C2. B'TSELEM AND HAMOKED, THE INTERNMENT OF UNLAWFUL COMBATANTS, JERUSALEM, OCTOBER 2009 (EXCERPTS).

This 80-page report by B'Tselem and HaMoked, two Israeli human rights

NGOs, provides a detailed overview, accompanied by illustrative cases, of administrative detention of Palestinians in Israel under three different laws: the Order Regarding Administrative Detention (which applies in the West Bank); the Emergency Powers (Detention) Law (which applies in Israel); and the Internment of Unlawful Combatants Law. While the first two laws have been used for years, the third law, the focus of the following excerpts, came into force in 2002 and has been used primarily to detain Gaza residents. The full report, titled "Without Trial: Administrative Detention of Palestinians by Israel and the Internment of Unlawful Combatants," can be found online at www.btselem.org. Footnotes have been omitted for space considerations.

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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. Among the detainees held were Mustafa Dirani and Shaykh '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.

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:

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

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.

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. 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.

The Law specifies two presumptions [that] 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.

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.

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.

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 to 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. 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.

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.

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. In August 2009, Israel released four internees. On 30 September, Israel was holding nine internees under the Law.

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.

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 question was theoretical. If the state relies on these presumptions in the future, the constitutional question may be raised before the Court.

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. . . .

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.

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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. . . . 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 blatantly contradict the provisions of the Fourth Geneva Convention and enable the internment of a person while disregarding the requirement that he pose a personal danger. The presumption of individual threat posed by the detainee and the presumption of the continuation of hostilities 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.

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. . . .