



Unlawful Combatants

The Violation of Gazan Detainees' Rights in Israeli Prisons

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This report aims to give the reader an understanding of the legal status of unlawful combatants within international law as well as Israeli and US law. It examines Israel's Incarceration of Unlawful Combatants Law, 5762-2002 (with amendments passed on 30 July 2008), as a way of abrogating the rights of Palestinian detainees in Israeli prisons. The report compares the policies of Israel towards unlawful combatants' detainment to those of the United States. Ultimately the report examines the international community's obligation to condemn the current policies, which directly violate international humanitarian law and international human rights law, in the way that the US policies have been criticized.



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Introduction

The Gaza Strip (Gaza) is part of the territory Israel occupied in June 1967 together with the West Bank (including East Jerusalem). Following Israel's implementation of the Unilateral Disengagement Plan in September 2005, Israel has retained effective control of Gaza's land crossings (including Rafah Terminal), air space, and territorial waters.

Since the beginning of the Second *Intifada* in September 2000, which followed the collapse of American-led negotiations between the Palestine Liberation Organization (PLO) and Israel, violence broke out throughout the Occupied Palestinian Territories (OPT), and Gaza in particular. The Israeli Occupation Forces (IOF) launched a large-scale campaign of systematic home demolitions and land razing. Additionally, the IOF bombarded most of the Palestinian police and security installations in Gaza. The most persistent feature of Israel's measures during the *Intifada* has been the policy of blockade, which has escalated since the end of the Second *Intifada* in November 2006. Israel implemented strict closure policies that limit any goods entering or exiting Gaza without the Israeli government's permission, and a complete restriction on all Palestinians from entering or leaving the Strip. The result of the strict restriction of movement is an almost total destruction of the economy, extremely high rate of dependence on international aid for subsistence and health, and a poverty rate exceeding 80% in the Gaza Strip.

As the Israeli siege and violence drags on, Palestinian resistance has grown more violent.¹ For several years resistant armed groups have been firing homemade rockets into areas of southern Israel close to the border with Gaza.² The IOF increased its incursions and targeted assassinations intended by Israeli officials to stop the launching of such rockets and suppress resistance. These types of violence persisted following the Israeli 'disengagement' from Gaza in September 2005.³

Following the victory of Hamas in the January 2006 legislative elections, Israel and the international community imposed financial and diplomatic sanctions against the PNA. The EU initiated a Temporary International Mechanism (TIM) so that humanitarian assistance could be channeled without communication with

¹ 4,575 Palestinians have been killed by IOF during the Second Intifada (924 children and 221 women). 32 out of 95 Palestinians killed by IOF during the first two months of the Second Intifada were children. This Intifada was initially less violent, taking the form of throwing stones at Israeli military barracks around the Gaza Strip; however, the level of force that was employed by the IOF led to more violent resistance.

² Palestinian armed groups have fired over ten thousand rockets since January 2001. These attacks have led to the death of 25 Israelis, with over 700 being wounded according to SderotMedia.com.

³ For legal analysis of the consequences of the Israeli disengagement of Gaza, see Al Mezan Center for Human Rights, 'Report on the Legal and Economic Consequences of the Unilateral Disengagement Plan', available online at www.mezan.org. See also 'LEGAL ASPECTS OF ISRAEL'S DISENGAGEMENT PLAN UNDER INTERNATIONAL HUMANITARIAN LAW'; Program on Humanitarian Policy and Conflict Research; Harvard University.



Hamas or Hamas controlled ministries. Israel froze Palestinian custom duty monies, which Israel collects from Palestinian trade through its ports, and toughened its closures and siege on the OPT. On 8 February 2007, Palestinian factions signed an agreement that created a National Unity Government in Mecca, Saudi Arabia. Nevertheless, Israel refused to recognize this government and the international community refused to support it. The blockade and violence continued throughout the OPT; with the IOF frequently launching incursions into Gaza, during which it detained hundreds of Palestinians.

On 27 December 2009 Israel launched an offensive on Gaza which lasted for 22 days, during which 1,410 Gazans (85% civilians) were killed and over 14,000 homes were destroyed or damaged. In addition, the IOF captured over 100 Gazans and took them to a detention facility within Israel, of which 14 are being incarcerated under Israel's Incarceration of Unlawful Combatants Law, 5762-200, amended on 30 July 2008. This law violates international legal standards in principle and even more so in practice.

The law and the violations it incurs share similarities to the US policy towards 'enemy combatants', as defined by the 2006 Military Commissions Act, and the justice system being implemented in Israel for these prisoners shares many similarities with that of Guantanamo Bay. The international community exerted severe pressure on the United States to change its treatment of unlawful combatants and to respect international legal standards. It has the obligation to exert the same amount of pressure on Israel and must unilaterally condemn these current policies, which directly violate international humanitarian law (IHL). Systematic breaches of relevant international rules concerning *habeas corpus*, incommunicado detention and/or torture represent grave breaches of peremptory rules of international law. If these violations go unpunished by the Israeli government, the international community then has an obligation under international law to hold those responsible accountable, as well as ensure that the violations do not continue.



Legal Background

Definition of unlawful combatants

Under IHL during an international armed conflict society is divided into three groups, the first two being clearly defined: combatants⁴, civilians⁵ and unlawful combatants⁶ (sometimes referred to as illegal combatants or unprivileged combatants/belligerents).

Combatants are allowed to partake in hostilities and cannot be prosecuted for lawful acts of war in the course of military operations. When captured, they are entitled to prisoner-of-war status (POW). The rules protecting and dictating the treatment of POWs are outlined in Geneva Convention (GC) III. The protection and treatment of civilians during international armed conflict are outlined in GC IV. The legal protections and criteria for the treatment of unlawful combatants are less clearly defined, and the term itself does not appear in the treaties of IHL. In addition, it is often hard to determine if a person belongs to the category of unlawful combatant, combatant or civilian. In such cases, GC III Article 5 of (PI Article 45) stipulates the procedure needed- a competent tribunal- to determine the detainee's status.

Legal Status of Unlawful Combatants in International Armed Conflict

Once categorized as unlawful combatants, detainees do not fall under the protections of GC I, II or III and therefore GC IV becomes relevant, though this point is disputed. The scope of those covered by GC IV are specified in Article 4 (1): "Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals." Qualifications and exceptions follow, including those not protected by the convention according to Article 4 (2): "nationals of a State which is not bound by the Convention; nationals of a neutral State who find themselves in the territory of a belligerent state, and nationals of a co-belligerent State, while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are."

GC IV Article 5 refers specifically to unlawful combatants, bringing them into the scope of the convention, while allowing for derogations to the protections of the convention only when granting them rights would significantly harm the security

⁴ The conditions for combatant/prisoner-of-war status are outlined in GC III Article 4 and PI Articles 43 and 44

⁵ A civilian is any person who does not belong to one of the categories of persons referred to in GC III Article 4A (1), (2), (3) and (6) and Protocol I (PI) Article 43

⁶ The generally accepted definition encompasses all persons directly taking part in hostilities without being entitled to do so. They cannot be classified as prisoners-of-war when captured by the enemy. This includes civilians taking part in hostilities as well as members of militias including organized resistance movements that are not integrated in the regular armed forces (as long as they do not comply with the conditions of Article 4A (2) of GC III).



of the occupying state.⁷ This protection of unlawful combatants under GC IV is also present in PI Article 45 (3).⁸ Article 45 highlights its applicability to unlawful combatants in occupied territories in particular; "In occupied territory, any such person, unless he is held as a spy, shall also be entitled, notwithstanding Article 5 of the Fourth Convention, to his rights of communication under that Convention."

Some legal scholars have questioned the applicability of GC IV to unlawful combatants, however during the drafting of GC III and IV, the issue of unlawful combatants was raised in drafting committees. Though there was a certain level of debate as to what rights would be afforded to them, the final conclusion can be interpreted as "unlawful combatants" meeting the nationality criteria of Article 4 of GC IV are protected by GC IV, this protection being subject to certain derogations, as mentioned above.⁹

The legal literature on the subject of unlawful combatants' legal status captures divergent opinions; while some authors stress that GC IV covers all unlawful combatants that fulfill the nationality criteria,¹⁰ others limit the scope of application of GC IV to unlawful combatants who operate in occupied territory.¹¹

⁷ GCIV Article 5 "Where in the territory of a Party to the conflict, the latter is satisfied that an individual protected person is definitely suspected of or engaged in activities hostile to the security of the State, such individual person shall not be entitled to claim such rights and privileges under the present Convention as would, if exercised in the favour of such individual person, be prejudicial to the security of such State."

"Where in occupied territory an individual protected person is detained as a spy or saboteur, or as a person under definite suspicion of activity hostile to the security of the Occupying Power, such person shall, in those cases where absolute military security so requires, be regarded as having forfeited rights of communication under the present Convention."

"In each case, such persons shall nevertheless be treated with humanity and, in case of trial, shall not be deprived of the rights of fair and regular trial prescribed by the present Convention. They shall also be granted the full rights and privileges of a protected person under the present Convention at the earliest date consistent with the security of the State or Occupying Power, as the case may be."

⁸ PI Article 45 (3) "Any person who has taken part in hostilities, who is not entitled to prisoner-of-war status and who does not benefit from more favourable treatment in accordance with the Fourth Convention shall have the right at all times to the protection of Article 75 of this Protocol. In occupied territory, any such person, unless he is held as a spy, shall also be entitled, notwithstanding Article 5 of the Fourth Convention, to his rights of communication under that Convention."

⁹ For more detail and commentary on the comments of the committees refer to Dörmann, Knut. "The legal situation of unlawful/unprivileged combatants." IRRIC, March 2003, Vol. 85, No 849. Travaux préparatoires, p.8

¹⁰ K. Ipsen, in D. Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflicts*, Oxford University Press, 1995, p. 301; H. McCoubrey, *International Humanitarian Law: Modern Developments in the Limitation of Warfare*, Dartmouth, Aldershot, 2nd ed., 1998, p. 137; E. David, *Principes de droit des conflits armés*, Bruylant, Brussels, 2nd ed., 1999, p. 397 *et seq.*; Bothe, Partsch and Solf, *op. cit* (note 17), p. 261 *et seq.*; Aldrich, *op. cit* (note 7), p. 893, footnote 12; G.I.A.D. Draper, "The status of combatants and the question of guerrilla warfare". *British Yearbook of International Law*, 1971, p. 197; Rosenblad, *op. cit* (note 14), p. 98; Kalshoven, *op. cit* (note 15), p. 71

¹¹ R.R. Baxter, "So-called 'unprivileged belligerency': Spies, guerrillas, and saboteurs". *British Yearbook of International Law*, 1951, p. 328 *et seq.*, 343 *et seq.*; R.R. Baxter, "The duties of



Few do not recognize the applicability of GC IV to unlawful combatants at all. The most informative case law dealing with GC IV's applicability to unlawful combatants comes from the ICTY in the *Delalic* case: "271. ...If an individual is not entitled to the protections of the Third Convention as a prisoner-of-war (or of the First or Second Conventions) he or she necessarily falls within the ambit of Convention IV, provided that its article 4 requirements are satisfied."¹²

Legal scholar and IHL expert J.S. Pictet posits that unlawful combatants should be protected by the convention:

"the application of the Fourth Geneva Convention does not depend upon the existence of a state of occupation within the meaning of the Article 42 referred to above. The relations between the civilian population of a territory and troops advancing into that territory, whether fighting or not, are governed by the present Convention. There is no intermediate period between what might be termed the invasion phase and the inauguration of a stable regime of occupation. Even a patrol which penetrates into enemy territory without any intention of staying there must respect the Conventions in its dealings with the civilians it meets. (...) The Convention is quite definite on this point: all persons who find themselves in the hands of a Party to the conflict or an Occupying Power of which they are not nationals are protected persons. No loophole is left."¹³

Substantive Protections for Unlawful Combatants

The broad wording of GC IV Article 4 ensures that the Convention protects "those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power."¹⁴ This would imply that GC IV Part III, Sections I, III and IV protections apply to unlawful combatants in occupied territory and Part III, Sections I, II and IV in enemy territory. However, the issue of derogations raised in Article 5 cannot be ignored. The rights and privileges defined in Part III, those relating to the treatment of protected persons, are allowed to be derogated according to Article 5 based on the basis of state security. There is a limit to the derogations allowed, and a minimum standard is set in the article; "such persons shall

combatants and the conduct of hostilities (Law of The Hague)", in Henry Dunant Institute and UNESCO (ed.), *International Dimensions of Humanitarian Law*, Martinus Nijhoff, The Hague, 1988, p. 105 *et seq.*

¹² ICTY, *The Prosecutor v. Delalic et al.*, IT-96-21-T, 16 November 1998, para. 271

¹³ J. Pictet (ed.), *Commentary: IV Geneva Convention relative to the Protection of Civilian Persons in Time of War*, ICRC, Geneva, 1958

¹⁴ ICTY case law defends this interpretation: Review of the Indictment, *Prosecutor v. Ivica Rajic*, IT-95-12-R61, para. 35-37 "The International Committee of the Red Cross's Commentary on Geneva Convention IV suggests that the protected person requirement should be interpreted to provide broad coverage. The Commentary states that the words 'at a given moment and in any manner whatsoever' were 'intended to ensure that all situations and all cases were covered'."



nevertheless be treated with humanity and, in case of trial, shall not be deprived of the rights of fair and regular trial prescribed by the present Convention."¹⁵ They are also to be afforded the full rights of the convention "at the earliest date consistent with the security of the State or Occupying Power." An outline of the components of the fair and regular trial that is referred to can be found in GC IV Article 71¹⁶ which stresses that a trial must occur as quickly as possible. Further details of the trial and punishment procedures are outlined in Articles 72-78. The obligation of humane treatment is expanded in Additional Protocol I Article 75¹⁷ and includes the prohibition of torture and ill treatment. These two key protections of humane treatment and a fair trial are non-derogable rights guaranteed under international law to unlawful combatants.

¹⁵ The right to humane treatment is enshrined in Articles 27 and 37; the fair trial rights are defined in Articles 71, 76, 57

¹⁶ GC IV Article 71 "...Accused persons who are prosecuted by the Occupying Power shall be promptly informed, in writing, in a language which they understand, of the particulars of the charges preferred against them, and shall be brought to trial as rapidly as possible. The Protecting Power shall be informed of all proceedings instituted by the Occupying Power against protected persons in respect of charges involving the death penalty or imprisonment for two years or more; it shall be enabled, at any time, to obtain information regarding the state of such proceedings. Furthermore, the Protecting Power shall be entitled, on request, to be furnished with all particulars of these and of any other proceedings instituted by the Occupying Power against protected persons."

¹⁷ PI Article 75 "1. In so far as they are affected by a situation referred to in Article 1 of this Protocol, persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Protocol shall be treated humanely in all circumstances and shall enjoy, as a minimum, the protection provided by this Article without any adverse distinction based upon race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria. Each Party shall respect the person, honour, convictions and religious practices of all such persons."



Israel

Background

Israel detained thousands of Palestinians without charges during the first Intifada, from 1987 to 1993. Most were held for a period of a few months, but some were held for years. After the end of the first Intifada, the numbers of administrative detainees dropped to around 200 in 1998. Since then the number has begun rising, particularly the number of Gazan detainees.

Initially, the British Mandatory Law provided the legal basis for the practice of administrative detention. In 1979, the Israeli government passed a new law to regulate the practice but continued to permit long-term detention, allowing the Minister of Defense to order detention for an unlimited number of six-month periods.

Legal Status of Unlawful Combatants under Israeli Law

In 2002 Israel passed the Incarceration of Unlawful Combatants Law (5762-2002), with several amendments that added further restrictions to prisoners being held under this law passed on 30 July 2008.¹⁸ This law was designed to legalize the indefinite detention of anyone suspected of "taking part in hostile activity against Israel, directly or indirectly." The law allows the chief of staff of the Israeli military to detain anyone if there is a basis to assume that he "takes part in hostile activity against Israel, directly or indirectly" or "belongs to a force engaged in hostile activity against the State of Israel."¹⁹ All detainees held under the law are automatically assumed to be a security threat and can be held without charge or trial as long as the hostilities against Israel continue. This law essentially licenses the military to hold individuals arbitrarily and indefinitely, on the basis of assumption rather than proven guilt.

The law includes regulations of the trial and conviction process: within 14 days from the time that the order was issued, the detainee must be brought before a district court, which shall determine whether the detainee is an unlawful combatant. Detainees who remain in detention must be brought every six

¹⁸ The amendments passed on 30 July 2008: the time that a prisoner can be prevented from seeing a lawyer was increased from 7 days to 21 days (Article 6(3)), it also expands the circle of army officers authorized to issue detention orders (Article 3). It orders the establishment of a military court of review and a military court of appeals to handle all procedures relating to 'unlawful combatants' in periods of large-scale military operations between Israel and organizations to which 'unlawful combatants' belong (Article 6 and Article 10d). It also stipulates that a ministerial committee will be responsible for proclaiming the occurrence of such military operations (Articles 10a and 10b), and the proclamation will be valid for an extendable period of three months (Article 10b). The stipulation that a defendant must be brought before a military judge within 14 days still remains, however, if the defendant is prevented from seeing a lawyer before the court date, once he has access to a lawyer he will be brought before the judge a second time.

¹⁹ Incarceration of Unlawful Combatants Law, 5762-2002



months before a district court judge. The judge, the Shin Bet,²⁰ and the military are empowered to cancel the order if they determine that the release of the detainee will not harm state security. Decisions by the district court judge to enforce the detention can be appealed to the Supreme Court.

The political motivations of the passing of this law are important to highlight. It was in direct response to the Israeli Supreme Court ruling against Israel holding 15 Lebanese civilians (originally 21 were being detained) in administrative detention. It was holding them as bargaining tools, and after the Court's decision in August 2000 the government was forced to release all but 2 of the detainees. A law was then drafted to enable the state to continue to hold the last 2, Mustafa Dirani and Sheikh 'Abd al-Karim 'Obeid by legitimizing the practice. The law was passed in 2002, after which it was challenged by two Gazans who were detained in Israel for providing alleged support to Hezbollah. The Supreme Court upheld it in June 2008.

Legality of Treatment of Gazan 'Unlawful Combatants' in Israel

When applying the international legal theory regarding unlawful combatants to the application of Israeli law it is important to note that Gaza is currently occupied land and Israel as the occupier is detaining Gazans in its prisons. Israel has argued that Gaza is not occupied, following its "disengagement" from Gaza in 2005, when Israel removed its settlements. In spite of this, the Israeli army has retained effective control over the Gaza Strip; Israel maintains sole control of Gaza's airspace and territorial waters and does not allow any movement of people or goods in or out of Gaza via air or sea or through the Israel Gaza borders without the permission of the Israeli government. Israel also continues to exercise a certain degree of control over Gaza's border with Egypt and Israeli officials have repeatedly stated that this border can only be reopened within the framework of a joint agreement with the Palestinian Authority and Egypt.²¹ In addition, Israel controls electricity, water and telecommunications in Gaza and has continued to conduct raids and assassinations since 2005 and recently a full-scale attack. As the occupying state, Israel is required to respect among other things, the principles of IHL as well as international customary law and human rights law, in particular when arresting and detaining Palestinians. It is also important to note that as of 2007 Israel's Security Cabinet under Olmert's government declared that Gaza is an enemy entity, thereby emphasizing its autonomy and invoking the status of international armed conflict.

Before examining the application of the law on the Gazan population, the legality of it in accordance with international law must be examined. In GC IV Article 5 the wording emphasizes the need for a high level of suspicion: "Where in the territory of a Party to the conflict, the latter is satisfied that an individual protected person is *definitely suspected* of or engaged in activities hostile to the security of the State..." The Israeli law on the other hand removes the obligation

²⁰ The Israeli national secret service, also known as the Shabak

²¹ OCHA's Movement and Access reports (<http://www.ochaopt.org>)



for such a strong level of conviction; "Where the Chief of General Staff has *reasonable cause* to believe that a person being held by the State authorities is an unlawful combatant and that his release will harm State security, he may issue an order under his hand, directing that such person be incarcerated at a place to be determined." In practice the level of suspicion required falls even lower than reasonable cause; the Israeli army practices a policy that strictly violates Additional Protocol I, which states that "in case of doubt whether a person is a civilian, that person shall be considered to be a civilian."²² A spokesperson for the Israeli army told the BBC: "Our definition is that anyone who is involved with terrorism within Hamas is a valid target. This ranges from the strictly military institutions and includes the political institutions that provide the logistical funding and human resources for the terrorist arm."²³ Even this claim is more restrictive than the actual policy - Israeli actions during the Offensive on Gaza like the attacks on police stations and hospitals showed that all institutions associated with Hamas were legitimate targets and associated individuals could be considered unlawful combatants.

In this way, the law grossly expands the definition of an unlawful combatant under international law. A nurse working in a Hamas-funded medical clinic is being treated as an unlawful combatant and can be detained in the same way as a militant engaging in violent attacks. By treating these people equally, the law is eliminating the distinction between unlawful combatants and civilians.

The process of trial and punishment outlined by the law also includes blatant abrogation of international law. During the proceedings the court is allowed to examine evidence without disclosing it to the detainee or the detainee's attorney if it is judged that the disclosure would harm state security or public safety. "5. (e)... the court may admit evidence, even in the absence of the prisoner or his legal representative, or not disclose such evidence to the aforesaid if, after having reviewed the evidence or heard the submissions, even in the absence of the prisoner or his legal representative, it is convinced that disclosure of the evidence to the prisoner or his legal representative is likely to harm State security or public security."²⁴ The state is also authorized to prevent the detainee from meeting an attorney for up to 21 days. These procedures violate the fair trial guaranteed by GC IV Article 5 that stipulates that the detainee must be brought to trial as rapidly as possible, receive due process, and be released after serving the sentence imposed.

The law was applied retroactively to people being held on the date of commencement of the law, including prisoners currently serving prison sentences. This means that once prisoners have finished their sentence, they can then be held indefinitely as an unlawful combatant. The retroactivity

²² PI Article 50(1)

²³ 2009 January 5 'BBC News'. "Who is a civilian? Gaza's 'Who is a civilian?' - her SharpHeat
> http://news.bbc.co.uk/2/hi/middle_east/7811386.stm

²⁴ Incarceration of Unlawful Combatants Law, 5762-2002



contravenes IHL and violates fundamental principles of international law; non-retroactivity is enshrined the Universal Declaration of Human Rights Article 11,²⁵ the ICCPR Article 15,²⁶ and the American Convention on Human Rights Pact of San Jose Article 9.²⁷

On a more fundamental level the law's presumption that the release of the unlawful combatant will endanger state security places the burden of proof on the detainees to demonstrate that they will not endanger Israel's security. This violates the fundamental legal principle that a person is innocent until proven guilty. In addition, this is a near impossible task for detainees when a large amount of the evidence against them is confidential.

International law allows for the administrative detention of unlawful combatants only when absolutely necessary for state security and no alternative exists. This law turns this type of administrative detention into the principal measure used. Because the law allows the detainee to be held as long as hostilities against Israel continue, Israel can hold an almost infinite number of people in administrative detention for an unlimited period of time, since this prolonged occupation that has lasted for almost 42 years shows little sign of ending in the near future.

The 'Unlawful Combatants' Law in Action

All of critiques raised above appear in the application of the law, especially in cases of Gazans who were detained during the Israeli Offensive. This was the first time that Israel applied this law to a group of detainees during a military operation²⁸ and therefore the last three months have given much insight into the implementation of the law. Of the hundreds²⁹ that the IOF arrested during the

²⁵ UDHR Article 11 "2. No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed."

²⁶ ICCPR Article 15 "1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby."

²⁷ Pact of San Jose Article 9 "No one shall be convicted of any act or omission that did not constitute a criminal offense, under the applicable law, at the time it was committed. A heavier penalty shall not be imposed than the one that was applicable at the time the criminal offense was committed. If subsequent to the commission of the offense the law provides for the imposition of a lighter punishment, the guilty person shall benefit therefrom."

²⁸ In the past other practices were used to detain Palestinian civilians such as administrative detentions that were based on 'secret evidence' and the length of which could be infinitely extended.

²⁹ Based on testimonies and affidavits taken, Al Mezan estimates that more than 500 prisoners were arrested in Northern Gaza during the Offensive.



Offensive, it took over 100 Gazans to in a facility 10 kms from the Israeli city of Beer el-Sabe (Beer Sheva) called the Yemen Airport. This was a military airport under the British Mandate that was refurbished for the purpose of becoming a prison for unlawful combatants. It was not finished by the time the Offensive ended and this was the excuse used by the Israeli government for denying prisoners' access to lawyers for over a week. During this time without legal representation all of the prisoners were interrogated multiple times. In addition, contrary to the stipulations of the law, the detainees were never informed of their right to legal representation.

40 prisoners³⁰ were detained for extended periods of time, 20 of which were interrogated for a month in Shikma Prison in Ashkelon, and of the 15 that were then convicted, two were convicted as unlawful combatants.³¹ The other 20 prisoners were taken to Ktzi'ot Detention Center in the Naqab and the twelve that were convicted were convicted as unlawful combatants.³²

Israel's emergency laws permit soldiers to serve as police during military operations; however they are only allowed to detain individuals for 24-48 hours. Soldiers detained most of the prisoners within their homes in Gaza for days to weeks during the Offensive. When they were taken to Israel this period was not included in their official detention time. Therefore, though the law stipulates that a court case must ensue within 14 days, the period of their detention was longer in reality. When Al Mezan's lawyers discussed the matter with Israeli army's legal advisors and the military prosecution, they were informally informed that this is a black hole in the law and there is no legal recourse to prevent such practices when they are carried out during a state of war.

The court proceedings for these prisoners have been conducting in the following way: within 14 days of the prisoners' detention in Yemen Prison, they are called to a hearing where there is one military judge present, along with the defendant's legal representation, the legal advisor of the Shin Bet, the Shin Bet agent responsible for this specific case, and an IOF agent. The lawyer of the defendant is given less than an hour with his client and is not given any access to the prosecution's material. Al Mezan's lawyer requested the client's file, which includes interrogation transcripts, etc. and was been refused access each time. These factors seriously impact the lawyer's ability to properly represent his/her client. Once the defendant's lawyer has made his plea, the detainee and lawyer are ordered to leave the courtroom. Then the Shin Bet legal advisor and the Shin Bet agent present the 'secret evidence' that has been collected. They then return and the defendant's lawyer is allowed to question the Shin Bet case-expert.³³

³⁰ Al Mezan represents 10 of the 40 prisoners.

³¹ After a month of interrogation, five prisoners were released, 15 were convicted two as unlawful combatants, and 13 for other crimes.

³² After two weeks of interrogation, 8 prisoners were released and 12 were convicted as unlawful combatants- six of which were later released.

³³ The defendant's lawyer is not allowed to question the IOF agent at any time during the proceedings, though the IOF is involved in giving evidence to the judge while the defendant and his lawyer are outside the courtroom.



More than 90% of Al Mezan's lawyers' questions were answered with the reply that the information is classified and therefore cannot be revealed; or that the matter had been clarified to the military judge during the confidential session. The judge issues the sentence within a period between one day and one week.

As was highlighted earlier, the law is being misapplied to classify innocent civilians as unlawful combatants by changing the GCIV's definition of those that qualify as unlawful combatants. Many cases highlight Israel's use of the law not on citizens that have supported Palestinian resistance groups, but that groups, such as Hamas, have helped through its social programs.

Hamid Al Attar, a 29 yrs old half blind teacher at the Al-Nour wa Amal primary school (Light and Hope) for the blind, was arrested on 4 January 2009. During the court proceedings, the prosecution's only piece of evidence for his detainment was that the school, which he worked as a teaching assistant at for 5 months, is government run and therefore his salary comes from Hamas-led Government. He was convicted as an unlawful combatant on March 5th and is currently being detained. In the court's decision, the judge stated that he was convinced that Hamid had been in contact with senior activists from Hamas, therefore he should be regarded as an unlawful combatant, however no evidence for this allegation was revealed.

Ammar Hamad was allegedly affiliated with PFLP,³⁴ until 1993. He took part in the party's nonmilitary and nonpolitical community programs. He was also a member of the PNA police force, and receives his salary from the Fatah-led government in Ramallah until now. Because of his neighbors' Hamas affiliations, he told them that he was receiving his salary from Hamas. This is the information that led to his conviction.

A Fatah party member, yet another detainee with no ties to Hamas, was convicted as an unlawful combatant on 5 March 2009. He had received training from the Al-Aqsa Martyrs' Brigades³⁵ but left it according to an agreement with the PNA three years ago and since then has not been involved in any actions to do with military operations, the brigade has also stopped functioning in Gaza. He was enlisted with the PNA security and got married. He also had a car accident that debilitated his potential ability to take part in military operations. He was convicted because the judge thought that he might think of joining another armed group at some point in the future.

The retroactivity of the law has been seen in cases of individuals that were arrested and after having carried out their full sentence, they not released and further detained under the unlawful combatant's law, this has happened to four prisoners so far.

³⁴ Democratic Front for the Liberation of Palestine, a Palestinian Marxist-Leninist secular political party. It is an opposition party to Hamas in Gaza.

³⁵ The military wing of the Fatah party.



Hamouda Abu Oun carried out a sentence of 5.5 years for being a member of the PLFP in several prisons, the last being Nafha Prison in the Negev. As his release date neared, he was told that he would not be released on time unless his family paid a fine of NIS 15000. Two days before his scheduled release his family paid the fine, and on 21 January 2009 they stood waiting for him at Erez Checkpoint for 8 hours. At 4pm they were informed that he had not been released because he was now being held under the unlawful combatant's law.

The Shin Bet can release convicted 'unlawful combatants' at any time. On Tuesday 26 March 2009 five alleged 'unlawful combatants' who had been captured during the Offensive were released, and three more were released on 26 March. They had been convicted on 5 March of being unlawful combatants and then were released without anyone having filed a petition to have their cases appealed. Three of those released, Sameer Hamouda Saleh Hamada, 40, Saleh Mohammed Saleh Hamada, 33 and Mohammed Anwar Hamouda Hamada are relatives and the family owns a gas station. None have any links with any armed groups and were so were released. However it is important to note that the court did convict all of them based on 'secret evidence' that they were in contact with Hamas activists, including active members of means of the military wing, and therefore were considered as people who took part in hostile activities against the state of Israel and/or affiliated with hostile forces.

These cases provide clear evidence of the misuse of the law to detain civilians, whether or not they engaged in hostilities against Israel. They also demonstrate the lack of a fair and justice trial system available to them; they represent a practice that violates GCIV and the protections it affords to all civilians, including those categorized as unlawful combatants.



The United States

Treatment of Unlawful Combatants under American Law

In October 2006, President Bush signed the Military Commissions Act, which defines an unlawful enemy combatant as: "a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al-Qaida, or associated forces); or a person who, before, on, or after the date of the enactment of the Military Commissions Act of 2006, has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense."³⁶

The term 'unlawful combatants' was first used in a Supreme Court decision in 1942 where it upheld the jurisdiction of a U.S. military tribunal over the trial of several German saboteurs in the United States: "Lawful combatants are subject to capture and detention as prisoners-of-war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful."³⁷

This decision was initially used in the War on Terror to justify to deny prisoners captured in the US and abroad their rights in detention centers outside the United States, like Guantanamo Bay. However, the legitimacy of using this to qualify such an abrogation of their rights has been questioned; the American Bar Association wrote in a report on the matter: "The *Quirin* case, however, does not stand for the proposition that detainees may be held incommunicado and denied access to counsel; the defendants in *Quirin* were able to seek review and they were represented by counsel."³⁸

One week after the 9/11 attacks, the US Congress passed a resolution³⁹ granting the President the right to use any force he determined necessary against those involved in the attacks. With this authority, President Bush issued an order allowing "individuals ... to be detained, and, when tried, to be tried for violations of the laws of war and other applicable laws by military tribunals."⁴⁰ The order does specify that the detainees are to be treated humanely, though there is no specification to the length of time that they can be detained. The result of this order was the capture and detention of thousands of people since 2001 without

³⁶ Military Commissions Act of 2006 No. 109-366, 120 Stat. 2600, 17 October 2006

³⁷ *Ex Parte Quirin*, 317 U. S. 1, 1942

³⁸ American Bar Association "Task Force on Treatment of Enemy Combatants". *Criminal Justice Section, Section of Individual Rights and Responsibilities, Report to the House of Delegates*, 2002

³⁹ Authorization for Use of Military Force Public Law 107-40 (S. J. RES. 23), 18 September 2001

⁴⁰ Citizens in the War -and Trail of Certain Non -Treatment -Detention -Presidential Military Order 2001 November 13 -The White House -terrorismAgainst T



affording them the rights of POWs. Many of those detainees were sent to Guantanamo Bay, a location chosen based on a 1950 Supreme Court ruling that US courts had no jurisdiction over enemy aliens held outside the USA.⁴¹ The Supreme Court overturned this ruling in 2004, when it ruled that United States has complete jurisdiction over the area and therefore the federal courts have the authority to decide whether foreign nationals held in Guantanamo Bay were rightfully imprisoned.⁴²

In spite of this, the Military Commissions Act of 2006 allowed enemy combatants and unlawful combatants to be tried under military commissions. In June 2008 however, the Supreme Court ruled that Guantanamo Bay captives were entitled to access the US justice system, and that the military commissions as defined in the Military Commissions Act of 2006 did not meet the court requirements guaranteed by the United States constitution.⁴³

Criticism of the Treatment of Unlawful Combatants in the United States

In several decisions US Courts have criticized the practices regarding the detention of unlawful combatants, most notably *Hamdi v. Rumsfeld* in 2004: the Supreme Court recognized the power of the government to detain unlawful combatants, but ruled that detainees must have the ability to challenge their detention before an impartial judge.⁴⁴ It also reaffirmed that the US is bound by the Geneva Conventions and that Common Article 3 of the Geneva Convention, regarding the treatment of detainees, applies to all prisoners in the War on Terror.

As a result of the *Hamdi* and *Rasul* rulings the US government established Combatant Status Review Tribunals to determine the status of detainees, an obligation under GC III Article 5. These tribunals have received considerable criticism and many legal scholars argue that these do not constitute competent tribunals; they conduct rudimentary proceedings, afford detainees few basic protections, many detainees lacked counsel and are only informed of general charges against them, and detainees had no right to present witnesses or to cross-examine government witnesses.

⁴¹ 1950 1763 S.U 339 *Eisentrager v. Johnson*

⁴² *Rasul v. Bush*, 542 U.S. 466, 2004

⁴³ *Boumediene v. Bush*, 553 U.S. ___, 2008

⁴⁴ *Hamdi v. Rumsfeld*, 542 U.S. 507, 2004



Similarities between Israeli and American Practices

There is considerable overlap between the treatment of unlawful combatants in Israel and the United States, the main one being the political motivation to pass these laws; the laws in both countries were drafted so as to legitimize illegal procedures as opposed to defending the legal system within the nation.

The lack of a fair trial process for the detainees is another area of overlap, with practices like a lack of knowledge of the reasons for detainment, 'secret evidence' and the lack of access to legitimate legal counsel.

At a more fundamental level, for both governments the concept of "unlawful combatants," encodes the idea that in their alleged wars on terror, IHL does not apply to the treatment of terrorists, while asserting political discretion to determine who falls into this category. The governments have tried through national legislation to create the category of unlawful combatants who have no legal rights.



Conclusion

Prior to the 08/09 Offensive on Gaza, more than 900 Palestinians from the Gaza Strip were being detained in Israeli prisons, serving sentences for "security" offences, and they have been deprived of family visits since May 2007.⁴⁵ As a result of the recent war, 14 Gazans were detained in Israeli prisons under the Incarceration of Unlawful Combatants Law, with an additional four being held under this law after having completed their jail sentences.

This law ostensibly seeks to establish a general principle for holding unlawful combatants. However in reality the law is intended to enable Israel to continue to hold individuals in administrative detention who pose no real security threat, by getting around the Supreme Court's ruling in 2000. This mirrors the process of the Bush administration in the United States to pass laws that stripped unlawful combatants their rights that circumvent prohibitions imposed by the US Supreme Court.

Under international law the international community holds the secondary responsibility, when the territorial state has not been willing or able to offer human rights protection, to prevent the continuation of human rights violations in any territory. This is articulated most clearly in the language of the International Covenant on Economic, Social and Cultural Rights, whereby each state party to the Covenant has legally obligated itself to protect the rights of "everyone" by means of "international assistance and cooperation. The international therefore has the responsibility not only to hold human rights violators accountable, but also ensure that the violations do not continue.

The international community- from international organizations, to foreign governments, to legal scholars- has condemned the practices of the United States government vehemently. The pressure from both the international and the local population led to much of the 2008 US presidential campaign being focused on both candidates promising to improve the US human rights record as well as to close Guantanamo Bay. On 13 March 2009 President Obama announced that the term 'enemy combatant' would be dropped and that only people who provided substantial support to Al-Qaeda and the Taliban are detainable. This positive step in US policy demonstrates that international pressure has the ability to urge countries to respect international human rights principles. This same pressure must be mounted by the international community against Israel. The situation in Israel is considerably worse than it was in the United States because the Israeli Supreme Court has demonstrated time and time again that it will not strike down

⁴⁵ "Israel: The conflict in Gaza: A briefing on applicable law, investigations and accountability." *Amnesty International*, 19 January 2009
<<http://www.amnestyusa.org/document.php?id=ENGMDE150072009&lang=e>>



racist laws that violate the human rights of the Palestinian community.⁴⁶ Therefore they cannot be relied on to strike down the ongoing practices, as was the case in the US, and have already upheld the Unlawful Combatant's law.

The primary objective of IHL is to protect the victims of war and occupation. Israel has consistently denied residents of the West Bank and Gaza their rights under the Fourth Geneva Convention. This law distorts the interpretation of the convention in order to justify the continued violation of human rights. The international community has the obligation to express its rejection of such practices.

⁴⁶ Refer to the Citizenship and Entry in Israel Law (2003) as an example of the Supreme Court's unwillingness to strike down a law, even though it violates the SC's own decision two years earlier on the right to citizenship.