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COMMITTEE ON THE HUMAN RIGHTS OF PARLIAMENTARIANS

► CASE N° PAL/04 - HUSSAM KHADER - PALESTINE / ISRAEL

THE TRIAL OF MR. HUSSAM KHADER

Report by Mr. Simon Foreman, lawyer and expert appointed by the Committee on the Human Rights of Parliamentarians in accordance with the resolution adopted by the Governing Council of the Inter-Parliamentary Union at its 176th session (Manila, April 2005)

INTRODUCTION – ORGANIZATION OF THE MISSION

1. This mission was decided on by the Governing Council of the Inter-Parliamentary Union at its 176th session, on 8 April 2005, in Manila.

The Council expressed its concern at the trial and decided to send a jurist to observe the forthcoming hearings. The Committee on the Human Rights of Parliamentarians has been monitoring Mr. Khader's situation since April 2003, that is, since shortly after his arrest on 17 March 2003. It sought permission to visit Mr. Khader in prison in July 2003, which was refused by the Israeli authorities.

2. The hearings in the Hussam Khader trial began in the summer of 2003 and the trial had already been under way for two years (with a great many interruptions, and several months between the hearings) when I went to Israel and the occupied territories to observe the latest hearings.

3. The mission took place in two phases.

I travelled on the first occasion to Tel Aviv and Salem, the seat of the court, for the hearing of 29 June 2005 (part of which had to be held in camera, hence without my being able to attend). After that hearing day the resumption of the trial was scheduled for 4 September 2005.

At its meeting of 14 July 2005, the Committee on the Human Rights of Parliamentarians re-examined the case and asked me to continue observing the trial at the subsequent hearings.

4. I therefore attended a second hearing on 4 September 2005. In the course of that day, the prosecution modified the charges laid against Hussam Khader and, in the light of these new charges, he pleaded guilty.

That being so, the trial on the charges and the facts ended with a finding of guilt. The court then set 23 October as the date of the final hearing for deciding on the punishment.

5. For my two journeys to Tel Aviv and Salem I was given a kindly welcome by the Israeli authorities, particularly the officials of the Knesset, the Foreign Ministry (Department of International Organizations), and the Israel Defense Forces (IDF). My special thanks go to Lieutenant-Colonel Erez Hason, President of the Samaria Military Court, for greatly facilitating my mission materially speaking, in particular by placing a soldier at my disposal to translate part of the proceedings on the occasion of my first

visit of 29 June (the authorities called upon to organize the mission, who authorized it only on 27 June, not having had the time in that short interval to find an interpreter able to accompany me to the court).

For the second phase of my mission the Secretariat of the Inter-Parliamentary Union arranged for me to be accompanied by Ms. Tamar Fox, a professional interpreter, to whom I express my gratitude for her most effective assistance.

6. This report consists firstly of a factual account of the situation of Mr. Khader, before examining whether he enjoyed all the guarantees provided for in international law.

As we have seen, I was only able to attend two hearings in June and September 2005, while the trial started in July 2003 and had already run to 15 hearings in the two-year interval. The items of information in this report therefore do not all correspond to conclusions that I was able to reach myself. I had to rely in part on information from my discussions with the stakeholders in the trial, or from the family of Mr. Khader, his support committee, sources having referred the matter to the IPU Committee on the Human Rights of Parliamentarians, and the Israeli authorities.

Where some of these items of information are contested or unverified, I shall make this clear in the report (with the conditional tense in the French version).

I. THE FACTS

7. Mr. Hussam Khader, born in 1961, is an elected member of the Palestinian Legislative Council (PLC) and a member of Fatah known for his involvement in the issue of refugees' rights. He himself lives in the Balata refugee camp, Nablus, where he was born.

On account of his involvement in the first Intifada, he was reportedly arrested more than a score of times by the Israeli authorities before being expelled to Lebanon and then going into exile in Tunisia up to the time of the signing of the Oslo Accords, which enabled him to return to the West Bank. He then stood in the first legislative elections in 1996 and was elected for the Nablus constituency.

Mr. Khader also explains that he was deeply involved in combating corruption within the Palestinian Authority, a factor to be of importance in the context of his trial since he suspects his arrest and the charges brought against him to be at least in part due to a "settling of scores" within the Authority.

A. The arrest and the investigation phase

*** *The arrest***

8. Mr. Khader was arrested during the night of 16 to 17 March 2003.

According to the information put out by his support committee, the arrest was particularly violent and reportedly involved a disproportionate show of force: his house in the Balata camp was reportedly stormed by several dozen Israeli soldiers, who are said to have broken down the door and fired at the house, thereby terrorizing its occupants (including the mother of Mr. Khader, three children and a nine-month-old baby). His computer, his mobile telephone and his files were reportedly seized on that occasion.

Mr. Khader was led away by the soldiers and his family was given no information as to where he was being taken. He has been held without interruption since that date.

*** *The detention of Mr. Khader up to his trial: 90 days of custody***

9. For a week neither the family of Mr. Khader nor his lawyers were able to find out where he was detained. On 19 March 2003, the World Organisation Against Torture (OMCT) launched an appeal in his favour and expressed concern in particular about his physical and psychic integrity.

On 24 March one of his lawyers informed me that Mr. Khader was being held at the Petah Tikva centre and that he had been authorized to meet him there. This place of detention is a GSS (General Security Services, internal intelligence services) interrogation centre.

At that meeting Mr. Khader explained to his lawyer that he was subjected to interrogations for periods of 20 hours a day, with only very short intervals allowed for rest and sleep.

10. The first appearance of Mr. Khader before a judge took place 10 days after his arrest, on 26 March 2003, when his detention was examined by a military judge within Petah Tikva prison.

On that occasion, Mr. Khader was assisted by his lawyer Mr. Riad Anis, but the latter did not have access to the investigation file, the items in the file having been classified "secret" by the GSS. The only information given was that Mr. Khader was accused of threatening the security of the region and supporting military activities against Israeli targets.

The judge authorized a 15-day extension of his detention.

The detention was then regularly prolonged throughout the phase of investigation then that of the trial, up to the present time.

11. After the first hearing of 26 March 2003, Mr. Khader once more "disappeared" from the sight of his family and his lawyer, who were not informed of his whereabouts.

On 4 April 2003, after threatening to bring a lawsuit in order to be able to meet his client, Mr. Anis was informed of Mr. Khader's transfer to the Acre detention centre, where he was finally able to see him.

During that meeting Mr. Khader was incapable of saying how long he had been at Acre. He said that he was subjected to total isolation, that the interrogations were continuing, and that he was deprived of sleep and subjected to loud noises, in addition to the *shabeh* method. *Shabeh* consists in attaching interrogated persons to a chair (handcuffed behind the back, ankles fastened to the chair) and obliging them to remain seated for hours on end in a painful position.

On 8 April the GSS issued an order forbidding any contact between Mr. Khader and his lawyer for a period of five days. In fact it was only on the following 25 April that they were able once more to confer.

12. Mr. Khader was held by the GSS for three months.

During May 2003 he was reportedly kept in complete isolation for a week, before undergoing an uninterrupted 60 hours of interrogation during which he is said to have been unable either to eat or to rest.

Shortly after that interrogation he was brought back from the Acre centre to Petah Tikva prison.

On 16 June 2003 the services of the military prosecutor drew up the indictment on the basis of which the trial was to open.

B. The trial

13. The trial took place over a period of more than two years, from the summer of 2003 to the autumn of 2005, and the final hearing is due in principle to take place on 23 October next. During this period, some 15 hearings took place generally two to three months apart.

* The charges

14. The charges have evolved in the course of the trial. The Hussam Khader support committee states that at the outset there were only two charges:

- services rendered to a banned organization (al-Aqsa Martyrs Brigades);
- remittance of funds to an individual to buy munitions for an attack against Israeli soldiers.

Subsequently a further three charges were added, concerning three armed attacks against Israeli targets in the West Bank (including a plan that its authors dropped on finding a strong military presence at the place of the intended attack). Mr. Khader was accused of having been privy to these three plans and of not alerting the authorities in order to prevent them.

15. At the hearing of 4 September 2005 the prosecution modified the charges a final time.

Of the most recent accusations (having had knowledge of planned attacks and having done nothing to prevent them), it dropped two, finally only bringing the charge concerning the attack aborted because the authors desisted.

The two initial charges were maintained but redefined to involve only the following:

- the first charge (services rendered to a banned organization) accused Mr. Khader, in its final version, of having handed over funds to an individual (Mr. Amir Sowalma, to whom reference will be made) himself linked to the al-Aqsa Martyrs Brigades. The prosecution states that the funds handed over by Mr. Khader subsequently aided the activities of the banned organization;
- the second charge, which initially accused Mr. Khader of having been one of the instigators of a planned attack for the purposes of which he allegedly handed over sums of money to the same Amir Sowalma, was also modified since it is now only stated that Mr. Khader knew that Mr. Sowalma was planning an attack when he gave him a sum of money.

16. Mr. Khader decided to plead guilty on account of that modification of the charges.

At his court hearing of 4 September, he did not deny indeed knowing Mr. Sowalma, an inhabitant of the same refugee camp, or having allowed him the benefit of financial support, such as he gave to many other of the camp dwellers, as part of his social activities.

On the other hand, he vigorously denied having ever, even remotely, taken part in the preparation of acts of violence and having known that Mr. Sowalma could use for those purposes the sums that Mr. Khader helped him to obtain in the context of welfare assistance.

The modified charges now make Mr. Khader liable to no more than a 10-year prison term, instead of the life sentence on the previous charges. In these circumstances, and since he is no longer accused of personal responsibility for acts of violence, Mr. Khader decided to plead guilty.

* *The Samaria Military Court*

17. The trial is being conducted before the Samaria Military Court.

This court is part of the military jurisdictions instituted by the Israel Defense Forces in the occupied West Bank and Gaza territories, as provided for in the Fourth Geneva Convention of 1949 relative to the Protection of Civilian Persons in Time of War.

That Convention of 12 August 1949 covers "the protection of civilian persons in time of war" and applies in particular to situations of occupation of a territory by the army of a foreign State (Article 2). Israel acceded to the Convention on 6 January 1952.

Its Article 64 permits the occupying power to issue in the occupied territory "provisions which are essential to enable the Occupying Power to fulfil its obligations under the present Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them".

And as a complement to the this text, Article 66 of the same Convention provides that: "In case of a breach of the penal provisions promulgated by it by virtue of the second paragraph of Article 64 the Occupying Power may hand over the accused to its properly constituted, non-political military courts, on condition that the said courts sit in the occupied country. Courts of appeal shall preferably sit in the occupied country."

Although Israel considers that the Fourth Geneva Convention does not apply in the occupied West Bank and Gaza Strip territories (on the grounds that no power exercised any legitimate sovereignty over these territories at the time of their occupation by Israel in 1967), the authorities decided to apply a number of its provisions in practice, including Articles 64 and 66.

A system of military courts has thus been in place since the early days of the 1967 occupation.

18. The occupied territories were divided into three jurisdictional districts corresponding to the territorial coverage of the three military courts set up:

- Gaza Military Court;
- Judea Military Court (competent for the south of the West Bank);

- Samaria Military Court (competent for the north of the West Bank) before which Mr. Khader is appearing. This court used to sit at Nablus but was transferred a few years ago to a military base near the village of Salem, between Jenin and Meggido, about 80km north-east of Tel Aviv. This military base is situated on the "green line", the border between Israel and the occupied Palestinian territories. The court sits on the Palestinian side of the border in order technically to respect Article 66 of the Fourth Geneva Convention ("... on condition that the said courts sit in the occupied country").

The decisions of these three military courts may be referred to a Military Court of Appeal sitting in Ramallah.

The decisions of the Ramallah Military Court may at final instance be appealed to the Supreme Court of Israel, sitting in Jerusalem.

19. The military judges are jurist officers appointed by a commission in which the army, the judiciary and the Bar are represented. Most of them are former military prosecutors. The judges ruling as sole judge and those presiding over collegiate entities must be officers assigned full-time to their duties as military judges. Their status guarantees them independence in their jurisdictional functions, for which they do not depend on their hierarchy, but decide cases under the supervision of the Military Court of Appeal.

The assessor judges may be civilians doing their military service. Such is the case, for example, of the two assessors accompanying Lieutenant-Colonel Hason in Mr. Khader's trial, who are both lawyers in civilian life and regularly sit on the military court as part of their military obligations.

The Israel Defense Forces have established a corps of military prosecutors, who are officers with substantial legal training.

The defence is practised either by the lawyers of the Israeli Bar or by those of the Palestinian Bar.

* *Progress of the hearings*

20. Up to 29 June 2005, the first 15 hearings were devoted to the prosecution statements, the Military Prosecutor having had a number of witnesses heard, including some GSS personnel.

The hearing of 29 June 2005 was the first that I attended. During the hearing the Prosecutor completed his presentation of the indictment, and the court began hearing the defence. Mr. Anis thus began questioning his client.

The defence statements continued at the hearing of 4 September until, after a suspension, the Prosecutor announced that he was modifying the indictment.

On the basis of the modified charges, Mr. Khader decided to plead guilty, which brought the court to a finding of guilt.

The acts henceforth held against Mr. Khader now carry only a maximum 10-year prison term. As a result, his trial is now a matter for the single-judge court. The case has thus been adjourned until 23 October 2005 to be heard before the President of the Court sitting without his assessors.

In view of the guilty verdict, the proceedings will be solely concerned with the penalty.

* *The charges against Mr. Khader and the evidence submitted to the court*

21. The evidence submitted by the prosecution is vigorously contested by the defence. These objections concern, on the one hand, access to the material assembled by the GSS in the course of the investigation and, on the other, the prosecution witnesses.

22. A number of items gathered by the investigation services have been classified "secret" by the security forces, as a result of which the defence was denied access to them.

The Israeli authorities explained this situation by the need to protect the identity of certain sources and the confidential nature of the methods, technical resources, and working and investigation procedures of the

GSS. They insist that this secrecy can also be invoked against the court since no information covered by the secrecy requirement is transmitted to it, so that such information cannot be used to secure a conviction.

The authorities add that, in connection with the "secret" classification, a check is carried out to ensure that no material so classified might be of use to the defence.

23. A tangible example of the problems raised by this situation may be given: Mr. Khader had told his lawyer that, shortly after his arrest, the GSS investigators played to him a cassette in which two young men were admitting participation in planning attacks and stating that they had been in contact for that purpose with him.

Mr. Khader has always formally denied what those two young men alleged.

When the trial began and the prosecution presented its evidence, that cassette was not part of it.

Mr. Anis has argued that that item – kept secret by the GSS – would finally be of use to the defence and convinced the court to ask for it to be communicated to the prosecution. The cassette was played to the court in camera in the presence of a member of the GSS whom Mr. Anis was able to cross-question at the hearing of 29 June.

Although I was present at the Samaria Court that day, I was unable to attend that part of the hearing held in camera.

According to information I gathered subsequently, the GSS agent acknowledged that the cassette had not been communicated to the court because a part of its content was false. He nevertheless refused to say which part of the cassette was genuine and which part false.

Mr. Khader's defence would have liked to be able to examine the entire file constituted by the GSS and not make do with the assurance given by the authorities that none of its items would have been of use to the defence. The example of that cassette shows that such an examination must be made by the defence itself. I was nevertheless told that an application to lift the secrecy status of the file had reportedly been rejected.

24. Regarding the prosecution witnesses, two types of problems were raised:

The first concerns the hearing by the court of GSS agents.

As stated earlier, the investigation into Mr. Khader's case has been conducted by the GSS, which kept him in detention for the three months following his arrest. For the sake of guaranteeing the confidentiality and security of members of that service, the Israeli courts hear them when they come to testify before them, in the course of in camera hearings, which is a departure from the principle of the public nature of proceedings, to which the defence acquiesced (Article 14 of the International Covenant on Civil and Political Rights permits such an exception on national security grounds).

25. The second problem concerns the personality of the principal prosecution witness, Amir Sowalma.

As we have seen when considering the charges earlier, they rest chiefly on the accusations of Mr. Sowalma. Yet he was not arrested until several weeks after Mr. Khader. His statements implicating Mr. Khader, which form the basis of the charges against him, therefore did not yet exist at the time of Mr. Khader's arrest.

Furthermore, the defence has made a point of arguing the fragility of the testimony of Mr. Sowalma, observing that he made the statements implicating Mr. Khader when he himself was held incommunicado and interrogated by the GSS, with interrogation methods that cast serious doubt over the spontaneity and sincerity of the statements obtained. According to the defence, Mr. Sowalma alleged that he had suffered interrogation conditions comparable to cruel, inhuman or degrading treatment and had been deprived of counsel during the weeks of his interrogation.

Mr. Khader's lawyer considered that it was not possible to give more credence to Mr. Sowalma's statements than to those of the two young men who had also tried to implicate Mr. Khader and which the prosecution had given up the idea of utilizing.

When he testified for the prosecution before the Court, Mr. Sowalma stated that he had brought accusations against Mr. Khader at the request of certain members of the Palestinian Authority wishing to settle scores with him.¹

At the hearing of 4 September the defence called for Mr. Sowalma to be heard, in addition to the GSS agent who had taken his statements. In short, the dropping by the prosecution of the most serious charges and Mr. Khader's decision to plead guilty to the modified charges ended the debates on the facts and degree of guilt, so that the witnesses were finally not heard.

It is to be noted that Amir Sowalma has meanwhile been found guilty of several attacks and sentenced to life imprisonment.

In its resolution of 8 April 2005, the IPU Governing Council noted "with deep concern that the prosecution case essentially rests on the statement of one person, who does not appear to be a credible witness".

II. ANALYSIS: A TRIAL NOT IN KEEPING WITH INTERNATIONAL STANDARDS

26. The following points will be examined to assess whether the Israeli authorities kept to the prescriptions of international law in conducting the trial of Mr. Khader.

1. His arrest and transfer to Israel;
2. His right to be informed without delay of the reasons for his arrest;
3. His right to be brought promptly before a judge;
4. The problem of incommunicado detention;
5. The allegations of cruel, inhuman or degrading treatment;
6. The impartiality of military courts;
7. Access to the investigation file;
8. The public nature of the hearings;
9. His present conditions of detention.

1. The arrest of Mr. Khader and his transfer to Israel

27. Mr. Khader was arrested by the army during the night and immediately transferred to an interrogation centre of the intelligence services in Israel. He has since been held in Israeli territory, except in connection with the hearings before the military court, for the purposes of which he was taken to the court sitting, as explained earlier, in occupied territory.

28. The strictly formal compliance with the need to have the court sit in occupied territory contrasts with the liberty taken by Israel regarding the other provisions of the Fourth Geneva Convention to which Israel is a party, notably that prohibiting the transfer of prisoners to the territory of the occupying power.

For Article 49 of the Convention stipulates that:

"Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive."

It follows very clearly that the occupying army is prohibited from transferring a prisoner from the occupied territory to Israeli territory, "regardless of [its] motive".

29. Israeli practice is nevertheless constantly in breach of this since it is quite usual to transfer for interrogation and detention in Israel persons taken prisoner in the occupied territories.

This practice is the subject, in Israel, of legal debates that I have already set out in my report to the Inter-Parliamentary Union on the trial of Mr. Marwan Barghouti. The Supreme Court has indeed validated the

¹ Mr. Khader referred to this point again at the hearing of 4 September, where he explained that in 2000 he had been one of the co-authors of an open letter publicly denouncing corrupt practices within the Palestinian Authority. He further explained that several of the co-authors of the letter had suffered reprisal measures; that his own home had been shot at and that, already in 2001, some Palestinian leaders had planned to organize a "bogus attack" in which the suicide bomber, whose bomb would fail to explode, would be arrested in possession of his telephone number.

practice of transferring prisoners to Israel, deeming that Article 49 does not prohibit transfers of individual prisoners but only mass deportations of civilian populations (Judgment Afu HCJ 785/87, 18 April 1988).

This analysis is very much contested in Israel itself by various authors and even some judges. It is absolutely inadmissible under international law and, in particular, contradicts the doctrine of the International Committee of the Red Cross. It may be recalled that, according to the Geneva Convention itself, there is no necessary distinction between individual and collective transfers since they are all prohibited by the aforesaid Article 49; and that, under Articles 146 and 147, unlawful transfers of prisoners constitute a "grave breach" which should even be a punishable crime.

2. Right to be promptly informed of the reasons for his arrest and detention and of his rights

30. Mr. Khader was not told at the time why he was being arrested. Even 10 days later, when he appeared before a judge on 26 March 2003, his lawyer and he were not informed of the charges against him and did not have access to the investigation file, which had been classified secret by the GSS.

They were only told of threats that Mr. Khader allegedly represented for the security of the region and of support for military activities directed against Israeli targets.

There was therefore a breach of Article 9.2 of the International Covenant on Civil and Political Rights, ratified by Israel in 1991, which provides that: "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. Right to be brought promptly before a judge

31. Article 9.3 of the International Covenant on Civil and Political Rights provides that: "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."

This first appearance before a judge is intended to permit an impartial and independent check on the lawfulness of the arrest and detention, and of the need to continue the detention.

It must take place "promptly" even though the text does not give any maximum time limit, each situation being special and the actual conditions needing to be taken into consideration on a case-by-case basis to appreciate whether an appearance could have taken place earlier. It is anyway generally considered that such an interval should not exceed a few days and, for the sake of comparison, the following periods were deemed excessive:

- one week: the Human Rights Committee instituted by the Covenant considered that a delay of one week was excessive.² In that case, the detainee was liable to the death penalty but it will be observed that Mr. Barghouti is liable to the maximum penalty provided for under Israeli penal law, namely life imprisonment;
- one week: the Inter-American Commission on Human Rights criticized Cuba's penal procedure law on the grounds that it theoretically permitted a detention period of one week before the detainee was brought before a judge;³
- four days and six hours: the European Court of Human Rights considered that such a interval before bringing a detainee before a judge was not satisfactory.⁴

32. In the case of Mr. Khader, his first appearance before a judge did not take place until 10 days after his arrest, without any explanation of the reasons that might have justified such a time lag.

This period is manifestly excessive. That being so, the guarantees provided for in Article 9.3 of the Covenant were breached.

² Case *McLawrence v. Jamaica*, 29 September 1997, para. 5.6.

³ Seventh report on the situation of human rights in Cuba, 1983.

⁴ Case *Brogan et al. v. United Kingdom*, 29 November 1988, para. 62.

4. Incommunicado detention

33. Mr. Khader was kept in isolation on several occasions, not only during the interrogation period, which lasted three months following his arrest, but once more in 2004 during the trial phase proper.

34. During the first three months, from 17 March to 15 June 2003, when he was kept in custody by the GSS agents, communication between Mr. Khader and his counsel was extremely limited.

Periods of several weeks went by without their being able to meet or communicate.

During the first week following his arrest (in which period fears were expressed, notably by the World Organisation Against Torture, regarding respect for his physical and psychic integrity), his family and friends had no idea where he had been taken by the army, until 24 March, when he was able to meet a lawyer for the first time.

Subsequently, the very day after his first appearance before a judge (26 March), Mr. Khader once more "disappeared" until 4 April 2003 since during that period his lawyers and his family were kept in ignorance of his fate and his whereabouts.

On 4 April, after threatening to bring a lawsuit in order to be able to meet his client, Mr. Anis was finally able to see him, but as early as 8 April the GSS had recourse to the possibility allowed it in Israel to issue orders forbidding any contact between a detainee and his lawyer.

35. In addition, it does not suffice to authorize meetings between a detainee and his lawyer; it must also be ensured that such meetings are of use for the effective exercise of the rights of the defence, which presupposes that the meeting can be usefully concerned with the investigation under way. Yet even when Mr. Khader and his lawyer were allowed to meet, during the first three months of his detention, they were not informed of the charges against him and had no access to the investigation file, which also constitutes a breach of the rights of the defence.

36. During the trial phase proper, there were several periods, in 2004, during which communications between Mr. Khader and his lawyers were once more forbidden on the grounds that he was being held incommunicado, notably for disciplinary reasons or for having taken part in a hunger strike.

Mr. Anis had to refer the matter to the Minister of Justice with a request that he lift that ban. It is to be noted that, on 1 September 2004, the Israeli Supreme Court ruled that the authorities were not permitted to restrict communication between prisoners and their lawyers, even in the event of a hunger strike.

37. From the standpoint of international law, these situations of incommunicado detention are in breach of several instruments providing for the need to inform the families of prisoners and their lawyers of the places of detention.⁵

Article 14.3(b) of the International Covenant on Civil and Political Rights, ratified by Israel, guarantees anyone charged with a criminal offence the right "to communicate with counsel of his own choosing". The Human Rights Committee instituted by the Covenant to monitor compliance has taken the view that any person arrested must have immediate access to a lawyer.⁶ It is not fitting that such access should be exercised just once and then suspended, as it was here.

The same Committee also considered⁷ that: "To guarantee the effective protection of detained persons, provisions should be made for detainees to be held in places officially recognized as places of detention and for their names and places of detention, as well as for the names of persons responsible for their detention, to be kept in registers readily available and accessible to those concerned, including relatives and friends", and that "provisions should also be made against incommunicado detention".

When communications of the detainee are suspended during interrogation phases, the "incommunicado detention" situation thus created becomes particularly difficult to justify.

⁵ Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principles 16, 18, and 19; Declaration on the Protection of all Persons from Enforced Disappearance, Article 10, para. 2; Minimum Rules for the Treatment of Prisoners, Rule 92.

⁶ Observations on Georgia, 9 April 1997, para. 28.

⁷ General Comment No. 20 (1992).

The United Nations Human Rights Commission has taken the view that such a situation is liable to facilitate torture and in itself to constitute a form of cruel, inhuman or degrading treatment.⁸ The Human Rights Committee has deemed that it may constitute a breach of Article 7 of the Covenant, prohibiting torture and cruel, inhuman or degrading treatment, or of its Article 10 (which provides that "[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person").⁹

5. Allegation of cruel, inhuman or degrading treatment

38. As mentioned earlier, Mr. Khader has alleged use by the GSS of interrogation methods comparable to cruel, inhuman and degrading treatment.

Such methods concerned the duration of interrogations: more than 20 hours per day during the days that followed his arrest, with rest periods not exceeding three hours. Subsequently, he was allegedly deprived of sleep during an initial period of 48 hours on end, then for a period of 60 hours in which he was allegedly not permitted to eat.

Mr. Khader has also stated that he was submitted, during his interrogations to the *shabeh* method whereby the person interrogated is attached to a chair, with the ankles and wrists secured, and kept for several hours in an unbalanced or uncomfortable position.

39. These allegations of cruel, inhuman and degrading treatment are unfortunately given credence by the failure of the authorities to order investigations when prisoners allege such treatment and, with regard to the long periods of sleep deprivation, by the case law of the Israeli Supreme Court, which in a manner very much open to criticism has accepted that the GSS may have recourse to it in some cases.

In a judgement of 6 September 1999, for instance, the Supreme Court distinguished the case in which sleep deprivation might be used to break the detainee, which it prohibits, from the case where the detainee is deprived of sleep by the necessities of the interrogation, which is tolerated: "Indeed, a person undergoing interrogation cannot sleep as does one who is not being interrogated. The suspect, subject to the investigators' questions for a prolonged period of time, is at times exhausted. This is often the inevitable result of an interrogation, or one of its side effects. This is part of the "discomfort" inherent to an interrogation. This being the case, depriving the suspect of sleep is, in our opinion, included in the general authority of the investigator" (para. 31).

This Supreme Court decision was criticized by the United Nations Committee against Torture at its 29th session (November 2001): "The court prohibits the use of sleep deprivation for the purpose of breaking the detainee, but stated that if it was merely incidental to interrogation, it was not unlawful. In practice in cases of prolonged interrogation, it will be impossible to distinguish between the two conditions".

The charges brought by Mr. Khader against his GSS interrogators should therefore in fact be the subject of an impartial investigation, as for instance provided for in Article 12 of the United Nations Convention against Torture, ratified by Israel in 1991: "Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction."

6. Impartiality of military courts

40. The military courts established by the Israel Defense Forces in the occupied territories apply the same procedural rules and the same criteria for assessing evidence as the ordinary courts.

The judges offer all the requisite guarantees of competence, legal qualification, and independence in the exercise of their jurisdictional functions.

The specific nature of these courts is due to the fact that the sanction rules issued by the occupying authority in the occupied territories and, above all, that they are integrated into a totally military environment since judges, prosecutors, registrars and interpreters are in uniform and armed, and the courts are physically located in military bases.

⁸ Resolution 1997/38, para. 20.

⁹ Cases *Albert Womah Mukong v. Cameroon*, 21 July 1991, and *Megreisi v. Libya*, 23 March 1994.

The actual conduct of the proceedings, as far as I was able to observe during my two missions, and according to other information I was able to gather on the subject, does not differ from the manner in which proceedings are conducted in ordinary criminal courts.

As in any court, some judges are reputed to be harsher than others or to have a stricter attitude than others to the hearing. In the particular case of Mr. Khader's trial, I observed, at the two hearings I attended, that the operations took place in accordance with the standards one is entitled to expect in any criminal court and that, to the extent permitted by the situation and the nature of the matters judged, the working atmosphere was as serene as possible.

41. The true problem of the equitable character of the trial is situated at another level.

In the course of a criminal trial, the accused is required to be accountable to the society to which he belongs and whose rules he has disregarded. The purpose of the trial, even if it does not always succeed in this, is to restore a social link severed or broken by the offence. Confronted with his own acts, the accused is expected, at best, to become aware of his failing and accept the punishment meted out on behalf of the society to which he belongs, which restores the social link, pacifies the situation and prepares the accused for rehabilitation, for which his sentence should also serve.

This theoretical outline obviously represents an ideal not always achieved.

This *raison d'être* of criminal justice nevertheless seems to be completely unachievable in a situation in which the occupation army of a territory itself judges the acts that the civilian populations of the territory may direct against that army or against the interests or nationals of its State of origin.

The expected impartiality of the judge therefore seems impossible to achieve not in its subjective dimension – it was confirmed to me in the course of discussions with lawyers that there are of course military judges who, taken individually are just as "impartial" (in the subjective sense) as civilian judges – but in its objective dimension, adhering to the common law precept that "justice must not only be done: it must also be seen to be done".

The institution of military courts as such is bound by a principle of objective impartiality with which it is unable to comply. While justice must be done on behalf of the society to which the accused belongs and whose values he has betrayed, it is done here by an army of occupation which is not judging its own nationals but civilian members of the occupied population, who are generally accused of offences against the army of occupation.

The army thus finds itself in an untenable position for a judge: that of being both judge and victim of the crime under trial.

42. It is nevertheless an international convention, as mentioned earlier, that provides for the establishment of military courts in occupied territories (Article 66 of the Fourth Geneva Convention).

We must nevertheless reflect on the scope of that text, put back in the broader context of applicable international law, and ask ourselves whether it legitimates the maintenance of a military justice system which has now been in use for nearly 40 years.

43. Work within various forums establishing international law have led to the definition of a number of principles that States having instituted military jurisdictions are invited to respect. In general one of these principles is that military courts should only try members of the armed forces and should not be required to try civilians.

In 1977, for example, the United Nations Human Rights Committee invited Lebanon to transfer to the ordinary courts the jurisdiction of the military courts for all matters concerning civilians.

In 1981 the Inter-American Commission on Human Rights recommended to Colombia that it no longer bring civilians before military courts, or that it limit the jurisdiction of such courts to crimes constituting veritable attacks on State security.

This same Inter-American Commission, in its 1993 report, took the view that the fact of making military courts competent to try civilians constituted a violation of Articles 8 and 25 of the Inter-American Convention on Human Rights, deeming that the competence of such exceptional courts should be to

maintain discipline within the army or the police and therefore to try only members of those two institutions.

With respect to the United Nations Human Rights Commission, the Sub-Commission on the promotion and protection of human rights placed on its agenda the question of the administration of justice by military courts and designated one of its members, Professor Emmanuel Decaux, as Rapporteur on the subject.

In his report of 14 June 2004, the Rapporteur highlighted a number of principles by which military courts should abide and one of those principles (Principle No. 2) concerns their functional competence: "Military courts should, in principle, not have competence to try civilians. In all circumstances, the State shall ensure that civilians accused of a criminal offence of any nature are tried by civilian courts. The jurisdiction of military tribunals should be limited to offences of a strictly military nature committed by military personnel (...)".

44. The rule laid down in Article 66 of the Fourth Geneva Convention must therefore be seen in the light of this broader legal context. It is for one thing older (the Fourth Geneva Convention was signed in 1947) and, for another, it governs a special and dispensatory situation, that of military occupations. While it is perfectly acceptable in law that special rules should exist that override general rules, it nevertheless follows that they must be strictly construed.

It is therefore no doubt necessary to consider the need to establish military courts in occupied zones, as provided for in Article 66 of the Fourth Geneva Convention, to be for the purpose of managing a dispensatory and hence necessarily provisional situation.

Such in any case is the present trend of international law in the matter.

The Decaux report, cited above, setting out a number of principles relating to the administration of justice by military courts, thus provides in its Principle No. 17 for the need to verify periodically whether recourse to military courts continues to be a functional necessity. The author thus makes this comment on the principle: "Since the sole justification for the existence of military courts is linked with practical eventualities, such as those related to peacekeeping operations or extraterritorial situations, there is a need to check periodically whether this functional requirement still prevails" (report cited, para. 56).

45. From this point of view, one can of course not fail to note that, if the occupation of the West Bank since 1967 provides the only justification for the maintenance of these jurisdictions, such justification cannot be more lawful than the occupation itself.

The international community has on many occasions condemned the prolongation of this occupation and asked Israel to withdraw from the occupied territories, since Security Council resolution 242 of 22 November 1967, constantly reiterated up to the time of its resolution 1435 of 24 September 2002.

46. In 1995 the Knesset ratified the Oslo II Accords, which, under a process set to culminate in the constitution of a Palestinian State, provided for a gradual withdrawal from the territories and the transfer to the Palestinian Authority of substantial prerogatives of sovereignty relating, in particular, to security and the administration of justice. The logical consequence should normally have been a transfer to the Palestinian Courts of the competence of the Israeli military courts.

By virtue of those Accords, it is indeed for the Palestinian police and judicial institutions to ensure the security of the region by trying offences committed in Palestinian territory and, in particular, by punishing attacks against Israel from such territory.

Thus, in Mr. Khader's case, if the Israeli authorities had respected the Oslo Accords they would have communicated to the Palestinian authorities the prosecution evidence at their disposal, such as might justify the arrest and prosecution of Mr. Khader.

But the Oslo Accords are no longer applied.

On the one hand, the Israeli authorities accuse the Palestinian authorities of failing to fulfil their obligations under the Accords by not punishing attacks against Israel, or even by supporting terrorism.

On the other hand, Israel has since 2002 been reoccupying a substantial part of the occupied territories, from which it had partially withdrawn six years earlier.

Yet from the legal standpoint those Accords have not ceased to exist and the Israeli Supreme Court continues to recognize their legal validity (see decision of 3 September 2002, HCJ 7015/02 and 7019/02).

The provisions whereby the maintenance of order and security in "Zone A" (which includes the city of Nablus where Mr. Khader was arrested) is incumbent upon the Palestinian Party (Articles XIII and XVII), including the trying of criminal cases (Annex III, Article 1), are still in force although they are not respected in practice, and notably so in the present case.

47. The institution of military courts in 1967 should not and could not then be seen as anything other than a necessity as provisional as the occupation itself, intended temporarily to ensure order and security in a zone whose institutions were temporarily unable to continue functioning.

It should have ended with restoration of the full competence of Palestinian jurisdictions, as provided in the Oslo Accords, including for the purpose of punishing attacks against Israel.

Its continued existence, 38 years later, has transformed these provisional courts from a temporary instrument for the maintenance of order and security into a permanent tool of the occupation, and one which may be perceived by the local population as an instrument of repression, as its competence consists precisely in punishing Palestinians who resort to violence in order to oppose the occupation.

On account of this factor alone, the Israel Defense Forces find themselves in the position of being both the victims of the offences involved in prosecutions (or of a large part of them) and the judges of those same offences, which puts the military judges in an ethically untenable position and deprives them, to say the least, of that appearance of impartiality without which no jurisdictional system can lay any claim to legitimacy.

In this respect – and whatever the competence, independence or even subjective impartiality of the judges making up these courts – one is forced to conclude that the military courts instituted by the Israel Defense Forces in the occupied territories do not meet the requirement of impartiality under international law.

7. Access to the investigation file

48. As explained above, the defence did not have access to the entire investigation file constituted by the GSS because some of its items were classified.

The authorities justify this de facto state of affairs by stating that it has no implications for Mr. Khader since no item classified "secret" is communicated to the court, which means that it cannot be used in support of a conviction.

They add that in the classifying process a check is carried out to ensure that the items classified "secret" would not be of use to the defence.

49. Yet it is for the defence to appreciate what would or would not be of use to it.

We have seen earlier the example of a cassette containing statements implicating Mr. Khader made by two young men, a cassette that the prosecution had initially not included in its file. Although that cassette may seem to be incriminating, it was the defence that insisted that the court order its communication and the GSS finally acknowledged at the hearing of 29 June 2005 that the cassette was not reliable. The defence was thus able to utilize this element to show that the testimonies implicating Mr. Khader could have been manipulated.

8. Public nature of the proceedings

50. I was able without difficulty to attend the hearings of 29 June and 4 September 2005, except during the hearings of GSS members, which were held in camera as stated earlier.

It is nevertheless permissible under international law that the principle of the public nature of proceedings may be waived in certain circumstances enumerated in Article 14.1 of the International Covenant on Civil and Political Rights: for reasons of morals, public order, national security, interest of juvenile persons or of the private lives of the parties involved, and so forth. What was invoked here were security considerations, and the defence raised no objection.

The principle of adversarial proceedings is respected since the defence is of course still present at the hearing of these witnesses, whom it is allowed to cross-question freely. If it considers that an in camera hearing is not justified, it always has the possibility of criticizing this and requesting a reopening of the proceedings in public, which was not done in this case.

51. On the other hand I was told that Mr. Khader's family had in some circumstances encountered obstacles to attendance in court.

The Israeli authorities even informed the IPU that public attendance would be limited to two relatives per prisoner.

I did not observe any application of this rule. I was told that that could be an effect of my presence as an observer, but on 29 June and 4 September 2005 more members than that of Mr. Khader's family were admitted to the hearing room.

Furthermore I did not see anything to justify the rule invoked by the authorities, limiting public access to two persons per accused. The hearing rooms of the Samaria Court are big enough to accommodate an audience of several dozen people, and there is ample military presence to ensure order.

52. The members of the public coming from the occupied territories enter the court by an entrance different from that which I used, coming as I was from Tel Aviv and having entered from the Israeli side. I was told of scenes of humiliation in controls of the public admitted to the military area, but I did not witness this since the controls in question took place in an area that I was unable to see.

On the morning of 29 June, before the start of the proceedings, I learned from a soldier who had come to give me this information that Mr. Khader's family members were present and wished to meet me. The soldier offered to take me to them. The relatives of the accused were then in the hearing room. On my arrival, the soldiers keeping watch in the room wanted me to leave the room since the proceedings had not begun, and to get the family to leave on one side (the "Palestinian" side) and to have me leave by the other side (that from which I had arrived, which was also where the offices of the judges were, and where the lawyers wait). I asked to be allowed to go out by the same exit as the relatives so that we could talk. A soldier tried to dissuade me from this with the injunction that "it would not be proper for you to go", and I had to be insistent. I was thus able to observe that members of the Palestinian public simply did not enjoy the same freedom of movement in the premises as I did, since they were shut up pending the hearings in a sort of fenced and guarded courtyard sheltered from the sun by an awning under which benches are installed for the wait.

During the hearings themselves, when there are suspensions, I was able to observe that the soldiers generally did not let the family approach the box of the accused or talk to him. Communication was confined to signs and smiles from a distance. On 4 September, however, the family was permitted to converse a little with Mr. Khader. It seemed to me that this question of communication between the accused and his family in fact depended on the goodwill of the soldiers guarding the room at any particular time, some being more understanding than others.

53. At the hearing of 4 September 2005, apart from the family, my interpreter and me, two Knesset parliamentarians were also present in the audience for a part of the proceedings.

54. I was told that the access of journalists had sometimes been hindered, prompting the defence to lodge a special application in the court for journalists to be admitted to the hearing room.

9. His present conditions of detention

55. With regard to his health, at the hearing of 29 June 2005, Mr. Khader told me that he was suffering from back pains, probably caused by his poor conditions of detention in cells where he is kept for the days preceding his trial. At the hearing of 4 September 2005 he told me that he was receiving treatment for those pains.

56. The family of Mr. Khader spoke of major difficulties regarding visits to him in prison, particularly the fact that his brothers and sisters have never been allowed to visit him (the authorities have nevertheless stated that one of his brothers was able to visit him in December 2004 and January 2005), and the fact that his mother was unable to meet him for two years.

He may receive visits from his children but without any physical contact between them, since they remain behind a glass separation and have to communicate through an interphone. His lawyer has taken steps to obtain the right for Mr. Khader and his children to have physical contact, but so far to no avail.

CONCLUSION

57. The role of an observer is naturally not to take the place of the court in giving an opinion on the guilt or otherwise of the accused or in ruling on the prosecution or the arguments of the defence; but his role is to gather elements enabling the Inter-Parliamentary Union to appreciate whether the internationally recognized standards of fair trial have been respected.

The public hearings before the court (which I attended only very partially) constitute only the final phase of the trial. Deciding whether or not it has been fair involves taking account of all the preparatory stages, from the arrest of the accused until the time of his court appearance.

For the reasons given in this report, this examination led me to conclude that these international standards were not respected in regard to a number of points:

- international law does not permit a situation where, when individuals are arrested, their families are denied information as to their situation for a whole week; the transfer of a prisoner from occupied territories to the territory of the occupying power is a grave breach of the Fourth Geneva Convention;
- Mr. Khader was not brought before a judge until 10 days after his arrest, a time lag which is excessive, and without him or his lawyer having had access to the investigation file, in which respect the authorities failed to abide by their international obligations to inform any person detained of the charges against him or her;
- Mr. Khader was subsequently held incommunicado on several occasions in 2003 and 2004, without any possibility of contact with his lawyer, again in breach of the applicable international rules;
- these phases of incommunicado detention finally work against the authorities, for they lend credence to the allegations of use of interrogation methods prohibited under international law, together with the failure of the authorities to investigate such allegations. Sleep deprivation is accepted in some case by Israeli justice whereas it constitutes, in international law, an instance of cruel, inhuman or degrading treatment under a total and absolute ban;
- all statements taken in such a context (whether those of an accused or, in the present trial, those of witnesses) are consequently open to doubt, and in the very interests of the justice system and its credibility, their admissibility as evidence should be made conditional on the guarantee that they have been obtained in a manner respectful of the physical and psychic integrity of the person heard; now the Israeli system does not at present provide this guarantee;
- the maintenance of a system of military courts in the occupied territories, competent to try acts by local civilian populations directed against the occupying power creates a situation incompatible with the requirement of *objective* impartiality on the part of the judge, who should be a neutral third party not involved in the conflict. Even though the military jurists making up these courts may individually offer the requisite conditions of competence, independence and impartiality, that does not suffice to offset this intrinsic defect of military justice, nevertheless accepted and even provided for in the Fourth Geneva Convention, but whose justification is impaired with the duration of the occupation and whose maintenance becomes difficult to reconcile with the development of international law in the matter.

One is forced to the conclusion that Mr. Khader has not, since his arrest two-and-a-half years ago, had the benefit of compliance with the international rules of fair trial.

58. These shortcomings give the impression that Israel has, for the sake of combating terrorism, abandoned the idea of ensuring absolute respect in all circumstances for the physical and psychic integrity of prisoners, which is nonetheless an overriding obligation from which no exceptional circumstance allows of any derogation.

Yet this is of no help to Israel in confronting the acts of terror of which it is a victim and against which it must protect its population. On the contrary, the shortcomings in question undermine the legitimacy of the decisions of its courts and nourish such sentiment of injustice as the accused may experience, besides causing verdicts to be rebuffed by public opinion, or in any case by Palestinian opinion and a part of international opinion.