violation of the orders, whereby enforcement and prosecution becomes a matter entirely of the military authorities' choosing. Enforcement need not entail any criminal prosecution, but may be punishing in its own right.

For example, in late 1982, several months after the death of her husband, an UNRWA medical assistant with a history of resistance-related activities, Khadija Yusef, answered the doorbell of her home located in the Dheisheh refugee camp outside of Bethlehem. She was confronted with Israeli soldiers and their commander who proceeded to search her house without a warrant or any explanation. After a thorough search of the house, they removed the entire collection of the family library containing medical, religious and literary books. Along with these 800 books, they removed family records including her husband's birth certificate, identity cards, passports, family pictures, school graduation certificates, and family property titles. The soldiers took the entire lot outside, dumped them into a 44-gallon drum, drenched them in gasoline, and set them on fire. Mrs. Yusef was never charged with any violation of the orders and to this date has yet to receive an official explanation as to why the family library was destroyed.

Should an arrest be carried out, the Israeli authorities may hold the accused at a police station or other place of detention for up to 96 hours before obtaining an arrest warrant. Any Israeli police officer is competent to issue an arrest warrant in writing for a period not exceeding 7 days. Military courts are authorized to issue an extension of the arrest warrant for a period of up to 6 months. Should formal

chrges be filed with the military court, the court may order the detention of the accused until the trial is completed.

CONCLUSION

Despite the system of censorship outlined above, newspapers, books, magazines, and other forms of expression do find their way to the West Bank. The stated purpose of the orders restricting importation and distribution is open to serious question in light of the fact that movement of local residents between the West Bank, East Jerusalem, and Israel is normally unrestricted and materials legally published in Israel but banned in the West Bank are accessible to West Bank residents. Furthermore, radio and television news of events in the West Bank and programming that most certainly would be considered "hostile propaganda" are broadcast daily on Jordanian, Syrian, and Egyptian networks, all of which are received in the majority of West Bank homes. The ease with which the same materials can be obtained or received removes any functional justification for the orders prohibiting importation and distribution.

Restrictions placed on printing and publishing materials of an undefined "political nature" have not eliminated the publishing of these materials. However, they have caused the vast majority of independent printers and publishers in the "closed area" to relocate their operations in East Jerusalem where the censorship practices and threat of prosecution are more relaxed. Attempts to impede the availability of publications of an unfavorable political nature through warrantless search and seizure practices and to deter or punish Palestinians for possession of these publications through arrest and prosecution has not prevented similar political messages from being received. Apart from these attempts at suppressing "political" publications, Israeli military censorship orders and enforcement practices place West Bank Palestinians, who choose to read publications on

economics, history, and the humanities, or novels, poetry, and the like, in jeopardy of selective and arbitrary prosecution and punishment for practices - i.e., the exercise of literacy - which pose no real challenge to "security and public order."

FOOTNOTES

1. Meir Shamgar, Editor, Military Government in the Territories Administered by Israel, 1967 - 1980: The Legal Aspects. (Jerusalem: Alpha Press, 1982), p.295.

2. "Makhoul vs. District Commissioner of Jerusalem, H.C. 322/81 (1982)". An unofficial translation from the Hebrew text. (Jerusalem: the Association for Civil Rights in Israel, 1983).

3. See Military Order No.5 (1967).

4. For a detailed analysis see Meron Benvenisti, Israeli Censorhip of Arab Publications (New York: The Fund for Free Expression, 1983); and The Jerusalem Post, 9 December 1983, p.6.

APPENDIX

PUBLISHED AND UNPUBLISHED CORRESPONDENCE CONCERNING VIRGIL FALLOON'S ARTICLE FOLLOWING ITS PUBLICATION IN "INDEX ON CENSORSHIP"

I. Article by columnist Philip Kleinman in the "Jewish Chronicle" (London) of 27 July 1984.

TRUTH - BUT NOT ALL THE TRUTH

Index on Censorship is a respected publication which numbers among its directors Dan Jacobson and Stephen Spender. When the magazine devotes, as in its current [August 1984] issue, six pages to Israeli censorship in the occupied territories, it deserves to be taken seriously.

Or, at least, that is what you might think. Having read it, I am not so sure. Nor am I sure that George Theiner, the editor, has done his job properly.

That is not because any of the material printed is completely untrue. I believe most of it to be factually correct. But there are at least three flagrant examples of suggestio falsi, an overall offence of suppressio veri and an atrocity story which should have been checked out and apparently was not.

Israel is not Russia or Iran. Reporters do not have to smuggle information out, relying on one-sided accounts because it is impossible to get two sides. If, in a relatively open society, they are free to ask questions and compare evidence, they are under some obligation to do so.

One of Theiner's correspondents is not in the conventional sense a reporter at all, but that does not change

the moral situation. The longest of three linked pieces is by Virgil Falloon, described as a legal research volunteer on the West Bank. He details the censorship rules, which are both strict and criticisable, especially in regard to military powers to enforce them.

According to Falloon, the military seized 800 books from one Arab widow's home and burned them on the spot together with family records. That is the atrocity story. The official version of this alleged incident is not supplied.

Because permission is required for the distribution of any publication, Falloon says West Bankers who read economics, history or literature are "in jeopardy of selective and arbitrary prosecution." This suggests that Israel has blocked educational development. The opposite is true. The four West Bank universities have all been created since the occupation.

Falloon mentions the banning of a book by former deputy Premier Yigal Allon. He does not reveal that the Arabic translation contained a violently anti-Israel preface.

Similarly, when Roger Hardy, in a shorter, accompanying article, refers to a New York Times report that Orwell's "1984" was banned, he does not explain that the report was based on a clerical error of December, 1976, confusing books banned and permitted, and that the error was rectified the following month.

A third piece is about the banning of books, by the talented Palestinian poet, Mahmoud Darwish, but does not mention that some contain direct incitement to hatred of Israelis. Nothing in Theiner's magazine indicates that the occupation and the censorship are the direct results of a war of survival.

Nor is the reader told that, whereas before June 1967 there was only one Arabic daily in the West Bank and East Jerusalem, there are now four, plus seven periodicals. According to a study reported in the Jerusalem Post, the pro-

PLO journals--yes, they exist, even under the occupation--write about Israel and Israelis with regular and total hostility.

II. Letter from the Editor of "Index On Censorship", George Theiner, in the "Jewish Chronicle" of 10 August 1984.

A PARADOX OF FREEDOM

Sir,

In his "Media" piece (July 27) Philip Kleinman takes us to task for our recent coverage of military censorship on the West Bank. The article was called "Truth--but not all the truth."

If one wanted to play this game, one could likewise accuse Mr. Kleinman of giving only some of the truth when, for instance, he describes Virgil Falloon, the author of the report we printed, as "a legal research volunteer on the West Bank," omitting the rest of the description given in "Index"--namely, that he works for the organisation Law in the Service of Man, the West Bank affiliate of the International Commission of Jurists in Geneva (surely not an unimportant detail when the author's credibility is being questioned); or again when he fails to make it clear that Roger Hardy's "accompanying article" was, in fact, a review of an authoritative report on "Israeli Censorship of Arab Publications" commissioned by the New York Fund for Free Expression and compiled by the former deputy mayor of Jerusalem, Meron Benvenisti.

I readily agree with Philip Kleinman when he tells us that "Israel is not Russia or Iran"--that is why, when writing about Israel, we deal, not with writers and others languishing in prisons and labour camps or being tortured and executed, but with subjects like the censorship of Arab publications.

We did not explain, as Mr. Kleinman would have us do, that "the occupation and the censorship are the direct results of a war of survival," having sufficient faith in the intelligence and general knowledge of our readers to believe that they are aware of the background.

Maybe we have shown too much faith; we have certainly not perpetrated a suppressio veri. Mr. Kleinman has chosen not to notice the box with a quote from the "Guardian" which started with the words "It is a fact of Israel's life that notwithstanding the incessant attacks on its own people and property, it is expected, and its own people generally expect it, to show a high standard of justice and law enforcement when Israelis are the offenders."

We see our job as presenting the facts on censorship anywhere in the world. In doing so we appreciate that the relative freedom and the ease with which information can be obtained and transmitted in free societies sometimes leads to paradoxical situations, so that Israel gets far more column inches in our chronicle section than, say, East Germany, while Albania will appear rarely, if at all. We have on several occasions gone out of our way to point out the paradox--most recently in the issue in which the article on Israel appeared: "Countries which have considerable margins of freedom, such as Egypt and Israel," wrote our Middle East specialist, "figured constantly in our reports last year, even though the very fact of such reports means more freedom in those countries than among most of their neighbours."

George Theiner
Editor, Index on Censorship

III. Article by Philip Kleinman in the "Jewish Chronicle" of 17 August 1984.

FAITH IS FINE, BUT IGNORANCE RULES

George Theiner, editor of Index on Censorship, should pull his socks up. Three weeks ago I pointed out several specific distortions of fact in his August issue, largely devoted to censorship on the West Bank. His letter to this paper last week failed to mention, still less justify, any of them. Since then the Observer has quoted Index without comment.

Theiner replied only to my general criticism that his magazine contained no indication that "the occupation and the censorship are the direct results of a war of survival." Index, he wrote, had "sufficient faith in the intelligence and general knowledge of our readers to believe that they are aware of the background."

His faith is touching, but I cannot share it. A feature of recent media coverage of the Middle East is the ignorance revealed even by some specialist journalists of the history of the Arab-Israeli conflict. The point is brought out in an excellent new research report on "The Lebanon War and Western News Media" written by Dr. Yoel Cohen and Dr. Jacob Reuveny of Bar-Ilan University and published by the Institute of Jewish Affairs.

Theiner also reproached me for having failed to spell out the precise credentials of his contributors, as if that made their mistakes more forgivable. He overlooked the fact that, while they had 8,000 words to make their case, I had only 500 words to comment on it. Lack of space accounted for another ommission of mine.

Because I used all of my July 27 column to talk about Index's propaganda barrage, masquerading as objective reporting, I had no space to refer to the publication of a

long article by Lynn Reid-Banks in the Sunday Telegraph of July 22 which I would categorise as objective reporting. In it she summarised conversations with both Jews and Arabs on the West Bank.

If I go back to her article now it is because it stood in interesting contrast to the spate of recent "Israeli rotters, Arab victims" pieces to which I have previously drawn attention. (David Hirst was back playing that game in a series of three Guardian articles this week.)

While not hiding her distaste for Gush Emunim, Lynn Reid-Banks made clear what is so often concealed, namely that "not all Arabs on the West Bank are poor and downtrodden" and that quite a few of them despise the PLO, holding it responsible for their troubles.

Finally let me recommend a Jerusalem Post article by Hirsh Goodman which should be required reading for anyone like George Theiner whose awareness of the Middle East background seems incomplete. Meir Kahane's election to the Knesset, wrote Goodman, was "a result not only of blind hatred of Arabs in Israel, but also of blind Arab hatred of Israelis." The youngsters who had voted for him had grown up in an environment of "constant opposition by all except Sadat and a few moderate Palestinians, most of whom have paid with their lives for their moderation."

On Wednesday The Times printed a long-winded retraction of a story alleging Israeli soldiers killed a Lebanese child. More about this next week.

IV. Letter from George Theiner in the "Jewish Chronicle" of 24 August 1984.

"INDEX" AND CENSORSHIP

Sir,

I really don't want to take up your space by exchanging fire with Philip Kleinman ad infinitum, but I cannot allow his attack last week to go unanswered.

Briefly then, it just won't do to dismiss as "Index's propaganda barrage" two serious reports on censorship on the West Bank--one commissioned by an organisation in Israel which works with the International Commission of Jurists in Geneva, the other published by the Fund for Free Expression in New York and written by the former Deputy Mayor of Jerusalem, Meron Benvenisti. Philip Kleinman may have had only 500 words at his disposal, but that is no excuse for making it appear as if "Index" got all this information from some unidentified "correspondents" and was out to malign Israel.

And a final point: just because, as Kleinman rightly says, Israel is not Russia or Iran, when we write about it--just as when we write about Britain, the USA, or any other democratic country--we tend to set our sights somewhat higher and expect such countries to behave that much more correctly where censorship (and human and civic rights in general) is concerned.

George Theiner
Editor, Index on Censorship

V. Letter from R. R. Goldstone in the "Jewish Chronicle" of 24 August 1984.

Sir,

Perhaps George Theiner, editor of Index on Censorship, would like to explain why my own private protest three months ago, based on two free copies of "Index," dated August 1983 and February 1984, were ignored. I made the point that a disproportionate number of column inches were devoted to Israeli censorship--far more than for any other country.

Since the August 1983 copy gave sources of its world-vide reports, which were no longer given in the February 1984 issue, I wondered if the appointing of an Arab researcher Haifaa Khalaffah had anything to do with the change. The "Middle East International," no doubt Arab-inspired, was quoted as the source of three items on Egypt, a half-column, and four items on Israel and the Occupied Territories, a column and a half.

The Director's report, page 45 in this same issue, welcomes the researcher and in the February 1984 issue her name appears on the permanent staff list for the Middle East, a new appointment.

Sources were not given in this issue and there was no report on Egypt. But once again Israel and the Occupied Territories received pride of place with a column and a half. The Arts Council help to fund this publication, which means that we are funding an anti-Israel publication through our taxes.

Early this year I wrote to Sir Angus Wilson, the writer, a patron of "Index," asking him to deal with the matter and he passed on my complaint. Since then, in spite of a direct letter and further reminder, the silence has been deafening.

Therefore, I have concluded that "Index" is biased, anti-

Israel, pro-Arab, and I do not choose to support it financially as I had originally intended.

R. R. Goldstone
102 Claremont Road, E7

VI. Article by Philip Kleinman in the "Jewish Chronicle" of 31 August 1984.

TIPPING SCALES AGAINST ISRAEL

Index on Censorship may have a small circulation, but the letter from its editor, George Theiner, published in this paper last week, illustrated much of what is wrong with present-day media coverage of Israel.

Five weeks ago, I pointed out several specific distortions in an 8,000-word anti-Israel propaganda barrage (yes, I persist in calling it that) carried in his magazine. He has now written twice to the Jewish Chronicle, but has still made no attempt to prove the truth of those allegations I challenged.

I could, of course, be wrong, but at least I took the trouble to do some checking. Theiner does not appear to have bothered to do any checking of his own. Worse still, he does not acknowledge that he ought to have done so.

Conclusion one: these days you can believe anything, and print it, if it is defamatory of Israel. Never mind if it turns out to be inaccurate; only the Zionist minority will object, and who cares about them?

Theiner declared last week that when Index wrote about Israel, "just as when we write about Britain, the USA or any other democratic country, we tend to set our sights somewhat

higher and expect such countries to behave that much more correctly" (than Russia or Iran).

Conclusion two: Israel may be engaged in a long-term struggle with implacable enemies who routinely go in for repression of the worst kind, but it's perfectly OK to concentrate on the sins of the former while ignoring those of the latter. If the balance of Western public opinion thereby swings against the Jewish State and in favour of a collection of undemocratic thugs and tyrants, you can't blame respectable people like editors or TV producers.

As has often been pointed out, the relative openness of Israeli society makes it easy and safe for Western journalists to study its failings--while blithely disregarding its virtues, which don't make such exciting copy.

Poking your nose into the affairs of Israel's neighbours is neither easy nor safe. Which may be why we had another nice colour piece from The Times' Robert Fisk last week based on conversations with young Israeli soldiers in Lebanon, but not one about young Syrian soldiers. Strangely--or perhaps not so strangely--the Israeli boys all, it was implied, knew English. Here's a suggestion for Charles Douglas-Home, editor of The Times. Give Fisk a few months off to learn Hebrew--he's a clever fellow, he can do it--and then move him to, say, Tel Aviv or, better still, Ashdod with a brief to find out what really makes Israelis tick and write about it.

I would suggest the same experiment for The Guardian's David Hirst, except that, on the evidence of his recent series of features on South Lebanon, I suspect Hirst's dislike of Israel is so ingrained as to be immovable.

In the New Statesman, Claudia Wright wrote indignantly (natch!) about "extortion" by the pro-Israel lobby in the US, which "has been asked to drop all customs' duties" on Israeli goods and to do so before the Presidential election. She saw no way such an agreement could possibly benefit the US itself.

VII. Letter from George Theiner in the "Jewish Chronicle" of 21 September 1984.

Sir,

Mr. Kleinman's charges against "Index on Censorship" have grown into a wide-ranging attack on its accuracy and political impartiality. "Index" has been thoroughly misrepresented and this forces me to reply at length.

Mr. Kleinman began his criticism of "Index on Censorship's" recent article on Israeli censorship by saying he was not sure that I had done my job properly. He went on: "That is not because any of the material printed is completely untrue. I believe most of it to be factually correct. But there are at least three flagrant examples of suggestio falsi, an overall offence of suppressio veri and an atrocity story which should have been checked out and apparently was not" (July 27).

His latest charges (about the same material) are more general and more serious: "an 8,000-word anti-Israel propaganda barrage." He accuses "Index" of distortions, concentrating on the sins of Israel, disregarding its virtues, ignoring the sins of Israel's enemies (August 31).

Mr. Kleinman also rebukes me for not answering each of his points. I shall now do so.

1. The "atrocity" story which "should have been checked out and apparently was not". It is not an atrocity story; it concerns the burning of 800 books and was given as an example of the extremely wide-ranging and arbitrary powers of the military authorities. "The official version of this alleged incident is not supplied," adds Mr. Kleinman. If he believes the incident to be a fabrication, he should say so and state his reason. What makes him think the story was not "checked out" by the writer? (I imagine the editor of the "Jewish Chronicle", like most editors, does not "check out" all the

facts asserted in his reporters' stories. The writer is competent or not.)

2. Mr. Kleinman's second complaint concerns the concluding sentence of Falloon's "Index" article, which went as follows: "Apart from these attempts at suppressing 'political' publications, Israeli military censorship orders and enforcement practices place West Bank Palestinians who choose to read publications on economics, history, and the humanities, or novels, poetry and the like, in jeopardy of selective and arbitrary prosecution and punishment for practices -- i.e., the exercise of literacy -- which pose no real challenge to 'security and public order'."

Mr. Kleinman paraphrases this and comments: "This suggests that Israel has blocked educational development. The opposite is true."

The suggestion is Mr. Kleinman's. The exercise of literacy is not the same thing as education; the article is clearly about censorship and not about education. Mr. Kleinman is setting up an Aunt Sally in order to dispose of it.

3. Among over 1,000 titles banned by the military authorities, one is the Arabic translation of a book by former Deputy Premier Yigal Allon. Mr. Kleinman says: "He (Falloon) does not reveal that the Arabic translation contained a violently anti-Israel preface."

I don't yet have a copy of this edition to hand. Had Mr. Kleinman himself read the full Arabic introduction before writing his article? We will see what was actually written when the text is found. And what of the other banned titles?

4. Mr. Kleinman complains: "When Roger Hardy, in a shorter accompanying article, refers to a 'New York Times' report that Orwell's '1984' was banned, he does not explain that the report was based on a clerical error of December 1976, confusing books banned and permitted, and that the error

was rectified the following month."

Roger Hardy, towards the end of his review of a survey directed by Meron Benvenisti, former Deputy Mayor of Jerusalem, entitled "Israeli Censorship of Arab Publications," wrote: "After Anthony Lewis, of the 'New York Times', pointed out that even Orwell's '1984' was prohibited on the West Bank, the censor cancelled the lists issued before 1977, and in 1982 issued a master list comprising Arabic titles only."

It took Anthony Lewis's column to galvanise the Israeli authorities to revise the confused lists of banned books. The appearance of Orwell's "1984" on the banned list exposed the Israeli authorities to ridicule; and incidentally indicated the degree of confusion. Perhaps the mistake was subsequently corrected in the way Mr. Kleinman says it was, but what a mistake!

5. Mr. Kleinman writes: "A third piece (i.e., article) is about the banning of books by Mahmoud Darwish, but does not mention that some contain direct incitement to hatred of Israelis."

Mahmoud Darwish's books are banned in the West Bank because they give encouragement to the Palestinian cause. As Meron Benvenisti's survey states (page 128) -- and Roger Hardy quoted this -- "Poetry and fiction connected even indirectly and symbolically with Palestine is banned." The survey goes on to say: "Practically the entire range of human emotions connected with the Israeli-Palestinian struggle is perceived (by the Israeli military censor) as a 'call for action'." The survey emphasizes -- and Rogery Hardy quoted this, too -- "It may be that only 3-4 per cent of imported titles (of books) are censored, but the titles represent 100 per cent of all works that express, instill or foster Palestinian-Arab national feelings and national heritage."

6. Mr. Kleinman charges that "Index" did not tell its readers that "whereas before June '67 there was only one Arabic daily in the West Bank and East Jerusalem, there are

now four, plus seven periodicals."

I refer Mr. Kleinman to Mr. Benvenisti, page 35. "Jerusalem was the press capital of Jordan until the early 1960s. Of six dailies published in the Hashemite Kingdom, only one ('al-Urdan') was published in the capital, Amman, and five papers were published in Jerusalem... The number of regular publications (now) is three dailies, five weeklies, four bi-weeklies and monthlies, as well as numerous irregular publications."

To summarise 1-6: the first charge does not stand up to examination; the second, about education, is a red herring; the third remains open; the fourth adds a fact which, if true, doesn't invalidate or weaken Hardy's statement; the fifth gives a misleading alternative explanation which, even if true, would still fail to explain the banning of all Darwish's books; the sixth point is misleading.

The most serious charge against "Index" comes in Mr. Kleinman's column of August 31, where he writes: "Israel may be engaged in a long-term struggle with implacable enemies who routinely go in for repression of the worst kind, but it's perfectly OK to concentrate on the sins of the former while ignoring those of the latter. If the balance of Western public opinion thereby swings against the Jewish State and in favour of a collection of undemocratic thugs and tyrants, you can't blame respectable people like editors or television producers. As has often been pointed out, the relative openness of Israeli society makes it easy and safe for Western journalists to study its failings, while blithely disregarding its virtues, which don't make such good copy."

Considering that as recently as April of this year we carried an article with the title "Repression in Iraq and Syria" and sub-titled "Recent reports...point to torture, special courts and hundreds of executions" and accompanied by boxes such as "Iraq: torture and death" and "Iraq: writers arrested," while a sub-title on Syria read "Mass slaughter," I fail to understand how Mr. Kleinman can justify his repeated

accusation that "Index" criticises Israel but ignores the misdeeds of its enemies.

(He also complains that we disregard Israel's virtues. While "Index", by its very nature, is in the business of berating governments rather than praising them, there has been praise for Israel in the articles by Tom Segev and Professor Gershon Weiler -- to the extent that we have been accused of being pro-Zionist because we printed them!)

If Mr. Kleinman had taken the trouble of looking at "Index's" publishing record, he would have seen that the "sins of Israel's enemies" have certainly not been ignored: there have been 17 articles about Israel and 75 about the rest of the Middle East; General, 7; Algeria, 2; Bahrain, 1; Egypt, 14; Iran, 20; Iraq, 5; Kuwait, 1; Lebanon, 2; Libya, 4; Morocco, 6; Saudi Arabia, 4; Syria, 3; and Tunisia, 6.

"Index" is neither anti-Israel nor pro-Arab. It reports on the work of censors in such diverse countries as Poland, Turkey, the USSR, Argentina, South Africa, Britain and the USA, and publishes examples of banned writing. At different times it has been described as pro-Zionist, pro-Marxist and pro-capitalist. It is none of these. By misconstruing as hostile propaganda criticism which is made in good faith, Mr. Kleinman deludes himself and his readers -- and comfortingly removes the need to consider unpalatable facts.

VIII. Letter from Philip Kleinman in the "Jewish Chronicle" of 21 September 1984.

So, after nearly two months, Mr. Theiner has finally tried to answer my detailed charges. I thank him for summarising accurately some of what I said. I see no reason to recant.

Now to the six points:

1. It is not a question of the writer's competence, but of whether his source told the truth. Neither Mr. Falloon nor Mr. Theiner has supplied a whit of evidence for what may have been a fabrication. The onus of proof is on them, not me.

2. The suggestion that Israel has blocked educational development arises unmistakably from Falloon's text. I repeat that he deliberately ignored the educational development under Israeli rule.

3. No, I have not read the Arabic text of Allon's book. I rely on informants, but I hope less uncritically than Mr. Theiner.

4. I reported the official Israeli explanation of how Orwell's "1984" came to be put by a clerical error on the list of banned books. Their explanation, not mine, but I see Mr. Theiner does not deny it. He purports, however, to know it was only Anthony Lewis's article which caused the list to be revised. How does he know this?

5. Mr. Theiner does not attempt to answer the speficic point I made about Darwish's books, but again takes refuge in generalities.

6. Again Mr. Theiner ignores the point that, whatever the exact numbers (for which my source was a "Jerusalem Post" article), there is a thriving anti-Israel press under Israeli occupation.

I admit I am not well acquainted with "Index's" publishing record, but I note that in a previous issue the monthly world round-up of alleged infringements of freedom included one from Syria, one from Egypt, none from Iran, Iraq, Jordan or Saudi Arabia and 13 from Israel!

IX. Letter from Raja Shehadeh addressed to the Editor of the "Jewish Chronicle", but sent to George Theiner to be forwarded at his discretion.

1st October 1984

The Editor
The Jewish Chronicle

DOUBLE STANDARDS

Sir,

Law in the Service of Man has followed with interest the debate in your journal following the article which Mr. Virgil Falloon, a legal researcher working with LSM, contributed to Index on Censorship.

LSM stands behind all that was said in Mr. Falloon's article. The purpose of this letter is not to defend what appeared there, which has been adequately confirmed by Israeli writers and others in no sense hostile to Israel. Despite the criticism, censorship continues to be excessive in the areas occupied by Israel.

One internal contradiction seems to recur and is worth pointing out here. Supporters of Israel who believe they must defend it against any criticism, begin as a rule by pointing out how bad the situation is in Israel's neighbouring countries. For example, Mr. Philip Kleinman in his article "Truth - but not all the truth", objects to the fact that Mr. Falloon does not inform his readers that only one Arabic daily was published in the West Bank and East Jerusalem before June 1967. This is in fact thoroughly misleading, since it is only true of the period immediately preceding the occupation of the area by Israel, prior to which there were no less than five Arabic language daily newspapers published in Jerusalem. Nevertheless, apart from the fact that violations of human

rights in one country can never justify similar violations in another, why make comparisons with other countries over which Israel repeatedly boasts of its superior standard of freedom and democracy.

Either we accept Israel's claim that it attempts to uphold Western democratic values, and use these as the standard in our assessment of its policies, or we recognise that Israel has abandoned this tradition and judge accordingly. It must be one or the other.

Raja Shehadeh
Director

X. Abstracts of a letter sent by Law in the Service of Man to Philip Spender of "Index on Censorship" to reply to specific charges leveled by Philip Kleinman of the "Jewish Chronicle" against points raised in Virgil Falloon's article.

1 October 1986

1. Virgil Falloon's article states clearly that no official explanation was given for the burning of the widow's books and papers, and none has been given to this day. If Philip Kleinman is himself able to obtain an explanation of any kind from the authorities, this would be much appreciated. Neither the widow nor the Israeli lawyer she consulted have been able to do so.

2. We do not have, and cannot easily obtain a copy of Yigal Allon's book, but should it not be pointed out that this illustrates exactly the point under discussion - the book is banned in the West Bank?

The following extract from the Arabic preface to the book is quoted in an article by the Israeli journalist Amos Elon in the Hebrew-language daily Ha'Aretz of 7 May 1982 - the article reported an interview with the Israeli censor during which Elon was shown the book:

"...[the book] insults Arab intelligence with an attitude imbued with a deep-rooted arrogance and boundless aggression. The book is better than anything else [which we] could write on the schemes of oppression and the expansion of Israel and its plots to force a surrender on the Arab nation." Elon goes on to query whether the reader cannot be allowed to choose for himself between Allon's books and the introduction. Alternatively, if the introduction is offensive, why cannot this alone be censored, leaving the main body of the book? It is widely considered, by both Israelis and Palestinians, that the book was in fact censored because the views expressed in it by Allon, in particular the advisability of returning part of the Occupied Territories and not settling areas heavily populated by Palestinians, conflicted with the views of the Israeli government.

3. Kleinman's assertion that before June 1967 there was only one Arabic daily newspaper in the West Bank and East Jerusalem is misleading. In Meron Benvenisti's study of Israeli censorship, also reviewed in the August edition of Index On Censorship, he describes the state of the press in the early 1960s in Jordan, including Jerusalem, as follows: "Of the six dailies published in the Hashemite Kingdom, only one (al-Urdun) was published in the capital, Amman, and five papers were published in Jerusalem ... In March 1967 a new press law reduced the number of newspapers to three ... however, the 1967 war intervened before the changes took place. The Jerusalem papers ceased publication two days before the occupation of East Jerusalem by Israel." Thus, although Mr. Kleinman's statement may be correct in relation to the days immediately preceding the occupation, only weeks before there had been a flourishing Arabic press. The five newspapers published were: Falastin, al-Difa'a, al-Jihad, al-Manar, and al-Bilad.

More important, however, is that the comparison with the situation under Jordanian rule is itself invidious, since Jordan did not hold itself out as a prime example of an open and democratic society as Israel does. Furthermore, before 1967 residents of the West Bank and Jerusalem had access to newspapers from all over the Arab world, whereas now they are necessarily reliant on local newspapers (and Egyptian papers since the Israeli treaty with Egypt).

4. Despite censorship, Mahmoud Darwish's poems are very well-known here. Far from inciting hatred of Israelis, many of the poems are addressed to Israeli friends, for which he has even been criticised in some Palestinian circles. The recurrent themes of many of his poems are the sorrow of exile, the love of his country and attachment to the land, which is not synonymous with hatred of Israelis as Mr. Kleinman may assume.

The following are the books of poetry by Mahmoud Darwish which are censored:

(i) To Love You Or Not
(ii) Attempt No. 7
(iii) Oh Peace
(iv) A Diary of Ordinary Sorrow
(v) Diwan of Mahmoud Darwish
(vi) Weddings
(vii) This Is Her Portrait, This Is the Suicide of Her Lover
(viii) A Lover From Palestine
(ix) The Birds Die in Galilee
(x) A Soldier Dreams of White Lilies

5. As to education, Mr. Kleinman's statement that the four West Bank universities have all been created since the occupation is incorrect, and may be misleading if taken to suggest that Israel has promoted the growth of these universities.

Bir Zeit University was founded in 1924 as a school; in 1962 it developed into a college, holding two-year degree courses, and in 1972 its status was changed to that of a university when it started to hold four-year courses. Al-Najah National University has existed since 1918 as a school, before becoming a teachers' training college in 1965 and a university in 1977. The Islamic College in Hebron was founded in 1971, and Bethlehem University in 1973 by the Catholic Freres.

The West Bank universities are all private institutions and receive no funding from Israel. Prior to the occupation, Palestinians had easy access to the universities of Egypt, Lebanon and elsewhere. After 1967, such access was difficult and costly for those from the Occupied Territories, and even where possible those leaving ran the risk of not being allowed to return to their homes. It was to fill this need for higher education that the universities grew. That these universities have flourished is due solely to the efforts of West Bank educators and their supporters, most notably other Arab universities. Israel allowed, rather than encouraged, their development initially, but in 1980 it assumed extensive powers of control over the universities by means of Military Order 854, followed by other supplemental orders. In addition, all the universities suffer considerable harassment, including total closure (al-Najah is at present closed by order of the military authorities for four months), arrests and imposition of restriction orders on students, expulsion of teachers and of two presidents, and, of course, censorship of books.

EXCESSIVE SECRECY, LACK OF GUIDELINES

A REPORT ON MILITARY CENSORSHIP IN THE WEST BANK

This paper outlines the Israel practice of censorship in the occupied West Bank, and the legal justifications given by the authorities for its imposition as it applies to importing, distributing, publishing, and possessing printed materials.

AL–HAQ / LAW IN THE SERVICE OF MAN is an affilliate of the International Commission of Jurists and was formed in 1979 by a group of West Bank Palestinians to develop and uphold the principles of the rule of law in the West Bank, carry out legal research, and provide legal services for the community

THE INTERNATIONAL COMMISSION OF JURISTS, whose headquarters are in Geneva, Switzerland, is a non–governmental organization devoted to promoting the understanding and observance of the rule of law and the legal protection of human rights throughout the world.

AL–Haq / Law in the Service of Man, P.O.Box 1413, Ramallah, West Bank, via Israel (☎ 02–952421)

WALL ST.J.:10-18-83

West Bank Time Bomb? A Demographic Fallacy

By Benjamin Netanyahu

It often is claimed that Israel cannot retain the West Bank and remain both Jewish and democratic. If it holds on to Judea-Samaria, some argue, it will soon be overwhelmed by a hostile Arab population whose higher birthrate will make it a majority. The fringes of left and right offer drastic solutions to this problem: Israel must divest itself of the territory (the view of the left) or expel the Arab population (the view of a handful on the far right).

The underlying demographic premise is seldom examined. When Israel won the Six-Day War and gained control of Judea-Samaria, some predicted that the Arab population would engulf the Jews. That was 16 years ago. If this projection had been valid, by now we should have seen a dramatic increase in the ratio of Arabs to Jews in the area west of the Jordan River. We find no such increase. In 1982 the proportion of Jews to Arabs was the same as it was in 1967: 71% Jews and 29% Arabs (65% and 35%, respectively, if Gaza is included).

Neglect Other Factors

These demographic projections have proved wrong because they focus on the Arab birthrate (itself in decline) and neglect other factors, especially emigration. West Bank Arabs have been emigrating voluntarily since 1950, a steady flow prompted by economics, not by politics.

In the 1950s and early 1960s, emigration was caused by King Hussein of Jordan's policy of neglecting the West Bank and concentrating industry on the East Bank. To this was added in the 1970s the allure of high pay in the Persian Gulf and elsewhere in the Arab world, and most recently the attraction of emerging Palestinian Arab communities in Europe and the Americas. As a result, the West Bank's population has remained virtually unchanged over 30 years: 742,000 in 1952; 747,000 in 1982.

There is no reason to expect a change in this pattern in the foreseeable future. It is true that Judea-Samaria has fared considerably better under Israel--e.g., real income doubled in the decade after the Six-Day War and emigration has never reached the peak levels under King Hussein. Nevertheless, the West Bank's internal economy still can't provide enough attractive opportunities to curb Arab emigration. This emigration most likely will continue, although the recent economic decline of the gulf may cause an adjustment in numbers and destinations.

Were it not for the high birthrate of the 700,000 Arabs within the pre-1967 boundaries, the percentage of the Arabs in the total population would have dropped. But this birthrate, too, has been declining steadily. It fell to five children per family in 1981 from 8.4 in 1965, and it is expected to approach the Jewish rate (now leveling off at 2.7) in the next 15 to 20 years.

Clearly, Malthusian projections of Arab population trends, so uncritically accepted, are unconvincing. It is not inevitable that the Jewish majority will be engulfed.

Clearly, the Malthusian projections of Arab population trends, so blithely presented and so uncritically accepted, are unconvincing. It is not inevitable that the Jewish majority will be engulfed by Arab population growth. It is at least as likely that the current ratio of Jews to Arabs will hold for the coming decades. The percentage of Jews may actually increase, especially if there is a resurgence of Jewish immigration.

Even if the Arabs do not become a majority in the country, it is argued, Israel still will have to resort to expulsion or repression to control a hostile minority. The notion that Israel would contemplate expulsion of the Arabs is fantasy. Far from "expelling" the Arabs, Israel has enabled 42,000 Arabs to resettle in Judea-Samaria and Gaza since 1967.

The assumption of repression is also contradicted by experience. As Israel made clear at Camp David, it does not aim to perpetuate military government but to enable the Arabs of Judea-Samaria to enjoy full rights in a democratic polity. The political status of the Arabs of pre-1967 Israel evolved along similar lines. In the 1950s they lived under a military administration and soon became Israeli citizens with full rights. Through three decades and five Arab-Israeli wars, there have been no serious problems of irredentism or terrorism in this community.

It is instructive to compare Israel's policy toward a potentially hostile minority in wartime to that of the other democratic nations in similar conditions. In World War II, the U.S. incarcerated 120,000 Japanese-Americans. In both world wars, Britain and France ordered the mass internment of aliens. And in World War I, Britain jailed even British subjects of foreign origin. Israeli policy, in contrast, has been not to infringe upon the rights of its Arab inhabitants in wartime. Except for a partial curfew during the Sinai Campaign of 1956, no special security measures have been taken against them in wartime and none proved necessary.

What accounts for the absence of subversion, or of any Israeli concern about it, is the Arab minority's conviction that Israel is here to stay. This conviction is the foundation on which the Arabs of Israel have built their lives, despite incessant anti-Jewish agitation and Palestine Liberation Organization terrorist threats. The belief in Israel's permanence is the key to peace between the Jewish majority and the Arab minority.

The experience within the pre-1967 borders is likely to recur in Judea-Samaria once the Arabs living there recognize the irreversibility of a Jewish presence. Often encouraged by the pronouncements of outsiders, some Arabs believe that a transfer of power to the PLO or Jordan is still a possibility. Uncertainty and the fear of retribution from new rulers are sufficient to prevent West Bank Arabs from openly coming to terms with Israel. (The PLO murders Arabs who advocate cooperation with Israel; Jordan passes death sentences in absentia on those who sell land to Jews.) Only the steady growth of the Jewish population in Judea-Samaria can convince the Arabs that the Jews are there to stay.

Palestinians Have a State

But why should Israel stay in Judea-Samaria at all? To most Israelis the answer is obvious. Despite disagreements on the area's final political status, virtually all agree that Israel must maintain military control there to survive. And despite pragmatic differences over the pattern of settlements, there is an overwhelming consensus on the right of Jews to settle throughout the Land of Israel. Judea-Samaria is the very heart of the historic Jewish homeland, the place where much of Jewish history was made.

Nor do most Israelis consider the creation of a second Palestinian Arab state acceptable. The Arabs of Palestine already have a state, called Jordan, in eastern Palestine. The demand for another state in the West Bank has nothing to do with self-determination. The purpose is to create a base for an irredentist drive to destroy the state of Israel.

This would be the real West Bank time bomb. An Israeli withdrawal from the area would start it ticking. This is why Israel will not leave Judea-Samaria. Nor will it infringe on the individual rights of the West Bank Arabs. The Arab minority has nothing to fear from living with a Jewish majority, just as the Jewish majority need not fear living with an Arab minority. Neither the expulsion of the Arabs nor the withdrawal of the Jews is acceptable. In Judea-Samaria, the only realistic solution for the two peoples is to live, in peace, together.

Mr. Netanyahu is deputy chief of the Israeli mission in Washington.

A REPORT ON THE TREATMENT OF SECURITY PRISONERS AT THE WEST BANK PRISON OF AL-FARA'A

BY

LAW IN THE SERVICE OF MAN

Ramallah, April 1984

WEST BANK PRISON CONDITIONS

This report is concerned with the conditions in which Palestinian political prisoners are held in West Bank prisons. By political prisoners we are referring to those convicted or detained on suspicion of committing offences against the "security" laws of the Israeli military government in the occupied West Bank. Although strictly against article 76 of the IV Geneva Convention many West Bank Palestinians are held in Israeli prisons. While conditions there have given rise to many complaints, the laws and regulations governing them are different to those which apply in the West Bank. Beyond calling attention to these facts, the condition of prisoners situated in Israel, lies outside the scope of this report.

This report will first deal with conditions and matters of complaint that are applicable to all West Bank prisons, and will then deal with one specific case which gives special cause for alarm - al'Fara'a prison.

At present the following prisons in the West Bank are holding political detainees:-

Approximate Number of Prisoners at present

Jenin	Not Known
Tulkarem	60
Nablus	500
Ramallah	200
Hebron	250
Fara'a	250

The prisons are governed by Military Order 29 (Order Concerning the Operation of Prison Institutions).

The information contained in this report has been obtained from interviews with former prisoners, prisoners' relatives, and lawyers. Much of the information has been obtained in the form of sworn affidavits which are held at the offices of LSM.

CONDITIONS

a) Cells:-

Independently provided accounts from those interviewed suggest general complaints about severe overcrowding. Prisoners are locked up in their cells for 22 hours a day, being let out into a small courtyard for two exercise periods of one hour each. There are no beds and prisoners are forced to sleep on the floor with inadequate covers.

b) Recreation:-

Prisoners are allowed three newspapers - the Jerusalem Post,

Al Anba, and Al Quds. No other periodicals are allowed. There is a large banned book list and the final decision regarding the bringing in of books is taken by the prison commander. Personal effects of prisoners are regularly confiscated by prison officers.

c) Food:-

According to Military Order 29, article 4 "Prisoners should be supplied with suitable nourishment in order to ensure the protection of their health". An official diet-sheet exists, but prisoners have not been allowed to see it, and there is a general complaint that the food provided does not satisfy the requirements of article 4. Anaemia and ulcers and other dietary related illnesses are common among prisoners. Recently released former prisoners complained that meals were always eaten on the floor of their cells where the prisoners also sleep and spend twenty two hours of the day.

d) Health:-

Article 5 of Military Order 29 concerns medical treatment. Subsection (a) states that "Prisoners should receive necessary medical treatment". Many prisoners complain of inadequate medical treatment while in prison and many prisoners are released from prison in a very poor state of health and require much further treatment.

FARA'A PRISON

The prison is situated about 20km. north-east of the West Bank town of Nablus. Built by the British as an army camp it continued to serve that purpose under the Jordanians. After the Israeli occupation in 1967 the buildings fell into disuse until the spring of 1982.

Widespread demonstrations and protests in the West Bank during the spring of 1982 led to many arrests and serious problems in the already overcrowded existing prisons and detention centres. In April 1982, the then Israeli Chief of Staff, Rafael Eitan, issued a memorandum giving instructions on how to deal with the wave of protest. He suggested that a "detention/exile camp" be built, "even if it does not have the conditions of a normal prison". The camp could "serve for detention when use needs to be made of the legal measures allowing detention for a period of time dictated by the law (18 days)" (see Jerusalem Post 21.1.83). Such a camp was established at Fara'a, and those who were suspected of committing an offence, and those against whom it seemed clear no charges could be made were taken to Fara'a where they would be kept, without interrogation, for the eighteen days allowed by Military Order 378 and then released. The prison, unlike other West Bank

prisons, was run by the army and was officially known as Fara'a Correction Centre. The previously derelict buildings had been quickly opened as a prison and this fact coupled with control by the army rather than the prison service seemed to lead to far harsher conditions existing at Fara'a than elsewhere.

In May 1982 Fara'a was brought into line with the other West Bank prisons/detention centres when Military Order 998 was introduced. This order added Fara'a to an already existing list of detention centres (see Military Order 43). But the change in the law seems to have had little effect on the conditions at Fara'a. According to article 19 of Military Order 29 the commander of the prison (appointed by the West Bank military commander) is responsible for specifying the guard arrangements. Unlike other prisons, Fara'a continues to be guarded by the army.

Article 32 of Military Order 29 allows the prison commander to decide on additional conditions and regulations for the prisoners. LSM has written to the Legal Advisor to the Military Government for copies of these regulations but has so far received no reply. Many additional rules of behaviour have been introduced at Fara'a which are not to be found elsewhere and which result in a strict regime.

For example:-

1) Prisoners must always keep their arms behind their backs in the presence of soldiers.

2) No talking is allowed in the presence of soldiers except with prior permission.

3) Most prisoners have their heads forcibly shaved upon entry to Fara'a. From the evidence of former prisoners, it appears that this practice is carried out more to humiliate prisoners than for any reasons of hygiene.

Until January 1984, the prison consisted of three sections which we shall refer to as the rooms, the stables, and the tents.

The Rooms;

There are nine rooms found in the main buildings of the prison in which up to 30 prisoners are kept. The rooms are 20 square meters in area and contain no WC. Just five toilets are provided for the hundred or more prisoners who are kept in the main buildings.

The Stables:

These are the old stables that were used by the British and Jordanian armies. Measuring 9 meters by 20 meters, the stables are divided into individual horse pens in which as many as 5 prisoners are kept. In total up to 60 prisoners are confined in the stables. There is no WC or running water.

The Tents:

During periods of widespread arrests, and the prison is full, tents are erected outside to contain the overflow. Up to 50 prisoners may be kept in each tent, which measures 3 meters by 6 meters. The tents are kept closed with the prisoners inside for large periods of the day.

We include here sections taken from affidavits given by two people who spent time in Fara'a during 1983. The complete signed affidavits are held at the offices of LSM.

A student, who was arrested on 22 April 1983 and taken to al-Fara'a, gives the following account:

"At around 6:30 in the morning they took us to another prison called al-Fara'a. When we got there, they left us until 2:30 pm, still without food and making us stay sitting on the ground all the time. After that we were summoned to the securities centre and they took all our money and Identity Cards. They took us to a section called the 'Stable,' used specially for horses in the British Mandate period and the period of Jordanian rule. This place is extremely damp, and there are about 120 prisoners held there. We slept four to the place of one horse, the normal thing for the other prisoners. An officer came and read a series of orders to us, which in brief meant standing up when any soldier came to the stable, putting your hands behind your back when walking and not sitting down to eat before hearing the order from the soldier. Anyone violating these orders would be liable to punishment - either being put in a cell, or being deprived of food. We spent Saturday under these conditions; the first meal we had was in the afternoon, and consisted of a plate of soup without salt, an onion; a rotten banana and rotten meat. I saw one of the soldiers feeding the same meat to the dogs.

On the second day (ie. Sunday) while I was walking round the yard, Captain Jedir called me over and told the barber to shave my head. I refused the idea, whereupon Captain Jedir set upon me, hitting me on the head and back, and ordered me to submit to his orders, to obey him and have my head shaved.

So, the barber shaved my head and when it was over, Captain Jedir began to jeer at me saying, "How are you going to meet your friends in the university looking like that?" At the same time, he put one of my colleagues in the cells because he refused to submit to Captain Jedir's orders to have his head shaved. They shaved sixty Birzeit and Najah students in the same fashion.

We stayed there under such conditions until five days had gone by in al-Fara'a prison - or rather, in al-Fara'a stable. Two hours before we were released, Captain Jedir ordered us to clean the prison yard of all the dirt and filth sticking to it. After that we went to securities and were released at about 4 pm on Tuesday, 26th April 1983."

On 3 April 1983, the owner of a grocer shop was arrested in the West Bank town of Nablus and was taken to al-Fara'a. He gives the following account of the conditions there:

"When we got to al-Fara'a prison in the district of Nablus, we met the supervisor of the prison and he ordered us not to break the rules and regulations of al-Fara'a which stipulate:

1. Anyone leaving the tent had to put their hands behind their back.

2. When any soldier entered the tent, everyone had to stand up, again with his hands behind his back.

3. At mealtimes, you had to remain standing until given the signal to sit.

4. You had to put your hand up before speaking to a soldier.

5. The door of the tent was not to be opened at all throughout the day.

6. No work inside the tent.

Anyone who broke these orders and rules was liable to punishment, either by being put in the isolation cells or being deprived of food - this last applied with respect to rule 3; or having everyone brought out of the tent and made to stand with their hands up for rules 4 and 5. We were in fact taken out of the tent twice and made to stand for twenty minutes with our hands up, the first time because a detainee had laughed loudly, and the second because another had opened the door of the tent for ventilation purposes.

The people being held at al-Fara'a had warned us, with regard to the tent, about the risk of getting infectious rashes of spots on our bodies as a result of the dirt in the tent and the covers, and also because of the lack of soap. While we were there, we 26 youths did in fact get these spots on our bodies and in particular on our faces.

The food was in very limited supply, and was not clean. They used to give us two bowls of soup for all 26 youths, and just three spoons for every ten of us. The conditions were miserable. They would wake us up every day at 4:30 am to wash, and breakfast was at 7:30 am; this was just to make life uncomfortable. Also, next to the tent, there was a bucket used as the toilet. This bucket stood next to the tent all day, and then at the end of the day its contents would be emptied out beside the tent; the smell stayed with us all day, expecially as we were also not allowed to open the tent all day.

We stayed like that until Friday, 8 April 1983 and were then released without being questioned."

In January 1984, several changes occurred at Fara'a. Until this time Fara'a had been used solely as a detention centre, interrogation and investigations being carried out elsewhere. Since January, Fara'a has started to be used as an interrogation centre and there have been many allegations from prisoners of maltreatment and torture. Some prisoners also claim that such maltreatment is sometimes used not for purposes of obtaining information, but as a punishment in itself. Among the methods of interrogation which have been reported by prisoners are the following:

1. Hooding - Prisoners are made to stand for long periods with their hands tied behind their back and a hood over their head. They will often remain hooded for several days.

2. Hooded prisoners are sometimes made to stand outside in the courtyard without clothes, and other hooded prisoners have been stood in a corridor and have been regularly hit by the soldiers as they have passed.

3. Prisoners are kept alone in a very small cell, the floor of which is covered with water to a depth of about 10cm. This has resulted in prisoners complaining of headaches and more serious health disorders.

4. Necessary medical treatment has been withheld until the prisoner has signed a confession.

5. Several reports collected have alleged the practice of putting a stick or a pen between each finger of the prisoner and squeezing hard.

6. Prisoners are forced to take very hot showers followed by very cold showers in rapid succession.

7. Prisoners are made to stand for long periods continually moving their head from left to right or with their arms outstretched.

We include here sections from three affidavits given by people who suffered serious ill-treatment at al-Fara'a during the first three months of 1984.

The first section is given by a 16 year-old student who was imprisoned at al'Fara'a on 24 February 1984.

"On my arrival at al-Fara'a I was summoned by military intelligence, who wore military-type clothes; they put a bag over my head and manacled my hands - the handcuffs were extremely tight - and thus I remained until 1 pm. I was summoned for interrogation and questioned by Captain Abu Samra, who made numerous charges against me - writing on walls, throwing stones, Molotovs, demonstrations, membership, raising the flag...I can't remember the rest. I denied all these charges. He then drew up

a paper with the word 'not' added to all the above mentioned charges: 'I did not write on walls, I did not throw stones...etc.' He then asked me to sign it and I did. Thereupon, the captain proceeded to strike out the word 'not' and threatened to put me on trial. He put the paper away and returned me to my former state with a bag over my head and my hands manacled. I was summoned several times, and during interrogation was subjected to various kinds of torture. Several times I was given 'hot showers' - I was interrogated on the subject of various charges and then hooded and handcuffed. I was hooded thus for 5 days on end, standing up; sometimes we would be ordered to sleep on the floor hooded and handcuffed, and while stretched out, other policemen would come and shout at us and we would be ordered to stand up. During these 5 days I was placed for 24 hours in a cell with 10-15 centimeters of water in it covering the entire floor and giving rise to severe chill, cold and headache. Afterwards I observed a pustule on my stomach that began to increase in size and spread over my body. I was very frightened by this, but the interrogation continued and I was thereby forced to confess that I had thrown a stone, despite the fact that I had done no such thing; I confessed merely to put an end to the torture, having begun to fear for my life. After my false confession, the prison doctor came and examined me, and told me my condition was serious. He did not, however, give me any kind of treatment, but simply took my temperature, although by now the pustule, inflammations and pus had spread over most of my stomach and back. I was taken back to the cell and stayed there until the morning of the next day, when I was taken to the army hospital. There, I was seen by a doctor who said that my disease was contagious and I should be put in a room by myself. Once again, I received no treatment.

On 2 March 1984, as a result of extreme physical pain, two Jewish doctors were called in and, upon examining me, were taken aback. My disease had become critical and was being daily aggravated due to lack of treatment and the wretched conditions in the cell - the damp, and the dirt arising from the lack of bathing or washing. A trial was therefore held the same day, 2 March, 1984, without me appointing a lawyer. I was sentenced to one year in prison suspended for four years and was released immediately."

The second section is given by a 15 year-old student who was arrested at 1:30 am on the night of 22 January 1984.

"When I got to al-Fara'a prison, my personal possessions were taken and I went to the doctor's room for a check - I didn't have any illness - and was taken from there to the Stable. There, I was handcuffed with one hand over my shoulder and the other behind my back, and they put a bag over my head. Then they took me into the toilets. They forced me to sit down in the water there inside the toilets and I stayed there for two days. During this time I was subjected to ugly interrogation; they beat me with an electric cable and ordered me to turn round and round for a long time so that I go giddy and nauseous. They made me

stand cross-like in the middle of the interrogation room for an hour and a half, after which I simply was not aware of what was happening to me, as I was in a heavy faint because of the interrogation. When I came to, I found a nurse beside me calling me by my name, and he gave me some tablets. Half an hour later I was returned to interrogation. They used extremely bad methods of interrogation. They kicked me with their army boots on my shins, and used insults and bad language, saying for example that they'd bring my sister and do what they liked with her. This went on for a long time. I told them I was innocent but they didn't believe me, and kept on torturing me for 12 days on end. During this period, many charges were made against me but I only confessed to one, which was throwing stones at a car with an Israeli number. After 12 days, they put me in the rooms and I stayed there for two months. During these two months, I was taken to court four times. The fifth time, I was sentenced. The judge was satisfied with my term of detention (two months) and sentenced me to two months suspended for three years. I was released at 7:30 pm on 22 March 1984."

The third section is taken from an affidavit given by a 23 year-old carpenter who was arrested on 5 March 1984.

"When I got to al'Fara'a, they took all my personal possessions and I went to the doctor's room. He checked me - I didn't have any illness - and when the medical examination was over, they moved me to the Stable and put me in handcuffs with a bag over my head for two days. Then I went to an interrogation room where there was an interrogator called Abu Dani. He proceeded to make various charges against me - closing stores in Ramallah, inciting, preparing Molotov cocktails and also (membership in) internal organizations. I had done none of these things and told him so. I told him I owned a shop and supported my family who consisted of my wife, two daughters and a son. After this, I was moved to a cell for seven days on end, with continuous interrogation, day and night. There were handcuffs on my hands and a bag over my head, and there was always water on the floor of the cell. They also restricted my food. I underwent a long period of interrogation and extremely ugly techniques were employed. More than once they used cold showers on me; the weather was extremely cold with heavy rain, and they used this method on me during the bitterly cold nights. Another method was for the interrogator to rub my genitals with his hands, and also pull them. Then I was taken to the cell for two hours and then back to the rooms. After this, I went on trial and my detention was extended for seven days. During the seven days I was taken once at random to the court, and after the session the judge ordered I be released.

After I left prison, I had pains in my throat, stomach, right knee, and genitals. During interrogation, I was told I wouldn't be able to father children because of the treatment they dealt to my genitals."

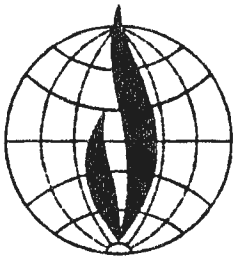
Such ill-treatment appears to be taking place in the stables

which have now been converted. Several rooms have been built for the use of officers of Israeli Intelligence. Ten cells have also been constructed. These cells measure just 60cm by 170 cm and are often used by more than one prisoner during the period of interrogation. The cells have just one small window (measuring about 30cm by 20cm) and no WC. Prisoners are sometimes, although by no means always, provided with a bucket. Prisoners are kept in these cells for several days.

There are at present 250 prisoners in Fara'a, most of them between the ages of 15 and 18.

For the Rule of Law

THE REVIEW



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The Legal System of the Israeli Settlements in the West Bank

by
*Raja Shehadeh**

Introduction

Much has been written about the legal history of Palestine and the status of the occupied West Bank. Many Israelis and apologists for Israel have attempted to interpret that history so as to justify the Israeli military presence and the military authority's extensive amendments of the laws existing there.

It is not my purpose here to add to that literature. I would, however, like to emphasize from the start that even by the standards set up by the Israeli High Court of Justice and the recent publication of the Israeli section of the ICJ, *The Rule of Law in the Areas Administered by Israel*, the extensive legislation on settlements which is the subject of this study cannot be justified.

An interesting analysis of the legal status of the West Bank was made by Dr. Allan Gerson in his book *Israel, The West Bank and International Law*. The conclusion reached by Dr. Gerson is that the West Bank was under tutelage or in trust to the mandatory for the benefit of the inhabitants of the territory, and even though, as claimed by Israel, Jordan may not have been the legitimate sovereign of the West Bank before 1967, Israel derived from that fact no proper claim of sovereignty. Such sovereignty remains with the Palestinians. However, although the Palestinians possess sovereignty over the territories, Dr Gerson argues, they have never effectuated their sovereign power so as to establish governmental structures and laws which Israel must maintain in existence pending Palestinian exercise of sovereignty at the termination of the occupation. Thus, in Gerson's view, Israel "would not be barred from implementing any changes in the existing laws or institutions *provided such amendments were in the best interests of the inhabitants.*" (My emphasis.) I do not agree with Dr. Gerson's analysis. However, even if we accept this analysis, the recent military orders affecting the settlements cannot be justified.

Israel has already established more than 80 civilian settlements in the occupied West Bank of Jordan. These have now been granted their own legal structure which is separate and distinct from that of the other Arab population centres in the region. They also have their own court system. In military order #892, the military commander of the West Bank has proclaimed that "the

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* Raja Shehadeh is a lawyer practicing in the West Bank and the principal author of *The West Bank and the Rule of Law*, published by the ICJ in 1980. In the introduction to this article the author replies to a publication issued in the name of the Israeli Section of the ICJ entitled "The Rule of Law in the Areas Administered by Israel.

Area commander shall determine the jurisdiction of these courts, the law which they shall apply their constitution as well as any other necessary matter for the proper administration of these courts" (art. 2b). The settlements have also been given their own defence system.

This article is divided into two parts: in the first a comparison is made between the Jordanian laws as amended that are applicable to the local government units of the Arab populated centres, namely the villages and municipalities, and the military orders and the regulations made by virtue of these orders applicable to the regional and local councils of the Jewish settlements. The settlement court and defence systems are also discussed in detail in this part.

In the second part I discuss, in the light of that part of the orders and regulations passed by the military government of the West Bank which I have been able to obtain, the manner in which settlements are administered the significance of the policy of having the settlements administered by regional and local councils instead of the other units of local government available under the Jordanian law applicable in the territories, and the significance of the timing of the proclamations of these military orders which came after 13 years of settlement activity had already passed with very few legislative enactments on this subject. I also attempt, in the second part, to put this legislation in historical perspective and to show how the military government in its recent enactments, and in its policy towards the Jewish and Arab population in the West Bank is being guided by the policies of the British government of the mandate which ruled over Palestine before the establishment of the state of Israel.

It is not my intention to discuss in this article the question of the legality of the settlements because this has been dealt with adequately in other places (see for example ICJ Review #19, December 1977 p 27). I do, however, intend to consider from the outset the extent to which the military government legislation concerning Jewish settlements is consistent with the alleged scope and justification for military government legislation, as set out in the recent publication *The Rule of Law in the Areas Administered by Israel* attributed to the Israeli National Section of the International Commission of Jurists.

The anonymous authors of that publication in the chapter on the legislation of the Regional Commander write:

> "Under International Law, the Regional Commander is empowered to determine obligatory norms of conduct in matters of security, public order and the general welfare of the local population. The exercise of such authority involves a certain latitude in amending existing local law."

They then go on to quote from the majority decision of the High Court of Justice in the case of the *Christian Society for the Holy Places v. The Minister of Defence:*

> "... On inquiring whether some enactment of an occupying power is consonant with article 43 of the Convention, great importance attaches to the question of the legislator's motive. Did he legislate to forward his own interest or out of a desire to serve the well-being of the civilian population, "la vie publique" of which article 43 speaks."

The examples the authors choose to indicate to the reader the "selectivity of the military government in amending local law" do not include the legislation (which was in force at the time of the publication of the booklet) affecting the settlements. This legislation clearly goes beyond the scope

which the learned authors describe and cannot be justified by the arguments they put forward

Despite the large quantity of these orders and the fact that they clearly exceed even the scope which the authors of the booklet posit and which can neither be justified by the precedents of the Israeli High Court of Justice nor the scholars of International Law whose works they quote, the authors reach the conclusion that:

> "the law in force in Judea and Samaria (the West Bank) when Israel first took over the administration thereof, has remained in effect... but, in view of the many social and economic developments occuring in the Region, there was an urgent need to amend existing legislation and adapt it to changing circumstances. In doing so, Israel has acted in a lawful manner in accordance with International Law."

The authors of the publication in question conclude the first paragraph quoted above about the power of the regional commander to amend existing local law, by stating that

> "needless to say, the publication and circulation of all enactments by the regional commander is a condition sine qua non for the exercise of this power."

They refute the accusation made in *The West Bank and the Rule of Law*, that:

> "the military orders are not available to the public (and that) some regulations affecting specific groups of people in the society are distributed only to those with whom they deal. Lawyers are not provided with them."

They do this by referring to the bound volumes of the collected orders which appear long after the orders are issued as an official gazette. In fact these bound volumes do not qualify to be considered as a gazette because, amongst other things, they do not contain all official announcements and notices such as those for example that are made by the office of the Registrar of Companies, they are not made available to the general public and are not published at regular intervals. They go on to say that

> "further, in order to bring the contents of an enactment to the attention of the local residents as soon as possible, *every* enactment is published individually, in Hebrew and Arabic, in large quantities It is then *immediately* distributed in the Region free of charge to *all* those persons and bodies whose names appear on a list..." (My emphasis).

After inquiring from those persons and bodies whose names are mentioned as being on the list, I have learned that some do not get *any* of the military orders and *none* get all of them.

But this unavailability of military orders is not only true of those orders that are published in between the dates of the publication of what is referred to as a gazette. Volume 45 of the collected orders which was published on September 24, 1980 includes orders #781 to #805, i.e. it includes order #783 but does not include those regulations on Regional Councils made by virtue thereof. Article 149 of the Basic Regulations passed by virtue of order 892 which is neither published in a bound volume nor has been distributed, states that these regulations affecting settlements shall be published as follows:

1) By posting them on the notice board in the offices of the Council (i.e. the Council of the settlement)

2) In the collection of the council's regulations.

Of course the general Arab public has no access to the offices of the settlements' councils, nor to its collection of regulations, which means that this category of legislation will be unavailable to the general Arab public. It also means that whenever the General Commander of the West Bank prefers that a certain order be immune from the scrutiny of the Arab public, he can call it a regulation and declare that it be published in the manner mentioned above.

The author of this article has therefore been unable to see all the orders referred to in this paper They are not in the last published volume of the collected orders (referred to as the gazette), nor in the possession of the people or bodies listed in the booklet to whom it was claimed that all the military orders are distributed.

I was fortunate to have access to some of the orders affecting the settlements and these were only available in Hebrew (they do not seem to have been translated into Arabic). My request made to the authorities last July and repeated in October to obtain the rest has not been granted.

This limitation in the available sources has meant that some gaps remain in this study, such as in the definition of the regional councils and the relationship between this unit and the smaller unit, the local council.

Within this limitation of primary sources mentioned above, I have endeavored to analyze the legislation applicable to the Jewish settlements in the West Bank and to put it in historic perspective.

Part I: Comparison between Arab Municipalities and Israeli Councils

Prior to March 25, 1979 the military orders pertaining to Jewish settlements on the West Bank consisted of a small number of orders declaring the creation of what the orders called "religious councils" for the administration of specific settlements such as order number 561 of 1974 for the administration of Kiryat Arba settlement. This order states that "the settlement shall be administered in accordance with administration principles which the military commander shall declare by internal regulations." However, these regulations to my knowledge have never been made available to the public.

The most important post 1979 orders passed by the military government of the West Bank on the subject of settlements are order 783 of March 25, 1979 and order 892 of March 1, 1981. The former introduced the local government unit, the regional council. Without defining what a regional council is, the order declared that all the settlements listed in the appendix to that order are to be considered regional councils. As to the manner in which a regional council is to be administered, article 2(a) of the order stated that it shall be in accordance with the manner in which the area commander shall decide in regulations. I have to date been unsuccessful in obtaining copies of these regulations despite several applications to the authorities for them.

It is worth mentioning here that subsection (b) of article 2 which was subsequently repealed by order 806 of September 30, 1979 stated that

> "no regulation passed by virtue of the above (i.e. article 2(a)) shall diminish from any law or security regulation unless specifically so stated (or unless stated clearly in any other order or regulation)."

The second major legislation on the settlements is order #892 on the administra-

tion of local councils dated March 1, 1981. By virtue of article 2(a) of this order regulations were passed setting out the rules for the administration of local councils. The order lists the following as the local councils to which the order applies: Alkanah, Ariel, Ma'aleh Adomim, Ma'aleh Ephraim, and Kiryat Arbaa. The first council administering these Local Councils was appointed by the "person responsible" who is appointed by the military commander and who is responsible to him. Thereafter every resident of the local council over the age of 18 is eligible to vote and to be elected. It is worth mentioning here that there is no mention in the order as to how local councils may be created. The list of existing councils can only be enlarged by a new proclamation made by the military commander amending the above order. This means that even if an Arab village or municipality should wish to be turned into a local council there is no mechanism whereby this can be done.

What follows is a comparison between the provisions of these regulations and the Jordanian Municipalities law of 1955, as amended, i.e. the law which applies to the Arab municipalities in the West Bank.

A. The Jordanian municipality law and the Regulations for the administration of Local Councils

It is important to point out, before beginning the comparison between the Jordanian law on the municipalities and the order on the local councils, that all the powers vested by the Jordanian law in the King, the Council of Ministers and the Ministers of the Interior and Finance have been vested by virtue of military orders 194 and 236 in the hands of the "person responsible" who is appointed by the Commander of the West Bank. As will be seen later, the military commander also appoints a "person responsible" who has certain powers according to the Regulations applicable to local councils (hereafter The Regulations)

It will become clear from the survey below that Jordanian law has vested ultimate authority in many areas affecting municipalities in government ministers. As these powers are now enjoyed by the "person responsible" who is appointed by and serves the Military Government which is responsible for the creation of the settlements on the West Bank, it is to be expected that he will use his power to ensure that the growth and development of the municipalities does not jeopardize that of the settlements. In practice he uses his authority whenever possible to limit and discourage the growth of these Arab centres. A recent example of this is the prohibition on municipalities without an approved town planning scheme to issue building permits and the transfer of this power to the Higher Town Planning Council, which is constituted exclusively of Israeli officials.

All this is contrary, of course, to how his counterpart, the persons responsible for the 'local councils', act in relation to these councils whose establishment and development is the policy of the government he serves. Unlike the Arab inhabitants, the Jewish settlers have direct access to the persons responsible, either through fellow settlers who work in the Military Headquarters or through friends. They are therefore able to urge that the orders and decisions taken concerning the Arab centres and the Jewish local councils facilitate the development of the latter and restrict the growth of the former[1].

When studying the Jordanian municipality law (hereafter the Jordanian law), and the regulations for the purpose of making a comparison between them, the first thing that strikes the reader is the length of the regulations as compared with the Jordanian

law The regulations consist of 152 sections as compared to the sixty-five sections of the Jordanian law They are therefore the longest single piece of legislation produced by the West Bank Military Government authorities during the fourteen years of occupation

The Jordanian Law gives the Council of Ministers and the Minister of Interior important powers over the municipal council. The Council of Ministers on the recommendation of the Minister of Interior may for example dismiss a mayor if he is convinced that this serves the interest of the municipality His decision is final and is not subject to any form of appeal. Similarly the Minister of Interior with the agreement of the Council of Ministers may appoint, in addition to the elected members, 2 members to any municipal council and "these 2 members shall enjoy all the rights of the elected members." No similar powers are given to any official in the military government by virtue of the regulations for the administration of local councils.

Both the municipalities and the local councils are juridical bodies. Both councils are empowered to administer the affairs of their areas and to exercise the powers mentioned in Section 68 of the Regulations and 41 of the Law which are compared below. However unlike the municipal council, the local council has the power to appoint committees for the execution of certain functions.

Functions

The municipal council has the power over such areas and functions as roads, buildings, water, electricity, gas, sewage, crafts and industries, health, cleanliness, public places, parks, etc. In all the list comprises 39 areas. Some of these powers are similar to the powers given to the local councils. However the local council enjoys in addition to them other powers To begin with, a local council acts as the trustee, custodian or representative in any public case involving the inhabitants of the local council[2]. It is also empowered to administer, implement and establish services, projects and institutions which the council believes are important for the welfare of the inhabitants living within its area[3] It is also empowered to oversee the development of the local council, the improvement of life in it and the development of the financial, social and educational affairs of its inhabitants or any sector of them[4]. It can also organize, restrict or prevent the establishment or administration of any service, project, public institution or any other organization, craft work, or industry of any kind[5]. It is also empowered to oversee irrigation, pastures, the preservation of the soil and any other matter of agricultural significance provided that it is administrated for the benefit of the various farmers within the area of the local council[6]. The council may establish any corporations, cooperative or any other organization for the execution of any of its functions and buy shares in it[7]. It is also empowered to prepare the facilities for emergency and to operate them at the time of emergency including the organization of rationing and provision of the necessary services[8]. The council is also empowered to give certificates and to certify and issue licences for any of the matters included within its powers.

The council administering a local council may, according to Article 88 of the Regulation, with the agreement of the "person responsible" make regulations concerning any matter which the council has jurisdiction over. By Article 93 these regulations shall be considered as security legislation issued by the area commander. They shall be published by posting on the notice

board in the offices of the council and in other public places within the area of the local council or in any other way as the council shall decide. Municipal councils on the other hand, may make regulations only after a decision to this effect is taken by the Council of Ministers with the agreement of the king.

Taxes

A local council may, with the agreement of the "person responsible" impose taxes called "arnona," membership fees and other obligatory payment[9]. The council is empowered to impose any additions on the arnona after publishing a notice to this effect in the area of the local council[10]. The council may reduce the tax or fine for late payment taking into consideration the financial situation of those on whom it is levied or for any other reason to which the person responsible agrees[11].

A municipal council on the other hand may impose taxes on vegetables and fruits for sale in the market, or for any of the other matters mentioned amongst its powers in article 41 of the Municipalities Law, the amount and percentage of which is determined in regulations issued by the council with the agreement of the council of ministers[12]

Finances

A municipal council may only borrow money after obtaining the agreement of the Minister of Interior who will consider who the lender is and the purpose for which the fund is to be used[13]. It is on the basis of this article that many municipalities in the West Bank are prevented from collecting money contributed to them from Palestinians outside.

Property tax payable to the municipality is collected by the ministry of finance[14] and the customs authority collects custom duties on combustible liquids according to percentages specified in the law[15] By virtue of article 52 all funds collected for the municipalities by the ministry of finance are kept in trust for the municipalities and distributed in the percentage which the council of Ministers, on the recommendation of the Minister of Interior, decides according to criteria mentioned in article 52 (2), provided that some of these funds may be allocated to finance other matters.

The yearly budget prepared by the municipality is acted upon after it has been approved by the council and authorized by the Minister of Interior[16]. Similarly, a local council needs the approval of the "person responsible" for its yearly budget[17] However a local council does not need to get approval for borrowing money or receiving contributions[18].

The accountant who inspects the finances of the municipalities is decided upon by the Council of Ministers. However a local council appoints its own accountant. Also the Minister of Interior with the agreement of the Council of Ministers publishes regulations as to the proper administration of the municipalities financial matters. A local council, however, has discretion to administer its own finances without any interference. Regulations are made for the municipalities as to tenders, purchase of material and all other financial matters. A local Council decides these matters without interference except when the sale involves a monopoly or a concession.

Chapter 16 of the Regulation mentions powers which the area commander and the "person responsible" has in special cases. These include interference in the administration of the local council if they see that the council is failing to carry out any of its functions under the regulation or under a

security order. In case of emergency, and when there is no possibility for convening the council to take a decision which needs to be taken by the council in session, the "person responsible" may order the head of the council to take any action in accordance with the Regulation if he deems that the prompt execution of such action is necessary for the safety of the members of the council. The area commander may also appoint a new council if it has been proven to him that the council does not carry on its duties according to the Regulation or that there are financial misdealings. But he can only do this after he has warned the council and it did not take heed of his notice.

B. *The Settlements' Court System*

The Military Commander has used his power under order #892 to establish courts for the settlements and declared the establishment of such courts in article 125 of The Regulations. Acting also within his power according to order 892 he has determined the jurisdiction of the court as follows:

Art. 126

(a) "the court shall have jurisdiction to look into any offence committed contrary to the Regulations for the administration of Local Councils except those mentioned in chapter three (on rules for election of the council). It shall also have jurisdiction to look into offences against any regulations that the council may make and also any offence committed within the area of the council against any law or military order mentioned in the appendix to The Regulations. The court shall be competent to impose the punishment determined in The Regulation, other regulations made thereby, and laws or military orders that are mentioned in the appendix.

(b) in addition to what has been said in (a) above the court shall be competent to look into other matters which shall be determined in The Regulations or in any other military order."

The Regulation as it stood on March 1, 1981 mentioned only the Jordanian law of Town Planning in the appendix. However, as is clear from the above, more laws can be added and these need not be Jordanian laws because The Regulation does not restrict the court's jurisdiction to look into violations of Jordanian laws but says "any law mentioned in the appendix." In view of the provision in The Regulations which states that this or any other regulations made by virtue of it or in any other way need not be published except in the offices of the local council, it is possible that the jurisdiction of the court might be enlarged without the knowledge of anyone outside the settlement.

The judges of the settlement's courts are appointed by the commander of the area[19]. Judges for the first instance court are appointed from amongst magistrate judges, and for the appeal court from amongst judges of the District Court[20]. Whereas the judicial system in the West Bank does have District Courts, the implication is that the choice will be from among Israeli District Court judges.

It is important to note here that no connection is made between the West Bank judicial system and the system of settlement courts. For the West Bank the Minister of Justice has been replaced by the Officer in the Israeli army in charge of the judiciary. Judges for West Bank courts are chosen by a committee composed of military officers of whom no mention is made in The Regulations, where the choice of the settlement's judges is left to the area commander.

And although no formal connection with the Israeli system is established, the judges would be from amongst judges chosen in accordance with Israeli laws to serve in Israeli courts.

As with judges, the area commander also chooses the public prosecutor[21] The appeal court sits anywhere the area commander designates[22]

The procedure and the rules of evidence which the court applies are those applied in Israeli courts. The court also has all the powers held by an Israeli magistrate court as regards subpoena of witnesses and any other matter related to the hearing of a criminal case. Similarly the appeal court has all the powers which an Israeli District Court in Israel has when it convenes as an appeal court. Furthermore the court has all the powers given to military courts when it looks into the violations to laws and orders mentioned in the appendix[23].

The court may impose fines which are paid to the treasury of the local council[24]. If a fine is not paid the court may sentence the violater with actual imprisonment for up to one month. It is natural to ask how the court will execute its judgments. Will it use the West Bank execution departments and police, or the Israeli ones or will it have its own? But this is not the only question which The Regulation leaves unanswered. What categories of people does the court have jurisdiction over? What if a Palestinian is brought to appear before it, can he deny its jurisdiction over him and claim that only a local Arab court has the right? And when does the military court have jurisdiction over violators of military orders if these orders are mentioned in the appendix to The Regulation From the wording of The Regulation it is possible for the settler's courts to assume the powers of the military courts which implies that the settlers are not only given autonomy but also power over the local Arab Palestinian population.

The Municipal Courts

Until January 1976 municipalities had no courts nor did the Jordanian law give them the power to establish any To date only the Bethlehem Municipality has applied in accordance with order 631, whereby municipal courts have been established. and has acquired a municipal court of its own.

According to order 631[25], the Officer in charge of the Judiciary is responsible for the municipal courts[26]. The judges for the court are appointed by the officer from amongst magistrate judges who serve in West Bank courts[27]. No appeal court may be established and the court's decisions are appealable at the West Bank court of appeal[28]. The court shall apply the rules of procedure and evidence applicable in criminal cases in magistrate courts[29] The court shall have jurisdiction to hear violations against the regulations of the municipality and any violations committed within the area of the municipality which are listed in the appendix, which includes nine laws. The municipality is empowered to execute judgments issued by its court Although the municipality is empowered to appoint from amongst its employees the officers of the court[30], these employees are responsible to the officer in charge of the judiciary who may issue instructions to the municipality to change any officer or to cancel his appointment. He may also appoint any employee of the West Bank Ministry of Justice to the court[31].

C. The Defence of the Settlements

A number of related orders need to be discussed when considering the powers and functions of a local council. These are the orders dealing with what is called "the Defence of Villages".

These orders are modelled after an Israeli law of 1961, the local Authorities Regulation of Guard Service Law[32]. This law defines in its preamble 'the officer-in-charge of the guard-service' as a person whom the Brigadier-in-Command has appointed to be the officer-in-charge of the guard-service. Provided that in a Command in which the guard-service is in the hands of the Police, the Brigadier-in-Command shall empower the person responsible on behalf of the police for the guard-service. 'Guard-service' is defined to include exercises and any activities which in the opinion of the officer-in-charge of the guard-service is required for protecting the security of the inhabitants of a settlement or their property, and 'local authority' is defined as a municipality or a local council. Article 2 of the Israeli law states that:

> "the Minister of the Interior may, after consultation with the Minister of Defence, impose, by order, the duty of guard-service on the inhabitants of any settlement or settlements..."

The connection with Israeli law does not stop at the level of providing a model for the military orders on the same subject. In article 11 of order 432, the first of the orders passed by the West Bank Military Commander[33], it is stated that whoever is injured while performing guard-service shall be considered as one who has been injured during performance of guard-service in accordance with the above mentioned Israeli law. This direct reference and application of an Israeli law is one of the first to be made in the Military Proclamations in force in the West Bank.

Order 431 defines a village as one which has been established after 1967. As only settlements have been established after 1967, the order clearly refers to settlements. Defence is defined as training or any other activity deemed necessary by the person appointed by the Military Commander of the West Bank as the officer responsible under the order. The officer is empowered by the order to impose upon every settler the duty to defend the settlement. He is also empowered to appoint an authority to carry out the defence.

Order 669 amended the definition of a resident in order 432 to include:

> "whoever lives in the village and is unregistered as a resident in its registers whether he was from the West Bank or from Israel and who does not carry out guard duty in any other village."

The order also determined the age of the person eligible for guard duty as from 18 to 60, and provided that whenever guard duty is imposed on a person he shall be assumed to be eligible as long as he has not proven otherwise in the way that shall be provided by order. A fine is imposed on a person who refuses to carry out the guard duty. Order 817 empowers the director, who is defined in the order as whoever has been appointed director of guard duty according to order 432, "to oblige pupils of an institution (defined as a kindergarten, elementary school, junior high school, field school, advanced education institution, children's vacation enterprise, boarding school, youth and sport cultural centre, institution of higher education, yeshiva or any other institution in which education is provided) aged over 16 to do guard duty as well as the pupil's parents, the principal of the institution, the teachers and the workers." (Article 2 of the order).

A director may also oblige the parents whose children are at an institution to do guard duty. In special circumstances the director may order that an institution be guarded by paid policemen[34]. If the director believes that facilities must be installed

in the institution for its protection, he may, with the consent of the police, order the institution's owners to install them.

Order 848 of June 18, 1980 increased the number of hours of guard duty per person to six hours per week unless the director orders that the number of hours be increased to ten per week for 30 days. An increase above ten hours needs the approval of the commander of the area.

A fifth amendment to the original order[35] substantially increased the powers of the settlers. Article 3 of order 898 empowers them to:

- oblige any person whom the settlers have any reason to suspect of having committed any offence contrary to any military order to show them his identification card;
- arrest any person whose identity has been not proven and to transfer him to the nearest police station and
- arrest any person without a warrant:
  - if he commits before him a felony punishable by five years imprisonment or if he has any basis which makes him believe that a person has of late committed a misdemeanor or a felony punishable by the military orders with five years imprisonment, or
  - if he saw him in suspect circumstance taking precautionary measures to disguise himself without being able to give any reasonable explanation of his actions.

A person who arrests another in the above circumstances must hand him to the police as soon as possible. Any one refusing to obey the orders of the settlers will be considered as one contravening the military order on security of 1970.

Appended to the order is the format of the card with which the settlers will be issued. The above powers are printed on the card.

As with all the other 921 military orders already in force in the West Bank, the power to interpret the provisions of this order are vested in the military courts.

It has been common practice for the settlers to exceed their powers of guard duty and interfere with the Arab inhabitants of the West Bank. There have been many reported incidents when they have set up and manned road blocks and searched passers-by, and they have attacked nearby villages and made their lives intolerable.

Two reservists were quoted in the Israeli English newspaper, The Jerusalem Post, as saying after Jewish student settlers from the local yeshiva and from Kiryat Arba in Hebron manned the army check-point alongside them: "this is the first time and the last time we will serve in this area." The settlers had joined them at the check-point because they said they preferred to defend themselves after the incident in Hebron where several of them were killed.

With the orders for the defence of the settlements promulgated, the organization of the military territorial defence system of Jewish settlers serving in the West Bank into organic military units stationed in their own areas under their own command has been completed.

Part II: Comments

When the Israeli army occupied the West Bank, the Jordanian law on local government provided for only two types of local government units: the municipality and the village. The regional and local councils that existed at the time of the British Mandate were abolished by article 105(1) of the Jordanian Municipalities Law of 1955 which declared all previous Ottoman, Jordanian and Palestinian laws dealing with munici-

palities and local councils repealed provided that

> "all municipalities and local councils existing at the date of the coming into force of this law shall be considered municipal councils by virtue of the provisions of this law and shall continue to carry out their functions until replaced by municipal councils elected in accordance with the provisions of this law."

Despite the continuous settlement activity that has gone on uninterrupted though at an uneven rate since 1967, no substantial amount of legislation was promulgated concerning the administration of the settlements. They continued to be administered by what was called a religious council (as mentioned above) until March 1979 when a number of lengthy military orders were proclaimed declaring that regional and local councils will administer the settlements.

Under the Jordanian law in force in the West Bank, a group of people in a village can petition the District Commissioner to declare their village a municipality. Whereas this function has now been assumed by an officer in the Israeli army, why then did the military government not choose to use the existing local government laws and structures and declare Jewish settlements to be villages or municipalities? Clearly this would have been the easier course, which would have released Israel from having to justify again a charge of violating international law by amending and adding to the local law in a way that exceeds the scope of the legislative powers of an occupier and cannot be justified as necessary legislation for the welfare of the population of the occupied territories.

A possible justification of this choice which the military government may give could be based on the provision in the Jordanian law which stipulates that the candidates for municipal election must, amongst other things, be Jordanian male citizens. However this justification can easily be rebutted by pointing out that the military authorities have already amended this article by removing the condition as to sex, giving the franchise to women. They could have made a further change and eliminated the condition that the candidates and electorate must be Jordanian citizens. It is clear, therefore, that it was not any legislative difficulty that has determined the choice of turning the settlements into local councils rather than municipalities.

Nor is the reason the independence of the municipal councils from the military authorities. As has been shown at length in the first part of this article, the Jordanian law gives more power to the government than the power which the *Regulations for the Administration of the Local Councils* gives to the commander of the area or the person appointed by him to be the "person responsible" for the purpose of the Regulations.

The more likely reason for the choice, to my mind, is the desirability of having separate administrative units for Arabs and Jews to enable separate and independent legislation and policy for the growth and development of each of the two communities.

It is interesting to realize how the military government, in making the choice to establish regional and local councils to administer the settlements, seems to be guided by the policy that was pursued by the British Mandatory government in Palestine before 1948. Article 2 of the Mandate runs as follows:

> "The Mandatory shall be responsible for placing the country under such political, administrative and economic conditions as will secure the establishment of the

Jewish national home, as laid down in the preamble, and the development of self-governing institutions, and also for safeguarding the civil and religious rights of all the inhabitants of Palestine, irrespective of race and religion."

It is not difficult to imagine, though I have no basis to verify this conjecture, that the policy guidelines given by the Israeli government to the military command in the West Bank run on similar lines.

Article 3 of the Mandate provides that:

"The mandatory shall, so far as circumstances permit, encourage local autonomy."

In the yearly reports by the United Kingdom to the League of Nations and in the reports of the Palestine Royal Commission, the rate of progress achieved by the government of the mandate in fulfilling the terms of the Mandate and in assisting the Jewish and Arab communities to attain a greater level of local autonomy was reported.

The 1937 report of the Palestine Royal Commission, for example, reported that

"there are at present only five Jewish Local Councils, but they rank almost next in wealth and population to the four major municipalities of Jerusalem, Haifa, Jaffa and Tel Aviv and have been active and reasonably efficient."

The Commission recommended that:

"the remaining preponderantly Jewish Local Councils, taken together with all the present existing municipalities should be re-classified by means of a new ordinance into groups according to their respective size and importance."

The military orders relating to the Jewish local councils are not, as far as their content is concerned, modelled after the British Ordinances. They give much greater power to the local councils than was available at the time of the mandate. Despite the difference in degree, the same policy followed by the government of the mandate to achieve local autonomy for the Jewish minority in Palestine is now being pursued by the Israeli government towards the Jewish settlements in the West Bank. The only difference (and it is a very significant one) is that the government of the mandate planned a restricted growth for the Jewish community and was interested in ceding local autonomy to both the Arab majority as well as the Jewish minority, in fulfillment of the terms of the mandate and the Balfour declaration whereby two communities would exist in Palestine. The Israeli government, on the other hand, is interested in incorporating the West Bank into Israel and plans to do this by facilitating the development and growth of the Jewish communities living, or who will be imported to live, in the settlements which have been planned to exist around the Arab population centres. Mattiyahu Drobles, an instrumental figure in government settlement efforts, referring to West Bank Arabs as "minorities" said[36]:

"They (the Arabs) will find it difficult to unite and create a continuous territorial entity if they are cut off by Jewish settlements."

Many other legislative actions of the government of the mandate were also aimed at facilitating the fulfillment of the terms of the mandate. The Land Transfer Ordinance of 1920, for example, gave the government the power to control land acquisition to insure that lands in areas designated for Jews did not get transfered to

Arabs. Similarly a military order was passed soon after the occupation whereby the military government acquired the right to control land transfers by making it necessary to get a permit for every transaction in land (order 25).

With strong support from the Jewish Agency and other Jewish organizations outside Palestine, and the greater experience of the European Jewish immigrants in civic administration, the Jewish municipalities and local councils grew often at the expense of the nearby Arab municipalities or local councils. With the establishment in 1948 of the Jewish state, and the exodus of the majority of the Arab population from the region, this policy was pursued systematically, and the present situation of the cities of Jaffa and Tel Aviv is a good example of it. Whereas Arab Jaffa before 1948 was a flourishing sea port and the bigger municipality, with Tel Aviv then considered in size and importance as a mere Jewish suburb, the situation now is reversed with Jaffa a mere suburb administered by the greater Tel Aviv municipal council. The Israeli policy towards the West Bank seems to aim at the continuation of this pattern so that, for example, the Jewish settlement near Ramallah, Beit Eil, whose population is at present approximately 400 would be encouraged to grow and develop to dominate the town of Ramallah which has at present a population of approximately 20,000. Ramallah would then come to be treated as a mere Arab suburb of the Jewish settlement of Beit Eil.

The timing of the legislation for the administration of the settlements as regional and local councils is not without significance. March 25, 1979 was only seven months after the signing of the *Framework for Peace in the Middle East Agreed at Camp David*. Some of the provisions concerning the West Bank in the agreement did not at all please those Jews who had already settled in the West Bank and those intending to do so.

It is perhaps not too far-fetched to suggest that the activities and legislation in the West Bank which followed the signing of the agreement indicate the intentions which the Israeli negotiators had in mind when they negotiated the wording of the agreement and agreed to sign it as presently worded.

It is not accidental that only in article 1 of the Camp David Accords the expression "Palestinian people" is used. Elsewhere in Sections A.1.(A), (C), (C)1, (C)2 etc. the reference is to the 'inhabitants of the territories' (i.e. the West Bank). The clarification acknowledged in President Carter's letter to Prime Minister Begin on September 22 reads

"in each paragraph of the agreed framework document the expression Palestine or Palestinian people are being and will be construed and understood by you as Palestinian Arabs."

No clarification is sought or given about the expression "inhabitants of the territories". Does it refer to Arab inhabitants or any inhabitants, Arab or Jewish?

Obviously without clarification it will mean what it stands for, i.e. any inhabitant whether Arab or Jewish. This choice of expression was therefore made carefully, and the activities ensuing after the agreement make it clear what the intention was, and what the result of the implementation of the provisions of the Camp David agreement will really mean to the Jewish settlers in the West Bank.

Even the limited powers which the Camp David Accords provide for the Palestinian Arabs will under the newly created reality which Israel has been busy creating, and because of the careful wording of the Camp David agreement, have to be shared by the

Jewish and the Arab inhabitants of the area. The concentrated activities aimed at creating more settlements and bringing more Jews to live in them while changing the legislation to facilitate their independence and growth was intensified after Camp David.

Although at present the Arabs constitute the majority of the inhabitants of the West Bank there is no assurance that the elections for the self-governing authority envisaged under the Camp David agreement will proceed on the basis of proportional representation rather than on a regional basis. If the latter is the method then in view of the large number of the settlements already established Jewish representation in that authority will be substantial. In this way even the limited concessions Israel seemed to be making in the Camp David agreement will have been forfeited. This, of course, presuming the Jewish settlers would like to exercise control in this manner.

It is also possible, however, that the settlers may feel that their separate status as "self-governing authorities" gives them more power and better enables them to grow within the large areas of land that have been allocated for them. They might then leave the Arabs to exercise alone the meagre powers given to them.

Conclusion

More than 950 military orders have been promulgated during the 14 years of Israeli military occupation of the West Bank. This violation by Israel of international law has lately become better known. In response to criticism of this practice, the decisions of the Israeli High Court of Justice in appeals submitted to the court against the military commander, and publications by Israelis as well as apologists for Israeli practices, have attempted to justify such violations. In this paper I have attempted to show how even if the standards used by the High Court judges and the authors of these studies to justify these changes in Jordanian laws are accepted and applied, legislation affecting Jewish settlements in occupied territories cannot be justified.

I have also attempted to point out the Israeli policy towards the West Bank concerning the settlements by comparing these regulations to the Jordanian law still in force which applies to the Arab population centres. This comparison proves that two distinct communities have been created with different sets of laws applying to each The separate development of each of these communities is thereby facilitated.

By referring to the legal situation that existed at the time of the British Mandate over Palestine I have attempted to show that the policy followed in the West Bank is similar to some extent to that of the Mandate Government, which by the terms of its mandate endeavored to facilitate the growth and development of an Arab and a Jewish national presence in Palestine. The only difference in the case of the West Bank being that the military authorities there will continue to attempt to retard the growth of the Arab population and encourage the establishment of a Jewish one.

This paper has shown how a complex and elaborate structure for the administration of the Jewish centres equipped with legal and defence systems has already been established to facilitate this process.

Finally, the direction in which matters seem to be going in future as far as Jewish-Arab relations on the West Bank are concerned, is parallel to a version of the South African Apartheid or separate development policy. Granted the reality and conditions of the two areas differ; so does the extent of the similarity. However, enough parallels do exist in the nature of the problem facing the South African government and the Israeli government (anxious as it is with

trying to Judaize and control an area with an Arab majority), and in the nature of the two systems and to some extent the practices of the two governments, to support a conclusion that there are strong similarities which, all indications point, are only bound to increase with time.

References

(1) Shlomo Amar, an Israeli official in the military government of the West Bank acting as Minister of Interior, was appointed by the Military Commander on March 27, 1979, as a member of the Council Administering the settlement of Ma'aleh Adomim.

(2) Article 68(3) of the Regulations for the Administration of Local Councils.

(3) *Ibid*, article 68(1).

(4) *Ibid*, article 68(2).

(5) *Ibid*, article 68(6).

(6) *Ibid*, article 68(11) and 12.

(7) *Ibid*, article 68(13).

(8) *Ibid*, article 68(14).

(9) *Ibid*, article 76.

(10) *Ibid*, article 81(b).

(11) *Ibid*, article 87.

(12) Jordanian Municipalities Law of 1955, article 41(c) added by a 1956 amendment.

(13) *Ibid*, article 45.

(14) *Ibid*, article 47

(15) *Ibid*, article 49

(16) *Ibid*, artible 56(1).

(17) The Regulations article 97(c).

(18) *Ibid*, article 101.

(19) *Ibid*, article 127(a).

(20) *Ibid*, article 127(d)

(21) *Ibid*, article 131.

(22) *Ibid*, article 128(a).

(23) *Ibid*, article 134.

(24) *Ibid*, article 137.

(25) As amended by order 713 of June 10, 1977.

(26) Military Order 713 article 1.

(27) *Ibid*, article 4(a).

(28) *Ibid*, article 10.

(29) *Ibid*, article 8.

(30) *Ibid*, article 12(a).

(31) *Ibid*, article 15(b).

(32) Published in Sefer Ha-Chukkim no. 346, June 13th, 1961, p. 169.

(33) The date of this order is June 1, 1971.

(34) Military Order 817, article 7.

(35) Military Order no. 898.

(36) Reported in *The Jerusalem Post*, July 26th, 1979.

ANALYSIS OF MILITARY ORDER NO. 854 AND RELATED ORDERS CONCERNING EDUCATIONAL INSTITUTIONS IN THE OCCUPIED WEST BANK

BY: Jonathan Kuttab. J.D.

Prepared for:
LAW IN THE SERVICE OF MAN
WEST BANK AFFILIATED OF THE
INTERNATIONAL COMMISSION OF JURISTS GENEVA

Analysis of Military Order 854 and Related Orders Concerning Educational Institutions

Introduction:

In July of 1980 the Israeli military government acted to tighten its control over all educational institutions in the Occupied West Bank. This was done by promulgating a number of military orders headed by Military Order No. 854 (hereinafter "M.O. 854"). The ramafications of these new orders and regulations was immediately perceived by the colleges and universities which had hitherto remained relatively free of direct control by the military authorities.

M.O. 854 brought universities and colleges within the ambit of the Jordanian Law on Education and Culture No. 16 of 1964 (hereinafter "Law No. 16") which previously applied only to elementary and secondary schools. At the same time the authorities altered Law No. 16 and promulgated new regulations that gave them complete control over who may be a student, teacher or principal in the occupied territories and which authorized them to entertain non-academic "public order considerations" when they decide to issue teaching certificates.

For universities and colleges, these orders constituted an unacceptable restriction on academic freedom and such a stifling of the spirit of inquiry as to severely restrict their role as institutes of higher learning. For other schools, the orders legitimized the use of the ordinary functions of a ministry of education to serve the political and police functions of the military occupation. Following is an analysis of these orders and their effect on educational institutions in the West Bank:

Legal Analysis

Military Order No. 854 was introduced as an amendment to Jordanian Law No. 16. This is a frequent Israeli device for legislating in the West Bank. International Law forbids an occupying power to legislate in occupied territories or to alter existing laws except insofar as is necessary for the physical security of its forces, or for bringing local laws into compliance with International Law (e.g. abolishing any laws mandating slavery or apartheid in the occupied territories). The Israelis do not wish to extend Israeli law to the territories, which would be tantamount to annexation. Nonetheless they do legislate for the West Bank, but they camouflage their legislation as mere amendments within the framework of Jordanian law.

Military Order 854 began by amending Law No. 16 to bring colleges and universities within its purview as "institutes of learning."[1] This made all provisions of that law (as amended by the rest of the Order) applicable to universities and colleges. Next, the Order added to the provisions of Law No. 16 itself, the authority to issue regulations regarding teachers convicted of security offenses and teachers held under administrative detention.[2] This authority was immediately exercised and regulations based upon it prohibiting such teachers from teaching without a special permit were issued in conjunction with M.O. 854 itself.[3]

M.O. 854 also replaced the Jordanian Ministry of Education, for purposes of Law No. 16, with an Officer in the Israeli Army in Charge of Education. It also specifically authorized that officer, in consultation with the Chief of Police in the area and the local military governor, to "take into consideration matters of public order in determining whether to issue a certificate" to teachers.[4] The Order then granted the three West Bank universities and the School of Sharia (College of Islamic Studies) in Hebron temporary licenses under it.[5] On January 5, 1981, a correction was issued explaining that the temporary licenses granted in M.O. 854 were only for the school year 1980/1981.

Three other unnumbered Orders were issued in conjunction with M.O. 854. Two of them prohibit entry into the West Bank (which had previously

been declared a closed area by virtue of Military Order No. 34) to anyone who intends to work there as a teacher or principal or be a student in any academic institution, without first obtaining a written personal permit issued by a military commander.[6] Both orders state that they do not derogate from other legislation but merely supplement every other requirement for a license, work permit or residency permit.

The text of both orders is almost identical. One of them applies to Israelis and foreigners who seek to enter the West Bank as students, teachers or principals of schools. The other, a little more difficult to understand, applies to residents of the administered territories who choose to be teachers, students or principals there. One possible explanation is that this order is intended to restrict movement of teachers and students from one administered area (e.g. Gaza, Golan Heights, West Bank) into another. But the language of the orders itself is more expansive and renders it necessary to obtain a permit for all students and teachers, in all educational institutions in the West Bank, and not just for those moving from one administered areainto the next. It is important to note that these orders apply to all schools and educational institutions and not just to colleges and universities.

The fourth document that was issued with M.O. 854 is an amendment to the Regulation Regarding Teacher Certification.[7] This amendment permits the "relevant authority" to cancel the teaching certificate issued to anyone convicted of a security offense or who was held in administrative detention.[8] It also added to the Regulation a provision prohibiting the granting of any teaching certificate without the consent of the "relevant authority" to one who has been convicted of a security offense or who had once been an administrative detainee.[9]

Effects of the new orders:

1 - They jeopardize the existence of the universities

The licensing requirement of M.O. 854 makes the very existence and legality of the three universities subject to obtaining a permit from the military authorities year after year. No four-year institution can operate

on a temporary license, which must be reviewed every year and which may or may not be renewed, particularly when the licensing authority is not an objective academic or professional body. No criteria for accreditation are spelled out and the language of M.O. 854 makes it clear that criteria other than academic ones will be used. Given the history of animosity between the military government and the universities, such a state of affairs is very detrimental. Already the three universities have been notified that their temporary licenses have expired and they must apply for renewal of their licenses.[10]

2 - <u>They create an unsatisfactory scheme for regulating universities</u>

The military authorities justify M.O. 854 by stating that the universities and colleges had existed in a legal vacuum and that it was necessary to devise a framework for regulating and supervising them. But even if we grant the need for some means of regulating and accrediting institutions of higher learning, the orders in question and Law No. 16 in particular provide a very inadequate basis for such regulation. As will be shown below, the Jordanian legislator never intended Law No. 16 to apply to universities and colleges. Different laws (such as the Law of Jordan University, Law No. 17 of 1964, hereinafter referred to as "Law No. 17") were passed that are more suitable for universities.

In a statement issued by the military government to justify M.O. 854 in the face of mounting opposition from academic and other circles, it was argued that this particular form of regulation (applying Law No. 16) was adopted "in furtherance of the established practice by the Israel Authorities of maintaining in force, inasmuch as possible, local Jordanian law, rather than introducing new legislation." Yet this contention must fall in light of the fact that the Military Government has not hesitated, in more than 900 military orders to date, from introducing extensive new legislation, albeit disguised as "amendments to Jordanian law."

The same statement explained that a special committee of lawyers and education specialists set up to find an appropriate legislative framework for West Bank universities chose to apply Law No. 16 rather than Law No. 17 because the Amman University was a government-owned and regulated institution while West Bank universities were privately owned. Since Law No. 16

refers to both private and public educational institutions, the special committee found it more suitable!

M.O. 854 came at a time when there was tension between the occupation authorities and universities and schools in general, and did not introduce any beneficial change or improvement in the legal schemata as far as schools or universities were concerned.

3 - They abolish Compulsory Education

Jordanian Law mandates compulsory education for the first nine school years.[11] It provides that children should not be dismissed from their education before the age of 16 except for medical reasons.[12] By requiring an individual permit for every student to attend school, the orders in question in effect abolish compulsory education and render all schooling, public or private, a privilege subject to the whims of the military government. The military government is authorized to bestow that privilege upon each student at its own discretion, subject to no discernable criteria other than its own political and security concerns.

4 - They reduce the pool of available teachers

The amendment of the Regulation Regarding Teacher Certification, prohibiting the granting of teachers certificates to those convicted of security offenses or to those who had been held under administrative detention, prevents a large segment of the population from joining the teaching profession. The impact of this regulation is only realized when we recall that "security legislation" governs a wide range of activities including distribution of leaflets, participation in demonstrations, scribbling slogans on walls and listening to unauthorized political speeches. It encompasses almost every conceivable political activity. Few individuals in this highly politicized society can manage to escape committing an act which can be considered under the order a security offense.

But even if an individual managed to avoid overt action which results in a conviction for a security offense, he may nonetheless be included in this category through no fault of his own since soldiers are authorized to administratively arrest and hold any individual in the West Bank without

ever accusing him or charging him with any offense. Persons so held will be considered administrative detainees and will fall automatically within the purview of the new regulations.

5 - They subject the educational process to political manipulation

Perhaps the worst effect of these orders is that they enable the military government to exercise direct control over all teachers, students and educational institutions. M.O. 854 specifically authorizes the military government to exercise that control for political and "public order" considerations[13] and singles out individuals who are essentially politically undesirable from its point of view for denial or restrictions of teaching certification.[14] The new orders subvert the powers of the Ministry of Education to serve as an additional instrument for implementing the political and security ends of the military administration even though sufficient laws already exist enabling the military government to exercise any degree of control it may reasonably claim to need in security or even political matters.[15]

6 - They render the status of students and teachers precarious

By requiring individual written permits from a military governor to be a principal, student or teacher in the West Bank, these orders make the academic status of these individuals uncertain and conditional upon the good will of the military authorities. This is particularly true for foreign or Israeli lecturers at the local universities. Bir Zeit, for instance, "imports" about 30 percent of its teaching staff from a pool of Israeli Arab or international academicians. In the past refusal to grant such professors permits would have in and of itself crippled the university. The Orders exacerbate this situation by covering also local teachers and students, as well as elementary and secondary schools. If the authorities start enforcing these orders, the control of the military government over the schools will be complete and individual students as well as whole areas or schools can be "punished" through selective denial of their academic status.

The Jordanian Framework

It has been claimed that M.O. 854 merely attempts to fill a vacuum by extending existing Jordanian legislation on elementary schools to apply to universities which were set up after 1967. Holders of this view point out that no colleges or universities existed in the West Bank in 1967 and that M.O. 854 endeavors to regulate such new institutions with the minimum of interference with Jordanian Law.

A close analysis of Jordanian legislation existing in 1967 reveals that Law No. 16 was never intended to cover colleges and universities and that the Jordanian legislator had an entirely different scheme for universities. Law No. 17, for example, creates a meaningful administrative framework for Amman University which was specifically excluded from application of Law No. 16.[16] After 1967, other laws were passed to regulate Yarmuk University and to amend Law No. 17 to meet the changing needs of Amman University.

Law No. 16 was intended to regulate elementary, secondary, vocational schools, adult education, kindergartens and certain other educational institutes (Ma'ahed). Each category or level was carefully defined and differently regulated, based on academic and professional criteria. Great care, however, was taken to ensure that the category "Ma'ahed" does not refer to or include colleges and universities. A "Ma'ahed" is defined in the law itself as an educational institute teaching any subjects or skills after secondary school, whereby the period of study is less than four years.[17] The law also outlines the purposes of Ma'ahed and describes them as a specialized level of education falling between the secondary school and the university education.[18] Ma'ahed generally includes institutions which offer secretarial, accounting, language courses and other academic/vocational skills to high school graduates who do not go to college.

Law No. 16 creates a "Higher Committee" for setting, approving, and commissioning textbooks to be used in the schools covered by that law.[19] No textbook can be used in the elementary and secondary schools unless first approved by this committee. It is quite apparent that no such control, supervision or censorship can be exercised over a college or univer-

sity without severely curtailing academic freedom and undermining the principles of free inquiry that are basic to a college education.

One provision of Law No. 16 prevents teachers covered by that law from joining political parties or undertaking any "party activities" inside the educational institutions or outside them.[20] Law No. 17 for the Amman University on the other hand, imposes no political restriction on teachers whatsoever. Appointments to teaching positions in the university are made based upon stated academic criteria. Faculty appointments and promotions are proposed by the particular college in question to the board of directors which decides upon them, then the appointment or promotion is confirmed by a royal decree published in the Official Gazette.[21]

By contrast, the amendments to Law No. 16 include, as shown above, several restrictions on political activities in all educational institutions, universities and colleges included, and the military government is specifically authorized to grant or deny licenses based on political considerations.

The claim that Law No. 16 was preferred to Law No. 17 because Amman University, unlike West Bank colleges, is a public institution while Law No. 16 contemplates both public and private institutions is an example of semantic sophistry. By hinging their argument on this technical difference, the authorities attempt to justify their refusal to deal with the substantive differences between the two laws and with the real needs of a university, and to hide the real reason for issuing M.O. 854.

Summary of objections to the new orders

1 - They are contrary to the Geneva Convention

International law prohibits an occupying power from altering local laws except insofar as is necessary for the security of its forces. By legislating in this area the orders in question constitute a drastic interference in the functioning of the educational institutions of the West Bank, since legislation, even if it were beneficial, is the sole domain of the sovereign. The military government's usurpation of that law-making

authority clearly violates the express provisions of international law.

2 - They violate academic freedom

Particularly as they apply to colleges and universities, these orders violate the basic principles of academic freedom and prevent the existence of an atmosphere conducive to study and inquiry. Teachers and students must now live with a sword of Damocles suspended over their heads. Textbooks, teachers and students must pass the scrutiny of military authorities whose main concern is not academic or educational.

3 - They subvert civilian functions for political and military ends

These orders add to a large number of other orders that transfer all the civilian functions of government in the West Bank into the hands of military officers who can manipulate them for political and military ends. The educational system and the power of certification and granting of permits can now be used as a threat or reward to insure "approved" political action or at least docile acquiescence in the occupation and its policies.

4 - They are overbroad and unnecessary

The orders are unnecessary from a security point of view and are too broad to be implemented in full. This leads to selective enforcement, which is more dangerous because it is necessarily arbitrary and discriminatory. It grants the military government far more power than it can legitimately require or can effectively utilize. The result is that the educational purposes of the original laws are lost as the military authorities concentrate on applying only those new portions and amendments that serve their security and political interests.

5 - They prevent growth and development of educational institutions

The existence of such restrictive orders necessarily restrains and prevents the establishment, growth and development of new educational institutions. Existing institutions are also left in a precarious and unstable position.

6 - They contribute to the Brain Drain

By restricting employment opportunities in the field of education,

these military orders narrow the major avenue of employment for college graduates in the West Bank. Given the present economic situation there, large segments of the educated population, who cannot obtain teaching positions will be forced to emigrate, leaving an impoverished society of unskilled laborers.

7 - They insure continued tension on campuses

Since the beginning of the occupation, there has been a continuous current of tension and animosity between the military authorities on the one hand, and academic institutions, teachers and students on the other. The recent orders are viewed by many on both sides, not as necessary educational reforms, but as weapons introduced by the first group in its continued fight against the second. As such, it can hardly be expected to achieve any constructive result. Instead, it will only fan the flames of discontent and insure more demonstrations, strikes and unrest on school campuses.

Already several strikes and demonstrations have occurred in protest against these orders. The universities in particular have refused to comply with them. On August 27, 1980 the military authorities sent each university a request for detailed information on the names, addresses, and other particulars of each local teacher as well as all students and administrators. On October 8, 1980 the universities were informed that their temporary licenses had expired and that they must apply for new licenses, send the required information and comply with the military orders described in this study. Further tension and unrest seem inevitable as the authorities attempt to enforce these orders against the resistance of the Palestinian schools, teachers and students.

Conclusion

Military Order 854 and the accompanying orders constitute a violation of international law and a severe restriction on academic freedom. They cannot be justified as serving any security purpose for the Israelis and instead lead to more bitterness, frustration and animosity.

Footnotes

1. Articles 1, 2 and 3. Military Order No. 854, July 6, 1980. See Appendix.

2. Article 4, Military Order No. 854

3. Regulation Regarding Teacher Certification No. 23 of 1965 (Amendment), July 6, 1980, issued pursuant to Law No. 16. See Appendix.

4. Article 5 (c), Military Order No. 854

5. Article 6, Military Order No. 854

6. General Permit to Enter (Inhabitants of the Administered Territories) (No. 5) (Amendment) (The West Bank) 1980-5740; and General Permit to Enter (Israelis and Foreigners) (No. 5) (Amendment No. 2) (The West Bank) 1980-5740. See Appendix.

7. See Appendix.

8. This is done by amending Article 8 of the Regulation Regarding Teacher Certification.

9. This provision is now found as Article 9 of the Regulation Regarding Teacher Certification, as amended.

10. Form letters to that effect were sent to the universities on October 8, 1980.

11. Article 8 (a), Law No. 16

12. Article 13, supra

13. Article 5, M.O. 854

14. Article 4, M.O. 854 and the Regulation Regarding Teacher Certification

15. See Military Orders Nos. 101 and 378 and the Emergency Defense Regulations of 1945.

16. Article 115, Law No. 16

17. Article 2 and Article 8 (c), Law No. 16

18. Article 20, Law No. 16

19. Articles 27-54, Law No. 16

20. Article 25, Law No. 16

21. Article 20, Law No. 17

Appendix

ISRAELI DEFENCE ARMY

ORDER #854

Order concerning Education and Culture Law Number 16 for the year 1964 (Amendment) (West Bank)

In accordance with the authority vested in me by virtue of the law of Culture and Education, Law Number 16, for the year 1964 (hereinafter "the Law"), I hereby order as follows:

Amendment to Article 2 of the Law:

1. In the definition of "Institute" occurring in Article 2 of the Law, the phrase "on condition that the period of study should be less than four years" shall be deleted.

Amendment to Article 8 of the Law:

2. In Article 8 (c) of the Law, the phrase "and its duration is less than four years" shall be deleted.

Amendment to Article 20 of the Law:

3. In article 20 of the Law, the phrase "at intermediate level of specialization between secondary and university education" shall be deleted.

Amendment to Article 26 of the Law:

4. At the end of Article 26 the following shall be added: - "The mentioned Ordinance may included regulations concerning teachers who are convicted of committing a crime in accordance with security legislation, or who are placed under administrative detention."

Amendment to Article 59:

5.a. In Article 59 of the Law, the word "Ministry" shall be replaced by the following phrase, "the responsible official by virtue of the Order Concerning Powers Regarding Laws of Education (West Bank Area) (Number 11) for the year 5727 - 1967 (hereafter - the "responsible official")

b. Paragraph (c) of Article 59 of the Law will be referred to by the letter (d) to be preceded by the following:

c. "The responsible official may in consultation with the District Chief of Police and the Military Governor of the area directly concerned, may take into account considerations of public order among other considerations, in granting the licence mentioned in this Article."

Transitional Provisions:

6. Every educational institution operating in the Area mentioned at the end of this Order will be considered as having obtained a temporary licence, in accordance with the Law as amended in this Order, as of the date when this Order comes into force.

Effective Date:

7. This Order shall come into force as of 24th Tammuz 5740 (8th July 1980).

Name:

8. This Order shall be called, "Order Concerning Education Law Number 16 for the year 1964 (amendment) (West Bank) (Number 854) for the year 5740-1980".

22 Tammuz 5740
6 July 1980

Benjamin Eli'ezer
Tat Aluf - Commander of the
Area of the West Bank

END

1. Bir Zeit University
2. Al-Najah National University
3. Bethlehem University
4. Institute of Islamic Studies - Shari'a College

ISRAELI DEFENCE ARMY

EDUCATION AND CULTURE LAW NUMBER 16 OF 1964

Regulation Regarding Teacher Certification Number 23 of 1965 (Amendment)

In accordance with the authority vested in me by virtue of Article 117 of the Education and Culture Law Number 16 of 1964 (hereafter - "the Law") I issue the following Regulation:

Amendment to Article 8:

1. The provision of Article 8 of the Regulation Regarding Teacher Certification Number 23 of 1965 (hereafter - "the Regulation") will be referred to by the letter (a), and to this the following will be added:

   b. The responsible official may cancel the teaching certificate granted to whoever was convicted of committing a crime in accordance with a security legislation, or to whoever was placed under administrative detention.

Addition of Article 9:

2. After Article 8 of the Regulation comes the following:

   9. "No teaching certificate of whatever kind shall be granted to anyone who has been convicted of committing a crime in accordance with a security legislation, or to anyone who has been placed under administrative detention except with the approval of the responsible official".

Effective Date:

This Regulation will be called the "Regulation Regarding Teacher Certification Number 23 of 1965 (West Bank) (amendment) for the year 5740 - 1980."

22 Tammuz 5740
6 July 1980

Benjamin Ben Eli'ezer
Tat Aluf - Commander of the
Area of the West Bank

ISRAELI DEFENCE ARMY

ORDER CONCERNING CLOSED AREAS (WEST BANK) (NUMBER 34) 5727 - 1967

GENERAL PERMIT TO ENTER (Inhabitants of the Administered Territories) (Number 5) (Amendment) (West Bank) 5740 - 1980.

In accordance with the authority vested in me in my capacity as Commander of the Area, I issue the following declaration

Amendment to Article 2

1.a. Article 2 of the General Permit to Enter (Inhabitants of the Administered Territories) (Number 5) (Judea and Samaria) for the year 5732 - 1972 will be referred to by letter (a), and at its beginning the following phrase shall appear, taking into account the contents of Paragraph (b).

b. After Paragraph (a) of Article 2 this will follow:

"(b) No one who enters the Area, from the inhabitants of any administered territory, may work as a teacher or principal of any educational institution, or be a student of any educational institution unless he obtains a personal permit issued in writing by a military commander.

c. Paragraph (b) is not intended to derogate from the provisions of any legislation or security legislation which imposes the requirement of obtaining a licence, or the acquisition of a permit to reside or work, but it was included as an addition to any such provisions.

Transitional Rules:

2. This amendment does not apply during the scholastic year 5740 (1979/1980) to a teacher or student who has already started teaching or studying as the case may be, at any educational institution, before the coming into force of this amendment.

Effective Date:

3. The Order shall come into force as of 24 Tammuz 5740 (8 July 1980)

Name:

4. This declaration shall be called "General Declaration for Entry (Inhabitants of the Administered Territories) (Number 5) (Amendment) (Judea and Samaria) 5740 - 1980."

22 Tammuz 5740
6 July 1980

Benjamin Eli'ezer
Tat Aluf - Commander
of the West Bank

ISRAELI DEFENCE ARMY

ORDER CONCERNING CLOSED AREAS (West Bank Area) (Number 34) for the year 5727-1967.

General Permit to Enter (Number 5) (Israeli and foreign inhabitants) (West Bank Area) 5740-1980.

In accordance with the authority vested in me in my capacity as Commander of the Area I issue the following Order:

Amendment to Article 2:

1. In article 2 of the General Permit to Enter (Number 5) (Israeli and Foreign Inhabitants) (West Bank Area) of 5730 - 1970 (hereafter - the General Permit to Enter), the following shall appear after Paragraph 9.

10.a. No Israeli or foreign inhabitants entering the Area may work as a teacher or principal at any educational institution unless he obtains a personal permit issued in writing by a military commander.

b. Paragraph (a) is not intended to derogate from the provisions of any legislation or security legislation imposing the requirement of obtaining a license or the acquisition of a permit to reside or work, but it was included as an addition to any such provisions.

Transitional Rules:

2. This amendment does not apply during the scholastic year 5740 (1979/1980) to a teacher or student who has already started teaching or studying, as the case may be, in any educational institution before the coming into force of this amendment.

Effective Date:

3. This amendment shall come into force as of 24 Tammuz 5740 (8 July 1980).

Name:

4. This Declaration will be called "General Permit to Enter (Number 5) (Israeli and foreign inhabitants) (Amendment Number 2) (West Bank) 5740 - 1980."

22 Tammuz 5740
6 July 1980

Benjamin Ben Eli'ezer
Tat Aluf - Commander of
the West Bank Area