



The Law Library of Congress

REPORT FOR CONGRESS

December 2008

Directorate of Legal Research
LL File No. 2009-01734

ISRAEL:

DETENTION OF TERRORISM SUSPECTS ON BOTH SIDES OF THE GREEN LINE

This report concerns the detention authorities exercised by Israeli officials toward persons who are suspected of committing security offenses and those suspected of posing threats to State and public security. It analyzes the different application of both domestic and international law to residents of Israel per se and of territories outside of the Green Line, including under its belligerent occupation.

LAW LIBRARY OF CONGRESS

ISRAEL

DETENTION OF TERRORISM SUSPECTS ON BOTH SIDES OF THE GREEN LINE

TABLE OF CONTENTS

Executive Summary 1

I. Introduction 2

II. Pre-trial Detention of Persons Suspected of Security Offenses 3

III. Emergency Powers for Warrantless Detention 4

IV. Detention of POWs 6

 A. Applicable Law 6

 B. Identity 6

 C. Duration of Captivity 7

 D. Treatment 7

V. Internment of Unlawful Combatants Law 8

 A. Purpose 8

 B. Conditions for Issuance of a Detention Order 9

 1. Unlawful Status 9

 2. Detainee’s Individual Threat 9

 3. Reasonable Suspicion that Detainee’s Release Will Harm State Security 10

 4. Detainee’s Residence 10

 C. Conformity of the Definition with International Law 11

D. Procedural Requirements for Issuing Detention Orders	12
E. Judicial Review	12
F. The Right to a Lawyer	13
G. Duration of Internment.....	13
H. Conditions of Internment	14
I. Declaration of Large-scale Fighting and Implications for Implementation	14
1. Authority to Issue Internment Orders	14
2. Proceedings Before Military Court Instead of Civilian Courts	15
3. Establishment of Military Court of Review and Military Court of Detainees' Appeals	15
VI. Detention of Non-POWs in Areas Beyond the Green Line Under Belligerent Occupation	15
A. Historical Background	15
B. Decree Regarding Administrative Detentions (Temporary Order) (Judea and Samaria).....	16
C. Special Orders: Detention in Time of Warfare (Temporary Orders).....	17
VII. Comparison Between Administrative Detention in Israel and in the West Bank	19
VIII. Conclusion	20

LAW LIBRARY OF CONGRESS

ISRAEL

DETENTION OF TERRORISM SUSPECTS ON BOTH SIDES OF THE GREEN LINE

Executive Summary

Israel applies different laws to persons who are suspected of committing security offenses and those suspected of posing threats to its security. Suspects of security offenses in Israel, as defined by the penal law, are detained in accordance with the law governing pre-trial detention. Unlike pre-trial detentions, which are part of the criminal process, emergency powers are granted to the Minister of Defense to detain persons whose detention is required for state or public security. Emergency detention powers must only be exercised on a restrictive basis and with great caution. These authorities differ from the authorities implemented in the course of an armed conflict.

Israel maintains its authorities to detain prisoners of war. Recognizing that it is engaged in an international armed conflict against hostile countries as well as against terrorist organizations, Israel passed a law to authorize the detention of foreign individuals who belong to terrorist organizations that operate against the State. Such individuals, if not privileged under the international law of armed conflict as combatants, are recognized as “unlawful combatants,” a sub-category of civilians, who do not enjoy the same degree of protection under international law as that to which innocent civilians are entitled.

Detention authorities that derive from Israeli domestic laws may not be applicable in areas beyond the Green Line (not including East Jerusalem and the Golan Heights, which were annexed pursuant to Israeli legislation) that are under belligerent occupation. Whereas the Supreme Court recognized that Israel’s Internment of Unlawful Combatants Law was applicable to residents of the Gaza Strip following Israel Defense Forces redeployment, it expressed an unbinding opinion that it may not be applicable to residents of the West Bank.

I. Introduction

Israeli law recognizes different categories of detentions within Israel and in territories under Israeli military control beyond the Green Line. The term “Green Line” is used to refer to the 1949 armistice lines established between Israel and its neighbors (Egypt, Jordan, Lebanon, and Syria) after the 1948 Arab-Israeli War.¹ The West Bank, the Gaza Strip, the Golan Heights, and the Sinai Peninsula were captured by Israel Defense Forces (hereinafter IDF) in the 1967 Six-Day War, and thus are considered “beyond the Green Line.” The Sinai Peninsula was returned to Egyptian control following the signing of the Treaty of Peace between the State of Israel and the Arab Republic of Egypt.² IDF unilaterally redeployed from the Gaza Strip in August 2005. The Golan Heights and Jerusalem were annexed by Israel in accordance with Israeli law.³

The choice of law that applies to detention of persons suspected of engaging in terrorism does not depend on whether they are detained in or outside of the Green Line. Rather, it depends on the objective of their detention, on whether they are considered Prisoners of War (POWs), whether they are foreigners and whether their place of residence is under belligerent occupation.

Generally, persons may be detained in Israel as criminal suspects under a judicial warrant, as warrantless detainees under domestic emergency powers or under special legislation applicable to “unlawful combatants,” as POWs, and in areas under belligerent occupation such as the West Bank under military regulations, as applicable.

Criminal suspects may be detained under a judicial warrant for an investigation leading to an indictment. Persons who qualify for protection as POWs may be detained in accordance with Israel’s domestic law, which has incorporated international conventions to which Israel is a party, including the Geneva Convention Relative to the Treatment of Prisoners of War.⁴ Persons not recognized as POWs who are suspected of posing a danger to the State or to public security may be detained under the Emergency Powers (Detention) Law, 5739-1979,⁵ as amended. Foreigners who are suspected of such dangers may be detained under the Internment of Unlawful Combatants Law, 5762-2002,⁶ as amended. The latter law also addresses the issue of detention during large-scale fighting. The above-cited laws have different objectives and provide for different procedures of detention.

¹ For the text of the 1949 Armistice Agreements, *see* 42 U.N.T.S. nos. 654-657, *in* THE ARAB-ISRAELI CONFLICT AND ITS RESOLUTION: SELECTED DOCUMENTS 74-102 (Ruth Lapidoth & Moshe Hirsch, eds., 1992).

² Treaty of Peace Between the State of Israel and the Arab Republic of Egypt, 1138 U.N.T.S. no. 17855, at 72; *in* THE ARAB-ISRAELI CONFLICT AND ITS RESOLUTION, *id.*, at 218.

³ Basic Law: Jerusalem Capital of Israel, 34 LAWS OF THE STATE OF ISRAEL (hereinafter LSI) 209 (5740-1979/80); The Golan Heights Law, 5742-1982, 36 LSI 7 (5742-1981/82).

⁴ Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135, *available at* United Nations Treaties Collection website, <http://treaties.un.org/untc/Pages/doc/Publication/UNTS/Volume%2075/volume-75-I-972-English.pdf> (last visited Nov. 24, 2008).

⁵ Emergency Powers (Detention) Law, 5739-1979, 33 LSI 89 (5739-1978/79).

⁶ Internment of Unlawful Combatants Law, 5762-2002, as amended, SEFER HAHUKIM (S.H.) No. 1834, at 192.

Persons active in hostile activities against the State who reside in areas outside of Israeli jurisdiction (beyond the Green Line) could qualify for detention as either POWs or as civilians who are unprivileged (unlawful) combatants in accordance with rules of international humanitarian law applicable under the Geneva Convention Relative to the Protection of Civilian Persons in Time of War (hereinafter “Fourth Geneva Convention”).⁷ The Internment of Unlawful Combatants Law does not apply in areas under belligerent occupation where detention may be issued under military orders in accordance with applicable international law rather than in accordance with Israeli domestic law.

Israeli courts therefore recognize detention authorities contained in domestic law, where relevant, directed at residents of Israel proper (pre-1967 borders), and at residents of East Jerusalem and the Golan Heights (both annexed by Israel through legislation). The Israeli Supreme Court, however, has recognized the applicability of the Internment of Unlawful Combatants Law to residents of the Gaza Strip, following the end of its belligerent occupation by Israel. It has expressed a *prima facie* unbinding preference for the view that this law does not apply to residents of the West Bank.⁸

The following report analyzes the law that applies with regard to detention of residents on both sides of the Green Line on suspicion of security offenses.

II. Pre-trial Detention of Persons Suspected of Security Offenses

The arrest and detention of persons suspected of committing criminal offenses in Israel, including specific terrorism-related offenses, are regulated by the Criminal Procedure Law (Implementation Authorities – Arrests), 5756-1996.⁹ The law generally requires a warrant as a precondition to an arrest.¹⁰ In exceptional cases, specified by law, where an arrest may be made without a warrant, the law requires that the suspect be brought before a supervising officer as soon as possible and before a judge within twenty-four hours.¹¹ When the supervising officer finds that it is necessary to conduct an immediate investigation that cannot be delayed until the suspect is brought before a judge, that period may be extended up to forty-eight hours from the start of the detention.¹² A forty-eight hour limit for a warrantless detention is similarly provided when there is a need for “urgent activity” required for an investigation of security offenses.¹³

⁷ Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Aug. 12, 1949), Office of the High Commissioner, United Nations Human Rights, <http://www.unhcr.ch/html/menu3/b/92.htm> (last visited Nov. 10, 2008).

⁸ CrimA 6659/06 etc., A & B v. State of Israel, para. 11, THE STATE OF ISRAEL: THE COURT AUTHORITY website, http://elyon1.court.gov.il/files_eng/06/590/066/n04/06066590.n04.pdf (last visited Dec. 18, 2008).

⁹ Criminal Procedure Law (Implementation Authorities–Arrests), 5756-1996, S.H. No. 1592, at 338 (May 12, 1996) (effective one year from its date of publication).

¹⁰ *Id.* § 4.

¹¹ *Id.* § 29.

¹² *Id.* § 30.

¹³ *Id.*

The law defines “a suspect of a security offense” as a person suspected of committing any of the following offenses:¹⁴

- Treason, espionage, the conduct of unauthorized military exercises or use of weapons and activities in unlawful associations in accordance with the Penal Law 5737-1999;¹⁵
- “Offences relating to firearms, explosives, property etc.,” “offenses against the maintenance of public order,” “unlawful drilling,” “false evidence,” “harbouring,” “abetment,” “attempts,” and offenses involving “unlawful associations,” all under the Defence Emergency Regulations, 1945;¹⁶
- Activity or membership in a terrorist organization in accordance with the Prevention of Terrorism Ordinance;¹⁷
- Infiltration in accordance with the Prevention of Infiltration (Offenses and Jurisdiction) Law, 5714-1954;¹⁸
- Use of property for terrorism objectives in accordance with the Prohibition of Financing of Terrorism, 5765-2005.¹⁹

III. Emergency Powers for Warrantless Detention

Administrative detention (detention without a judicial warrant) is considered to be a last resort and the authorities must attempt to indict suspects in the normal criminal process before resorting to its use.²⁰

Administrative detention was implemented by the British Mandate Powers before the establishment of the State of Israel, based on Regulation 111 of the Defence (Emergency) Regulations (hereinafter Regulation 111).²¹ These emergency regulations were promulgated in 1945 and applied to the whole of Mandatory Palestine in an effort “to provide the authorities with wide-ranging powers needed, in their view, to crush the uprising of the Jewish underground movements.”²²

¹⁴ *Id.* § 35(b).

¹⁵ Penal Law 5737-1999, LSI special volume, ch. G, arts. B & D, §§ 143, 144, 146 & 147.

¹⁶ Defence (Emergency) Regulations, 1945, PALESTINE GAZETTE (No. 1442) (Supp. 2) 1055 (1945). These regulations were imposed by the British Mandate government based on the Palestine Order in Council (Defense) 1937, PALESTINE GAZETTE (No. 675) (Supp. 2) 267 (1937).

¹⁷ Prevention of Terrorism Ordinance, 1 LSI 77 (5708-1948).

¹⁸ Prevention of Infiltration (Offenses and Jurisdiction) Law, 5714-1954, 8 LSI 133 (5714-1953/54).

¹⁹ Prohibition of Financing of Terrorism, 5765-2005, S.H. No. 1973, at 76.

²⁰ H.C. 9441/07 Agbar et al v. IDF Commander in Judea and Samaria, available at <http://elyon1.court.gov.il/verdictssearch/HebrewVerdictsSearch.aspx> (last visited Dec. 17, 2008).

²¹ Defence (Emergency) Regulations, 1945, PALESTINE GAZETTE (No. 1442) (Supp. 2) 1055 (1945).

²² See DAVID KRETZMER, THE OCCUPATION OF JUSTICE: THE SUPREME COURT OF ISRAEL AND THE OCCUPIED TERRITORIES 121 (2002).

Following the establishment of the State of Israel, the regulations were absorbed into domestic Israeli law, through the Law and Administration Ordinance, 5708-1948, which provided for the continuing validity of laws that existed at the time of independence, “subject to such modifications as may result from the establishment of the State and its authorities.”²³ In 1979, the Knesset (Parliament) passed the Emergency Powers (Detention) Law, 5739-1979,²⁴ which repealed Regulation 111.

The Emergency Powers (Detention) Law, 5739-1979, as amended, provides that it “shall apply only in a period in which a state of emergency exists in the State [.]”²⁵ The state of emergency continues to apply by virtue of a declaration made in accordance with section 9 of the Law and Administration Ordinance, 5708-1948.²⁶

The Law assigns extensive powers to the Minister of Defense by authorizing him to order the detention of a person for a period not exceeding six months, when he “has reasonable cause to believe that reasons of state security or public security require” this action.²⁷ This period may be extended periodically, on the same grounds, for an additional period of up to six months. In the absence of such authorization, the Chief of the General Staff may order a person’s detention for a period not exceeding forty-eight hours, which cannot be extended further.

The detention orders described above may be granted in the absence of the prospective detainee.²⁸ The orders are, however, subject to judicial review by the President of the District Court within forty-eight hours of the detention’s initiation and may be set aside if the court finds that the detention orders are not based on reasons of state or public security, made in bad faith, or result from irrelevant considerations. Detention orders are subject to review every three months, or within a shorter period, as determined by the President of the District Court in his decision. Detention orders approved by the President of the District Court are subject to appeal before the Supreme Court.

The law permits deviations from the rules of evidence in judicial proceedings when the President of the District Court has been satisfied, for reasons stated in the record, that “this will be conducive to the discovery of the truth and the just handling of the case.”²⁹ Proceedings under this Law are conducted behind closed doors.³⁰

²³ 1 LSI 9 (5708-1948) § 11.

²⁴ 33 LSI 89 (5739-1978/79).

²⁵ *Id.*

²⁶ *Id.* § 1.

²⁷ *Id.* § 2.

²⁸ *Id.* § 2(d).

²⁹ *Id.* § 6.

³⁰ *Id.* § 9.

IV. Detention of POWs

A. Applicable Law

The detention of POWs either within or outside of Israeli territory is regulated by Israel's domestic law, which incorporates the relevant international conventions.

The Military Justice Law, No. 54 of 5715-1955³¹ establishes Israel's military justice system. In addition to regular and reserve forces of the IDF, persons in IDF custody, and IDF employees, the Military Justice Law also applies to POWs "subject to any provisions enacted by regulations...for the purpose of adapting the provisions of this Law to the international conventions to which Israel is a party."³² Those conventions include the Geneva Convention Relative to the Treatment of Prisoners.³³

Israeli domestic law, including the Military Justice Law, No. 54 of 5715-1955³⁴ and relevant regulations such as the Military Justice (Adaptation of the Law with the Geneva Convention Relative to the Treatment of Prisoners of War) Regulations 5766-1966,³⁵ impose requirements on Israeli military personnel and will apply wherever they serve by order of the State.

B. Identity

In accordance with the Geneva Convention Relative to the Treatment of Prisoners,³⁶ POWs are generally defined as persons who have fallen into the power of the enemy and are either members of the armed forces of a Party to the conflict or of militias or volunteer corps that form part of such armed forces. Members of other militias and volunteer corps may be recognized as POWs upon capture in or outside their own territory, even if this territory is occupied, if such militias or volunteer corps:

- Are commanded by a person responsible for his subordinates;
- Have a fixed distinctive sign recognizable at a distance;
- Carry arms openly; and
- Conduct their operations in accordance with the laws and customs of war.

³¹ 9 LSI 184 (5715-1954/55).

³² *Id.* § 10.

³³ Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135, available at United Nations Treaties Collection website, <http://treaties.un.org/untc/Pages/doc/Publication/UNTS/Volume%2075/volume-75-I-972-English.pdf> (last visited Dec. 18, 2008).

³⁴ 9 LSI 184 (5715-1954/55).

³⁵ Military Justice (Adaptation of the Law with the Geneva Convention Relative to the Treatment of Prisoners of War) Regulations 5766-1966, KOVETZ HATAKANOT (Subsidiary Legislation) 796 (5766-1966), as amended.

³⁶ Geneva Convention Relative to the Treatment of Prisoners of War.

Additional categories of persons recognized as POWs include members of regular armed forces who profess allegiance to a government or an authority not recognized by the detaining power; persons who accompany the armed forces without actually being members thereof who do not benefit by more favorable treatment under any other provisions of international law; and locals who take up arms openly and, while respecting the laws and customs of war, resist invading forces.³⁷

C. Duration of Captivity

According to the Convention, prisoners of war should “be released and repatriated without delay after the cessation of active hostilities.”³⁸

D. Treatment

The Military Justice Regulations 5766-1966,³⁹ among other provisions, require orders regarding the behavior of POWs to be in a language they understand, preserve the rights accorded by the Convention to POWs subjected to disciplinary penalties or detention before trial to the extent possible, shorten the period of detention prior to military or disciplinary adjudication, and prescribe different disciplinary penalties than those prescribed by the law for those IDF personnel and persons in IDF custody, to whom the Military Justice Law, 5715-1955⁴⁰ usually applies. The regulations further impose a requirement on the commander of a POW camp to maintain a list of POWs subjected to disciplinary actions and of the penalties imposed on them. In addition, the commander is also required to inform the POWs’ representative of every disciplinary judgment against any of the POWs.

The regulations further require that a POW who is expected to be tried by a military court must be provided, before his trial, with a notice regarding his rights in accordance with the Convention. The POW may be assisted by one of his friends, by a defense attorney of his choice in accordance with the Military Justice Law No. 54 of 5715-1955,⁴¹ or by a defense attorney assigned by the protecting power. If such a selection was not made, he may be assigned an attorney by the authority summoning the military court adjudicating the POW. The attorney for the POW is entitled to all the rights listed in section 105 of the Convention. Among other stipulations, the regulations require the timely submission of the indictment to the POW and his defense attorney, in a language they both understand, prior to the start of a hearing.

³⁷ *Id.* art. 4. For a comprehensive discussion of the entitlement to POW status under international law, see YORAM DINSTEIN, *Lawful Combatancy*, in *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 27-54 (2004).

³⁸ Geneva Convention Relative to the Treatment of Prisoners of War.

³⁹ Military Justice (Adaptation of the Law with the Geneva Convention Relative to the Treatment of Prisoners of War) Regulations 5766-1966.

⁴⁰ 9 LSI 184 (5715-1954/55).

⁴¹ Military Justice Law, No. 54 of 5715-1955 § 316, 9 LSI 184 (5715-1954/55).

V. Internment of Unlawful Combatants Law

A. Purpose

The Knesset passed the Internment of Unlawful Combatants Law, 5762-2002⁴² on March 4, 2002, following the Supreme Court's April 12, 2000, decision to release certain Lebanese petitioners who were held in administrative detention.⁴³ This law, however, does not offer an alternative to the 1979 Emergency Powers (Detentions) Law. In *A & B v. State of Israel*⁴⁴ the Court held:

Thus we see that even though the Emergency Powers (Detentions) Law and the Internment of Unlawful Combatants Law provide a power of administrative detention whose purpose is to prevent a threat to state security, the specific purposes of the aforesaid laws are different and therefore the one cannot constitute an alternative measure for achieving the purpose of the other. Each of the two was intended for a different purpose and therefore, in circumstances such as ours, they are not alternatives to one another.⁴⁵

The law provides that its objective “is to regulate the detention of unlawful combatants who are not entitled to prisoner-of-war status, in a manner consistent with the obligations of the State of Israel in accordance with provisions of international humanitarian law.”⁴⁶

In the June 2008 decision, the Supreme Court President Beinisch held that the purpose of this law was:

to protect state security by removing from the cycle of hostilities anyone who is a member of a terrorist organization or who is taking part in the organization's operations against the State of Israel, in view of the threat that he represents to the security of the state and the lives of its inhabitants.⁴⁷

⁴² S.H. No. 1834, at 192 (5762-2002).

⁴³ See A.Cr.H. 7048/97, *John Does v. Ministry of Defence*, 54(1) P.D. 721 (5760/61-2000), THE STATE OF ISRAEL: THE COURT AUTHORITY website, http://elyon1.court.gov.il/files_eng/97/480/070/a09/97070480.a09.pdf (last visited Dec. 11, 2008). Initially, the law seemed to respond to the specific human rights problem highlighted by this decision, namely, Israel's inability to secure the return of or gain any information regarding its MIAs. That problem has been resolved, for the most part, by a prisoner exchange that took place in February 2004.

⁴⁴ CrimA 6659/06 etc., *A & B v. State of Israel*, para. 11, THE STATE OF ISRAEL: THE COURT AUTHORITY website, http://elyon1.court.gov.il/files_eng/06/590/066/n04/06066590.n04.pdf (last visited Dec. 18, 2008).

⁴⁵ *Id.* para. 35.

⁴⁶ Detention of Illegal Combatants Law, 5762-2002, S.H. No. 1834, at 192 (5762-2002) § 1 (translated by the author, R.L.).

⁴⁷ CrimA 6659/06 etc., *A & B v. State of Israel*, para. 11.

The law's August 2008 amendment⁴⁸ introduced major changes to detention procedures and detainees' rights as well as a temporary arrangement for detention during large-scale fighting.

B. Conditions for Issuance of a Detention Order

There are several requirements for the issuance of a detention order under the Unlawful Combatants Law. They include the detainee's unlawful status and his individual threat to security; as well as the risk of harm to State security presented by his release. An additional condition appears to relate to the detainee's place of residence.

1. Unlawful Status

The law defines an "unlawful combatant" as:

A person who took part in hostilities against the State of Israel, whether directly or indirectly, or who is a member of a force carrying out hostilities against the State of Israel, who does not satisfy the conditions granting a prisoner of war status under international humanitarian law, as set out in article 4 of the Third Geneva Convention of 12 August 1949 relative to the treatment of prisoners of war.⁴⁹

2. Detainee's Individual Threat

According to established precedent, the definition of "unlawful combatant" also requires proof of the detainee's individual threat to security. In accordance with the above provision, such individual threat may derive from one of the following: either that the detainee himself participated in hostile activities against Israel, or that he belongs to a force that conducts such activities.

In its July 2008 decision Supreme Court Justice Prokatie held that application of the first alternative requires that the person participated in the hostile activities either directly or indirectly. The participation should not be distant or miniscule, but rather, at a level indicative of his individual threat. With regard to the second alternative of belonging to a force that conducts hostile activities against the State, Justice Prokatie held that, although a weak link with the terrorist organization does not suffice, there is no requirement that the person took direct or indirect part in the activities themselves. Rather, the personal link to the organization may be reflected in a different way that will justify its inclusion in the general fighting.⁵⁰

⁴⁸ Internment of Unlawful Combatants Law (Amendment and Temporary Amendment) 5768-2008, S.H. No. 2178, at 828 (Aug. 7, 2008).

⁴⁹ *Id.* § 2, translated in CrimA 6659/06 etc., A & B v. State of Israel, para. 11.

⁵⁰ CA 7446/08 Halad Ali Salam Said v. State of Israel, THE STATE OF ISRAEL: THE COURT AUTHORITY website, <http://elyon1.court.gov.il/files/08/460/074/r01/08074460.r01.pdf> (in Hebrew: last visited Dec. 9, 2008).

3. Reasonable Suspicion that Detainee's Release Will Harm State Security

In accordance with the Internment of Unlawful Combatants Law⁵¹ the cancellation of the detention order is possible only when the release of the detainee will not harm State security, or upon special reasons that justify the release.

4. Detainee's Residence

In accordance with Court President Beinisch's interpretation in a leading June 2008 decision,⁵² the legislature's express reference to international humanitarian law, as cited above, together with the requirement that the detainee does not meet the criteria for POW status, lead to the conclusion that the law was intended to apply only to foreign parties (non-Israeli citizens and residents) who belong to a terror organization that operates against the security of the state.⁵³

In analyzing the legality of the law and the scope of its application, Beinisch held that it should not be applicable to areas maintained under belligerent occupation. She therefore recognized the law's applicability to residents of the Gaza Strip following the IDF's 2005 redeployment but expressed an unbinding view that the law does not apply to residents of the West Bank.

Court President Beinisch held:

It is therefore possible to summarize the matter by saying that an "unlawful combatant" under section 2 of the law is a foreign party who belongs to a terrorist organization that operates against the security of the State of Israel. This definition may include residents of a foreign country that maintains a state of hostilities against the State of Israel, who belong to a terrorist organization that operates against the security of the state and who satisfy the other conditions of the statutory definition of "unlawful combatant."

This definition may also include inhabitants of the Gaza Strip which today is no longer held under belligerent occupation. In this regard it should be noted that since the end of Israeli military rule in the Gaza Strip in September 2005, the State of Israel has no permanent physical presence in the Gaza Strip, and it also has no real possibility of carrying out the duties required of an occupying power under international law, including the main duty of maintaining public order and security. Any attempt to impose the authority of the State of Israel on the Gaza Strip is likely to involve complex and prolonged military operations. In such circumstances, where the State of Israel has no real ability to control what happens in the Gaza Strip in an effective manner, the Gaza Strip should not be regarded as a territory that is subject to a belligerent occupation from the viewpoint of international law, even though because of the unique situation that prevails there, the State of Israel has certain duties to the inhabitants of the Gaza Strip.... In our case, in view of the fact that the Gaza Strip is no longer under the effective control

⁵¹ Internment of Unlawful Combatants Law § 5.

⁵² CrimA 6659/06 etc., A & B v. State of Israel, para. 11, THE STATE OF ISRAEL: THE COURT AUTHORITY WEBSITE, http://elyon1.court.gov.il/files_eng/06/590/066/n04/06066590.n04.pdf

⁵³ *Id.*

of the State of Israel, we are drawn to the conclusion that the inhabitants of the Gaza Strip constitute foreign parties who may be subject to the Internment of Unlawful Combatants Law in view of the nature and purpose of this law.

With regard to the inhabitants of the territory (Judea and Samaria)^[54] that is under the effective control of the State of Israel...I tend to the opinion that in so far as this is required for security reasons, the administrative detention of these inhabitants should be carried out pursuant to the security legislation that applies in the territories and not by virtue of the Internment of Unlawful Combatants Law. Notwithstanding, the question of the application of the aforesaid law to the inhabitants of the territories does not arise in the circumstances of the case before us and it may therefore be left undecided.^[55]

C. Conformity of the Definition with International Law

In its December 2006 leading decision on the policy of “targeted killings” of terrorists in the West Bank and Gaza, former Court President Barak held that the statutory recognition of a status of “unlawful combatant” does not create any additional category to the two that are currently recognized under international law of either “civilians” or “combatants.”⁵⁶

The Court confirmed this ruling in the leading June 2008 decision on the legality of the Internment of Unlawful Combatants Law and its application. The Court held:

[t]he term “unlawful combatants” does not create a separate category of treatment from the viewpoint of international humanitarian law, but constitutes a sub-group of the category of “civilians.” This conclusion is based on the approach of customary international law, according to which the category of “civilians” includes everyone who is not a “combatant.” We are therefore dealing with a negative definition.^[57]

The Supreme Court further recognized that international humanitarian law does not grant “unlawful combatants” the same degree of protection as that to which innocent civilians are entitled. Accordingly, the Fourth Geneva Convention allows for internment of protected “civilians” in administrative detention, when this is necessary for reasons concerning the essential security needs of the detaining power. This conclusion is based on the reading of “article 27...that...recognizes the possibility of a party to a dispute adopting ‘control and security’ measures that are justified on security grounds.”⁵⁸ In addition, articles 41-43, as well as 78, provide for rules regarding detention of “civilians.”⁵⁹

⁵⁴ Judea and Samaria comprise the West Bank.

⁵⁵ CrimA 6659/06 etc., A & B v. State of Israel, para. 11.

⁵⁶ H.C. 769/02 The Public Committee Against Torture in Israel et al. v. The Government of Israel et al., available at THE STATE OF ISRAEL: THE COURT AUTHORITY website, <http://elyon1.court.gov.il/files/02/690/007/A34/02007690.a34.pdf> (in Hebrew, last visited Dec. 18, 2008).

⁵⁷ CrimA 6659/06 etc., A & B v. State of Israel, para. 11.

⁵⁸ *Id.* para. 16

⁵⁹ *Id.*

D. Procedural Requirements for Issuing Detention Orders

An officer holding at least a Lt. Colonel rank who was appointed by the Chief of Staff for this purpose is authorized to order the temporary internment of a person he has a reasonable basis to suspect of being an unlawful combatant. The order expires within 96 hours or earlier upon a decision by the Chief of Staff, or if another basis for detention exists.

The Chief of Staff issues an order directing the detention of a person if he has a reasonable basis to assume that the detainee is an unlawful combatant and his release will harm state security. A detention order must include the reasons for the detention, without harming state security needs, and may be issued in the absence of the detainee. The law requires that the detainee be informed of the detention order at the earliest possible time, and that he be given the opportunity to state his arguments regarding the order before an officer holding at least a Lt. Colonel rank, appointed by the Chief of Staff for this purpose. The detainee's arguments are noted by the officer and brought before the Chief of Staff for re-evaluation.⁶⁰ If the Chief of Staff believes, at any time following issuance of the detention order, that the conditions for the detention are not met or that special reasons exist justifying the release of the detainee, he will order a cancellation of the detention order.⁶¹

An unlawful combatant may be subjected to criminal proceedings in accordance with any other law. The law specifically authorizes the Chief of Staff to order the internment of an unlawful combatant even if the detainee was subject to a criminal procedure under any other law.⁶²

E. Judicial Review

The law requires that the detainee will be brought before a District Court judge within fourteen days from the actual start of detention (including the 96 hours of temporary detention) and subsequently, once every six months. The order will be cancelled if the Judge finds that the initial conditions for detention are not met, the release of the detainee will not harm state security, or that there are special reasons justifying his release. The decision of the District Court may be appealed to the Supreme Court within thirty days, where a single judge will hear the appeal. A detainee who was not allowed to meet an attorney prior to the Court hearing should be summonsed before the judge a second time shortly after a determination was made that such a meeting will not harm State security or human life.

Deviations from the laws of evidence are allowed in proceedings pursuant to this law if the judge records the reasons for deviation. Accordingly, the court may admit evidence, whether in the absence of the detainee or his representative or without disclosing it to them, if, after examining the evidence or hearing arguments, the court is convinced that disclosing evidence to

⁶⁰ Internment of Unlawful Combatants Law (Amendment and Temporary Amendment) 5768-2008, § 3, S.H. No. 2178, at 828 (Aug. 7, 2008).

⁶¹ *Id.* § 4.

⁶² *Id.* § 9.

them may harm state security or public safety. In addition, the hearings in proceedings pursuant to this law are conducted *in camera* unless otherwise decided.⁶³

F. The Right to a Lawyer

The detainee is entitled to meet with an attorney at the earliest possible time in which such a meeting can be held without harming state security needs, but no later than seven days from the initial detention.⁶⁴ The Law authorizes an officer holding at least a Lt. Colonel rank who was appointed by the Chief of Staff, the head of IDF Intelligence Unit, or the head of the investigators unit at the General Security Service (GSS), appointed for that purpose by the head of the GSS, to further delay such a meeting for up to 10 days from the start of detention to prevent harm to State security or preserve human life. Such a delay should be justified in writing and may be appealed by the detainee before a single judge of the district court.⁶⁵ The judge may, upon a request by the legal adviser to the government, extend the 10-day period for a period not to exceed 21 days from the start of detention.⁶⁶ The latter decisions of the district court may be appealed to the Supreme Court before a single judge.⁶⁷ A decision by the district court to allow the detainee to meet with the attorney may be delayed by 48 hours to allow the State to file an appeal.⁶⁸ Hearings in the above matters may be conducted *ex parte* (in the presence of one party) unless otherwise ordered. The detainee must be informed at the earliest convenience of the decision.

The Minister of Justice may limit the right of representation in proceedings under this law to persons approved to serve as defense counsel in military courts in accordance with the Military Justice Law, 5715-1955, as amended.⁶⁹ The law further authorizes a judge of the district court who noticed that a detainee brought before the court is not represented to inform the detainee of his right to be represented by a lawyer in proceedings under the Internment of Unlawful Combatants Law. If the detainee so wishes, the court may appoint him an attorney for representation⁷⁰ in accordance with the Public Defense Law, 5756-1995.⁷¹

G. Duration of Internment

The law establishes a presumption that a person who belongs to a force conducting hostile activities against the State of Israel or who took part in such activities, either directly or

⁶³ *Id.* § 5.

⁶⁴ *Id.* § 6(a).

⁶⁵ *Id.* § 6(a1).

⁶⁶ *Id.* § 6(a2).

⁶⁷ *Id.* § 6(a3).

⁶⁸ *Id.* § 6(a4).

⁶⁹ 9 LSI 184 (5715-1954/55).

⁷⁰ *Id.* § 6(a7).

⁷¹ The Public Defence Law, 5756-1995, S.H. No. 1551, at 8.

indirectly, is a person whose release will harm State security as long as the hostile activities of that force have not ceased, unless otherwise proven.⁷²

The law further provides that a determination by the Minister of Defense, in writing, that a particular force conducts hostile activities against the State of Israel or that such activities either ceased or have not ceased serves as proof in any legal proceeding unless otherwise proven.⁷³

H. Conditions of Internment

The Law requires detainees to be held in suitable conditions that do not harm their health or dignity, and in accordance with conditions determined by the Minister of Defense in regulations.⁷⁴ The Regulations of Detention of Illegal Combatants (Conditions of Detention) 5762-2002,⁷⁵ issued under the law, regulate the following matters: the separation of detainees from convicted offenders or those awaiting trial, solitary confinement, clothing, the receipt of food and food products, medical exams and treatment, hygiene, walk, work, the right to receive personal items and exercise religious practices, the receipt of cigarettes, visitation by the defendant's attorney, visits by other persons, the receipt of letters, the receipt of money or payments, detention site offenses and penalties, escape from legal arrest, and the right to review these regulations.

I. Declaration of Large-scale Fighting and Implications for Implementation

The August 2008 amendment of the law recognizes certain deviations from the general rules for a temporary period of two years.⁷⁶ According to the Bill's explanatory notes the difficulties in implementing the law during actual fighting became clear during the second Lebanon War of 2006. The Bill's authors recognized that actual fighting is usually accompanied by substantive logistical difficulties as well as the possibility of a larger number of detainees.⁷⁷ The amendment authorized the Government to declare that large scale fighting activities are taking place and implementation of different arrangement listed by law is therefore required.

1. Authority to Issue Internment Orders

The above declaration by the government results in the provision of internment order authorities to lower-ranking officers and an extension of the initial internment order from 96

⁷² *Id.* § 7.

⁷³ *Id.* § 8.

⁷⁴ Detention of Illegal Combatants Law, 5762-2002, S.H. No. 1834, at 192 (5762-2002), § 10.

⁷⁵ Regulations of Detention of Illegal Combatants (Conditions of Detention) 5762-2002, KOVETZ HA TAKANOT (Subsidiary Legislation, hereinafter K.T.) 5762 no. 6161 at 588 (Apr. 11, 2002), *amended by* K.T. 5763 no. 6221 at 426 (Jan. 16, 2003), *available at* <http://www.nevo.co.il> (by subscription).

⁷⁶ Detention of Illegal Combatants Law (Temporary Amendment), 5768-2008, S.H. No. 2178, at 828, § 10.

⁷⁷ Internment of Illegal Combatants Law (amendment), 5768-2008, Hatza'ot Hok (HH) Issue No. 375, p. 474, 478.

hours to 7 days. The government declaration must be brought before the Knesset (Parliament) Committee for Foreign Affairs and Security for approval as early as possible and no later than 48 hours from issuance. The declaration will expire within 5 days unless approved by the Committee. The approved declaration will expire within three months from issuance or earlier, unless extended for three months periodically as long as the fighting continues or within 30 days after it has ended.

2. Proceedings Before Military Court Instead of Civilian Courts

When the government has made the declaration described above and the Minister of Justice has found that there are special circumstances that reasonably prevent conducting proceedings before the district court or the Supreme Court in accordance with the provisions of the law, the Minister may, with the consent of the Minister of Defense, temporarily transfer the authorities otherwise bestowed on the district or the Supreme court to the Military Court of Review and to the Military Court of Detainees' Appeals, respectively. In such circumstances, the authorities otherwise bestowed on the government attorney may be transferred to the Chief Military Attorney.

3. Establishment of Military Court of Review and Military Court of Detainees' Appeals

The 2008 amendment established military courts to exercise legal proceedings and appeals related to internment of unlawful combatants during a declared state of large-scale fighting. Judges serving in military courts operating in Israel and in the West Bank may be selected by the Chief of Staff, with the recommendation of the President of the Military Court of Review, or of the Military Court of Detainees' Appeals as appropriate.⁷⁸

VI. Detention of Non-POWs in Areas Beyond the Green Line Under Belligerent Occupation

A. Historical Background

Following the 1967 Six-Day War, Israel occupied the West Bank (Judea and Samaria) and the Gaza Strip from Jordan and Egypt respectively. Israel did not extend its law or jurisdiction to either the West Bank (except for the eastern part of Jerusalem)⁷⁹ or the Gaza Strip. In the absence of an express repeal by the Jordanian Constitution of 1952 during the occupation of the West Bank by Jordan, or by Egyptian legislation during the occupation of the Gaza Strip by Egypt,⁸⁰ Regulation 111 of the 1945 Defence (Emergency) Regulations⁸¹ had continued to apply in these areas until it was replaced in 1970 by Military Order No. 378 Concerning Security

⁷⁸ *Id.* § 10c & d.

⁷⁹ *See* Basic Law: Jerusalem, Capital of Israel, 34 LSI 209 (5740-1979/80). Section 1 states, "Jerusalem, complete and united, is the capital of Israel."

⁸⁰ KRETZMER, *supra* note 21, at 121-124.

⁸¹ Defence (Emergency) Regulations, 1945, PALESTINE GAZETTE (No. 1442) (Supp. 2) 1055 (1945).

Provisions (hereinafter Military Order 378), promulgated by the Israeli military commander.⁸² In substance, this military order included the same elements as Regulation 111.⁸³

Following the 1979 amendment of Israeli law, the Orders Concerning Security Provisions in Gaza and the West Bank, including Military Order 378, were amended in 1980 to incorporate features of the Israeli system. Accordingly, the revised Military Order 378 included a six-month limit on the detention period, subject to judicial approval, and a mandatory three-month periodic review of detention orders.⁸⁴

On March 17, 1988, the Military Commander of Judea and Samaria (the West Bank) issued the Decree Regarding Administrative Detentions (Temporary Order) (Judea and Samaria) (No. 1226) 5748-1988.⁸⁵ The original 1988 decree has been amended numerous times, mainly with regard to relevant time periods. A search for the up-to-date version of the law on administrative detention has identified the Decree Regarding Administrative Detentions (Temporary Order) (Judea and Samaria) (Amendment No. 30) (No. 1555) 5765-2005 as currently applicable.⁸⁶

In addition, special temporary orders were issued during times of active warfare. Such orders were issued during the 2002 Operation Defensive Shield, which was carried out in response to a sharp increase in Palestinian terrorist attacks against Israelis, both in the West Bank and in Israel, in an effort to destroy the terrorist infrastructure. As part of this operation, the IDF entered various areas in the West Bank and detained thousands of persons.

B. Decree Regarding Administrative Detentions (Temporary Order) (Judea and Samaria)

As explained, Israel has not extended its law and jurisdiction to the West Bank and the Gaza Strip. The law that applied in these areas before their occupation by Israeli forces continued to apply until amended by the 1970 Order Concerning Security Provisions (Military Order 378) and additional Orders and Decrees issued by the Military Commander. Israeli forces redeployed from the Gaza Strip in August 2005.

The current Decree Regarding Administrative Detentions (Temporary Order) (Judea and Samaria), as amended, was issued by the Military Commander of the West Bank on February 11, 2005. The decree was issued in accordance with the IDF Commander's authorities and his belief that reasons of security of the area and public security required its issuance, due to the

⁸² The Security Provisions Order (Military Order 378), 21 MINSHARIM, TSAVIM UMINUIIM SHEL MIFKEDET EZOR YEHUDA VEHASHOMRON (Announcements, Orders and Appointments of the Judea and Samaria [West Bank] Regional Command, Official Publication in Hebrew and Arabic, hereinafter MTU) 733 (Apr. 22, 1970).

⁸³ KRETZMER, *supra* note 21, at 129.

⁸⁴ Security Provisions Order (Military Order 378) ch. E1, as amended.

⁸⁵ Decree Regarding Administrative Detentions (Temporary Order) (Judea and Samaria) (No. 1226) 5748-1988, 76 MTU 180 (Sep. 12, 1990).

⁸⁶ Decree Regarding Administrative Detentions (Temporary Order) (Judea and Samaria) (Amendment No. 30) (No. 1555) 5765-2005, 209 MTU 3855 (Jan. 2006).

exceptional security situation in the area. The Commander specifically highlighted the “necessity to fight the terrorist infrastructure, on all its parts, components, institutions and bodies, and [the need]...for frustration of terrorist actions and harming terrorism infrastructure and for prevention of harm to IDF forces and public order[.]”⁸⁷

The Decree authorizes the IDF Military Commander in Judea and Samaria, or a military officer appointed by him for implementation of this decree, to issue a detention order in writing against a person for periods not exceeding six months, when he has a reasonable belief that the detention is required for the security of the area or public security.⁸⁸ A detention order issued under these circumstances can be granted in the absence of the prospective detainee.⁸⁹ Detention authorities under the decree should not be implemented by a military officer “unless he is of the opinion that this is crucial for definite security reasons.”⁹⁰

The Order requires that a person detained under the above orders be brought before a military judge within eight days,⁹¹ or be released in the absence of any other reason to detain him in accordance with any law. The Judge may approve, cancel, or shorten the detention order. The detention order may be voided when the court finds that it is not based on reasons of the area’s security, or public security, or where the order is made in bad faith or for irrelevant considerations.⁹² The judge’s decision may be appealed to the Military Court of Appeals who has the authority to delay the release of a detainee until the final decision in the appeal, or for special reasons that must be specified in writing.⁹³

Deviations from the rules of evidence in judicial proceedings are permitted under this Order if the military judge is satisfied, for reasons that are recorded, that this will be conducive to the discovery of the truth and the just handling of the case.⁹⁴ Proceedings under the Order are conducted behind closed doors.⁹⁵

C. Special Orders: Detention in Time of Warfare (Temporary Orders)

Temporary Order (Number 1500) – 2002, as amended by Orders 1502, 1505, 1512, and 1518, was specially promulgated for a limited time in 2003 as part of Operation Defensive

⁸⁷ *Id.*

⁸⁸ *Id.* § 1(a), (b).

⁸⁹ *Id.* § 1.

⁹⁰ *Id.* § 3.

⁹¹ *Id.* § 4(a), as amended in the Decree Regarding Administrative Detentions (Temporary Order) (Judea and Samaria) (Amendment No. 27) (No. 1532) 5763-1999, 203 MTU 3435 (April 2004).

⁹² *Id.* § 4, as amended in the Decree Regarding Administrative Detentions (Temporary Order) (Judea and Samaria) (Amendment No. 13) (No. 1466) 5759-1999, 187 MTU 2563 (June 1999).

⁹³ *Id.* §§ 5a, 5b, as amended in Decree Regarding Administrative Detentions (Temporary Order) (Judea and Samaria) (Amendment No. 30) (No. 1555) 5765-2005, 209 MTU 3855 (Jan. 2006).

⁹⁴ *Id.* § 6.

⁹⁵ *Id.* § 7(a), as amended in the Decree Regarding Administrative Detentions (Temporary Order) (Judea and Samaria) (Amendment No. 13) (No. 1466) 5759-1999, 187 MTU 2563 (June 1999).

Shield, which, as noted above, was designed to destroy the terrorist infrastructure in the West Bank. The Order temporarily suspended Military Order 378, mentioned above, and authorized the Military Commander to utilize powers exceeding those provided in the latter. These powers are described in the summary of the decision in the *Marab* case,⁹⁶ and included the authority of an authorized officer to order the detention of a person for longer periods of up to eighteen days initially, which was later changed to twelve days, in the absence of a judicial warrant, and the prevention of a meeting with a lawyer for eighteen days instead of the fifteen-day period under Military Order 378.

The Supreme Court has also reviewed the legality of detention orders issued pursuant to temporary military orders in the West Bank. In the 2003 *Marab* decision, the Court evaluated temporary detention orders issued to a large number of West Bank residents during the March 2002 Operation Defensive Shield.⁹⁷

The Court held that the IDF had authority to detain persons for purpose of investigation. In the absence of a specific article in the Fourth Geneva Convention, this authority can be derived from the law applicable in the area under belligerent occupation and is included in the general authority of the military commander to preserve peace and security. The possibility of detention for the purpose of investigating an offense against security legislation may also be derived from Article 78 of the Fourth Geneva Convention, which provides that residents of the area may be subject to internment or assigned residence.⁹⁸

The Court further held that a detention order should be based on a suspicion that the detainee himself endangers security. Thus, a person should not be detained merely because he has been apprehended during warfare, or because he is located in a house or village where other detainees are located. Rather, he could be detained in an area of warfare while he was actively fighting or carrying out terrorist activities, or because he was suspected of being involved in warfare or terrorism.

The Court recognized that the evidentiary basis for establishing a suspicion against an individual varies from one matter to another. For example, when shots are fired at the defense forces from a house, any person or a group of persons located in the house with the ability to shoot may be suspected of endangering security. This does not result in an authorization for “mass detentions,” just as detaining a group of demonstrators for the purpose of investigation, when one of the demonstrators has shot at police officers, does not constitute mass detention. The size of the group has no bearing as long as an individual cause for detention exists with regard to each of the individual detainees.⁹⁹

⁹⁶ HCJ 3239/02 *Marab et al. v. The Commander of IDF Forces in the West Bank* 54(2) P.D. 349 (5763/64-2003), available at THE STATE OF ISRAEL: THE COURT AUTHORITY website, <http://elyon1.court.gov.il/files/02/390/032/A04/02032390.a04.pdf> (in Hebrew; last visited Dec. 18, 2008).

⁹⁷ *Id.*

⁹⁸ *Id.* para. 21.

⁹⁹ *Id.* para. 23.

Having analyzed customary international law, as well as relevant covenants and court decisions, the Court concluded that although international law does not specify the number of days during which a detainee may be held without judicial intervention, it requires that anyone arrested or detained be brought promptly before a judge or other officer authorized by law to exercise judicial power.¹⁰⁰ The Court held, however, that “it should not be demanded that the initial investigation be performed under conditions of warfare, nor should it be demanded that a judge accompany the fighting forces.”¹⁰¹

The Court recognized that meetings between detainees and attorney should generally be permitted under both Israeli and international law. Detainees’ rights to such meetings, however, are not absolute and may be prevented if significant security considerations justify it. Such considerations exist where there is suspicion that “the lives of the combat forces will be endangered due to opportunities to pass messages out of the facility. A meeting may also be prevented when it may damage or disrupt the investigation. Advancing the investigation, however, is not a sufficient reason to prevent the meeting. The focus is on the damage that may be caused to national security if the meeting with the lawyer is not prevented.”¹⁰²

VII. Comparison Between Administrative Detention in Israel and in the West Bank

In a December 2007 decision, the Supreme Court reviewed the legality of the issue of administrative detention orders in the West Bank.¹⁰³ The Court stressed that administrative detention either under the domestic Emergency Powers (Detention) Law, 5739-1979¹⁰⁴ or under the Decree Regarding Administrative Detentions (Temporary Order) (Judea and Samaria), as amended,¹⁰⁵ is “a difficult default option,” and that the authorities, despite their work load, must try to indict suspects in the course of a criminal process. In consideration of the fact that an administrative detention is not a penal measure but rather a preventive one, detention orders and their extensions must be carefully examined. The Court must ascertain that a real investigation was conducted, and utilize a high level of caution in reviewing privileged evidence submitted to it while using proportionality in evaluating all aspects of the case. Decisions regarding the validity of a detention order or its extension must take into consideration the period of detention and the level of danger the detainee poses to a near certainty of harming security.¹⁰⁶

¹⁰⁰ *Id.* para. 27.

¹⁰¹ *Id.* para. 30.

¹⁰² *Id.* para. 45.

¹⁰³ H.C. 9441/07 Agbar et al v. IDF Commander in Judea and Samaria, *available at* THE STATE OF ISRAEL: THE COURT AUTHORITY website, <http://elyon1.court.gov.il/verdictssearch/HebrewVerdictsSearch.aspx> (in Hebrew; last visited Dec. 18, 2008).

¹⁰⁴ Emergency Powers (Detention) Law, 5739-1979, 33 LSI 89 (5739-1978/79).

¹⁰⁵ Decree Regarding Administrative Detentions (Temporary Order) (Judea and Samaria) (Amendment No. 30) (No. 1555) 5765-2005, 209 MTU 3855 (Jan. 2006).

¹⁰⁶ H.C. 9441/07 Agbar et al v. IDF Commander in Judea and Samaria, para. M.

In comparing administrative detention in Israel to that in the West Bank, Justice Rubinstein noted the different time frame for judicial review. In accordance with the Decree Regarding Administrative Detentions (Temporary Order) (Judea and Samaria), as amended,¹⁰⁷ the detainee must be brought before a military judge within eight days from his detention. This period was extended for up to eighteen days during Operation Defensive Shield and the difficult 2002 struggle against suicide bombers. These periods differ from the domestic Emergency Powers (Detention) Law,¹⁰⁸ which requires judicial review of a detention order within forty-eight hours.

The causes for cancellation of detention orders either in Israel proper or in the West Bank, however, are the same; namely, they must be based on reasons of the area's security, or public security, or originally made in bad faith or for irrelevant considerations. Under both domestic and military orders, the judge may deviate from the law of evidence if he is satisfied, for reasons that are recorded, that this will be conducive to the discovery of the truth and the just handling of the case. Unlike in Israel, judicial review over detainees from the West Bank is conducted by military judges whose decisions are subject to appeals before the Military Court of Appeals, and sometimes result in petitions to the Israeli Supreme Court.

Under both domestic and military law as applicable to the West Bank, courts may base their decisions on privileged evidence. According to Justice Rubinstein, the Court's experience generally indicates that the confidential evidence that it views in its review of administrative detentions is often severe and justifies the detention, subject to some exceptions where additional investigative efforts would produce a criminal indictment, or where the State representatives are convinced by the Court to change their position. Such evidence is usually based on collection techniques that, if disclosed, would severely harm specific public or individual security interests.¹⁰⁹

While recognizing the disadvantage of the detainee in such a situation where he is not afforded the option of examining all the evidence against him or the opportunity to cross-examine witnesses, Rubinstein held that the Court must protect the detainee and extensively examine the evidence submitted to the Court. The Court must be directed by the rule that the mass of evidence that is required to justify an administrative detention, both quantitatively and qualitatively, may and has to change over time; the evidence that was sufficient to justify the initial issue of a detention order may not suffice to justify its extension or any further extensions.¹¹⁰

VIII. Conclusion

Israeli authorities detain persons suspected of committing security offenses in the course of the criminal process. Such detentions require a judicial warrants and are subject to restricted

¹⁰⁷ Decree Regarding Administrative Detentions (Temporary Order) (Judea and Samaria) (Amendment No. 30), 209 MTU 3855.

¹⁰⁸ Emergency Powers (Detention) Law, 5739-1979, 33 LSI 89 (5739-1978/79).

¹⁰⁹ H.C. 9441/07 Agbar et al v. IDF Commander in Judea and Samaria, para. E.

¹¹⁰ *Id.* para I.

time frames. Israeli law, however, bestows exceptional authorities for warrantless detentions (administrative detentions) both within and outside the Green Line. Such authorities are used in extreme cases where the Minister of Defense (in Israel) or the Military Commander of Judea and Samaria (in the West Bank) has reasonable cause to believe that reasons of state security or public security require issuance of an administrative detention. Although similar in their objectives and procedures, in the quantity and substance of evidence (often privileged), and in the availability of judicial review, the main difference between legislation applicable in Israel per se and the military decrees applicable in the West Bank is usually the relevant time periods required for judicial review.

Unlike the pre-trial and the emergency detention powers that apply to general security violations, Israel's detention of terrorists in the context of an international armed conflict may be regulated under different arrangements. Combatants apprehended by the IDF may be detained as POWs. Foreigners who belong to terrorist organizations that operate against the State, if found not to enjoy privileges as combatants, may be detained as "unprivileged combatants". Such persons are viewed as a sub-category of "civilians" and may be detained under more restrictive conditions. The purpose of their detention is to remove them from the cycle of violence.

Although such detention orders may be issued by high ranking military officials, they are subject to civilian judicial review within fourteen days from the initial arrest. Detainees have a right to a lawyer and are entitled to suitable conditions that do not harm their health or dignity. The law provides for a temporary amendment, set to expire in August 2010, that allows the government to declare that large-scale fighting is taking place, allows lower ranking officers to issue internment orders, and establishes military courts for the review of such orders.

Two recent decisions of the Supreme Court considered the detention of foreign residents, including those from the Gaza Strip who qualified as "unlawful combatants," as valid. Residents of the West Bank, however, may not be detained under Israel's domestic law of the Internment of Unlawful Combatants. In accordance with international law, the law that applies to areas under belligerent occupation is the domestic law of those areas, subject to military decrees necessary to protect security.

Military legislation, such as the Decree Regarding Administrative Detentions (Temporary Order) (Judea and Samaria), as amended, chapter E1 of the 1970 Order Concerning Security Provisions (Military Order 378) that preceded it, and the special temporary orders that were issued during actual fighting, attempt to provide some basic general requirements, albeit much restricted and arguably insufficient, to meet due process. These include judicial review by a military court and judicial recourse all the way to the Israeli Supreme Court. The Supreme Court has recognized specific detainees' rights, while taking into consideration the conditions in particular cases.