

ISRAEL AND THE OCCUPIED TERRITORIES*

The basic laws of Israel guarantee the independence of the judiciary, which is generally respected by the legislative and executive powers. The September 1999 landmark judgement of the High Court barring the use of torture and the April 2000 ruling prohibiting the holding of detainees for use as “bargaining chips” demonstrated that the judiciary would maintain independence even in certain sensitive cases relating to national security. The overall human rights situation vis-à-vis the Palestinian population under the jurisdiction or control of Israel deteriorated markedly. Following the outbreak of violence in late September 2000, Israeli security forces made repeated and sustained incursions into Palestinian territory, engaging in widespread and gross violations of human rights and humanitarian law.

Israel has no written constitution, but rather a series of basic laws which provide for fundamental rights. The legislative power is vested in a unicameral parliament, the Knesset, consisting of 120 members serving four-year terms pursuant to public election. The Knesset has the power to dissolve the government and to limit the executive branch. The executive authority is vested in the Presidency and the Government. The President, elected by the Knesset for a five-year term, serves as head of state and retains largely ceremonial functions. Moshe Katzav of the Likud Party currently holds the position. The principal executive powers are exercised by the Prime Minister, who is directly elected by popular vote, and his cabinet. The Prime Minister appoints the other ministers, subject to approval by the Knesset. The Prime Minister and at least half of all other ministers must be members of the Knesset. Presently, Israel is governed by a "national unity" government, which includes the Likud and Labour parties.

The continuing Palestinian *intifada* (uprising), following the visit by Ariel Sharon to the Temple Mount in October 2000 and the collapse of peace negotiations prompted the resignation of the former Prime Minister Edhud Barak (Labour Party). In February 2001, Ariel Sharon, of the conservative Likud Party, was elected Prime Minister of Israel. His Government adopted a hard-line approach in the occupied territories, which included repeated and sustained incursions into territory administered by the Palestinian Authorities. In October 2001, Israel sent troops and tanks into Palestinian cities following the murder of Rehavam Zeevi, a far-right Israeli politician and member of the cabinet. In December, bombs in Jerusalem and Haifa caused substantial civilian casualties. Israel responded by bombing the infrastructure of the Palestinian Authority and declaring it a “terror-supporting entity”. With Mr Sharon seemingly bent on destroying the Palestinian Authority, and more Palestinians abandoning the peace process, a political settlement seemed far off.

HUMAN RIGHTS AND HUMANITARIAN LAW ISSUES

By October 2001, a year after the onset of the latest *intifada*, more than 570 Palestinians had been killed by Israeli security forces, in most instances unlawfully and when no lives were in danger. Palestinian armed groups (*Fatah* – and its military arm, *Tanzim* – *Hamas*, *Islamic Jihad*, the Popular Front for the Liberation of Palestine, and the Democratic Front for the Liberation of Palestine) and individuals had killed more than 150 Israelis, including 115 civilians both in Israel and the Occupied

See also chapter on Palestinian Autonomous Areas.

Territories. Thousands of additional Palestinians and Israelis have been wounded. Israeli forces killed Palestinians at demonstrations, checkpoints and borders, and bombarded Palestinian police stations and residential areas, leaving thousands of people without homes. At least 1,500 Palestinians have been arrested and many have been held in prolonged incommunicado detention and tortured. Almost every Palestinian town and village has been sealed from the outside world due to Israeli army checkpoints or physical barriers of earth, concrete blocks or metal walls. On security grounds, hundreds of Palestinian homes have been demolished and Palestinians have been prohibited from travelling along certain roads. Many Palestinians have become economically impoverished by the closures and traumatised by the killings and destruction.

Torture

In September 1999, the Supreme Court of Israel issued a landmark judgement declaring certain interrogation methods employed by the Israeli General Security Service (GSS) to be illegal (*See attacks on Justice 2000*). The methods examined included violent shaking, painful shackling in contorted positions, sleep deprivation for extended periods of time and prolonged exposure to extreme temperatures. However, the Court's judgement did not rule out the possibility of prospective legislation by the Knesset that would sanction the use of some physical force in interrogations by members of the GSS, provided that such legislation meets the requirements of article 8 of the Basic Law: Human Dignity and Liberty. This article requires the proposed legislation to befit the values of the state of Israel, to be enacted for a proper purpose, and to be of an extent no greater than is required. Enacting of any kind of legislation sanctioning the use of physical force would likely constitute a breach of Israel's obligations under the Convention Against Torture and Cruel, Inhuman or Degrading Treatment or Punishment and general international law.

In November 2001, the Committee against Torture (CAT) considered the third periodic report of Israel. The CAT welcome the 1999 Supreme Court ruling as well as the Government's decision not to initiate legislation to authorise the use of physical means in interrogations conducted by the police or GSS. However, it regretted that the ruling did not reflect a categorical prohibition of torture. Although the Court prohibited the use of sleep deprivation for the purpose of breaking the detainee, it stated that if such deprivation were merely incidental to interrogation, it was not unlawful. In practice in cases of prolonged interrogation, it would be impossible to distinguish between the two conditions. Furthermore, the Court indicated that GSS interrogators who use physical pressure in extreme circumstances ("ticking bomb" cases) might not be criminally liable, as they may be able to rely on the "defence of necessity". The CAT also expressed concern at the continuing allegations received concerning the use of interrogation methods by the GSS against Palestinian detainees that had in fact been prohibited by the September 1999 ruling of the Supreme Court. Finally, the CAT concluded that Israeli policies on closure and on house demolitions, might, in certain instances, amount to cruel, inhuman or degrading treatment or punishment.

Occupied Territories

Israel occupied the West Bank, Gaza Strip and East Jerusalem in 1967 and exercises control over these areas through a military government. As a result of signing the Israeli-Palestinian Declaration of Principles in 1993, areas containing much of the population came under Palestinian control. However, since the outbreak of violence in September 2000, Israeli forces have made periodic excursions into Palestinian-controlled territory. On 19 October 2000, the UN Commission on Human Rights adopted a resolution establishing an independent inquiry commission to investigate Israeli human rights violations and grave breaches of international humanitarian law. It also requested the UN High Commissioner for Human Rights to undertake an urgent visit to the

Occupied Palestinian territories to take stock of the violations of human rights and to facilitate the activities of the mechanisms of the Commission in implementation of the resolution. The Commission further requested that several Special Rapporteurs conduct immediate investigation into the situation and report the findings to the Commission.

The various UN reports have emphasised that as the occupying power in the West Bank, the Gaza Strip and Jerusalem, Israel bears *de jure* responsibility for implementing the applicable humanitarian law norms. Therefore, international humanitarian law obligations, including those contained in the 1949 Geneva Conventions, apply to Israel's role in the occupied Palestinian territories. The treaty bodies have subsequently reaffirmed that Israeli obligations remain applicable to the Occupied Territories. The various UN reports have identified massive and gross human rights violations committed by the Israeli Defence Forces (IDF), including *inter alia* excessive use of force, and extra-judicial executions/ political assassinations. The reports have noted a marked escalation in the use of lethal force against the civilian population, purportedly in response to demonstrations beginning in Jerusalem and spreading throughout the West Bank and Gaza Strip. The fundamental human rights and humanitarian norms of necessity and proportionality have been breached in most reported cases of confrontation between Palestinian civilians and Israeli forces.

In August 2001, the Committee on Economic Social and Cultural Rights considered the additional information submitted by Israel. The Committee deplored the State party's refusal to report on the Occupied Territories owing to the Government's position that the Covenant does not apply to "areas that are not subject to its sovereign territory and jurisdiction". The Committee expressed its deep concern at extensive violations of economic, social and cultural rights in the Occupied Territories. Such violations include severe measures to restrict the movement of civilians between points within and outside the Occupied Territories, severing their access to food, water, health care, education and work. The Committee noted that on frequent occasions, Israel's closure policy had prevented civilians from reaching medical services and that emergency situations have ended at times in death at checkpoints. The Committee was also alarmed over reports that the Israeli security forces had turned back supply missions of the International Committee of the Red Cross and the United Nations Relief and Works Agency for Palestine Refugees in the Near East attempting to deliver food, water and medical relief to affected areas.

Extrajudicial executions or targeted political assassinations have been carried out by the IDF. The practice of political assassination is a fundamental violation of international human rights standards, as well as a grave breach of the Fourth Geneva Convention. Several human rights instruments, including the Universal Declaration and ICCPR, affirm the right to life and specifically prohibit executions of civilians without trial and fair judicial process.

JUDICIARY

Israeli basic law guarantees the independence of the judiciary. The independence of the judiciary is generally respected by the legislative and executive powers. Article 22 of the basic law of the judiciary provides that it cannot be varied, suspended, or made subject to conditions by emergency regulations. Article 2 of the basic law of the judiciary states that "a person vested with judicial power shall not, in judicial matters, be subject to any authority but that of the Law". However, members of the judiciary have tended to acquiesce to Government arguments of national security in sensitive cases. The September 1999 landmark judgement of the High Court barring the use of torture marked a change in this practice, as did the April 2000 ruling prohibiting the holding of detainees for use as "bargaining chips". Judicial power is vested in the Supreme Court, District Courts, Magistrate Courts, Religious Courts and any other court designated by law.

Structure

Article 1 of the Basic Law of the Judiciary establishes that judicial power is vested in the following courts: the Supreme Court; District Courts; Magistrate's Courts; and other courts designated by Law as courts. It also vested judicial power in religious courts. No court may be established for a particular case.

Magistrate Courts are courts of first instance. They have jurisdiction over both criminal cases, where the penalty does not exceed seven years, and civil suits, for immovable property or where the value of the claim does not exceed one million shekels. Cases in Magistrate Courts are usually heard by a single judge, but in certain instances a matter may be heard by a panel of three judges. Judgements of Magistrate Courts may be appealed to the District Courts.

District Courts function both as courts of first instance and appellate courts. As a court of first instance, District Courts have jurisdiction over criminal cases with a penalty exceeding seven years imprisonment, and over civil suits where the claim exceeds one million shekels. As an appellate court, District Courts hear appeals from Magistrate Courts and Administrative Tribunals. Certain District Courts act in special capacity as Maritime Courts or Appeal Courts for elections.

The Supreme Court, which carries the ultimate judicial authority, is both a court of first instance, in cases involving government action, and an appellate court, when hearing cases from District Courts. Cases before the Supreme Court are heard by a panel of three judges or, if a party requests a rehearing of a case already decided by the Court, by a panel of five judges. However, questions of fundamental importance or those regarding constitutional issues can be heard by a larger number of judges. The Supreme Court sits in Jerusalem.

Various additional courts have been established to have jurisdiction over specific subjects, including religious courts, which are vested with jurisdiction to hear cases involving personal status, and labour courts, which have jurisdiction over cases involving labour relations.

The Israeli judicial system suffers from long delays and excessive caseloads. The administration of justice has been criticised as discriminatory. According to some human rights organisations, the legal system often imposes far stiffer punishments on Christian, Muslim and Druze citizens than on Jewish citizens. For instance, Israeli Arabs are more likely to be convicted of murder (which carries a mandatory life sentence) than Jewish Israelis. The courts are also more likely to detain Arab Israelis until the conclusion of proceedings.

Judges

A non-political selection of judges and the guarantee of life tenure secure the independence of the judiciary. Article 4 of the Basic Law of the Judiciary provides that judges be appointed by the President of the State upon election by a Judges' Election Committee. This Committee consists of nine members, including the President of the Supreme Court, two other judges of the Supreme Court elected by the body of judges thereof, the Minister of Justice and another Minister designated by the Government, two members of the Knesset elected by the Knesset and two representatives of the Chamber of Advocates, elected by the National Council of the Chamber. The Minister of Justice serves as chairman of the Committee. Only an Israeli national may be appointed judge.

According to article 7 of the Basic Law of the Judiciary, the tenure of a judge shall end only: upon his retirement on pension; his resignation; his being elected or appointed to one of the positions the

holders of which are debarred from being candidates for the Knesset; a decision of the Judges' Election Committee prepared by the chairman of the Committee or the President of the Supreme Court and passed by a majority of at least seven members; or upon a decision of the Court of Discipline (See below). Article 9 establishes restrictions on re-postings; a judge may not be transferred permanently from the locality he is serving to a court in another locality, save with the consent of the President of the Supreme Court or pursuant to a decision of the Court of Discipline. A judge shall not without his consent be appointed to an acting position at a lower court.

Regarding disciplinary proceedings, article 13 establishes that a judge shall be subject to the jurisdiction of a Court of Discipline, which consists of active and retired judges and judges appointed by the President of the Supreme Court. The rules of procedure shall be in accordance with law. Where a complaint or information is filed against a judge, the President of the Supreme Court may suspend the judge from office for such period as he may prescribe. Article 12 establishes that criminal proceedings against judges may only be opened with the consent of the Attorney-General. Furthermore, a criminal charge against a judge may only be taken to a District Court consisting of three judges, unless the judge has consented that the charge be tried in the ordinary manner. However, article 12(c) provides that these provisions shall not apply to categories of offences designated by law.

Article 23 provides that the manner of electing and duration of the tenure of the members of the Judges' Election Committee; qualifications for the posts of judges of the various grades; the conditions and procedures for terminating the tenure of a judge; and the proceedings for the suspension of a judge from office and review of the suspension shall all be prescribed by law. Article 10 establishes that salaries of judges and other payments to be made to them during or after their period of tenure shall be prescribed by law or by a decision of the Knesset or of a Knesset committee so empowered by the Knesset. No decision may be taken reducing the salaries of judges only.

Military Courts

Military Courts in Israel are established by the Military Justice Law. These courts have jurisdiction to hear cases involving military personnel for military and civilian offences. The military court system comprises both military courts of first instance and appellate military courts. Decisions from military courts of appeal may be reviewed procedurally by the Israeli Supreme Court. Judges of these courts are military personnel, with the President of the Court required to have legal training.

Israeli Military Courts have full jurisdiction in areas of the Occupied Territories that have not been handed over to Palestinian control (See chapter on Palestinian Autonomy). The Court of First Instance may try all cases connected to security, including criminal offences that may become security offences. Further, in article 2 of the jurisdiction in Criminal Offences Order of 1967, Military Courts were given jurisdiction over all criminal offences, by deeming them to be security offences. Palestinian detainees are judged in Israeli Military Courts. Although the jurisdiction of military courts in the Occupied Territories formally extends to Israeli residents in the Occupied Territories, in practice Israelis are never tried before one of these courts for offences committed in the Occupied Territories, but are rather tried before ordinary criminal courts. Military courts, following the establishment of the Palestinian Autonomy, are situated in military camps or attached to settlements, rendering it difficult for Palestinian lawyers to gain access to them. Authorisation is required to enter these areas and lawyers are frequently held up at checkpoints.

Military court trials do not meet international standards for fair trial. Judges and prosecutors are officers serving in the Israeli Defence Forces (IDF) or in its reserves. Judges are appointed by the IDF Regional Commander, following the recommendation of the Military Advocate General, who is advised by a special committee. Judges lack security of tenure and may be dismissed by the Regional Commander. This condition and the close links between military judges and military prosecutors rise to concerns as to the independence and impartiality of these tribunals. Trials are usually based on confessions and plea bargains. Detainees are prone to “confess” owing to pressures, such as incommunicado detention and interrogation methods amounting to torture or inhuman or degrading treatment. Many detainees plea guilty rather than risk trial because they lack confidence in the fairness of trial procedures or because the time expended for a trial might be equal to that a person convicted of this offence would spend in prison under the sentence.

ADMINISTRATIVE DETENTION

In Israel and the Occupied Territories, administrative detention is a procedure under which detainees are held without charge or trial. Neither criminal charges are filed nor is there intention to judge the detainee. In Israel and East Jerusalem, the Minister of Defence issues administrative detention orders, specifying the term of detention. In the Occupied Territories, except for East Jerusalem, military commanders issue such orders. Before the term expires, the detention order may be renewed and renewal is frequent in practice. The process may continue indefinitely. In the Occupied Territories, a judicial hearing is not afforded unless the detention order is longer than six months, in which case there is a judicial review at the culmination of six months. Shorter detention orders are renewed without judicial order. The law allows for the right to review every administrative detention, first by a military court and ultimately by the Supreme Court sitting as the High Court of Justice. However, this procedure does not comply with international standards, as in the vast majority of cases neither the lawyer nor the detainee are informed of the details of the evidence against the detainee. The court may determine which information to disclose based on security considerations. A defence lawyer may not be allowed to cross-examine witnesses.

The number of administrative detainees had been decreasing until the onset of violence in September 2000, after which the Government detained without charge hundreds of persons in Israel, the West Bank and Gaza. In November 2001, the Committee against Torture welcomed the Supreme Court's decision of April 2000 that the detention of a number of Lebanese, held as "bargaining chips", was unlawful and must be released.

LAWYERS

The legal profession is regulated by the Chamber of Advocates Law, which established the Israeli Bar. The Bar, headed by a president elected by the Bar membership for a four-year term, consists of two principal organs, the National Council and the Central Committee. The National Council has competency to adopt rules concerning the organisation of the Bar and its activities and is responsible for proposals for amending the Chamber Advocates Law. It is composed of the President of the Bar, the President's predecessor, the Director General of the Ministry of Justice, the State Attorney, the military Advocate General, 25 member elected by the other members of the profession and three members from each district elected by district committees. The Central Committee is the Bar's

executive organ and is responsible for the management of its affairs. It is headed by the President of the bar and its members are elected by the National Council.

The Bar's structure and administration ensures that the legal profession maintains a sufficient degree of independence from the executive and properly represents the interests of its clients. However, both Israeli and Palestinian lawyers have faced serious restrictions that hamper them from carrying out their professional tasks and responsibilities. The ability of Israeli or Palestinian lawyers to visit their Palestinian clients is often unduly limited. Palestinian lawyers are frequently unable to visit their clients in Israeli jails because of the difficulty of obtaining travel permits. The internal and external closure and the restriction on freedom of movement imposed by the Israeli authorities since 29 September 2000 have had far-reaching implications on the ability of lawyers to carry out their professional tasks and have led to serious breaches of the detainee's right and the state obligation to ensure legal representation upon arrest or detention within 48 hours. In fact, Israeli law, which also applies in East Jerusalem, establishes that although detainees must be brought to a court within 24 hours of their arrest, access to a lawyer may be withheld for up to 21 days. Military order 378 allows detentions of Palestinians in the Occupied Territories for up to 90 days without access to a lawyer.

CASES

Fares Riyad Abu Hassan {lawyer}: Beginning in October 1999, administrative restrictions were imposed upon this Palestinian lawyer by the Israeli authorities to prevent him from representing any individual in the military courts without the permission of Major General Ya'alon, Military Commander of the Central Division, West Bank, or any individual duly authorised by him. Virtually all the work of Advocate Abu Hassan has involved representing Palestinians in Israeli military courts. Detailed reasons for the restrictions on his professional activities were not provided in the court order, beyond a statement in the preamble that the order is necessary for "security reasons". The issuance of an order under article 85 (A) (4) of Military Order No. 378 of 1970 restricting the activities of a lawyer appear to have been unprecedented. An appeal against the order was rejected.

Adnan al-Hajjar {lawyer}: A Palestinian lawyer working for the Palestinian al-Mezan Human Rights Centre, Mr. al-Hajjar was arrested by the Israeli security forces on 23 April 2001 on his return from Egypt, where he had been with a Palestinian delegation attending a legal training seminar sponsored by the US Agency for International Development. He was held for a month at Shikma prison, in Ashkelon, Israel, but never charged with any offence. It was reported that during his detention he was kept chained to a chair and interrogated daily for 20-hour periods over 14 to 15 days, except during weekends. He was also deprived of sleep for four days during this interrogation. He was released on 23 May 2001.

Daoud Darawi {lawyer}: Mr Darawi is a Palestinian lawyer and a human rights activist. On 10 September 2001, he was arrested by Israeli officials at King Hussein/Allenby Bridge as he was crossing into the West Bank from Jordan. He had been accused of membership in both the Popular Front for the Liberation of Palestine and the Islamic Jihad organisation. Mr. Darawi was allegedly tortured, including by "*shabeh*", which involves forcing a person to remain in an uncomfortable or unnatural position for long periods of time. On 13 September 2001, an Israeli court extended Mr. Darawi's detention allowing the GSS 25 additional days for investigation. Mr Darawi's wife, also a lawyer, reportedly attempted to visit him in jail, but was not permitted to see her husband. Interrogators allegedly used her presence to further frighten Mr. Draw by telling him that she had

been arrested. By the end of September, Mr. Darawi had neither been released nor charged with an offence.