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Without Trial

Administrative Detention of Palestinians by Israel and the Internment of Unlawful Combatants Law

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Introduction

Israel currently holds thousands of Palestinians in its prisons. Most have been convicted in court, but hundreds of them have been held for months or years under administrative orders, without being tried. This report deals with these persons, who are detained without trial by order of an administrative official.

Administrative detainees are denied rights to which defendants in criminal proceedings are entitled. Criminal defendants are detained for purposes of interrogation and then released, or are prosecuted for acts they are suspected of having committed. Administrative detention, on the other hand, is intended to thwart a prospective danger and, at least officially, is used to this end. Unlike detainees and prisoners in criminal proceedings, administrative detainees are not told the reason for their detention and do not know what evidence there is against them. Consequently, they cannot try to refute it, to cross-examine the witnesses, or to present contradictory evidence. In addition, unlike prisoners who have been sentenced to a specific jail term, after which they are released, administrative detainees do not know when they will go free, and there is no restriction on the length of time they may be held.

Three separate pieces of legislation allow Israel to hold Palestinians without trial: the Order Regarding Administrative Detention (hereafter: the Administrative Detention Order), which is part of the military legislation applying in the West Bank;[1] the Emergency Powers (Detentions) Law, which applies in Israel;[2] and the Internment of Unlawful Combatants Law (hereafter: the Unlawful Combatants Law).[3]

Israel has used the first two enactments for years. The Unlawful Combatants Law came into force in 2002. It was initially intended for interning Lebanese nationals whom Israel classified as "bargaining chips" for the exchange of Israeli prisoners of war and bodies. Now, however, Israel uses the statute to detain Palestinian residents of the Gaza Strip.

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1. Order Regarding Administrative Detention (Temporary Provision) [Consolidated Version] (Amendment No. 1) (Judea and Samaria) (No. 1591), 5767–2007. A similar order regarding to the Gaza Strip was repealed following Israel's "disengagement" from Gaza in September 2005.

2. Emergency Powers (Detentions) Law, 5739–1979. The law replaced the arrangement regarding administrative detention set forth in the Defense (Emergency) Regulations that were enacted during the British Mandate. B'Tselem and HaMoked know of two Palestinians, residents of the Gaza Strip, who are held under this statute. See chapter 3.

3. The Internment of Unlawful Combatants Law, 5763–2002.

This report is a continuation of a report on the administrative detention of Palestinians that B'Tselem published prior to the second intifada.[4] It is also a continuation of HaMoked's ongoing monitoring of administrative detention, which appears in its annual activity reports.[5]

The first chapter presents the relevant provisions of international law. The second chapter addresses Israel's handling of Palestinian detainees under the Administrative Detention Order and the Emergency Powers (Detentions) Law, and contains a few cases illustrating the problems involved in this procedure. The third chapter examines the Unlawful Combatants Law and presents illustrative cases.

4. B'Tselem, *Prisoners of Peace: Administrative Detention during the Oslo Process* (June 1997), available at http://www.btselem.org/Download/199706_Prisoners_Of_Peace_Eng.pdf.

5. HaMoked: Center for the Defence of the Individual, *Annual Report 2007*, available at http://hamoked.org.il/items/13200_eng.pdf.

Chapter 1

Administrative detention in international law

International human rights law

The right to liberty is one of the pillars of human rights, and prolonged arbitrary detention is considered a breach of customary international law.[6]

Article 9 of the International Covenant on Civil and Political Rights states:

> 1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law.
>
> 2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
>
> ...
>
> 4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

According to article 4.1 of the Covenant, its provisions are not absolute and "in time of public emergency which threatens the life of the nation," the state may infringe, to a certain degree, rights that are enshrined in some of the articles, including article 9, which enshrines the right to liberty. Even then, however, the state may only take vital measures "to the extent strictly required by the exigencies of the situation."

Article 4.3 requires that a State Party to the present Covenant availing itself of the right of derogation inform the Secretary-General of the United Nations in advance of its intention to do so. When ratifying the Covenant, Israel declared that, from the time of its founding, it has been in a state of emergency, and to the extent that the detention and incarceration measures it takes as a result of this situation "do not comport with article 9 of the Covenant, the State of Israel derogates from its obligations under this provision."[7] In part, Israel relies on this declaration to claim the legality of using administrative detention.

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6. See, for example, General Comment 24: Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant, UN Doc CCPR/C/21/Rev.1/Add.6 (4 November 1994) [8].

7. Treaty Documents 1040, vol. 31.

The UN Human Rights Committee, which was established under this Covenant and is responsible for examining the State-Parties' implementation of the Covenant, related to this declaration and questioned whether it could justify Israel's use of administrative detention. In response to Israel's claim that its Ministry of Justice was making a comprehensive examination of whether the declaration of "state of emergency" is still justified, the Committee held that the examination should be completed as soon as possible. Regarding Israel's use of administrative detention, the Committee held:

> The Committee is concerned about the frequent use of various forms of administrative detention, particularly for Palestinians from the Occupied Territories, entailing restrictions on access to counsel and to the disclos[ure] of full reasons of the detention. These features limit the effectiveness of judicial review, thus… derogating from article 9 more extensively than what in the Committee's view is permissible pursuant to article 4.[8]

International humanitarian law

Administrative detention is the most extreme measure that international humanitarian law allows the occupying power to take against residents of the occupied territory. For this reason, its use is subject to stringent conditions.

Under article 78 of the Fourth Geneva Convention:

> If the Occupying Power considers it necessary, for imperative reasons of security, to take safety measures concerning protected persons, it may, at the most, subject them to assigned residence or to internment.
>
> Decisions regarding such assigned residence or internment shall be made according to a regular procedure to be prescribed by the Occupying Power in accordance with the provisions of the present Convention. This procedure shall include the right of appeal for the parties concerned. Appeals shall be decided with the least possible delay. In the event of the decision being upheld, it shall be subject to periodical review, if possible every six months, by a competent body set up by the said Power.

In its commentary on this article, the International Committee of the Red Cross states that the permission to intern residents of the occupied territory for security reasons is an extreme exception, and states are not allowed to use it in a sweeping manner.

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8. Concluding Observations of the Human Rights Committee: Israel, 21 August 2003, CCPR/CO/78/ISR, (Concluding Observations/Comments), art. 12, available at http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CCPR.CO.78.ISR.En (visited on 26 August 2009).

> Article 78 speaks of imperative reasons of security; there can be no question of taking collective measures: each case must be decided separately…. In any case, such measures can only be ordered for real and imperative reasons of security; their exceptional character must be preserved.[9]

Under this article, administrative detention can never serve as a substitute for a criminal proceeding and its only justification can be preventing a person from performing a future act.[10] Therefore, when a person is suspected of having committed a criminal offense, claims that relevant evidence cannot be revealed or that sufficient proof is lacking to prosecute him cannot justify administrative detention.

According to the ICRC's commentary, article 78 allows preventive internment only "within the frontiers of the occupied country itself," and not in the territory of the occupying state. This statement is made in light of article 49 of the Fourth Geneva Convention, which prohibits, among other things, the transfer of protected persons from occupied territory. This rule forbids the holding of protected persons as detainees or prisoners in prisons within the territory of the occupying state.[11]

9. Jean S. Pictet, ed., *Commentary: The Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (Geneva: ICRC, 1958), 367-368.

10. Ibid., 368.

11. Pictet, *Commentary*, p. 368; HCJ 7015/02, *Ajuri v. Commander of Military Forces in the West Bank, Piskei Din* 56 (6) 352, par. 20.

Chapter 2

Administrative detention of Palestinians by Israel

Four entities are involved in the decision to administratively detain a person: the Israel Security Agency, the military commander (OC Central Command or a commander delegated by him), the military prosecutor's office, and the judges who adjudicate the legality of the order. The decision is made after the ISA provides the military commander with a Request for Administrative Detention form. This document contains the ISA's recommendation for the length of the detention and a summary of the intelligence material prepared by the ISA relating to the person.

In most cases, prior to the issuing of the order, the army hands the detainee over to the police or to the ISA for interrogation. Detention "for purposes of interrogation" often lasts from a few days to a few weeks, although the interrogation itself usually takes a short while.

At the end of this period, if the authorities have decided neither to file an indictment against the detainee nor to release him, the military commander decides whether to hold him in administrative detention, and, if so, for how long. The period set in each order is usually three to six months, the maximum allowed by law for a single order. HaMoked and B'Tselem do not know of any administrative detention orders for Palestinians that were issued for shorter period. The order laconically states the grounds for the detention.

During the first eight days of detention, the detainee is brought before a military judge, who examines the detention order and determines whether to approve, cancel, or shorten it. An order is not valid if not approved by the judge.

At the end of the set detention period, the detainee is released or the military commander signs an order extending the detention, which is also limited to six months. In such cases, the detainee is again brought before a judge. Until a decision to release him is made – either by a judge or by the military commander – the detainee has no way of knowing when he will be released.

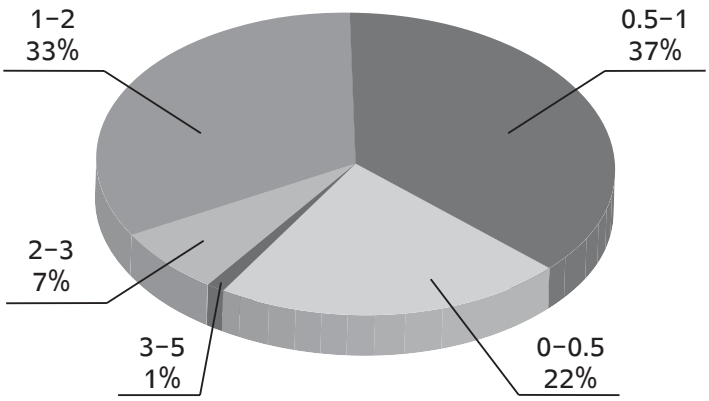
Administrative detainees are held in facilities operated by the Israeli Prison Service (IPS). One of these facilities – Ofer Prison – is located in the West Bank and the others are in Israel.

Statistics

As of 30 September 2009, Israel is holding 335 Palestinians in administrative detention, including three women and one minor. Most of them are being held pursuant to the Administrative Detention Order, and several under the Emergency Powers (Detentions) Law. One detainee is a resident of the Gaza Strip and all the others are West Bank residents.[12]

According to figures given by the IPS to B'Tselem, on 30 September 2009, 22 percent of the persons then in administrative detention had been held for less than six months, some 37 percent had been held for six months to one year, and some 33 percent for one year to two years. The remainder, some 8 percent, had been in continuous administrative detention for two to five years. This breakdown relates to the period each person had been in detention until 30 September; the full period of detention can only be known upon release.

Palestinian administrative detainees, by number of years in detention

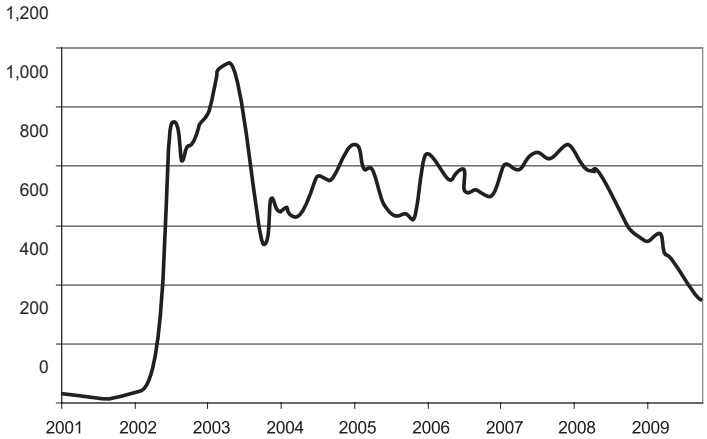


12. The Gaza Strip resident is held under the Emergency Powers (Detentions) Law, and not pursuant to the Administrative Detention Order, which, as explained, applies only in the West Bank. Israel is also holding in administrative detention one Israeli and two foreign nationals from Arab countries. The figures presented in this section do not include residents of the Gaza Strip being held pursuant to the Unlawful Combatants Law. Statistics on these persons are provided in Chapter 3. The figures in this section were provided to B'Tselem by the Information Department of the IPS on 31 July 2009, 9 September 2009, and 12 October 2009.

Over the years, Israel has held thousands of Palestinians in administrative detention, for periods ranging from several months to several years. The highest number of administrative detainees was documented during the first intifada. On 5 November 1989, Israel held 1,794 Palestinians in administrative detention. Toward the end of the first intifada, on 30 December 1992, the number stood at 510. In the 1990s, the number of detainees ranged from 100 to 350 at any given moment, and in 1998-2000, there were no more than a few dozen detainees at the same time.

On 13 December 2000, two and a half months after the second intifada erupted, Israel held twelve Palestinians in administrative detention. In March 2002, the number stood at 44. A month later, during Operation Defensive Shield, Israel administratively detained hundreds of Palestinians. On 8 December 2002, it held 960 administrative detainees; in February 2003, the number rose to 1,140. The number subsequently declined: in 2005-2007, it averaged 765 at any given moment, and has consistently decreased since November 2007.[13]

Palestinians held in administrative detention by Israel in recent years



13. These figures were provided to B'Tselem at various times by the IDF Spokesperson and the IPS. The registers of detainee numbers that relate to the period before Israel implemented the "disengagement" plan in September 2005 include detainees from the Gaza Strip who were held under the military legislation that applied at the time in the Gaza Strip. Other figures, including registers of detainee numbers over the years, are available at B'Tselem's website, www.btselem.org.

The Administrative Detention Order and Supreme Court case law

Most Palestinians detained without trial by Israel are held pursuant to individual administrative detention orders issued under the Administrative Detention Order, which is part of the military legislation that applies in the West Bank. A similar order that was issued in the Gaza Strip was cancelled upon completion of Israel's "disengagement" from Gaza in September 2005.

According to the Administrative Detention Order, the military commander, or a commander delegated by him, may order the detention of a person for a period not exceeding six months, when he has "reasonable basis for believing that the security of the region or public security" so require.[14] When the individual order is about to expire, the military commander may extend it, for a period that also does not exceed six months.[15] Administrative detention orders may be extended repeatedly, and no limit has been set in the Order for accumulated time spent in administrative detention.

The Administrative Detention Order established an apparatus for judicial review. Within eight days from the day the person is arrested, or from the day the detention order is extended, the detainee must be brought before a military judge holding the rank of at least major to determine if the detention is justified. The judge may approve or cancel it, or shorten the period of detention specified in the order.[16] Both the detainee and the military commander can appeal the judge's decision to the Military Court of Appeals.[17]

Hearings in both the lower and the appellate court are held in camera.[18] In these hearings, the judge is not bound by the regular rules of evidence; in particular, a judge may "admit evidence also not in the presence of the detainee or his representative, or without revealing it to them" if he is convinced that disclosure of the evidence is liable to "harm the security of the region or public security." Also, the judge may admit hearsay evidence.[19]

The detainee and the military prosecutor's office may appeal the decision of the Military Court of Appeals to the High Court of Justice. Over the years, barring isolated cases, the Supreme Court justices have denied the petitions of detainees

14. Section 1(a).

15. Section 1(b).

16. Section 4(a).

17. Section 5.

18. Section 8(a).

19. Section 7(c).

and accepted the state's position. However, in some decisions, as well as in decisions regarding the administrative detention of Israeli citizens, the justices have clarified the rules for holding a person in administrative detention, including judicial review.

The Supreme Court has emphasized that administrative detention is an extreme measure that severely infringes the detainee's rights, and is possible in the Occupied Territories under article 78 of the Fourth Geneva Convention (see chapter 1). Therefore, according to the Supreme Court justices, it may only be used as a forward-looking preventive measure against a person who poses an individual threat and may not be used as punishment for past acts.[20] The justices have emphasized that administrative detention is allowed only when the danger is posed by the person himself, and only when the action aids in removing the danger. Therefore, it is forbidden to use the exception provided in article 78 as a general deterrent or against a person who was considered dangerous in the past and no longer poses a threat.[21]

The Supreme Court has also held that administrative detention, like every other means, is subject to the principle of proportionality.[22] Consequently, it may not be used unless it is not possible to prevent the said danger by a criminal proceeding or by an administrative measure that causes lesser harm to human rights.[23] It is necessary to examine less harmful alternatives and to verify that the restriction of the detainee's liberty is proportionate to the danger he poses.

On this point, former Supreme Court president Meir Shamgar held:

> The detention is intended to thwart a security danger resulting from acts that the detainee is liable to commit, where it is not reasonably possible to prevent them by taking regular legal measures (a criminal proceeding) or by an administrative measure that results in less serious harm.[24]

However, the Supreme Court has allowed the use of administrative detention even when the person was suspected of committing criminal offenses, as long as proof was supplied that he posed a future danger. This has occurred in cases where the prosecution contended that it was not possible to prevent the danger from being realized by means of a criminal proceeding because the evidence against the detainee could not be revealed or there was insufficient evidence.

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20. See, for example, HCJ 814/88, *Nasrallah v. Commander of Military Forces in the West Bank, Piskei Din* 43 (2) 271.

21. See, for example, HCJ 7015/02, *Ajuri v. Commander of Military Forces in the West Bank, Piskei Din* 56 (6) 352, par. 24.

22. See, for example, HCJ 5667/91, *Jabarin v. Commander of Military Forces in the West Bank, Piskei Din* 46 (1) 858.

23. See, for example, HCJ 253/88, *Sajadiya v. Minister of Defense, Piskei Din* 42 (3) 801, 821. An excerpt from this judgment appears in chapter 2.

24. *Sajadiya,* at p. 821.

Supreme Court justices have clarified that the decision of the judge hearing an administrative detention case always prevails over the decision of the military commander.

> The power to decide if security reasons justify detention of a specific person is granted by law to the military commander… However, the liberty of the individual is too precious to be placed in the hands of the military commander alone. Therefore, the law subordinates the commander to the judge – the detention order is subject to judicial review. The judicial review is the defense line of the [individual's] liberty, and must be carefully safeguarded…
>
> In a dispute between the military commander and the judge regarding the danger posed by the detainee, when the same material is placed before both of them, the opinion of the judge prevails. This conclusion is dictated by the purpose of the Detentions Order, by the essence of the judicial review, and by the need for a proper balance between security and individual liberty.[25]

Consequently, when the judge shortens the period specified in the order, the military commander is not permitted to issue an order extending the detention. There are two exceptions to this rule: one, when new information, of substantial weight, is obtained regarding the danger posed by the detainee, and the other, when the judge's decision to shorten the detention is intended only to require the military commander to reconsider if further detention is necessary, prior to the completion of the period originally specified in the order. In this case, the decision is referred to as a "non-substantive reduction." Every other shortening of the period is referred to as a "substantive reduction."[26]

In addition, a judge may approve an administrative detention order and the period specified in it, while limiting the power of the commander to extend it.[27]

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25. ADA [Administrative Detention Appeal] 2320/98, *Al-'Amleh (al-Ma'maleh) et al. v. Commander of Military Forces in the West Bank et al., Piskei Din* 52 (3) 346, pars. 2, 10.

26. Ibid., in particular par. 12.

27. ADA 4621/08, *Wajih 'Abd a-Rahim 'Abdallah Nazal v. Military Prosecutor, Decision,* 11 January 2008. Among the judgments establishing the criteria for using administrative detention, see ADA 2320/98, *Al-'Amleh (al-Ma'maleh) et al. v. Commander of Military Forces in the West Bank et al., Piskei Din* 52 (3) 346; HCJ 4400/98, *Barham v. Legally-trained Judge Lt. Col. Moshe Shefi et al., Piskei Din* 52 (5) 37; HCJ 11064/05, *Jamal al- Jadayel v. Commander of Military Forces in the West Bank,* 5 December 2005; HCJ 3239/02, *Iyad Mar'ab et al. v. Commander of Military Forces in Judea and Samaria, Piskei Din* 57 (2) 349, 368-369; HCJ 9441/07, *Muhammad Mesbah et al. v. Commander of Military Forces in the West Bank,* 28 November 2007; HCJ 5555/05, *Federman v. OC Central Command, Piskei Din* 59 (2) 865, 869; HCJ 5784/03, *Salameh v. Commander of Military Forces in the West Bank et al., Piskei Din* 57 (6) 721; ADA 8788/03, *Federman v. Shaul Mofaz, Minister of Defense, Piskei Din* 58 (1) 176; ADA 9/01, *'Abdallah v. Commander of Military Forces in the West Bank*, 18 February 2001; ADA 3838/09, *Military Prosecution v. Fawaz Aqra',* 3 January 2008, par. 4; ADA Defense 4621/08, ADA Prosecution 4698/08, *Wajih Nazal*, 11 January 2009; ADA, *'Omar Barghouti v. Commander of Military Forces in the West Bank*, 18 February 2001; ADA 4/94, *Ben Horin v. State of Israel, Piskei Din* 48 (5) 329, 334; Crim. App. [Criminal Appeal] 6659/06, *Riad 'Ayad and Hassan 'Ayad v. State of Israel*, 11 June 2008, *Piskei Din* 44 (1) 721, 740-741; ADA 8607/04, *Fahima v. State of Israel,* par. 8; ADA 2/86, *A. v. Minister of Defense, Piskei Din* 41 (2) 508, 513.

A semblance of a judicial system

At any given moment, Israel holds hundreds of Palestinians in administrative detention. These detentions last for prolonged periods. Concern that the detention is arbitrary and is imposed even where other measures are available to prevent real danger is strengthened by two features of administrative detention. First, the wording of the grounds for the detention appearing in the orders is laconic, uniform, and contains no reference to the individual attributes of the detainee. The uniform wording is as follows: "because of his being a Hamas operative who endangers the security of the region and its residents." The name of the organization varies or does not appear at all. Uniform wording also appears regularly in the judges' decisions on hearings held in the framework of judicial review and appeals of the judicial-review decisions.[28]

Second, most of the initial administrative detention orders of Palestinians are issued for six months, the maximum period permitted. Some are issued for shorter periods, but orders are rarely issued for less than three months. If the objective is indeed to prevent danger, the length of detention must be suited to each person, and not based on collective criteria.

The judicial-review apparatus specified by law is intended to monitor decisions of the military commander and prevent sweeping and unlawful use of administrative detention. Examination of the operation of the judicial system in this regard reveals a huge gap between the rules established for the use of administrative detention and their implementation. Contrary to the stringent requirements in international law and contrary to instructions given by the Supreme Court, Israel routinely uses administrative detention and does not appear to reserve it for exceptional cases in which no alternative exists to prevent danger posed by a specific person.

Spokespersons for the military courts extol what they refer to as "the court's practice of frequent intervention in administrative detention orders" and the alleged existence of "rigorous judicial review," providing statistical support for these statements. However, the statistics are calculated in an inaccurate and misleading fashion: the figures provided on the "rate of intervention" include technical decisions such as deducting days spent in detention before the administrative detention order was issued, or other decisions that do not ensure the detainee's release, such as "non-substantive" reduction, in which the judge

28. See sample cases, below.

transfers the responsibility for the rest of the detention period back to the military commander.[29]

An examination of the IDF Spokesperson's figures on judicial decisions made in one year, between August 2008 and July 2009, indicate that judges in the court of first instance made decisions on 1,678 administrative detention orders. Of these, the judges cancelled 82 orders (5 percent) and approved 1,596 (95 percent).

Of the orders that were approved:

- In 267 of the decisions (17 percent), the judges restricted the power of the military commander to extend the detention upon expiration of the order, as no new substantial intelligence information was provided:
  - in 157 of these cases, the judges shortened the period of detention ("substantive reduction");
  - in 110 of the cases, the judges did not shorten the period of the order.
- In 1,329 of the decisions (83 percent), the judges did not limit this power of the military commander:
  - in 434 cases, the judges shortened the period of detention ("non-substantive reduction");
  - in 262 cases, the judges deducted the days of detention that preceded the issuing of the order;
  - in 633 cases, the judges approved the full period of detention specified in the order.[30]

In 2008, the Military Court of Appeals heard 1,880 appeals filed by administrative detainees. Of these, 273 (15 percent) were accepted. In addition, the appellate court heard 443 appeals filed by the military prosecution, accepting 254 (57 percent) of them.[31] In response to B'Tselem's request, the IDF Spokesperson's Office contended that it did not have specific data on orders that were cancelled or shortened by "substantive reduction" or by "non-substantive reduction" by appellate judges.[32]

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29. Military Courts in Judea and Samaria, *Annual Activity Report for the 5768-5769 Work Year, 2008*, 19; Netta Srury, "Report," vol. 32, *Bamahane* (26 August 2009), http://dover.idf.il/IDF/News_Channels/bamahana/09/32/01.htm (visited on 27 August 2009). As yet, military court reports have not distinguished between decisions to approve detention orders with a "substantive reduction" of the period of detention (i.e., a determination that a new order is not to be issued against the detainee upon the expiration of the order unless there is new evidence), and decisions to approve the order with a "non-substantive" reduction of the period of detention, which is not an order to release the detainee at the end of the period of detention but returns the matter to the military commander for re-examination.

30. Letter of 4 August 2009 to B'Tselem from the IDF Spokesperson's Office.

31. Military Courts in Judea and Samaria, *Annual Activity Report for the 5768-5769 Work Year, 2008*, 20.

32. Letter of 4 August 2009, supra.

The central problem with the implementation of the judicial review on administrative detention orders is that in the vast majority of cases, the judges adopt the prosecution's position regarding the need to declare evidence as privileged on grounds of state security. In doing so, the judges turn the exception specified in the Administrative Detention Order into a sweeping rule that enables the fundamental evidentiary material to be declared privileged, preventing the detainees from any possibility of defending themselves against the allegations.

ISA agents who have heard or seen the detainee engage in activity that points to the danger he poses do not appear in court. The same is true of the direct handlers of the detainee, who were provided the information. Therefore, almost all the evidentiary material is hearsay testimony and is not provided directly by the original source of information.

There are cases in which the prosecution submits evidence that is not privileged in addition to privileged evidence, primarily when the defense insists. This information includes, for example, statements made during police interrogations. In such cases, the detainee's counsel can rely on the revealed material to form a line of defense. But even then, the relevance of the evidence to the danger attributed to the detainee is unclear: the argument repeatedly made by the prosecution is that there is no connection between the revealed material and the reasons for the administrative detention.

In such a situation, the detainee cannot know the grounds for the detention or the allegations against him, except for the few words appearing on the detention order itself, along with the laconic statements made by the prosecution. Contrary to a criminal procedure, in which the evidence is generally disclosed, the privileged evidence prevents administrative detainees and their counsel from examining the quality of the information, its scope, accuracy, and relevance. Denial of access to the principal evidence prevents the detainee from providing relevant supplemental information and from attempting to refute the evidence submitted against him.

Defense counsel must, therefore, grope in the dark when questioning the prosecutors, surmising which questions and arguments may uncover the reasons for the detention, which are unknown to them. In court hearings, the prosecutors frequently contend they cannot respond to questions, and that the answers can be given only as "privileged material," that is, material provided only to the judge. An example of such a dialogue follows.

Defense counsel:	How many other actions did [the detainee] himself commit, for which he was administratively detained, for which he is deemed a threat?
Prosecutor:	Will be described in privileged material.
Defense counsel:	Can you now state the sections in which these actions were presented?

Prosecutor:	There are many sections.
Defense counsel:	Are there many actions?
Prosecutor:	The number of actions will be described in privileged material.
Defense counsel:	Is there a large number of actions?
Prosecutor:	Will be described in privileged material.[33]

Supreme Court justices have not questioned the sweeping imposition of privilege on evidentiary material in administrative detention proceedings. Instead, they accept the situation as a given and focus on establishing rules for guiding a judicial system in which evidence is rendered privileged and detainees are unable to defend themselves properly.

For example, in the matter of the administrative detention of Tali Fahima, Justice Ayala Procaccia held that, in cases of administrative detention, in light of the privilege placed on evidentiary material and the detainee's difficulties in defending himself, the judge must enter the shoes of the detainee and exhaust all lines of defense that the detainee might have taken had the material been disclosed to him.

> This reality makes it very hard for the detainee to defend himself properly against he suspicions and accusations alleged against him. This reality also places a special obligation on the court to be particularly careful in carrying out the judicial review of the detention order, and to act with especial caution when examining the privileged material by exhausting, by means of the court's own efforts, the examination of the possible lines of defense that the detainee might raise had he been allowed to see with his own eyes the evidentiary material existing against him.[34]

When evidence is privileged, the judges themselves must fill the vacuum created by their refusal to remove the privilege, and they must serve as "defense counsel for the moment" or "court defense counsel," in the words of Justice Mishael Cheshin.[35] In the words of Justice Elyakim Rubinstein, the judge must be "an eye and mouth" for persons from whom the material is hidden.[36]

Here, too, there is a gap between the fundamental case law on the judges' function and the judges' practice. Judges do not see all the material in the hands of the ISA and generally do not request it, making do with the Request for Administrative Detention form submitted to them. In many hearings, the military judge does not rush to demand that the prosecution submit open, unprivileged material, to the

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33. From the hearing in the Military Court for Administrative Matters, in Ofer Prison, regarding the administrative detainee Khaled Jaradat in file AD 2823/08, 7 October 2008. For more on Jaradat's detention, see the sample cases, below.

34. *Fahima,* supra, 4 November 2004, par. 9.

35. Crim. App. 889/96, *Muhammad Mazrib v. State of Israel,* 8 May 1997, *Piskei Din* 51 (1) 435.

36. Crim. Misc. Appl. 8920/06, *Majdi Ta'imah v. State of Israel,* Decision, 9 November 2006.

extent it exists, such as the transcript of the detainee's interrogation or of other interrogees , whose testimonies relate to the matter at hand. In their failure to do this, the judges err in carrying out their duty and disregard the instructions to act with especial caution in examining evidentiary material and in fully examining the possible lines of defense that the detainee might raise.

Until 2002, an ISA representative who was fully informed about the case and was able to respond to questions of the detainee's counsel, if only to the judge, was present at every court hearing. Since then, along with the sharp rise in the number of administrative detainees, the ISA stopped sending agents to hearings. Now, ISA agents appear only for privileged hearings and only in exceptional cases, when the judge demands it. This situation is problematic, given that the military prosecutor does not have much information on the detainee, and their understanding of the ISA material is limited. Protocols of court hearings indicate that on many occasions, prosecutors are reluctant to decide independently to reveal information included in the privileged material, even trivial information whose revelation is highly unlikely to harm state security. For example, in one hearing, the administrative detainee's attorney, Tamar Pelleg-Sryck, asked the prosecution, "Do you know where he works?" The response was, "Will be described in privileged information."[37] The military prosecutor used the same words to respond in the matter of another detainee after being asked by his attorney to which period the new material "that strengthens his organizational membership" related.[38]

Were judges to serve as "defense counsel for the moment" after evidence is defined privileged, they would insist on revealing information of this kind. Moreover, they would summon the sources of the intelligence information to court. In one case, the Supreme Court held that, "where the judicial authority is of the opinion that questioning the source of information in court is required to verify whether the detention of a person is vital, it is empowered – if not required – to do so, even if doing so requires administrative procedures of one kind or another to guarantee the source remains privileged." In that case, however, the justices ultimately ruled that, "study of the privileged material indicates that this question does not arise in the present case."[39]

The judicial review apparatus established under the Administrative Detention Order creates a semblance of a fair judicial system. The detainees are represented by counsel, they may appeal the judge's decision, and rules of procedure and

37. The comments were made in the hearing on the administrative detention of Nidal Abu 'Aqer, AD Judea and Samaria 2631/08, held on 1 September 2008 (see sample cases, below).

38. The comments were made in the hearing on the administrative detention of Wa'd al-Hedmi, ADA 1939/08, held on 27 April 2009 (see sample cases, below).

39. *Jamal Musa Abu al-Jadayel,* supra, 5 December 2005.

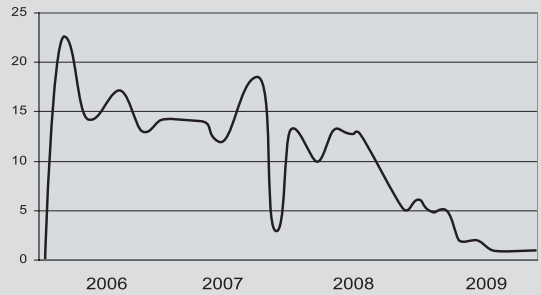
evidence supposedly apply. However, this system denies detainees any opportunity to reasonably defend themselves against allegations made against them, due to the privilege routinely placed on the evidentiary material. Often, detainees are not even told what danger they ostensibly pose and what their detention seeks to prevent. In light of this privilege, by not fully examining the possible lines of defense, the judges fail in their obligation to carry out meaningful judicial review of the decisions of the military commander, leaving the decision on the detention in his hands.

Minors in administrative detention

On 30 September 2009, Israel was holding one Palestinian minor, Hamdi a-Ta'mari, who was not yet 18 years old, in administrative detention. Other detainees were detained while they were minors and have become adults while in detention. To the best of B'Tselem's and HaMoked's knowledge, from January 2001 to October 2006, the number of Palestinian minors in administrative detention at any given time ranged from none to three. In November 2006, there was a wave of detentions in the West Bank, and the number of minors jumped to 22. From then until the end of 2008 there was an average of 12 minors, and the number has gradually declined since September 2008. In 2008 and early 2009, Israel held in administrative detention two minor girls – Salwa Salah and Sarah a-Siuri. This appears to be the first time that female minors have been administratively detained by Israel. Their cases are discussed below.[40]

According to Defense for Children International – Palestine, between 2004-2007, Israel held a total of 20 to 30 Palestinian minors in administrative detention every year.[41]

Number of minors in administrative detention at any given time, 2006-2009



40. The statistics presented in this section were provided to B'Tselem at various times by the IDF Spokesperson and by the IPS.

41. The breakdown is as follows: 2004 (30), 2005 (20), 2006 (25), 2007 (30). See http://www.dci-pal.org/english/publ/research/2008/PCPReport.pdf (visited on 6 August 2009).

Administrative detention of Palestinian minors raises several problems. First, international law and Israeli law state that a minor is a person who has not yet turned 18. Contrarily, the military law applying in the West Bank states that a minor is a person who has not yet turned 16, and persons aged 16 to 18 receive the same treatment as adults.

In addition, international law grants special protections to minors. Article 37 of the Convention on the Rights of the Child, which deals with the internment of minors in the context of an armed conflict, states, inter alia, that no child shall be deprived of his or her liberty unlawfully or arbitrarily; the arrest, detention or imprisonment must be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time. The article further stipulates that every child deprived of liberty shall be treated with humanity and respect for human dignity, and in a manner that takes into account the needs of persons of his or her age, and that the child shall have the right to maintain family contact, barring exceptional cases. The article further provides that a child deprived of liberty shall have the right of prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty and to a prompt decision on any such action.

Over the years, Israel has breached this article in its treatment of minors in administrative detention. The claims made in this report regarding the arbitrariness and sweeping nature of the handling of administrative detention by Israel and the lack of effective judicial review are also true regarding the detention of minors.

In addition, most Palestinian administrative detainees are held in Israel, in breach of international humanitarian law, which prohibits internment outside the occupied territory.[42] For this reason, and in light of the difficulties that Israel places on obtaining entry permits into its territory, families have trouble visiting them, and in many cases, detainees are severed from their families for the entire period of detention. It stands to reason that the emotional difficulty that such separation creates is especially great when minors are involved.

Administrative detention is the most extreme measure that international humanitarian law permits the occupying power to use. As such, it should be used only in exceptional cases, when other means have been proved to be ineffective. Taking this into account, and in light of the especial harm suffered by minors and the long-term consequences of this harm, HaMoked and B'Tselem call on Israel to refrain from holding minors in administrative detention.

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42. See articles 49 and 78 of the Fourth Geneva Convention and the official commentary of the ICRC. In March 2009, HaMoked, Yesh Din, and the Association for Civil Rights in Israel petitioned the Israeli High Court of Justice against holding prisoners and detainees from the Occupied Territories inside Israel. The petition is pending. HCJ 2690/09, *Yesh Din et al. v. Commander of Military Forces in the West Bank et al.,* Petition for Order Nisi, 25 March 2009. See http://www.hamoked.org.il/items/111510.pdf.

Sample cases

Several recent cases of administrative detention are presented below. Where the detainee was held both in the past and recently, but not consecutively, the discussion centers on the most recent detention. The cases are not a representative sample, but they suffice to give an impression of administrative detention policy, of its implementation, and of the infringement of the detainee's rights – most importantly, the right to due process.

Muhammad Kharaz

Name:	Muhammad Ziad Makawi Taher Kharaz
Place of residence:	Nablus
Age:	43
Length of detention:	Eight months
Type of detention:	Administrative detention pursuant to the Administrative Detention Order
Grounds for detention:	"Because of his being a Hamas operative who endangers the security of the region"
Detention facility:	Ketziot Prison (inside Israel)

"They took me by force from my wife, my mother, and my small children. They harmed my livelihood without any real justification and although I didn't commit any crime... I was punished for something I didn't do."

Muhammad Kharaz, following his release from detention[43]

Muhammad Kharaz, 43, lives in Nablus. He is married and has five children, owns a grocery store to make a living and is a builder by profession. He was detained in 2008 and released eight months later without any charges having been filed against him, and after a military-court judge ruled that his detention was based on "old information relating to a period about a year and a half to two years preceding his detention."[44]

Detention before the first administrative-detention order was issued: interrogation for more than a month

Kharaz was arrested on 6 November 2008. According to his testimony, in the early afternoon, a person in civilian clothes came into his grocery store and two others stood at the store's entrance. The person who entered pulled out a pistol, identified himself as a member of the Israeli army and ordered the customers to

43. His testimony was given to 'Abd al-Karim Sa'adi on 14 July 2009.

44. AD [Administrative Detention] 1589/09, Decision, 12 May 2009.

raise their hands. He ordered Kharaz to identify himself, and after the latter did so, cuffed his hands and led him to a vehicle waiting outside. Soldiers who were in the vehicle blindfolded him and took him to the Huwara army base for questioning by the Israel Security Agency (ISA). The next day, he was taken to an interrogation facility in Petah Tikva, where he was held in solitary confinement for about ten days, during which ISA agents periodically interrogated him. On 17 November, an ISA agent told him that four persons who had been questioned in 1997 had provided information on offenses that Kharaz had purportedly committed. He was asked, among other things, about trading in weapons.[45] Kharaz was interrogated during only a small part of the time during which he was detained "for interrogation."

The first administrative-detention order: the judges approve the order

On 14 December 2008, more than one month after he was arrested, an ISA agent informed Kharaz that a decision had been made to administratively detain him for six months. The detention began on 17 December 2008.

On 22 December, a hearing on the detention order was held in the military court at the Ofer army base. The attorney from the Judge Advocate General's office representing the military commander (hereafter: the prosecutor or the prosecution) stated at the start that a large portion of the material against Kharaz could be revealed and included confessions taken more than eight years earlier, including a confession by a person from whom Kharaz allegedly wanted to buy a pistol and pass it on to a person who was wanted by Israel. The open material also contained confessions of two persons who contended that Kharaz was a member of an organization responsible for the Hamas activity in the Nablus area. The prosecution contended that the privileged material, on the other hand, was current and linked Kharaz to "senior activity in the framework of the Hamas organization" that is "military and organizational activity." Since the revealed material was old, the prosecution argued that it was not proper to prosecute Kharaz under the criminal law, and that, "in light of the severity of the privileged material in our case, in the prosecution's opinion, his administrative detention should be approved."[46]

Since Kharaz's attorney, Usama Makboul, had not been provided the open material prior to the hearing, he requested that the hearing be adjourned. Judge Lt. Col. Ron Dalumi granted the request.

The hearing resumed on 5 January 2009, this time before Judge Major Zvi Heilbron. Kharaz's attorney had been provided the open material, which indicated the possibility that Kharaz was a suspect in planning a terror attack along with other

45. Testimony given to 'Abd al-Karim a-Sa'adi on 14 July 2009.

46. AD 3179/08.

persons. During the hearing, the prosecutor admitted, in response to questions posed to him by detainee's counsel, that most of the privileged information in the file "was obtained about a year and a half prior to his arrest to close to the time of his arrest" but refused to reveal why Kharaz had been detained so long after the testimonies had been given that ostensibly incriminated him and after the privileged information had been received. The prosecution revealed that "there are other persons involved" in the file but refused to provide details about them. In his response to detainee's counsel's questions, the prosecutor repeatedly referred the judge to the privileged material and refrained from giving substantive answers. In light of the prosecutor's response, detainee's counsel argued, inter alia, that administrative detention is defective when it is based for the most part on material that is so old.

The judge then ordered an *ex parte* hearing, during which he studied the Request for Administrative Detention Form. In his decision, which was primarily based on a standard wording that is transferred from decision to decision in "cut and paste" fashion, the judge held:

> It is not possible to reveal any detail of the information presented before me, other than what has already been revealed and handed over during the course of the hearings, out of concern that doing so is liable to harm the security of the region or public security... [Kharaz] is a senior operative in the Hamas organization, in the leadership echelon. In the framework of the organization, the respondent dealt with a wide variety of activity, in both the organizational sphere and the military sphere, and consequently poses a threat to the security of the region… Having carefully examined the privileged information, I am convinced that the said information is relevant and indicates the prospective danger presented by the respondent. In light of this, I find that the security of the region and public security require that the respondent be administratively detained, and that the period of administrative detention specified by the military commander in the order meets the proportionality requirements of the law.

The judge approved the administrative-detention order and the period of detention specified in it, after deducting the days Kharaz had been detained prior to issuing of the order. The order, therefore, was set to expire on 6 May 2009. The judge's order did not explain the justification for detention based on such old information.

Kharaz appealed the decision. The appeal was heard on 18 February 2009 before the appellate judge Col. Moshe Tirosh.[47] At the beginning of the hearing, the military prosecutor stated that, "just prior to the appeal, additional privileged information had been obtained" that strengthened the allegations against Kharaz.

47. ADA 1181/09.

Because the information was privileged, Kharaz and his attorney had difficulty in mounting a proper legal defense. During the course of the hearing, Kharaz said to the court:

> I am forty-two years old and work in the food trade. How can I both work and belong to an organization… My work is going well. I am not engaged in any organizational activity, I'm in my store twenty-four hours. How can I be wanted [for] twelve years and work… The store is under my house… [ISA agents] said I've been wanted for twelve years, and I've never been summoned to interrogation. I don't belong to any organization.

After reviewing the privileged material, the judge ruled that the privileged material should not be revealed, adding that, "the material includes many details, from various sources, with differing levels of reliability, which intertwine to some extent and partially verify each other. Some of the items are of substantial severity." The judge denied the appeal, stating:

> The commander of the region had a reasonable basis for believing, for imperative security reasons and based on evaluation of the prospective danger, that the security of the region [and] alternatively public security require that the appellant remain in detention. The length of the detention is relatively proportionate to the estimated danger that the appellant poses.

Study of other administrative-detention decisions made by Judge Tirosh reveals that this wording appears regularly in his decisions, and is copied from one decision to another using "cut and paste."

The second administrative-detention order: the judge shortens the detention

On 30 April 2009, shortly before the expiration of the first administrative-detention order, the military commander signed an order extending Kharaz's detention for another six months, to begin on 6 May.

On 12 May, a hearing was held in the military court in Ketziot before Judge Lt. Col. Amit Preiss.[48] The prosecution opened by stating there was no new material in the file, yet requested that the judge study the privileged material and approve the detention order. Adv. Tamar Pelleg-Sryck of HaMoked, who represented the detainee, argued that the material against him was extremely old. Her contention was based on the interrogators' questions, as they appeared in the revealed material, which did not relate to the period immediately preceding the detention. Adv. Pelleg-Sryck raised the possibility that the source of the suspicions against her client was faulty information given by non-credible persons having an interest in the matter.

48. AD 1589/09.

After studying the privileged material, the judge ruled that he was convinced that it was not possible to reveal it, and that, "the decision to extend his administrative detention is lawful and only imperative security reasons made the extension of the order necessary… The detainee indeed was a member of the Hamas organization and held a position of some standing in it." However, the judge held that the information that provided a basis, in his opinion, for the allegation regarding Kharaz's dangerous activity was "old information, from about a year and a half to two years before he was detained… After such a long period without information on continuing activity… it has almost no weight in evaluating the dangerousness of the detainee."

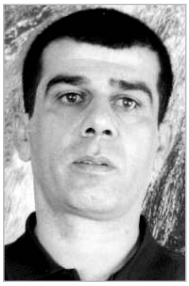
Later in his decision, the judge wrote:

> I gained the impression that even after some six months in prison, the danger resulting from the detainee's position has not completely passed. However, in my opinion, this danger can be thwarted by means of extending the detention for a relatively short period of only two months.

The judge emphasized that the reduction was "substantive," meaning that the military commander is not allowed to extend the detention except in exceptional cases.

Kharaz was released on 5 July 2009, after eight months in detention.

Nidal Abu 'Aqer



Name:	Nidal Na'im Muhammad Abu 'Aqer (Abu Muhammad)
Place of residence:	a-Duheisheh refugee camp
Age:	41
Length of detention:	Since March 2008 (with a one-month break)
Type of detention:	Administrative detention pursuant to the Administrative Detention Order
Grounds for detention:	"Because of his being a Popular Front operative who endangers the security of the region"
Detention facility:	Ofer Prison, Ramallah District

"I think they were out to get me. How can we know if the privileged material is correct? We know most of the revealed material is not correct... I want to be released from detention immediately."

Nidal Abu 'Aqer, at a court hearing on 20 November 2008

Nidal Abu 'Aqer, 41, is a resident of a-Duheisheh refugee camp in Bethlehem District. He is married, has three children, and is an abortion program coordinator for the International Planned Parenthood Foundation.

Since he was 17 years old, Abu 'Aqer has been administratively detained for extended periods of time. He was detained without interruption from 2002-2006. During this time, seven administrative-detention orders were issued and two indictments were filed against him. He was convicted on the criminal charges and served his sentence. A judge released him in October 2006, more than four years after he was first detained.

The current detention: the first period

On 10 March 2008, Abu 'Aqer was detained again. A week later, on 17 March, the military commander issued a six-month administrative-detention order against him, which expired on 16 September 2008.

On 23 March, a hearing was held in the Ofer military court before Judge Lt. Col. Amit Preiss.[49] The prosecutor contended that Abu 'Aqer was alleged to be carrying out "senior organizational activity in the Popular Front," and that there was privileged information on him obtained after he was released from his last detention, "that indicates current activity up to the time just preceding his detention." The prosecutor refused to grant the request of Abu 'Aqer's attorney, Adv. Tamar Pelleg-Sryck of HaMoked, to reveal even the number of intelligence reports on which the prosecutor's claims were based.

Abu 'Aqer and his attorney were then asked to leave the court room. Following the *ex parte* hearing on the privileged material, the judge gave his decision.

> I am convinced that it is not possible to reveal any part of the intelligence material… since doing so might harm the security of the region… I was presented reliable, quality intelligence material indicating a definite concern for the security of the region if the detainee were to be released. The material indicates with certainty that, in the period following his release from the previous detention… the detainee returned to activity in the framework of the organization and dealt with significant organizational activity… Given his status and activity, the same definite concern exists to justify his detention…
>
> During the weeks preceding his detention, information was received that indicates an appreciable increase in the danger posed by the detainee, for which reason it was necessary to detain him recently. Therefore, I am convinced that it is not possible to be satisfied with a period of detention that is less than six months.

The judge deducted the seven days Abu 'Aqer had been detained prior to issuing of the administrative-detention order, meaning the order would expire on 9 September 2008.

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49. AD 1568/08.

On 8 April, Abu 'Aqer appealed the decision. The appeal was not held until 27 May.[50] The Military Appeals Court judge, Col. Itzik Mina, studied the privileged material and held that there was "much reason" to shorten the detention, and ordered that Abu 'Aqer be released a month and a half later, on 15 July. The judge did not explain the basis for his decision that this specific amount of time would result in the abatement of the danger ostensibly posed by Abu 'Aqer.

The current detention: second period

On 19 August 2008, about one month after he was released, Abu 'Aqer was again detained. On 29 August, the military commander issued a three-month administrative-detention order against him. Since then, the military commander has extended the detention three times.

The first administrative-detention order

On 1 September 2008, a hearing was held in the military court at Ofer before Major Zvi Heilbron regarding the first detention order.[51] The military prosecutor repeated the contention that the detainee was "an operative in the Popular Front organization who is involved in organizational activity" and that "the activity that forms the basis of the current order dates from after his release" from the previous detention. At no stage was it contended that the activity was military.

"I spent more than ten years in jail in Israel, and more than seven years in administrative detention... I hope to be with my children and family soon, and that they'll release me."

Nidal Abu 'Aqer, in court, 26 April 2009

When asked by Abu 'Aqer's counsel if it was true that the privileged material did not relate to violent activity, the prosecutor stated only that "organizational activity is involved." An *ex parte* hearing was held, after which the judge approved the detention order, deducting the days of detention that had preceded the order. Here, too, much of the wording of the decision was clearly a "cut and paste" of decisions that had been made in cases relating to other detainees.

On 10 September, Abu 'Aqer appealed the judge's approval of the order. On 28 September, a hearing was held in the Military Appeals Court before Judge Lt. Col. Shlomi Kochav.[52] The prosecution announced that it had new information on Abu 'Aqer that was privileged, but that a decision might be made to reveal it, in which case filing an indictment would be considered. The prosecution did not yet have

50. ADA 2258/08.

51. AD 2631/08.

52. ADA 4378/08.

all the material, but requested that the appeal be heard without all the material. Adv. Pelleg-Sryck asked in wonderment: "How does the prosecution prevent the judge from receiving the findings existing at the present time… I don't think the court should waive its right to determine the weight and significance of the said material." The judge decided to adjourn the hearing until all the material was presented to him.

The second hearing on the appeal was held a full three weeks later, on 19 October. At the outset, the military prosecutor again stated that filing criminal charges against Abu 'Aqer was under consideration. He did not submit all the material to the judge and requested that the court shorten the period of administrative detention so that it would expire two weeks from then, on 2 November. Adv. Pelleg-Sryck contended that the prosecution's request, like its refusal to submit all the material in the two hearings, was intended to prevent a hearing on the appeal, so that her client would not be released. The judge ignored these comments and granted the military prosecutor's request, shortening the detention to 27 October. By doing so, the judge gave the prosecution ten days to prepare for a criminal proceeding. The judge classified his decision as a "non-substantive" reduction, enabling the military commander to issue a new administrative-detention order at the end of the period.

In any event, Abu 'Aqer's ability to mount a defense was limited due to the privileged evidence. The "non-substantive" reduction further harmed him, in that it resulted in termination of the hearing on the appeal and gave the military commander a free hand to issue a new administrative-detention order. Following the judge's decision, Adv. Pelleg-Sryck argued that, under the circumstances, "a 'non-substantive' reduction of the detention order will result in denial of the appellant's right… and we shall have to start all over again from scratch." The judge rejected the argument and did not change his decision.

Attempt to obtain a conviction: recruiting a minor to the Popular Front

On 26 October 2008, one day before the administrative-detention order was to expire, Abu 'Aqer was transferred to detention on criminal charges. About two weeks later, an indictment was filed against him, charging him with membership and activity in an unlawful association (the Popular Front) and for carrying out a service for an unlawful association.[53] The indictment alleged that he had recruited Ahmad Abu Kamal to the Popular Front at a time "not earlier than the beginning of 2004 to 13 July 2005, or thereabout."[54] During the said period, Abu 'Aqer was

53. Membership and activity in an unlawful association is an offense under sections 84 and 85(1)(a) of the Defense (Emergency) Regulations of 1945. Performing a service for an unlawful association is an offense under sections 84(1) and 85(1)(c) of the said regulations.

54. IP [Incident Particulars] 33614/08, *Military Prosecutor v. Nidal Na'im Abu 'Aqer*.

in prison. Accordingly, when the matter was clarified, an amended indictment was filed, alleging the act had been committed "during the first half of 2002." At that time, however, Ahmad Abu Kamal was only 11½ years old. The military prosecution withdrew the indictment.

The second administrative-detention order: approval following the prosecution's appeal

On 13 November 2008, immediately after the indictment was withdrawn, the military commander issued a four-month administrative-detention order against Abu 'Aqer. The court hearing was held before Judge Lt. Col. Yair Tirosh on 20 November.[55] The prosecutor admitted there was "no new privileged information added since the previous administrative-detention hearing and since he was prosecuted." Despite this, the prosecutor demanded that Abu 'Aqer be detained for the reason that the old information indicated a danger greater than that reflected in the indictment, and the only way to cope with the danger was to administratively detain him for the full length of time specified in the order.

Administrative detention is a nightmare that hounds my children and me. Its renewal is destroying the whole family. We've lost the best years of our lives to it... [We're] worried and afraid all the time... Why did I get a visiting permit for a whole year if he's supposed to be in detention for four months?

Manal Abu 'Aqer, Nidal's wife, after obtaining a permit to visit him in prison for longer than the period of detention imposed on him

Abu 'Aqer's attorney argued that the old material was irrelevant in that a few months previously, the court had ordered a "substantive" reduction, meaning that the material at the time did not warrant continued detention. The prosecutor then sought to correct what he had said, and argued that, "since August," that is, since Abu 'Aqer was detained after an interruption of one month between the two administrative-detention orders, "new material ha[d] been collected." In the court's decision, given ten days later, the judge ordered a "non-substantive" reduction "in light of the prosecution's handling of the matter," setting the expiration date at 12 December. However, the judge noted that, based on review of the privileged material, he was convinced that, "the detainee engages in terrorist activity that constitutes a real danger to the security of the region and to public security" and that "there is no alternative to administratively detaining him."

The prosecution appealed, following which Abu 'Aqer also appealed.[56] The prosecution requested that the appellate court approve the detention order and hear, contrary to normal practice, the testimony of an ISA agent. Abu

55. AD 3015/08.

56. ADA 5226/08 and ADA, 5271/08, respectively.

'Aqer's attorney requested that he be released or that the reduction be made "substantive." On 9 December, the Military Appeals Court judge, Lt. Col. Shlomi Kochav, accepted the prosecution's appeal and denied Abu 'Aqer's appeal. The judge held that the poor handling of the prosecution in the criminal case was unrelated to the administrative proceeding. He repeated the fixed wording of decisions of this kind: "I have studied the privileged material"; "I did not find that I am able to reveal it to the detainee"; and "I have concluded that the security of the region and the public require the detention." The judge did not state whether an ISA agent had appeared before him as the prosecution had requested. He approved the administrative-detention order in full.

The third and fourth administrative-detention orders

On 12 March 2009, the military commander extended the administrative-detention order for four months. Judge Lt. Col. Preiss approved it in full.[57] Abu 'Aqer's appeal was denied by the appellate judge, Lt. Col. Shlomi Kochav, on 26 April.[58] On 11 July, another administrative- detention order was issued, again for four months, and Judge Preiss approved it.[59] In the hearing, the prosecutor was clearly not well informed about the case, as is illustrated by the following dialogue regarding her contention that "supporting privileged information had been received."

Defense counsel:	What is the supporting information?
Prosecutor:	It's supporting information.
Defense counsel:	Which of the things that you contended against him is supported by it?
Prosecutor:	You can say that this information supports his organizational affiliation.
Defense counsel:	What organizational affiliation?
Prosecutor:	Hamas.
Judge:	Hamas?
Prosecutor:	The Popular Front.
Defense counsel:	The Popular Front, is that final?
Prosecutor:	Yes.

In the hearing, the prosecutor insisted that Abu 'Aqer was involved in "organizational activity" and that, due to privilege, she was unable to describe the activity. After ordering a hearing on the privileged material, the judge approved the detention and refused to reveal any of the information. The judge only pointed out, laconically, that the activity attributed to Abu 'Aqer was "membership and

57. AD 1332/09.

58. ADA 1895/09.

59. AD 1801/09.

activity that took place during the short period between his release from the previous detention, in July 2008, and the beginning of his current detention."

Abu 'Aqer's appeal was heard on 2 August.[60] At the outset, the prosecution stated that "no new information has been collected in the matter of the appellant." Adv. Pelleg-Sryck argued on behalf of Abu 'Aqer that, based on previous decisions in his case and on contentions raised openly by the prosecution, her client was not alleged to have carried out any military activity, but only to have engaged in political activity. She requested the judge to study the original ISA file and not to rely on a summary. Following this request, and after studying the privileged material, the judge, Lt. Col. Zvi Lekach, issued a rare summons to representatives of the ISA to respond to "questions that were raised following study of the material."

In his decision on the appeal, the judge held that, "the appellant is an operative in the Popular Front organization, which is a dangerous terrorist organization" and that the current detention order "was issued for imperative reasons of security and is intended to prevent a prospective threat." However, after examining the degree of danger posed by Abu 'Aqer, "taking into account the situation presently prevailing in the territory," "the possibility of extending it [the order] yet again should be restricted."

Accordingly, the judge held that the current period of detention would not be shortened, but that at the end of the period, "the commander may not extend the administrative detention without first obtaining new information in the matter of the appellant."

Nidal Abu 'Aqer is scheduled to be released on 10 November 2009.

60. ADA 2717/09.

Salwa Salah and Sarah a-Siuri

Name:	Salwa Rizeq Suliman Salah
Place of residence:	Al-Khader, Bethlehem District
Age:	18 (16 at the time of her detention)
Length of detention:	7 months (5 June 2008 to 1 January 2009)
Type of detention:	Administrative detention pursuant to the Administrative Detention Order
Grounds for detention:	"Because of her being a danger to the security of the region"
Detention facility:	Damun Prison (inside Israel)

Name:	Sarah Yasser Muhammad a-Siuri
Place of residence:	Husan, Bethlehem District
Age:	18 (16 at the time of her detention)
Length of detention:	7 months (5 June 2008 to 1 January 2009)
Type of detention:	Administrative detention pursuant to the Administrative Detention Order
Grounds for detention:	"Because of her being a danger to the security of the region"
Detention facility:	Damun Prison (inside Israel)

"They put us in the civilian wing... we didn't sleep all night. The women were naked, flirting with each other, showering together, using obscene language, moaning and groaning in a sexual way and laughing out loud. We were in shock."

Sarah a-Siuri, following her release, 25 March 2009

Salwa Salah and Sarah a-Siuri are cousins, born in 1991, from the village of al-Khader. In April 2008, a-Siuri married and moved to Husan, a nearby village.

On 5 June 2008, in middle of the night, soldiers entered their houses and arrested them. They were both 16½ at the time. Salah says she awoke to loud pounding on the door. A group of soldiers entered the house, and a female soldier checked her and told her she was under arrest.

"I asked her why I was being arrested, but she refused to answer and ordered me to hurry up. The two of us left the room, and my mother and brothers stood and cried… Outside the house, soldiers cuffed my hands, blindfolded me, and put me in one of the jeeps." A-Siuri, who was arrested in a similar manner, was placed in the same jeep. The two were then taken to Sharon Prison, inside Israel, where they were held for about a week.

On 12 June, they were taken to Ofer Prison, in the West Bank, where they were interrogated for a few hours. They were then placed in an especially small cell, without any air vents, for about two hours, and were then returned to Sharon

Prison. That same day, the military commander issued administrative-detention orders against them, detaining Salah for four months and a-Siuri for five months.

On 18 June, about two weeks after they were arrested and almost a week after the orders were issued, they were brought to Ofer and appeared, for the first time, before a judge, Lt. Col. Amit Preiss. They contend that they were held there in solitary confinement as they waited for the hearing.[61]

Their attorneys, Adv. Sahar Francis and Adv. Akram Samarah of the Adameer organization, raised the possibility in court that the prosecution had not exhausted the possibility of filing an indictment prior to utilizing an administrative measure.

The military prosecutor did not address that contention, instead arguing that the respondents "were alleged to have been involved in planning military actions," that the information relating to them was "extremely current," and that the detention orders were based on intelligence information. She requested that "this material be presented to the court for study without its contents being revealed to the detainee[62] or anyone else, to protect the information sources and prevent harm to the security of the region and its people."[63]

On 6 July, Judge Preiss ordered a "non-substantive" reduction of a-Siuri's detention from five months from the day of issuing of the order to four months from the day she was arrested, to enable a reexamination of the detention. On 17 July, the Military Appeals court judge, Lt. Col. Shlomi Kochav, denied a-Siuri's appeal.[64]

While waiting for the hearings in Sharon Prison, the two were held with adult criminal offenders. According to their testimony, they were exposed to humiliating treatment by the prison guards, particularly during a body search made while they were completely naked, at which the guards made mocking comments. The two also reported that, during this period, they were exposed to sexual activity and violent acts among the adult prisoners, and that prisoners also verbally assaulted them. Toward the end of the month, they were transferred to Damun Prison, also in Israel.

Just before the expiration of their detention, the military commander issued orders extending their detention for three months, although no new evidence against them had been collected. On 3 October 2008, the two were brought for one night to the female criminal prisoners' wing of Ramle Prison, to be transferred

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61. Their testimonies were given to Suha Zeid on 4 January 2009 (Salah) and 25 March 2009 (a-Siuri).

62. The prosecutor used the male form of "detainee" in Hebrew, although both detainees in this case were female.

63. AD 2195/08.

64. ADA 3667/08.

the next day to the military court at Ofer for a hearing. According to Salah, "It was a horrible night for us." The two contend that they were exposed, yet again, to sexual activity of the adult prisoners, which was carried out in public. According to a-Siuri, "This bothered us a lot, it was a real nightmare… Also, while they took us from the prison to the court and back, the soldiers treated us rudely. They asked us to walk fast although our hands and legs were tied, and shouted and swore at us." According to the two, at the court in Ofer, they again had to wait a long time in an especially small prison cell, and were returned to Damun Prison afterwards.

The two extension orders were approved, both in the judicial review and on appeal. In these hearings also, neither the two girls nor their attorneys were allowed to see the material against them.

On 1 January 2009, two days before the extended orders expired, the two were released.

Islam al-Hedmi and Wa'd al-Hedmi

Name:	Islam 'Arafat Mustafa al-Hedmi
Place of residence:	Surif, Hebron District
Age:	20 (18 at the time of detention)
Length of detention:	One year and nine months
Type of detention:	Administrative detention pursuant to the Administrative Detention Order
Grounds for detention:	"Because he is an operative of the Palestinian Islamic Jihad who endangers the security of the region"
Detention facility:	Nafha Prison (inside Israel)

Name:	Wa'd 'Arafat Mustafa al-Hedmi
Place of residence:	Surif, Hebron District
Age:	18 (16 at the time of detention)
Length of detention:	Held since April 2008
Type of detention:	Administrative detention pursuant to the Administrative Detention Order
Grounds for detention:	"Because he is an operative of the Palestinian Islamic Jihad who endangers the security of the region"
Detention facility:	Ofer Prison, Ramallah District

"I don't know when they'll return and when my husband and I will be allowed to visit them. I don't understand this business of administrative detention and the claim of privileged information... I hope there'll be an end to all this suffering."

Fawzeyeh Barad'iyeh, mother of Islam and Wa'd, in her testimony to B'Tselem, 29 March 2009

Islam al-Hedmi and Wa'd al-Hedmi, residents of Surif, Hebron District, are brothers. They have five brothers and sisters. The two were administratively detained for allegedly being operatives in the Islamic Jihad and endangering the security of the region. They had previously been convicted of stone throwing, for which they were given prison sentences.

Islam al-Hedmi

Islam, the eldest son, was arrested at home on 3 December 2007, about nine months after he was released from prison for throwing stones. He was one month after his 18th birthday and was in the twelfth grade. He was interrogated for about 20 days at the Etzion police station and then put in administrative detention at Ofer army base "because he is an operative in Islamic Jihad who endangers the security of the region." About a month later, he was transferred to a detention facility in Israel. In the court proceedings, held on 4 February 2009, the military prosecution alleged he engaged in "activity supporting terrorism and in organizational activity from within the prison."[65]

The first administrative-detention order

The first administrative-detention order issued against him was for six months, until 2 June 2008. Shortly before that date, his detention was extended for six months.

The second administrative-detention order

The hearing to extend the detention was held on 2 June before Judge Major Zvi Heilbron.[66] The prosecutor made only a brief statement: "The military prosecution requests approval of the administrative-detention order for the full period specified in it. The request is based on the privileged information… No new information was obtained." Islam's attorney, Jamal al-Khatib, argued that, in the absence of new information, the detention was unnecessary and his client should be released, primarily in light of his young age and the possibility that the detention would harm his future. As occurs time and again in hearings on administrative detention orders, the judge held an *ex parte* hearing, in which he examined the privileged information.

In his decision, Judge Heilbron held that, "It is not possible to reveal any of the information… out of concern that doing so is liable to harm the security of the region or public security." He further stated:

65. AD 1167/09.

66. AD 2077/08.

> I have found that the information is credible and reliable, and provides the factual basis required for examining whether the respondent's detention is justified… It appears that the respondent, just prior to his detention, engaged in organizational activity in the framework of the Palestinian Islamic Jihad organization, activity that substantially endangered the security of the region… I have been convinced that the said information is still relevant and that it indicates the prospective danger posed by the respondent.

In making these comments, which appear in almost all decisions of this kind, the judge did not explain how the information relating to Islam's purported activity prior to his detention remained relevant, given that he had been detained for more than six months, and in the absence of new information.

As Islam had a fractured rib, and for other reasons that the judge did not mention, the judge ordered a "non-substantive" reduction of two months, that were intended "to result in a renewed evaluation by the military commander," and not necessarily in Islam's release. The date set for expiration of the order was therefore 1 October 2008.

Islam appealed the decision.[67] The appeal was heard on 18 June by Col. Moshe Tirosh. Islam's attorney requested that his client's age be taken into account and demanded details on the dates in which he had allegedly engaged in the activity attributed to him, which had not been provided at the previous hearing. After again reviewing the privileged material, the judge denied the appeal, holding that some of the items in the intelligence material were "of substantial seriousness." The judge refused the appellant's request to see the material and held that all of it would remain privileged.

The third administrative-detention order

"I ask the court to release me. I want to go home… to return to my studies… there is nobody to help my parents."

Islam al-Hedmi in court, 4 February 2009

When the second detention period ended, about ten months after Islam was arrested, the military commander issued another detention order, also for six months, to run from 1 October 2008 to 31 March 2009. The hearing on the order was held before Lt. Col. Amit Preiss on 5 October.[68] This time, the prosecutor argued that new intelligence information had been received on Islam carrying out "activity supporting terrorism" in the Islamic Jihad from "within the prison's walls." In response to Islam's counsel's question, the prosecutor argued that this activity indicated that "he continues to maintain significant ties… to an organization in whose framework he engaged in

67. ADA 3107/08.

68. AD 2795/08.

the prohibited activity for which he was confined." In his decision, which followed his study of the privileged material, the judge held that, in light of Islam's standing in the Islamic Jihad organization, which was not detailed in the revealed material, there was "definite concern" for the security of the region if he were to be released. However, "in light of the relatively long period of detention," the judge again ordered a "non-substantive" reduction of his detention.

Islam appealed the decision, which was heard by Judge Lt. Col. Shlomi Kochav on 26 October.[69] The military prosecutor's office argued that new information had been collected that reinforced the contention that Islam was operating on behalf of the Islamic Jihad from within the prison. The judge studied the privileged material and denied the appeal.

The fourth administrative-detention order

When the third period ended, some fourteen months after Islam was arrested, the military commander issued yet another detention order against him. This time, the order was issued for four months, from 31 January to 30 May 2009. The hearing on the order was held before Judge Major Michael Ben David on 4 February.[70] The military prosecutor again alleged that Islam was engaged in "activity supporting terrorism" in the Islamic Jihad "from within the prison's walls," and that new information had been collected reinforcing his organizational affiliation. During the hearing, Islam turned to the judge and asked that he release him: "I want to go home… to return to my studies… [We are] two brothers in jail and there is no one to help my parents." As usual, the judge studied the privileged material and held that, "Out of concern that the safety of information sources or of modes of operation of the ISA may be harmed, it is not possible to reveal any details from the privileged material," approving the order in its entirety.

On 22 February, the appellate court judge, Col. Moshe Tirosh, denied the appeal after he studied the privileged material. He held, inter alia, that the length of the detention was proportionate "to the estimated danger posed by the appellant."[71]

The fifth administrative-detention order

When the fourth period of detention ended, some eighteen months after Islam was arrested, the military commander issued yet another order against him. This one, too, was for four months, from 30 May to 29 September 2009. The hearing on the order was held on 1 June before Judge Major Zvi Heilbron.[72] At the hearing, the military prosecutor admitted that the new material collected on Islam was "not

69. ADA 4726/08.

70. AD 1167/09.

71. ADA 1312/09.

72. AD 1673/09.

significant."[73] Nevertheless, the prosecutor demanded approval of the detention order for the entire four-month period. The prosecutor promised that, if "new material that increases the dangerousness of the respondent" is not obtained, "the military commander will not extend his detention."

After an *ex parte* hearing, the judge held that it was not possible to reveal the privileged material, and added:

> I found that the information is credible and reliable, and provides the factual basis required for examining whether the respondent's detention is justified… I am convinced that the said information is still relevant and that it indicates the prospective danger posed by the respondent. In light of this, I found that the security of the region and public security require that the respondent be administratively detained, and that the period of administrative detention that the military commander specified in the order meets the proportionality requirements of the law.

Despite these firm statements, Judge Heilbron decided to shorten the detention by one month and nine days, so that it would end at the beginning of the month of Ramadan. The judge ruled that the shortening of the period "is contingent on the absence of new material that increases his dangerousness."

The decision is baffling. If the judge believed that security reasons "require the detention," and that the period specified in the order "meets the proportionality requirements of the law," it is unclear how he could shorten it. After all, any time shorter than a period that "meets the proportionality requirements of the law" would not meet the security needs that ostensibly require the detention.

On 14 June, Islam's appeal was heard and denied by Judge Lt. Col. Shlomi Kochav.[74] He was released on 20 August 2009.

Wa'd al-Hedmi

On 29 April 2008, some five months after his brother was detained, Wa'd was arrested, also while at home. He was two weeks short of his 17th birthday and in the eleventh grade. After being interrogated for a few days, he was taken to Ofer Prison. He has remained there ever since and is kept with adult prisoners. The grounds for his detention were the same: "Because he is an operative in Islamic Jihad who endangers the security of the region."

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73. A similar admission had been made regarding Islam's brother about two months earlier (see below).

74. ADA 2416/09.

The first administrative-detention order

On 6 May, six days after Wa'd was arrested, the military commander issued the first administrative-detention order against him. Despite his age, the military commander specified that he be held for six months. At the court hearing on the detention, held on 12 May, Judge Lt. Col. Amit Preiss ordered a "non-substantive" reduction of the period to three months, enabling a reexamination of the detention.[75] Wa'd's appeal of the decision, heard on 2 July, was denied by the appellate judge Lt. Col. Shlomi Kochav.[76]

The second administrative-detention order

"I've been in administrative detention for fourteen months. All I want is to get out and be with my family and continue with my matriculation exams."

Wa'd al-Hedmi in court, 1 July 2009

With the end of the first detention period, the military commander issued an order extending the detention for three months. The court hearing on the extension was held before Judge Major Zvi Heilbron on 3 September.[77] The prosecutor stated that there was information indicating that Wa'd engaged in organizational activity and activity that "supported terrorism" in the framework of the Islamic Jihad. As usual, the judge studied the privileged material and held that, "despite his young age, prior to his arrest, he served as a central operative in the Palestinian Islamic Jihad. The respondent engaged in organizational activity and also in more dangerous activity." The judge added, using the standard wording, that "the security of the region and public security require the administrative detention… The period of the administrative detention specified in the military commander's order meets the proportionality requirements of law." The judge thus approved the order in its entirety. Lt. Col. Shlomi Kochav heard and denied the appeal on 24 September.[78]

The third administrative-detention order

When the second detention period ended, about six months after he was arrested, the military commander issued another detention order against Wa'd, this time for four months. The hearing on the order was held before Judge Major Michael Ben David on 27 November.[79] The prosecutor argued that new intelligence information had been obtained regarding Wa'd, but refused to reveal to his counsel whether the information related to activity he had carried out prior to the detention. The

75. AD 1945/08.

76. ADA 3308/08.

77. AD 2589/08.

78. ADA 4396/08.

79. AD 3070/08.

judge studied the privileged material and held that, indeed, it was not possible to reveal even the time that the activity attributed to Wa'd had taken place, and approved the detention order.

Wa'd's appeal was heard on 7 December before Judge Lt. Col. Shlomi Kochav, who denied it without revealing any additional details on the allegations made against him.[80]

The fourth administrative-detention order

About ten months after Wa'd had been arrested, the third detention period ended, and the military commander issued another detention order, for four months, to run from 26 March to 25 July 2009. The hearing on the order was held before Judge Major Zvi Heilbron on 30 March.[81] In response to Wa'd's counsel's question, the prosecutor admitted that the new material strengthened what was known about his membership in the organization, "but not significantly." After again reviewing the privileged material, the judge held that "the information is still relevant" and that "the security of the region and public security require the detention." However, "in light of the young age of the respondent and in light of the fact that the respondent is held with adults," he decided to shorten the period of detention by a month, a "non-substantive" reduction, so that the military commander would reevaluate the matter at an earlier date. The judge also observed that Wa'd's counsel had a point regarding the harm caused by keeping him in prison with adults. He held that the IPS must make an effort, "within the context of the resources available to it, to place the respondent with detainees his age, and, to the extent possible, prevent his involvement with persons who would have a negative influence on the respondent."

Wa'd's appeal was heard on 27 April before Judge Lt. Col. Shlomi Kochav.[82] Again, the prosecutor argued that there was new information "that reinforced the respondent's membership in the organization," but refused to disclose the period to which the information related. Judge Kochav denied Wa'd's appeal.

The fifth administrative-detention order

When the fourth detention period ended, about fourteen months after Wa'd was arrested, the military commander issued another detention order, this time for three months, to run from 25 June to 24 September 2009. The hearing on the order was held before Judge Lt. Col. Amit Preiss on 1 July.[83] The prosecutor did not mention that new information had been obtained, beyond that which had been

80. ADA 5217/08.

81. AD 1392/09.

82. ADA 1939/09.

83. AD 1759/09.

provided to the court in the last appeal. Wa'd's attorney complained that his client was still being held with adults, and again argued that this would gravely harm him and ultimately increase the danger he poses. The judge held that, "It transpires that since the detention, quite an amount of information has been received that increases the dangerousness that was indicated by the information that preceded the detention," and that "detention for the period specified in the order without any limitation is justified." The extension order was accordingly approved.

On 26 August 2009, Judge Col. Moshe Tirosh denied Wa'd's appeal.[84]

Khaled Jaradat

Name:	Khaled Hussein 'Abd al-Karim Jaradat (Abu Hadi)
Place of residence:	Silat al-Harithiya, Jenin District
Age:	48
Length of detention:	Since March 2008
Type of detention:	Administrative detention pursuant to the Administrative Detention Order
Grounds for detention:	"Because of his being a Palestinian Islamic Jihad operative who endangers the security of the region and its residents"
Detention facility:	Ketziot Prison (inside Israel)

"I've been imprisoned ten times. I was in jail for almost seventeen years. I have no connection to military activity."

Khaled Jaradat in court, 11 May 2009

Khaled Jaradat, 48, lives in Silat al-Harithiya, Jenin District and is an English teacher. He is married and has six children. Israel has held him in administrative detention for some eight years, not consecutively. His current detention began in March 2008.

The current administrative detention

The first administrative-detention order

On 5 March 2008, military forces arrested Jaradat in his home. His wife, Hino Jaradat, described the arrest:

> Soldiers surrounded the house and knocked on the door. The moment I opened it, soldiers threw a tear-gas canister into the house. The carpet caught fire and I was burned in the leg. The house got damaged. It was my husband's last, and hardest, detention.[85]

84. ADA 2837/09.

85. The testimony was given to 'Atef Abu a-Rub on 12 May 2009.

Jaradat was taken to interrogation on suspicion of activity in the Islamic Jihad and of performing services for the organization.[86] His interrogators told him that $15,000 dollars had been found in his house, and that a person whom they had interrogated stated that Jaradat had taken part in distributing food to the needy on behalf of the Islamic Jihad in Silat al-Harithiya during Eid al-Adha, a major holiday.[87] The military prosecutor's office tried to draw up an indictment against Jaradat, but a month or so later, on 6 April, an administrative-detention order for six months was issued against him and the indictment attempt was shelved.

On 9 April, Jaradat was brought before the military judge Lt. Col. Amit Preiss to obtain approval of the order.[88] Jaradat's attorney, Tamar Pelleg-Sryck of HaMoked, argued that the open material sufficed for filing a criminal complaint against her client, and that a criminal action must be preferred to administrative detention. The judge accepted the argument and ordered cancellation of the order, staying the cancellation until 17 April. The judge also accepted the prosecution's argument that Jaradat posed a danger to public security, but held that the attempt to prosecute him should be completed. Based on the testimony of the person who was interrogated regarding the distribution of food to the needy, the judge believed that Jaradat could be charged "at the very least with the offenses of activity as a member of an unlawful association and performing a service for an unlawful association." The judge also criticized the prosecution's handling of the case:

> Before choosing the route of administrative detention based on privileged material – as extensive and substantial as that material may be – the authorities must exhaust every other possible procedure for thwarting the estimated danger posed by the detainee. In my opinion, that has not been done in this case… Administrative detention in this detainee's case is not appropriate. Therefore, the order should be cancelled, while giving the prosecution the opportunity to file an indictment and an application for remand until the end of the proceedings.

The judge emphasized that if, within a week's time, no indictment was filed and no application was made to remand Jaradat until the end of the proceedings, he would be released. The judge also stated in his decision: "Should an indictment be filed but the court not order that the defendant be held in custody until the end of the proceedings, the prosecution may take the measures needed to issue a new administrative-detention order." This statement clearly confuses administrative and criminal proceedings, in that administrative detention is not intended to serve as a substitute for detention until the end of criminal proceedings. It is to be noted, however, that this type of decision has been common recently.

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86. Israel Police, File 91869/2008, Statement of Suspect, Statement of Khaled Jaradat, 25 March 2008.

87. According to the above police file, the additional witness was questioned on 11 March 2008.

88. AD 1717/08.

"When I was small, and I didn't know much, I wanted to be an operative in Islamic Jihad. [Now], I have a little boy, who is two and a half years old, and a big boy, who is sixteen. I think about how to raise them right. This is how every father with a family feels."

Khaled Jaradat, in court, 11 May 2009

After giving his decision, the judge reconsidered the prosecution's application in light of open material that had not been presented to him previously, in which the person who had allegedly testified against Jaradat clarified that, in effect, he was referring to another person by the name of Khaled Jaradat. At the rehearing, which was held at the prosecution's request on 16 April, just before the order was to expire, Judge Preiss ruled that, despite the possible confusion of persons, a criminal proceeding was preferred, and granted a two-week extension to the prosecution to complete the investigation. On 30 April, the day before the order was to expire, the prosecution appealed the judge's decision.[89] The appellate court judge, Lt. Col. Shlomi Kochav, acceded to the prosecution's request to extend Jaradat's administrative detention until the appellate court reached its decision on the appeal.

On 15 May, Judge Kochav accepted the appeal. He explained that, inasmuch as the other person who was interrogated contended that he was referring to another person, "criminal detention until the end of the proceedings is not possible." At no stage was the prosecution required to prove that it had taken all the necessary investigative actions to exhaust the criminal option. The judge summarized the matter: "The security of the region and public security require the detention." The original administrative detention order was, therefore, approved in its entirety.

The second administrative-detention order

On 5 October 2008, the military commander issued an order extending Jaradat's detention for six months. The court hearing on the extension was held on 7 October.[90] The prosecutor argued that Jaradat's administrative detention was unrelated to the food distribution. In response to Jaradat's counsel, the prosecution admitted that it knew the detainee was engaged in building a hospital and contended that the administrative detention was also unrelated to this activity. Adv. Pelleg-Sryck repeated the contention that Jaradat was engaged in humanitarian work and that the prosecution had not exhausted the possibility of prosecuting her client on criminal charges, either for an offense related to his holding the money, or for another offense. Judge Preiss rejected these arguments and approved the order in its entirety. He explained his decision.

89. ADA 2489/08.

90. AD 2823/08.

> I was presented quality, credible intelligence material that raises a definite concern for the security of the region if the detainee is released. The material indicates that the detainee was a senior operative in the Palestinian Islamic Jihad organization who engaged in extensive organizational activity that had only one objective – strengthening the Palestinian Islamic Jihad. It should be noted that the activity is ongoing and intensive, and leaves no doubt that were the detainee not in detention, he would continue his activity, which greatly contributes to the organization. In light of this… his dangerousness remains.

Despite the prosecutor's acknowledgment that the detainee was engaged in humanitarian activity, Judge Preiss held that his "organizational activity… had only one objective," which was "strengthening the Palestinian Islamic Jihad." The judge did not state how such activity, if it had indeed taken place, indicated any danger that the detainee would pose if released.

On 24 November, Judge Kochav denied Jaradat's appeal of the decision.[91] The judges in both instances refused to reveal any of the privileged material, and did not state that Jaradat was engaged at that time, or had engaged previously, in military activity or any kind of violent activity.

The third administrative-detention order

On 30 March 2009, four days before the last extended order was to expire, the military commander issued another extension order. This one, too, was for six months, beginning on 4 April and ending on 30 October 2009. The hearing on the extended order was held on 5 April before Judge Preiss.[92] The prosecutor repeated that the army wished to detain Jaradat for "organizational activity in which the respondent engaged prior to his detention," which was not connected to the open material. Adv. Pelleg-Sryck repeated, in her defense of Jaradat, that he was engaged in humanitarian activity, and noted that the prosecution had agreed in previous hearings that her client was involved, for example, in building a hospital. The prosecution did not claim that Jaradat had engaged in military or violent activity. Again, the judge studied the privileged material and held: "I have gained the impression that, even after more than a year in prison, his dangerousness remains." In light of the "relatively long" period of detention, the judge stated that Jaradat's matter should be brought before the military commander at an earlier date, and thus ordered a "non-substantive" reduction of three months, so that the order would expire on 3 July.

On 19 April, the prosecution appealed the decision.[93] Following the filing of the prosecution's appeal, Jaradat also appealed.[94] In its notice of appeal, the

91. ADA 4826/08.

92. AD 1441/09.

93. ADA 2026/09.

94. ADA 2159/09.

prosecution argued that the reduction was mistaken "in light of the seriousness of the privileged information." On 11 May, a hearing on the appeals was held before Judge Shlomi Kochav. Adv. Pelleg-Sryck argued that the connection between the seriousness of the material and the length of time of the confinement testified to the use of administrative detention contrary to its purpose, which is to prevent a threat. Indeed, in criminal proceedings, the defendant is punished in conformity to the seriousness of the offense – the more serious the acts attributed to the defendant, the longer the prison sentence imposed, as a criminal proceeding is punitive. But administrative detention is forward-looking, it is not a form of punishment, and its only legitimate purpose is to prevent a threat. Jaradat's counsel further argued that the military prosecution had deviated from its authority when it appealed the reduction, since the reduction was categorized as "non-substantive," so that the military commander could issue, at the end of the period, another detention order. It cannot be argued, therefore, that the decision harmed security in any way.

Judge Kochav denied both appeals.

The fourth administrative-detention order

On 29 June, four days before the last extended order was to expire, the military commander issued yet another extension order. This one was for three months, from 3 July to 30 October.

The hearing on the extended order was held on 7 July before Judge Lt. Col. Eyal Nun.[95] The military prosecutor contended that, "since the previous hearing, new privileged material has been received that strengthens his position, that he is a senior official in Islamic Jihad… who is involved in organizational activity and activity that supports terrorism." The prosecutor emphasized that the privileged material related "to the period following his detention."

Jaradat is being held in a special wing in Ketziot Prison, in southern Israel. Based on this fact, Adv. Pelleg-Sryck argued that the grounds for attributing "activity supporting terrorism" to Jaradat from within prison were unclear. In response to questions she posed on this point, the prosecutor admitted that he did not know where Jaradat was being held, and referred the judge again and again to the privileged material, without answering the questions directed to him. Adv. Pelleg-Sryck further argued that as the purpose of administrative detention is prevention, and as the proceeding at hand was administrative and not criminal, it is necessary to weigh the danger posed by Jaradat's activity, and not within which organization it is performed. She reiterated, in this context, that her client's activity was humanitarian.

95. AD 1779/09.

Judge Nun, who did not receive any new material regarding Jaradat's activity, refused to reveal the privileged material and approved the order in its entirety, holding:

> The picture arising from the privileged material… is that the detainee is a prominent leader of the terrorist organization Islamic Jihad in Judea and Samaria, and that this activity is multi-faceted (initiation of terrorist actions, activity in the organizational sphere of the terrorist organization, and activity with the "civilian" satellite organizations of the terrorist organization). Study of the privileged material indicates that the detainee… is a manifest terror operative who holds a senior rank, and therefore his administrative detention is justified.

Judge Nun also held that it was not possible to prevent the danger ostensibly posed by Jaradat by any means other than administrative detention. As the possibility of prosecuting Jaradat on criminal charges had been discussed in previous stages of his detention, and in light of the absence of new material revealed in the matter, the judge refrained from reexamining the possibility.

Jaradat appealed the decision, and the hearing on the appeal was held on 23 August before Lt. Col. Shlomi Kochav.[96] The prosecutor stated at the start that, "In advance of the appeal, new privileged information was collected, material that we believe is significant, that intensifies the evaluation of dangerousness at the present time. The information does not add activity, as we know, and it is updated and broadens the picture regarding the appellant." Adv. Pelleg-Sryck again argued, on behalf of Jaradat, that during the period preceding his detention, he had engaged in humanitarian activity, and that this activity, which was documented in the open material, was not dangerous. She also stated that no notice had yet been given as to what was done with the money that was seized at the time Jaradat was arrested. The prosecutor argued, in response, that Jaradat was not being detained for his humanitarian work, hinting that no such activity had taken place, and added that the money that had been seized did not affect the evaluation of the danger he posed. Adv. Pelleg-Sryck also raised the possibility that the new information was not relevant to determining the purported threat posed by Jaradat were he to be released; rather, she claimed, it stemmed from the prosecution's method of adding new information of no value at all just before hearings, solely in order to argue that the evaluation of danger had increased.

The court's decision, given the same day, was laconic and did not address the arguments raised by Jaradat's counsel. Judge Nun held only that, based on study of the privileged material, "the security of the region and public security require the detention."

96. ADA 2807/09.

Chapter 3

The Internment of Unlawful Combatants Law

In 2000, Israel's Supreme Court ruled that the state was not allowed to continue holding Lebanese nationals in administrative detention as "bargaining chips" for the return of Israeli prisoners of war and bodies, as they do not pose a threat.[97] Among the detainees held were Mustafa Dirani and Sheikh 'Abd al-Karim 'Obeid. To enable the state to continue holding them, the Knesset enacted, in 2002, the Internment of Unlawful Combatants Law (hereafter in this chapter: the Law).

This statute is now used to detain Palestinian residents of the Gaza Strip without trial. In the past, Israel used the statute to hold additional Lebanese nationals. Israel has made limited use of the statute, but it enables the state to carry out large-scale internments, for unlimited periods and without substantial judicial review. The protections provided to internees by the statute are even less than the few provided to detainees under the Administrative Detention Order that applies in the West Bank.

Provisions of the Law

Internment power

The Law defines an unlawful combatant as a person who is not entitled to the status of prisoner of war under international humanitarian law, who meets at least one of the two following criteria:

1. took part in hostilities against the State of Israel, directly or indirectly;
2. is a member of a force carrying out hostilities against the State of Israel.[98]

An officer holding the rank of at least captain, who is so delegated by the chief of staff, may order the internment of a person for 96 hours when he has "a reasonable basis for believing that the person brought before him is an unlawful combatant." Following that, the chief of staff, or an officer holding the rank of major-general delegated by him, may issue a permanent internment order if he has "a reasonable basis for believing" both,

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97. CrimReh 7048/97, *A. and B. v. Minister of Defense.*

98. Internment of Unlawful Combatants Law, 5762–2002, section 2. The conditions for entitlement to the status of prisoner of war are specified in article 4 of the Third Geneva Convention.

1. that the person is an "unlawful combatant" as defined by the law; and
2. that his release will harm state security.[99]

Contrary to detention under the Administrative Detention Order, internment under the Law is not limited in time. The internment ends only when, in the opinion of the chief of staff, one of the conditions for the internment ceases to exist or other reasons justify the person's release.[100]

Judicial review and presumptions specified in the Law

Under the Law, an internee shall be brought before a District Court judge no later than 14 days from the date on which the internment order is issued. If the judge finds that the conditions for internment specified in the Law are not satisfied, he shall cancel the internment order. If the order is approved, the internee must be brought before a judge once every six months, and if the court finds that his release will not harm state security, the judge shall cancel the internment order.[101] The judge's decision may be appealed to the Supreme Court. As with administrative detention under the Administrative Detention Order, the judge is not bound by the rules of evidence, and the hearings are held in camera, unless the judge directs otherwise.[102]

The Law specifies two presumptions add to its force. The first is that the release of a person defined as an "unlawful combatant" will harm state security as long as the contrary has not been proved. The wording of the presumption is as follows:

> With regard to this law, a person who is a member of a force that carries out hostilities against the State of Israel or who took part in the hostilities of such a force, whether directly or indirectly, shall be regarded as someone whose release will harm state security as long as the hostilities of that force against the State of Israel have not ended, as long as the contrary has not been proved.[103]

The second presumption relates to the existence of hostilities. It states:

> The determination of the Minister of Defense, in a certificate signed by him, that a certain force is carrying out hostilities against the State of Israel or that the hostilities of that force against the State of Israel have come to an end or have not yet come to an end, shall serve as evidence in any legal proceeding, unless the contrary is proved.[104]

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99. Section 3.
100. Section 4.
101. Section 5.
102. Section 5.
103. Section 7.
104. Section 8.

Change in the wording of the Law in 2008

In 2008, the Knesset amended the wording of the Law to expand the internment powers it provides. Under the amendment, when the government declares the "existence of wide-scale hostilities," the internee may be held for seven days prior to issuing a permanent internment order, instead of 96 hours, and the power to issue the order switches from the chief of staff to an officer holding the rank of brigadier-general. In addition, the declaration enables transfer of judicial review from the District Court to military courts that will be established especially for this purpose.[105]

The amendment's provisions have not yet been applied in practice. On 4 January 2009, during Operation Cast Lead in the Gaza Strip, the Minister of Defense declared the Sde Teiman military base an internment facility for the purposes of the Law. However, the government did not declare the "existence of wide-scale hostilities" and did not exercise the powers given it under the Law following such a declaration.

Use of the Law

In 2004, after an exchange deal with Hizballah in which Israel released the Lebanese nationals it had been holding in exchange for hostages and bodies, no internees under the Law remained in Israeli hands. In this context, the Supreme Court denied HaMoked's petition, filed in 2003, to nullify the Law, holding that the hearing was theoretical.[106] On 12 September 2005, only four days after the court's decision, Israel completed implementation of the "disengagement plan" and declared the end of the military government in the Gaza Strip. As the Administrative Detention Order ceased to apply in the Gaza Strip after the declaration, the chief of staff issued internment orders under the Law that same day against two residents of the Gaza Strip who were being held in administrative detention (see insert below).

Since then, the Law has been used primarily to detain residents of the Gaza Strip without trial, among them persons who were detained during army actions in the Gaza Strip, and prisoners who were declared "unlawful combatants" after they had completed their prison sentence.

In 2006, during the Second Lebanon War, Israel interned ten Lebanese nationals under the Law, two of whom were held until 2008. The Law has not been used to intern residents of the West Bank, although it allows for this use.

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105. Sections 10A-10D.

106. Crim. App. 3660/03, *'Obeid v. State of Israel et al*.

To the best of HaMoked's and B'Tselem's knowledge, Israel has used the Law to intern 54 persons to date:

- 15 were Lebanese nationals: Dirani, 'Obeid, and two other persons were held from 2002 to 2004 and were released in the prisoners and bodies exchange. The 11 others were interned during the Second Lebanon War, in 2006. Five of them were released a few days after their internment, one was released in October 2007, and two were released in July 2008. Three were prosecuted on criminal charges and were also released in July 2008.
- 39 were residents of the Gaza Strip: 34 of these were interned in 2009 during, or subsequent to, Operation Cast Lead, and most have been released. The other five were interned at various times between 2005 and 2008.[107] In August 2009, Israel released four internees. On 30 September, Israel was holding nine internees under the Law.[108]

Supreme Court judgments on the Law

In 2008, the Supreme Court held that the Law was constitutional. The president of the Supreme Court, Justice Dorit Beinisch, compared internment under the Law to administrative detention, stating that, "[t]he mechanism provided in the law is a mechanism of administrative detention in every respect." Thus, all the rules applying to administrative detention under the Administrative Detention Order apply to internment under the Law. Essentially, the internment must be based on a danger that the person himself poses and not only on his being a member of one organization or another. In addition, like every administrative detention, the internment must be for a preventive purpose and not as punishment for a past act, and it must be based on clear, convincing, quality, updated, and sufficient administrative evidence.[109]

In this judgment, as in other appeals decided by the Supreme Court on the Law, the justices refused to address the constitutionality of the Law's presumptions. In the appeals, the state generally argued that it did not rely on these presumptions, and that in each of the cases, evidence was presented proving that the internees themselves posed a danger. The justices relied on this claim to hold that the

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107. B'Tselem and HaMoked do not know how many of them were interned under the Law after serving prison sentences.

108. These figures are based on partial information that the IDF Spokesperson's Office provided to B'Tselem on 4 August 2009, on additional figures regarding internees under the Law who were represented by Adv. Hisham Abu Shehadeh of HaMoked, and on information the IPS provided to B'Tselem on 9 September 2009.

109. *Riad 'Ayad,* supra, pars. 15-23. The appeal was filed by Adv. Hisham Abu Shehadeh, of HaMoked. The official English translation of the court's judgment is available at http://elyon1.court.gov.il/files_eng/06/590/066/n04/06066590.n04.htm.

question was theoretical. If the state relies on these presumptions in the future, the constitutional question may be raised before the court.[110]

Although the Law enshrines the power to intern a person, and its rules on internment are identical to those of any other administrative detention, Justice Beinisch held that it is intended for a different purpose than the Emergency Powers (Detentions) Law applying in Israel. She contended that although both statutes require that the person pose a personal threat to state security, the Emergency Powers (Detentions) Law is intended to prevent danger resulting from citizens and residents of the state, and is generally used in isolated cases and for relatively short periods of time. The Law, on the other hand, is intended "to apply to members of terrorist organizations in a state of ongoing hostilities in a territory that is not part of Israel, where a relatively large number of enemy combatants is likely to fall into the hands of the military forces during the fighting."[111]

However, Justice Beinisch qualified her statement, blurring the fundamental differences between the statutes. First, she held that, "in appropriate circumstances, the Emergency Powers (Detentions) Law may also be used to detain foreigners who are not residents or citizens of the State of Israel."[112] Indeed, in one of the cases that the Supreme Court subsequently heard, Justice Jubran ruled that a resident of Gaza held under the Law did not fall within the category of unlawful combatants, and it was decided to transfer the individual to administrative detention under the Emergency Powers (Detentions) Law.[113]

Second, even though a similar rationale can apply to internment of residents of the West Bank, Justice Beinisch held, without explaining her statement, that it is preferable that West Bank residents be detained pursuant to the Administrative Detention Order.[114]

It appears that, in most of the cases, Israel has preferred to use the Law because it gives the state greater freedom of action and provides fewer protections to the individual: The presumptions specified in the Law switch the burden of proof to the internee; judicial review is less frequent; the internment does not depend on the existence of a state of emergency; and the internment is carried out pursuant to an order issued by the chief of staff or by an officer holding the rank of major general. Finally, contrary to the Emergency Powers (Detentions) Law, an order signed by the Minister of Defense is not required.[115]

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110. Ibid., primarily pars. 24-25.

111. Ibid., par. 35.

112. Ibid.

113. ADA 7750/08, *A. v. State of Israel*, 23 November 2008.

114. *Riad ʿAyad*, supra, par. 11.

115. Ibid., par. 35.

Riad ʻAyad and Hassan ʻAyad

In 2002, Israel administratively detained Riad ʻAyad, a resident of the Gaza Strip. In 2003, Israel arrested his cousin, Hassan ʻAyad, also from the Gaza Strip, and held him in administrative detention too. The two were held under the Administrative Detention Order then applying in the Gaza Strip. On 12 September 2005, when the Administrative Detention Order was cancelled in the Gaza Strip following the abolishment of the military government there, Israel transferred the two men to internment under the Law, contending that they were members of Hizballah. At the same time, Israel released other administrative detainees from Gaza or initiated criminal charges against them.

As required by the Law, the two were brought before a judge for periodical judicial review. Each time, the judge approved their continued internment without trial. Adv. Hisham Abu Shehadeh, of HaMoked, represented them in these proceedings and appealed on their behalf to the Supreme Court, raising fundamental questions about the legality of the Law and arguing that the Law should be nullified.[116]

On 11 June 2008, almost three years after being transferred to internment under the Law, the Supreme Court rejected the appeal. The court's opinion, given by the president, Justice Dorit Beinisch, held, inter alia, that the Law was constitutional, without discussing the constitutionality of the presumptions.[117]

Simultaneously, HaMoked filed civil suits on their behalf relating to the conditions of their detention.[118] Riad was held for five years and seven months in a wing for internees who are kept separate from the rest of the inmates, and Hassan was similarly held for one year and ten months. The suits claim that holding an internee separately for such a long period of time impinges on his rights and dignity. The impingement is especially grave in that the isolation is done without the approval of the competent IPS authorities, consulting with the competent authorities, granting the internee the right to state his case, or obtaining court approval.

In the middle of 2009, prior to a scheduled hearing on an appeal filed by the two against the decision of the District Court judge to authorize their continued internment, the defense authorities announced that they did not intend to extend the internment beyond September of that year. Consequently, the attorney representing the two withdrew the appeal and the court cancelled it.[119] On 18 August 2009, Israel abruptly freed Riad ʻAyad and Hassan ʻAyad, after holding them without trial for six and a half years and seven and a half years, respectively.

116. Regarding the statement of appeal, see www.hamoked.org.il/items/110550.pdf.

117. *Riad ʻAyad*, supra, pars. 24-25.

118. Civ. Comp. 13456/08, *ʻAyad v. State of Israel;* Civ. Comp. 13473/08*, ʻAyad v. State of Israel.*

119. *Riad ʻAyad*, supra, Decision, 13 July 2009.

Criticism

The Internment of Unlawful Combatants Law was originally intended to legalize the holding of foreigners as "bargaining chips," which the Supreme Court prohibited. The purpose of the Law was to create a combination of administrative detention and prisoner of war status, a draconian incarceration track that grants extremely minimal rights and protections to the detainee. On one hand, the state can prosecute such a person for taking part in hostilities, while, on the other hand, it can hold him in prison without trial as if he were a prisoner of war, and release him only at the end of the hostilities, regardless of the personal danger he may or may not pose if released.

The Law was approved despite the fact that the Emergency Powers (Detentions) Law, enacted already in 1979, enables administrative detentions of foreign nationals as well.

In the years since the legislative process began, the Law has undergone several changes, ostensibly in an attempt to conform its provisions to those of international humanitarian law. Section 1 of the Law states that the Law is intended "to arrange the incarceration of unlawful combatants, who are not entitled to prisoner of war status, in a way that conforms to the obligations of the State of Israel under the provisions of international humanitarian law." However, study of the Law clearly shows that it directly contradicts international humanitarian law.

When the Law came before the Supreme Court, the justices held that the status of "unlawful combatant" does not exist in international humanitarian law. In fact, they held, these are civilians, who are entitled to the protections of the Fourth Geneva Convention, and the Law merely established an additional form of administrative detention. In accordance with the provisions of the Convention, a person must pose a "personal threat of danger" to be detained under the Law. Despite this determination, the justices did not discuss the constitutionality of the presumptions specified in the Law, holding that such a discussion was not necessary regarding the cases at hand.

However, the two presumptions clearly contradict the provisions of the Fourth Geneva Convention and enable the interment of a person while disregarding the requirement that he pose a personal danger. The presumption of individual threat posed by the detainee (section 7) and the presumption of the continuation of hostilities (section 8) release the prosecution from the need to produce evidence to justify continuation of the internment, and enable internment for an unlimited period of time.

Given the presumptions, after the District Court decides that a detainee is an "unlawful combatant," the judicial system is left with nothing to do and periodic judicial review is effectively meaningless. The point of departure is that the

detainee's release will harm state security, as long as the defense minister maintains that the hostilities are continuing. The Law does enable the detainee to prove otherwise, but it is not clear how he can do so. The Law places the burden of proof on the shoulders of the detainee in matters that he can clearly never refute, given that the vast majority of the material against him is privileged and he is not allowed to examine the evidence against him.

Even when the presumptions are not relied upon, the personal danger that the state must prove in order to detain a person under the Law is very broadly defined, disregarding the fact that international humanitarian law permits administrative detention only in exceptional cases, when there is no other way to avert the danger. Under section 2 of the Law, being a member of a "force carrying out hostilities against the State of Israel" is sufficient for classifying a person as an "unlawful combatant." The Law does not interpret the nature of membership that is required and merely states that membership can be "direct or indirect." The Supreme Court even broadened the definition, stating:

> [I]t is not necessary for that person to take a direct or indirect part in the hostilities themselves, and it is possible that his connection and contribution to the organization will be expressed in other ways that are sufficient to include him in the cycle of hostilities in its broad sense, in such a way that his detention will be justified under the law.[120]

The 2008 amendment makes matters worse, as it enables mass, sweeping and easy use of the Law in time of war without meaningful judicial review.

Since the Emergency Powers (Detentions) Law enables administrative detention, it was not necessary to enact the Internment of Unlawful Combatants Law. The Law was added to the defense establishment's toolkit in order to broaden its scope of operation, which was already extensive, and to reduce supervision of its actions.

120. *Riad 'Ayad,* supra, par. 21.

Sample cases

Wael al-'Athamneh

Name:	Wael Majed 'Abdallah al-'Athamneh
Place of residence:	Beit Hanun, Gaza Strip
Age:	33
Length of detention:	Interned since January 2009
Type of detention:	Internment pursuant to the Internment of Unlawful Combatants Law
Grounds for detention:	"Reasonable basis for believing… that the internee is an unlawful combatant within its meaning in the Law and that his release will harm state security"
Detention facility:	Ketziot Prison (inside Israel)

Wael al-'Athamneh, 33, is married and has six children. In the three years preceding his internment, he was employed by one of the security services of the Palestinian Authority. His sixth son was born after he was interned.

The arrest

On 5 January 2009, two days after the army had invaded the Gaza Strip in the framework of Operation Cast Lead, soldiers surrounded the residential neighborhood in which al-'Athamneh lived and ordered all the residents to leave their homes. The soldiers separated the women and children from the men. According to al-'Athamneh, he and five other persons were taken to Erez Checkpoint and from there into Israel, to the Ketziot detention facility in the Negev. He contends that when interrogated about whether he was active in Hamas, he responded that he was a member of Fatah and that he received his salary from the Palestinian Authority. The next day, a temporary internment order pursuant to the Internment of Unlawful Combatants Law was issued against him. The order was signed by an intelligence officer holding the rank of captain and stated that, "This order is issued because I have a reasonable basis for believing, based on information that was brought before me, that the internee is an unlawful combatant within its meaning in the Law." Two days later, on 7 January, al-'Athamneh appeared before an officer holding the rank of lieutenant-colonel, before whom he repeated that he was not a member of Hamas, but of Fatah. Following this, a reserve-duty officer holding the rank of major-general, who was delegated for this purpose, issued an internment order, which stated that,

> This order was issued because I have a reasonable basis for believing, based on information brought before me, that the internee is an unlawful combatant within its meaning in the Law, and that his release will harm state security, and after I studied the internee's arguments relating to the order.

The next day, al-'Athamneh met with his attorney, Tamar Pelleg-Sryck, of HaMoked, for the first time. That day, he was given the permanent internment order.

In a document submitted to the District Court in Beersheva in advance of the court hearing on al-'Athamneh's case, the State Attorney's Office contended that he was a member of the Democratic Front, contrary to what was previously alleged.

> Existing intelligence information in the respondent's matter indicates that he is a senior member of the Democratic Front in the Gaza Strip and is the head of the Democratic Front in Beit Hanun. The information indicates that he commanded a unit that fired rockets in the north of the Strip and is involved in the firing of rockets at Israel. Also, material for the firing of high-trajectory weapons at Israel was stored in his house over the course of the past year.[121]

The legal proceedings

On 15 January 2009, a hearing was held in the District Court in Beersheva, before the president of the court, Yehoshua Pilpel. At the hearing, counsel for the state repeated the contentions specified in the application. Judge Pilpel then directed al-'Athamneh and his attorney to leave the courtroom so that he could receive an explanation from a representative of the ISA. After he had studied the file on al-'Athamneh and received the ISA representative's explanation, the judge continued the hearing with all parties present. An interrogation of the ISA representative by al-'Athamneh's attorney revealed that he did not know al-'Athamneh received his salary from the Palestinian Authority and that he was a member of Fatah. The ISA agent continued to contend that al-'Athamneh was in fact a member of the Democratic Front.

The Democratic Front has not been declared a force that is carrying out hostilities against the State of Israel, under section 8 of the Law. Nevertheless, the judge approved the internment order, holding that there was no need to decide in the matter of the identity of the organization to which al-'Athamneh belonged because the Law states that an unlawful combatant is also a person who personally took part in hostilities against Israel, even if he is not a member of a force fighting against it. However, the judge ruled that he was convinced from the material submitted to him by the ISA that al-'Athamneh was active in the Democratic Front.

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121. Misc. Appl. 020071/09, *State of Israel v. Wael Majed 'Abdallah 'Athamneh,* Application for Judicial Review in accordance with section 5 of the Internment of Unlawful Combatants Law, 5762 – 2002, 12 January 2009, section 6.

It was only at the court hearing that al-'Athamneh heard the contention that he was active in the Democratic Front. Until then, he had been presented with the contention that he was a member of Hamas. Therefore, his appearance before the officer prior to the hearing had been futile: he had no opportunity to respond to the claims existing against him. Former Supreme Court justice Yitzhak Zamir wrote, in this context, that "the right to be heard is worthless if it is not preceded by a statement from the competent authority as to the nature of the matter under discussion."[122] The District Court judge ignored this issue and denied the respondent's counsel's request to enable al-'Athamneh to testify, contending that he had already been given the right to be heard.

On 16 February 2009, al-'Athamneh appealed to the Supreme Court. Justice Esther Hayut ordered the state to file with the court a detailed response to a document submitted by al-'Athamneh "that appears to be on behalf of the [Palestinian] Authority," which stated that he was on the list of persons receiving a salary as members of Palestinian General Security in the southern district.[123] In its response, given on 26 February, the state made only a general comment: "Alongside his military activity in the framework of the Democratic Front, the appellant also received for a certain period of time a salary from a governmental entity in the Palestinian Authority." The state's response indicates that the said document had not been checked, and that the state had relied on other information at its disposal. However, after reading the privileged material, *ex parte,* the justice decided, on 2 April, to deny the appeal.

In early August 2009, six months after the judge approved al-'Athamneh's internment under the Law, another hearing was held before the District Court, and the court approved continuation of his internment.[124]

122. Yitzhak Zamir, *Administrative Authority (*Nevo Publishing Co., 1996), 816.

123. Letter of 17 February 2009 from Major General Muhammad Yusef, Organization and Administration Headquarters of National Security of the Palestinian Authority, 17 February 2009.

124. Telephone conversation on 5 August 2009 between al-'Athamneh's attorney, Hisham Abu Shehadeh, and HaMoked.

Usama Zari'i

Name:	Usama Hajaj Musa Zari'i
Place of residence:	Deir el-Balah, Gaza Strip
Age:	33
Length of detention:	Since February 2009 (before this, Zari'i served a prison sentence)
Type of detention:	Internment pursuant to the Internment of Unlawful Combatants Law
Grounds for detention:	"Reasonable basis for believing… that the internee is an unlawful combatant within its meaning in the Law and that his release will harm state security"
Detention facility:	Ketziot Prison (inside Israel)

Usama Zari'i, 33, is married and has four children. He lives in Deir al-Balah, in the Gaza Strip. On 6 February 2008, Zari'i was arrested in Israel after entering the country via Egypt without a permit. He contends that he was looking for work. He was convicted of infiltration and sentenced to imprisonment. A year later, after he had completed his sentence, an internment order pursuant to the Internment of Unlawful Combatants Law was issued against him, and he has been held since then, without trial, in Israel.

The legal proceedings

On 1 February 2009, when Zari'i completed his prison sentence, Major-General (Res.) Yiftach Ron-Tal, who had been delegated for this purpose, issued an order interning Zari'i pursuant to the Internment of Unlawful Combatants Law. The grounds for the internment were standard and lacked any substantial details.

> This order was issued because I have a reasonable basis for believing, based on information brought before me, that the internee is an unlawful combatant within its meaning in the Law, and that his release will harm state security, and after I studied the internee's arguments relating to the order.

About a week and a half later, on 9 February 2009, in advance of the court hearing, the State Attorney's Office filed a slightly more detailed document with the District Court. The document states that "existing intelligence information" regarding Zari'i indicates that he "is an operative in the framework of the military wing of Hamas." In the document, the state emphasized that, "in accordance with section 8 of the Law," which establishes the presumption regarding hostilities, the Minister of Defense signed a certificate stating that Hamas "is a force that is carrying out hostilities against the State of Israel."

On 17 March, in continuation of the state's reliance on the presumption regarding hostilities, Zari'i's attorney, Hisham Abu Shehadeh of HaMoked, submitted a brief arguing that the presumption regarding hostilities is unconstitutional, in part because it switches the burden of proof to the internee. A similar argument was

raised on appeal regarding the presumption of dangerousness, but the state declared that it did not rely on the presumption in this case.[125]

On 8 March, a hearing took place in the District Court in Tel Aviv before Judge Zvi Gurfinkel. In his decision, given on 31 March, the judge approved Zari'i's internment. The judge rejected the arguments regarding the unconstitutionality of the presumptions, holding that despite the state's reliance on the presumption in the matter of hostilities, it could be held without relying on the said presumptions that Zari'i is a member of a hostile force whose actions harm state security and that his release would harm state security. This determination was based on the report presented before him, categorized as "extremely confidential," that was not shown to Zari'i or his counsel.

On 22 April, Zari'i appealed the decision to the Supreme Court, repeating his arguments relating to the constitutionality of the presumptions.[126] In her decision on the appeal, given on 28 April, Justice Miriam Naor held that she was convinced that Zari'i belongs to Hamas, which is classified as a force carrying out hostilities, and that Zari'i is an unlawful combatant. Also, Naor agreed with the District Court's holding that there was "much activity of the appellant in various terrorist attacks" and that it can be held positively, without relying on the presumptions, that Zari'i is a member of a force that carries out hostilities against the State of Israel and that his release will harm state security. Therefore, the appeal was denied.[127]

In an additional hearing that was held in early August before the District Court in Tel Aviv, Judge Dr. Oded Mudrik approved Zari'i's continued internment, following his study of privileged material.[128]

125. Misc. Appl. 9285/09, *State of Israel v. Usama Hajaj Musa Zari'i.*

126. ADA 3410/09, *A. v. State of Israel.*

127. See sections 8-10 of Justice Naor's decision.

128. Misc. Appl. 90242/09, *State of Israel v. Usama Hajaj Musa Zari'i*, 4 August 2009.

Conclusions

"It is not possible to hold a fair proceeding where there is material that the defense does not have the opportunity to try to use for its needs." Thus held Supreme Court Justice Elyakim Rubinstein regarding the intention of the prosecution to declare evidence privileged in the criminal trial of a resident of the Kiryat Arba settlement who was documented shooting at Palestinians, on cameras belonging to B'Tselem.[129]

These comments are equally relevant to the matter at hand. The administrative-detention hearings held in the military courts do not satisfy the requirements of due process. There may be cases in which real security considerations require that certain evidence be declared privileged. However, if security considerations are to be balanced with detainee's rights, an entire legal system that routinely imposes privilege on most of the evidence cannot be justified.

Detention without trial is the most extreme measure that an occupying state may use against residents of the occupied territory. It is solely intended for the most extreme cases, and only where the detainee poses a personal threat, and no measure causing lesser harm to the person is available to prevent that threat. Yet Israel makes extensive use of this measure, in breach of international humanitarian law. Israel holds hundreds of Palestinians in prolonged detention based on undisclosed suspicions, without informing them what these suspicions are, without giving them an opportunity to defend themselves, and without notifying them when they will be released.

The military-court judges play a decisive role in denying the right of detainees to defend themselves. The judges do not fulfill their duty to protect the detainees, who are unable to refute the allegations against them. Supreme Court justices have indeed established rules that appear to be intended to limit the use of administrative detention, but have failed to question the fact that the entire legal system relating to administrative detention is based on privileged evidence, accepting it as a basic assumption. The absence of effective judicial review facilitates the use of administrative detention as an easy substitute for a criminal proceeding when the prosecution prefers not to expose evidence.

The Internment of Unlawful Combatants Law exacerbates the problem, establishing a judicial-review mechanism that provides even less supervision than the mechanism for administrative detention. According to the Law, it can be presumed that every person whom the defense establishment classifies as an "unlawful combatant" indeed poses a danger to state security, switching the

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129. Crim. Misc. Appl. 2489/09, *Ze'ev Braude v. State of Israel,* Petition to Disclose Privileged Evidence, 7 June 2009. The decision is available at http://elyon1.court.gov.il/files/09/890/024/t03/09024890.t03.htm (visited on 9 June 2009).

burden of proof on this question to the person himself. The Law also enables internment of a person solely for being a member of an organization that the defense establishment has determined is carrying out hostilities against Israel.

Unlike administrative detention, which is carried out pursuant to the Administrative Detention Order, Israel has so far made only limited use of the Law, and has generally refrained from relying on the presumptions specified in it. However, the Law enables internment of many persons, grants the security authorities far-reaching power, and lays the groundwork for extensive infringement of human rights, to a greater extent than the infringements resulting from implementation of the Administrative Detention Order and the Emergency Powers (Detentions) Law.

Israel's sweeping use of detention without trial against Palestinians greatly differs from its handling of Israelis whom security officials believe to be dangerous. Only very few Israelis have been administratively detained over the years, and generally for shorter periods of time. In at least one case, the state was even ordered to compensate an Israeli who had been administratively detained.[130]

As with much of its activity in the West Bank and Gaza Strip, Israel gives "security needs" as the reason for its detention-without-trial policy. Here, too, it appears that Israel uses the claim to justify grave infringement of human rights, in breach of international humanitarian law.

HaMoked and B'Tselem call on the government of Israel to immediately cease using the Internment of Unlawful Combatants Law and to take action to repeal it.

Israel must release the administrative detainees or prosecute them, in accordance with the standards of due process specified in international law. So long as Israel continues to detain Palestinians in administrative detention, it must use this measure in accordance with the rules set out in international law.

130. See Efrat Forscher, "NIS 100,000 in compensation awarded to Noam Federman," *Ma'ariv-nrg,* 11 October 2005, available at www.nrg.co.il/online/1/ART/995/370.html (visited on 26 August 2009).

Response of the Ministry of Justice

State of Israel
Ministry of Justice
The Human Rights and Foreign Relations Department

Date: 19 Elul 5769
8 September 2009
Re: 3760

Ms. Yael Stein, Attorney
Director of Research
B'Tselem – The Israeli Information Center
for Human Rights in the Occupied Territories
P.O. Box 53132, 8 Hata'asiya Street (Fourth Floor)
Jerusalem 91531

Dear Madam,

Re: **Draft of Report on Administrative Detention**

Our comments regarding the above-referenced draft report are as follows:

Administrative detentions

1. First, it should be mentioned that the use of administrative detention is derived from security constraints and is carried out for preemptive purposes in the framework of the ongoing war against terrorism, in cases where it is impossible to otherwise hinder the security threat. The use of administrative detention comports with the provisions of international law mentioned in the draft report: both with respect to international human rights law, specifically the International Covenant on Civil and Political Rights, and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and with respect to international humanitarian law, specifically Article 78 of the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 1949 (hereafter: "the Fourth Geneva Convention").

2. Procedurally, the detainee's right to appeal (section 5) and the requirement of judicial review (sections 1(b) and 4(a)) are anchored in the Order Regarding Administrative Detention. This, while under Article 78 of the Fourth Geneva Convention judicial review is not specifically required. The maximum period of administrative detention under the Order is six months, and every extension is subject to judicial review; in

רח' השלושה 2, ת.ד. 9299 תל אביב 61092 טל' 6899801 פקס 6899792
P.O. Box 9299 Tel-Aviv 61092 Tel: 972-3-6899801 Fax: 972-3-6899792
E-Mail: international@justice.gov.il

practice, therefore, judicial review is held once every six months. All in accordance with the requirements of the said Article 78.

3. Substantively, while the accepted interpretation of Article 78 permits a person to be held in administrative detention in a wide variety of cases, including for reasons relating to the person's activity, knowledge, or traits – and even his/her age, in certain situations – Israel's practice in this context is much more restricted, where a person is held in administrative detention only when he poses an individual threat, contrary to what the draft report contends.

4. Therefore, in the course of judicial review, the court examines all the evidentiary material relating to the detainee, including the extent to which the material is up-to-date. In this context, the contention that the similar wording of court documents indicates a lack of exercise of judicial discretion is utterly rejected, as these are court documents that are intended to conform to the language of the relevant order; accordingly, their language is similar. Since administrative detention is an anticipative measure – contrary to criminal punishment, which refers to past occurrences – where the existing evidence do not indicate that the detainee poses a threat at the present time, he is released.

5. Accordingly, in practice, in the vast majority of cases, the duration of an administrative detention does not exceed two years (and in many instances, less than that; actually, there are currently only 36 administrative detainees who have been held in administrative detention for a (consecutive) period of more than two years). This length of time, which is shorter than the period of incarceration that, most likely, would have been imposed on the detainee had he been prosecuted in a regular criminal proceeding, proves that the decision to use the measure of administrative detention is based solely on the inability to reveal evidence. Only in exceptional cases is the detainee held for a longer period, and this, as stated, only when the evidentiary material supports it.

6. Furthermore, Israel takes many measures to reduce, to the extent possible, the use of administrative detention. Administrative detention is used as a measure of last resort when no other alternative exists to remove persons engaged in terrorism, where significant evidence indicates that the person in question poses a real and imminent security threat to the security of the area and the public. In seeking to ensure that all efforts are made to exhaust the criminal-proceeding framework, every detainee undergoes, shortly following his arrest, a criminal investigation either by the Israel

Police or by the Israel Security Agency (ISA), aimed at obtaining admissible evidence. The results of the criminal interrogation are forwarded to the military prosecution in the area to examine the possibility of filing an indictment. Only in cases in which the prosecution concludes that it is impossible to prosecute the detainee on criminal charges is an examination made to determine whether the administrative detention channel can be implemented.

7. The Military Advocate General's Office monitors all of the administrative detention procedures, and examines the need for administrative detention in light of the threat that the person poses and the evidentiary material that exists in the matter. In relevant cases, the matter is also brought to senior officials in the Ministry of Justice and in the State Attorney's Office for examination. All these actions precede the judicial review itself.

8. Moreover, in the framework of judicial review itself, and contrary to the contention made in the draft report, there is substantial review of the procedure, thus for example, in 2008, 2,277 orders were heard, of these, in 1,028 orders (45 percent) the detention period was reduced and some 154 orders (6.7 percent) were cancelled. In addition, of the 527 appeals that were accepted regarding administrative detention in 2008, 273 were appeals filed by the defense. Furthermore, in recent years, several fundamental decisions were made, among them establishing the possibility of holding a hearing before an expanded judicial panel on essential questions, as well as authorizing the military courts to approve orders in a limited manner while restricting the authority of the military commander to repeat the use of this means. In addition to the supervision in the framework of the military judicial system, there is additional supervision and review in the form of petitions to the High Court of Justice, which are frequently filed against decisions of the Military Court of Appeals.

9. Also, contrary to the information presented in the draft report, the judicial review must be carried out by a judge holding a rank of captain, at least.[1] In the past two years, a senior judge holding the rank of lieutenant colonel coordinates the judicial review in the court of first instance.

10. Regarding the presence of a representative of the ISA during court hearings, it should be noted that it is the practice of the military courts, at all levels, that in cases in which claims are raised by the defense concerning intelligence information, and the

answers provided by the prosecution are not deemed satisfactory by the Court, the Court summons an ISA representative to appear at the proceedings and provide clarification and answers as necessary.

11. As also noted in the draft report, the Supreme Court, in its rulings over the years, has emphasized the exceptionality of the means of administrative detention, and the need to use it only when the circumstances absolutely require so.[2] Needless to mention that the Military Advocate General's Office strictly complies with Supreme Court's rulings and the principles outlined therein, and that the possibility of transferring a detainee from administrative detention procedures to criminal procedures is constantly considered – even for a lesser offense than the one for which the person was initially detained. Indeed, this is accomplished in many cases, upon the finding of evidence that can be revealed in court for the purpose of the criminal prosecution.

12. The Supreme Court addressed the use of privileged evidence in administrative detention proceedings, stating:

> "[R]eliance on inadmissible administrative evidence and on privileged material for reasons of state security lies at the heart of administrative detention, since had there been sufficient admissible evidence that could have been shown to the detainee and brought before the court, in general the measure of holding a criminal trial should be chosen […] There is no doubt that a proceeding that is held ex parte for the sake of presenting privileged evidence to the court has many deficiencies. But the security position in which we find ourselves in view of the persistent hostilities against the security of the State of Israel requires the use of tools of this kind when making a detention order under the Internment of Unlawful Combatants Law, the Emergency Powers (Detentions) Law or the security legislation in areas under military control[…]"[3]

13. It should also be noted that the steady decline in the number of administrative detainees, a decline that is mentioned in the draft report as well, also testifies to the efforts made by law-enforcement authorities to minimize the use of administrative

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[1] Section 4(a) of the Order Regarding Administrative Detention (Temporary Provision) [Consolidated Version] (Judea and Samaria) (No. 1591), 5767 – 2007.

[2] HCJ 11006/04, *Kadri v. Commander of IDF Forces in Judea and Samaria*, Tak-El 2004 (4) 3109; Ad. D.A 7/94, *Ben Yosef v. The State of Israel*, Tak-El 94 (3) 1582; HCJ 554/81, *Beransa v. OC Central Command*, IsrSC 36 (4) 247; HCJ 3239/02, *Marab v. Commander of IDF Forces in Judea and Samaria*, IsrSC 57 (2) 349; HCJ 11026/05, *A. v. Commander of IDF Forces*, Tak-El 2005 (4) 3190.

[3] HCJ 6659/06, *A. and B. v. State of Israel*, par. 43.

detention, efforts that are, of course, contingent on the security situation in Judea and Samaria. Moreover, the small number of administrative detainees which currently constitutes 4.83 percent (364) of all the security related detainees, of which there are now 7,522, clearly indicates the limited use of administrative detention and the clear preference for criminal prosecutions in matters relating to terrorist activity.

14. Regarding the use of administrative detention in the case of minors, it should be noted that such occurrences are extremely unusual, and are taken only in extreme cases and under close supervision of the Military Advocate General's Office. Regarding the holding of minors in administrative detention, it must be noted that minors are held in a detention facility operated by the Israeli Prisons Service, and that separation of minors from adult detainees is required by the directives and is fully implemented - the draft report does not contend otherwise. Indeed, at detention facilities operated by the IDF (including facilities in which detainees are held prior to the hearing in their case), it is not always possible to ensure complete separation between adults and minors, but this lack of separation lasts for only an extremely short period of time.

Unlawful combatants

15. As is known, in recent years Israel has been engaged in an armed conflict with various terrorist organizations, which wage substantial warfare against Israel from within foreign territory, which is not under Israel's effective control. A clear example of this is the Hamas organization, which operates from within the territory of the Gaza Strip, which has been under its complete control since June 2007, and from which it constantly launches missiles and rockets at the southern part of Israel, and against which IDF forces operated during December-January (Operation "Cast Lead").

16. The campaign against these terrorist organizations constitute an armed conflict for all intents and purposes, in which the adversary routinely and flagrantly breaches international humanitarian law, by intentionally directing its attacks solely against civilian objects, with the declared intention of injuring mainly Israeli citizens and residents, and also by having their combatants operate in the midst of the civilian population, without distinguishing themselves from it, and making active use of the civilian population as a "human shield."

17. For these reasons alone, it is clear that terrorists who are apprehended by IDF forces in the framework of the hostilities **are not entitled to prisoner-of-war status**. However, this does not mean that Israel may not hold them as long as the hostilities

actions continue, for the purpose of preventing them from returning to the "cycle of hostilities." Although this authority is not explicitly enshrined in the conventions that comprise international humanitarian law, it derives directly from the right of a party to a conflict to use force against the combatants of the adversary to remove them from the "cycle of hostilities."

18. The Internment of Unlawful Combatants Law (hereafter: "the IUC Law") is intended to anchor this basic principle of international humanitarian law in Israeli domestic law, by providing a procedure for the holding of enemy combatants and stipulating their basic rights. Thus, contrary to claims made in the draft report with regard to the purpose and intent of the Law, the Supreme Court affirmed that: "The law was therefore not intended to allow detainees to be held as 'bargaining chips.' The purpose of the law is to remove from the cycle of hostilities someone who belongs to a terrorist organization or who takes part in hostilities against the State of Israel."

19. It should be emphasized that the IUC Law requires that judicial review be conducted periodically also with respect to persons held pursuant to the Law (although these requirements do not exist with respect to prisoners of war).

20. The contention raised in the draft report – whereby the state prefers using internment under the IUC Law to detention pursuant to the Administrative Detention Law, for the reason that the former provides greater freedom of action than the latter – is unfounded. First, as the Supreme Court recently held, each of the laws is intended for a different "population". Second, the statement that, in the case of internment under the IUC Law, "the judicial review is less frequent," is baseless. Regarding the caution and proportionality implemented in this procedure, one might note that the majority of those detained during Operation "Cast Lead" have been released, although their detention was approved by the court. The necessity in continued detention in constantly examined – and the IDF, in consultation with the ISA and the State Attorney's Office, found it appropriate to eventually cancel the internment orders. All but those of two – found to pose a significant risk.

21. The legality of the Law and its conformity to the relevant standards of international humanitarian law were confirmed by the Supreme Court (Cr. Ap. 6659/06, *A. and B. v. State of Israel*). In this case, the court discussed, *inter alia*, the argument that the Law creates a "third incarceration track," as claimed in the draft report. On this point, the Honorable President Beinisch held:

> "The appellants argued before us that the detention provisions provided in the law de facto create a third category of detention, which is neither criminal arrest nor administrative detention, and which is not recognized at all by Israeli law or international law. We cannot accept this argument.[…] It should be noted that the actual power provided in the law for the administrative detention of a 'civilian' who is an 'unlawful combatant' on account of the threat that he represents to the security of the state is not contrary to the provisions of international humanitarian law." [4]

22. The argument that the amendment recently made to the IUC Law "likens the internment powers enshrined in the Law to those in administrative detention orders" is absolutely mistaken, as all the procedural restrictions specified in the IUC Law will continue to apply also where a "large-scale combat action" is declared.

23. It should also be noted that, in the framework of the said amendment, the District Court is empowered to appoint, for a detainee who is not represented by counsel, an attorney from the Public Defender's Office, and to postpone the judicial review until the detainee and his attorney have time to meet and consult (section 6(c)). Simultaneously, proceedings under the IUC Law were added to the list of instances in which a person is entitled to representation by the Public Defender's Office, which are specified in section 18(a) of the *Public Defenders Office Law* 1995-5755.

24. It would not be superfluous to state that the said right, for legal representation at the expense of the adversary side to an armed conflict, does not exist in international humanitarian law – whether regarding prisoners of war or any other detainee – and is granted, as an expression of the profound commitment of Israel to due process and transparency, to the extent possible, in the matter of all detainees.

25. Finally, it should be mentioned that, following further examination made with the relevant officials in the IDF, the IDF Spokesperson's response of 4 August 2009 to your letter regarding the number of persons being held under the IUC Law did not list two persons: a Lebanese citizen, with respect to whom an IUC order was issued on 7 July 2003, and who was released on 29 January 2004, and a Canadian citizen, with respect to whom an IUC order was issued on 21 October 2002, and who was released on 29 January 2004.

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[4] Pars. 15-16.

26. Regarding specific cases referred to in the draft report:

    a. Mohammed Haraz – As to Haraz 's claim that "the ISA interrogators told me that I am wanted for 12 years and summons for interrogation was never delivered to me..", we wish to refer to the Military Court's ruling in A.D *Judea and Samaria* 3179/09: "It would not be superfluous to mention that there is no basis for the laches claim raised by the defense since as mentioned by the prosecutor, attempts to arrest the defendant were made but those were hindered by him and therefore a…claim can not be made."

    b. Wa'el al Atamna – Regarding the claim that the aforementioned was arrested due to membership in Hamas, we would mention, as noted by the State in Ad.D A. 1510/09, "Atamna was not told that he is a Hamas activist although it is possible that that was the tenor since most of the detainees at the time were Hamas activists". Regarding the claim that the prosecution argued that the aforementioned was a member of the Democratic Front and that the ISA representative did not know that Atamna was receiving a salary from the Palestinian Authority, we wish to mention that Atamna's claims were thoroughly examined by the Supreme Court in Ad.D A 1510/09 and were rejected. Therefore, Atamna's right to due process was upheld as was also held by the Honorable Judge Hayut in her ruling: "[..] It appears that the flaws in the internment procedure concerning the appellant do not justify the nullification of the order in this case, since those were fully restored at in the course of the judicial review and the appellant right to due process was upheld."

    c. Osama Haggag Musa Zare'e – Hearings were held before the District Court with regard to the aforementioned, whereas in the second judicial review procedure, the Honorable Judge Mudrik examined the privileged evidentiary material and unequivocally determined that current assessments by the security authorities are based on solid grounds and therefore there is no justification for his interference in the validity or duration of the internment order.

Sincerely yours,

Hila Tene-Gilad, Adv.
Acting Director (Human Rights and Liaison with International Organisations)

Researched and written by Ofir Feuerstein

Edited by Yael Stein, Michelle Bubis

Legal advice by Adv. Tamar Pelleg-Sryck, Adv. Hisham Abu-Shehadeh,
Adv. Sigi Ben-Ari

Data coordination by Noa Atlas, Soud Jammal, Ronen Shimoni

Fieldwork by ʻAtef Abu a-Rub, Musa Abu Hashhash, Salma a-Deb'i, ʻAbd al-Karim Sa'adi, Muhammad Sabah, Suha Zeid

Translated by Zvi Shulman

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בצלם

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B'TSELEM - The Israeli Information Center for Human Rights in the Occupied Territories

רחוב התעשיה 8 (קומה רביעית) ירושלים 93420
טלפון: 02-6735599, פקס: 02-6749111

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8 Hata'asiya St. (4th Floor) Talpiot, Jerusalem 93420
Tel. 02-6735599, Fax. 02-6749111

mail@btselem.org • www.btselem.org

HAMOKED
המוקד להגנת הפרט
Center for the Defence of the Individual
هموكيد ـ مركز الدفاع عن الفرد

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Founded by Dr. Lotte Salzberger - Registered Association
اسسته د. لوطة زلتسبرغر ـ مكتب الشكاوي ـ جمعية مسجلة

רחוב אבו עוביידה 4, ירושלים 97200
טל. 02-6283555, פקס. 02-6276317

4 Abu Obeidah St. Jerusalem 97200
Tel: 972-2-6283555, Fax: 972-2-6276317

شارع ابو عبيدة ٤، القدس ٩٧٢٠٠
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e-mail: mail@hamoked.org.il
www.hamoked.org.il