

**PREVENTIVE DETENTION FOR NATIONAL SECURITY PURPOSES –  
THE ISRAELI EXPERIENCE**

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INTRODUCTION

The beginning of the twenty-first century has seen a marked increase in democratic states confronting terrorism at home, on their borders and overseas. In doing so, they have employed different security measures, one of them being preventive detention – that is, detention of a person by the executive authorities as a means of preventing that person from carrying out future acts which are expected to endanger the security of the detaining state and its civilians (rather as a part of, or following, criminal proceedings). This form of detention has found its use both within the context of hostilities, as a key tool for preventing persons from continuing to partake in hostilities; and also within a domestic security context, where it is considered an exceptional tool of last resort used to prevent a person from committing future acts that may threaten national security.

While preventive detention has been considered a highly effective tool in negating concrete security threats, it may lie in tension with generally accepted legal principles on the domestic and international level – the most significant being the duty to refrain from unjustified detention. Much of the extensive debate surrounding the issue of preventive detention in recent years has focused on this very tension – that is, how to effectively address national security interests while continuously minimizing the risk of detention that is unjustified or no longer needed. States that have employed preventive detention have done so in various ways, in an effort to address this tension.

This article presents the Israeli legal experience concerning preventive detention and discusses it in the broader context of international law. Israel has acquired this experience while contending with a wide range of national security threats over several decades, both domestic and international. In particular, this article will present Israel's three different frameworks of preventive detention, each individually designed so as to contend with the specific challenges stemming from the different contexts in which such a measure may be required, and each of which corresponds with a different legal regime under international law.

The first framework, the Emergency Authorities (Detention) Law 1979, was designed primarily for use as a domestic security measure. Typically applied to

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individuals located within Israel's territory who pose a severe threat to state security, it is rarely used. The second framework, the Incarceration of Unlawful Combatants Law 2002, regulates the internment of foreign nationals in the context of a trans-boundary armed conflict involving a non-state actor (NSA). Since the law's enactment, Israeli authorities have invoked it mainly during military operations that included a ground maneuver of Israeli security forces into enemy territory. The third framework, the Military Order Concerning Security Provisions (Consolidated Version) (no. 1651) 2009, is applicable under the military governance existing in the West Bank. The use of this framework fluctuates depending on the extant security situation in the West Bank, and, overall, authorities have employed it considerably more often than the other two frameworks.<sup>1</sup>

This article presents an overview of these three frameworks, as well as an analysis of relevant jurisprudence. It focuses on two fundamental aspects – the authority to detain (and therein, the entities possessing this authority, and the grounds under which it may be exercised) and the main procedural safeguards for preventing the misuse of this authority (most importantly, judicial review and practices intended for reconciling between the detainee's interest in having the information on which the detention is based disclosed to him together with the imperatives of secrecy).<sup>2</sup> The article considers each framework against the relevant international law, and in doing so provides broader insights into how Israeli domestic law has sought to manage the interplay with international law.

The article concludes with a comparative analysis of the three frameworks. This analysis discusses how the balancing point between the need to contend with threats to national security, on the one hand, and the obligation to avoid unjustified detention, on the other hand, is reflected somewhat differently in the context of each framework, while concurrently maintaining similar fundamental procedural safeguards.<sup>3</sup>

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<sup>1</sup> As regards terminology, in this article, preventive detention enacted by force of the first framework (the Emergency Authorities (Detention) Law 1979) or the third framework (the Military Order Concerning Security Provisions (Consolidated Version) (no. 1651) 2009) will be termed “administrative detention.” Preventive detention enacted by force of the second framework (the Incarceration of Unlawful Combatants Law 2002) will be termed “internment” (a term that essentially carries identical meaning to the term “administrative detention,” but is traditionally employed in an armed conflict context). For the purposes of this article, where the term “detention” is used on its own, it is done so in a colloquial fashion, as a generic term referring to deprivation of liberty. Therein, it will be occasionally used to describe situations whereby a person is deprived of his liberty *prior* to a decision by the executive authorities to subject him to preventive detention. Preventive detention in the West Bank, regulated under the third framework, is also in fact conducted in the context of an armed conflict, and could therefore be termed “internment.” Nevertheless, the authors preferred to use the term “administrative detention” in this context, as it has turned out to be the more common expression while discussing preventive detention in the West Bank. For a discussion with regard to terminology in the detentions context, see CLAUDE PILLOUD ET AL., COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 875 (Yves Sandoz et al. eds., 1987).

<sup>2</sup> A full overview of these safeguards will not be exhausted in this article. Likewise, other aspects of preventive detention, such as conditions in detention, are outside the scope of this article, as is a discussion of the recourse to preventive detention in principle (as opposed to how this tool is employed).

<sup>3</sup> A fourth legal framework of preventive detention extant in Israel (and worldwide) is the detention of Prisoners of War (POWs) in the context of international armed conflicts. This framework will not be discussed in this article.

Israel's experience with legal issues concerning preventive detention may serve to inform other states contending with similar challenges, as well as international initiatives aspiring to develop relevant international law.

## I. THE EMERGENCY AUTHORITIES (DETENTION) LAW (1979)

### A. Background and General Principles

Immediately following Israel's declaration of statehood in 1948, the nascent state was embroiled in ongoing internal violence between its Jewish and Arab inhabitants and facing an imminent invasion by the regular armies of six neighboring states. In these circumstances, the Provisional Israeli Government adopted the laws and regulations in force at the time of declaration of statehood as the provisional legislation of the new state. This meant that the existing law in the territory known in those years as Mandatory Palestine (comprising the territories of the modern State of Israel, the West Bank and the Gaza Strip) became the new state's domestic legislation, until so modified or annulled by the authorities.<sup>4</sup>

The inherited law included the Defence (Emergency) Regulations 1945 (hereinafter Defence Regulations),<sup>5</sup> promulgated by the British authorities that administered Mandatory Palestine. The purpose of the Defence Regulations was to centralize the powers and jurisdictions of the British Mandatory authority regarding public safety and order. As such, the Defence Regulations made reference to a range of issues, including the powers provided to military and police officials to ensure public order, regulations regarding security offenses and the judicial authorities charged with enforcing the regulations.<sup>6</sup> The Defence Regulations were employed primarily in response to the unrest and violence present in the territory at the time, including the underground activity of the Jewish resistance organizations that operated in the area.<sup>7</sup>

A section of the Defence Regulations allowed military commanders appointed by the Minister of Defense<sup>8</sup> to order the detention of any person on a wide range of security grounds,<sup>9</sup> without strict supervision by other authorities or obligatory judicial review processes. This power, incorporated into Israeli domestic legislation as part of

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<sup>4</sup> Law and Administration Ordinance, 5708-1948, § 11, 1 LSI 7 (5708-1948) (Isr). Israeli legislation and related sources (Bills, Explanatory Memoranda, and the like), as well as court cases cited in this article, are available in Hebrew only, unless noted otherwise. All other sources, including academic literature and articles, are in English, unless noted otherwise.

<sup>5</sup> Defence (Emergency) Regulations, 1945, Palestine Gazette (no. 1442) (Supp. No. 2) 1058.

<sup>6</sup> See Explanatory Memorandum to Draft Bill The Defence (Emergency) Regulations (Repeal), 2013 HH No. 782 p. 992 (Isr.).

<sup>7</sup> See Explanatory Memorandum to Draft Bill Emergency Authorities (Detention and Other Provisions), 1978 HH No. 1360 p. 294 (Isr.).

<sup>8</sup> Originally, the Defence Regulations granted these authorities to the "High Commissioner," who was the executive appointed by the British central government to be in charge of the British Mandate in Mandatory Palestine. After Israel was established, Israeli legislation transferred the authorities of the High Commissioner under the Defence Regulations to the Minister of Defense.

<sup>9</sup> Specifically, orders under this section could be made where the High Commissioner or Military Commander was of the opinion that "it is necessary or expedient for securing the public safety, the defense of [Israel], the maintenance of public order or the suppression of mutiny, rebellion or riot." See Defence Regulations, § 108. In the original Defence Regulations the word "Palestine" appears, which should be translated into "Israel" in accordance with the Law and Administration Ordinance. Law and Administration Ordinance, 5708-1948, § 11.

the original Defence Regulations package, was heavily criticized even prior to the establishment of the state.<sup>10</sup> These criticisms also found their way into debates and resolutions on administrative detention in the Knesset (the Israeli Parliament) amidst efforts to draft alternative legislation.<sup>11</sup> Whilst it was ultimately decided to refrain from amending these powers in light of the precarious and complex security environment that accompanied the state's first years,<sup>12</sup> their practical application was constrained by binding policy instructions issued by both the Attorney General and the Israel Defense Forces (IDF), and instances of detention under this law were limited.<sup>13</sup>

In 1979, however, the efforts to revise this section of the Defence Regulations bore fruit, and a new statute regulating administrative detention – the Emergency Authorities (Detention) Law 1979 (hereinafter ADL)<sup>14</sup> – replaced the previous legislation, fundamentally reforming the framework for the employment of the powers granted under the Defence Regulations. While the new legislation ensured that the state retained recourse to the core authority to detain individuals for preventive reasons of national security, the legislation transferred the responsibility for utilizing the power from the military to the civilian authorities, and provided for a more comprehensive and robust system of safeguards and limitations on the employment of this power (some of which were drawn from the former policy instructions regarding the implementation of the Defence Regulations). In the words of the Supreme Court of Israel (the highest judicial instance in Israel) in its first decision concerning the ADL, the law reflects an effort to strike a proper balance between, on one hand, the state's need for preventive security measures against risks posed by underground movements which cannot be dealt with through ordinary legal proceedings, and on the other hand, ensuring by way of judicial review that the authorities do not misuse or needlessly employ their powers.<sup>15</sup>

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<sup>10</sup> Harold Rudolph, *The Judicial Review of Administrative Detention Orders in Israel*, 14 ISR. Y.B. HUM. RTS. 148, 149-50 (1984).

<sup>11</sup> Baruch Bracha, *Restriction of Personal Freedom Without Due Process of Law According to the Defence (Emergency) Regulations, 1945*, 8 ISR. Y.B. HUM. RTS. 296, 318-19 (1978) (citing 9 Divrei Haknesset 1828 (1951)).

<sup>12</sup> This sentiment was expressed also by Israel's Supreme Court. *See* HCJ 95/49 Al-Khouri v. Chief of General Staff 4(1) PD 34, 47 (1950) (Isr.).

<sup>13</sup> *See* Explanatory Memorandum to Draft Bill Emergency Authorities, *supra* note 7. Instructions issued by the Attorney General regarding section 111 of the Defence Regulations required that the person issuing the detention order “must be convinced that it would be impossible to prevent dangerous activity on the part of the detainee without having recourse to the given action”. Bracha, *supra* note 11, at 308 (citing Instructions of the Attorney General, Instruction 21.927, para. 10B). As required by the military internal instructions, detention orders could only be issued by the Chief of General Staff, the three Regional Commanders (Northern, Central and Southern Command) and the Navy Commander (all at the rank of Major-General, which is the second highest rank in the Israeli military), and in addition, orders that were issued for periods exceeding one month required approval of the Chief of General Staff. Orders could not exceed six months at a time. Prior to the issuance of any order, the military order required the case be reviewed by a specially appointed advisory committee headed by a senior representative of the Military Advocate General's Corps, whose recommendations were reviewed by the Ministry of Defense and only then provided to the Chief of General Staff for his decision. In accordance with the Defence Regulations, in the event the order was issued, any objections of the detainee were provided to another advisory committee (which was, in practice, presided over by a judge of the Supreme Court). While it appears that these internal instructions were never published, they have been referred to by past members of the Military Advocate General's Corps as well as other researchers who had access to the relevant documents. Zvi Hadar, *Administrative Detentions Employed by Israel*, ISR. Y.B. HUM. RTS. 283, 284-85 (1971); Alan Dershowitz, *Preventive Detention of Citizens During a National Emergency – A Comparison Between Israel and the United States*, 1 ISR. Y.B. HUM. RTS. 295, 313 (1971); Bracha, *supra* note 11, at 306-08.

<sup>14</sup> Emergency Authorities (Detention) Law, 5739-1979, 33 LSI 89, (1978-79) (Isr.) [hereinafter ADL].

<sup>15</sup> AdminA 1/80 Kahana v. Minister of Defense 35(2) PD 253, 257 (1980) (Isr.). *See also* Criminal Further Hearing (CFH) 7048/97 John Does v. Minister of Defense 54(1) PD 721, 740 (2000) (Isr.) [hereinafter

In terms of international law, the predominant legal regime which would apply to a typical scenario of detention under the ADL – detention of an Israeli national within a domestic security context – would be that of International Human Rights Law (IHRL).<sup>16</sup> Applicable IHRL does not prohibit administrative detention on security grounds, but rather requires that where administrative detention is used, certain procedures are respected.<sup>17</sup> The primary legal instrument applicable in Israel's case is the International Covenant on Civil and Political Rights (ICCPR), to which Israel is a party, and particularly Article 9 which deals with detention.<sup>18</sup> According to Article 9, detention cannot be imposed arbitrarily and must be based on grounds and procedures established by law; information concerning the reasons for detention must be given; and court control of detention must be available.<sup>19</sup> The manner in which these requirements find expression in the ADL and the relevant case law will be discussed below.

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Lebanese Detainees Case], *translation available at*  
[http://elyon1.court.gov.il/files\\_eng/97/480/070/a09/97070480.a09.pdf](http://elyon1.court.gov.il/files_eng/97/480/070/a09/97070480.a09.pdf) (holding that the purpose of the ADL is “[o]n the one hand, safeguarding national security; on the other hand, safeguarding the dignity and liberty of every person.”); *Crim. A 6659/06 Anonymous v. State of Israel*, 62(4) PD 329, para. 35 (2008) (Isr.) [hereinafter *Iyyad*] *translation available at*  
[http://elyon1.court.gov.il/files\\_eng/06/590/066/n04/06066590.n04.htm](http://elyon1.court.gov.il/files_eng/06/590/066/n04/06066590.n04.htm) (“[The ADL] prescribes the power of administrative detention that is usually invoked with regard to isolated individuals who threaten state security and whose detention is intended to last for relatively short periods of time, apart from exceptional cases.”).

<sup>16</sup> Notwithstanding that non-Israeli nationals may also be detained under the ADL, and that the law may be applied in scenarios which would require the application of the distinct legal regime of the Law of Armed Conflict (LOAC). As will be presented below, prior to the promulgation of the Incarceration of Unlawful Combatants Law in 2002, the ADL was utilized to detain foreign nationals in the context of cross-boundary hostilities (and both the Supreme Court and the state did not rule out the possibility that such usage would not be repeated in the future, where for any particular reason the law enacted in 2002 is deemed unsuitable). In such an event, questions may arise regarding the applicability and interplay between the IHRL legal regime and the distinct legal regime of LOAC – questions which are outside the scope of this article. However, whether the ADL meets other international law standards is not of practical significance, as, in the authors' view, the ADL meets IHRL standards, which are generally more stringent than those of LOAC. Further, internment of foreign nationals in the context of armed conflict today is regularly performed under the Incarceration of Unlawful Combatants Law 2002, which means that this issue is less likely to arise with regard to the ADL.

<sup>17</sup> LOUISE DOSWALD-BECK, HUMAN RIGHTS IN TIMES OF CONFLICT AND TERRORISM 263 (2011); John Bellinger III and Vijay Padmanabhan, *Detention Operations in Contemporary Conflicts: Four Challenges for the Geneva Conventions and Other Existing Law*, 105(2) AM. J. INT'L L. 201, 211-12 (2011).

<sup>18</sup> G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights, art. 9 (Mar. 23, 1976) [hereinafter ICCPR]. The use of preventive detention under the ICCPR is not conditioned by a process of derogation, which the ICCPR enables in times of public emergency in regard to certain rights. *See* DOSWALD-BECK, *supra* note 17, at 264. The UN Human Rights Committee, which has recently taken a relatively strict general approach towards administrative detention in its interpretation of Article 9 of the ICCPR, considers that such detention presents “severe risks of arbitrary deprivation of liberty,” but nevertheless does not find it requires derogation. *See* U.N. Human Rights Comm., General Comment No. 35 – Article 9, § 13, U.N. Doc. CCPR/C/GC/35 (Oct. 30, 2014) [hereinafter General Comment 35]. Unlike the ICCPR and other human rights conventions, the European Convention of Human Rights (ECHR), to which Israel is not a party, does require derogation in order to enable administrative detention.

<sup>19</sup> ICCPR, *supra* note 18, arts. 9(1), 9(2) and 9(4). The duty to inform the detainee of the reasons for detention under Article 9(2) of the ICCPR is to be granted to whoever is “arrested” (as distinct from “arrested or detained” – a wider scope appearing in all other paragraphs of Article 9). As the term “arrest” is usually construed to refer to criminal matters, and is narrower than the generic term “detention,” it may be argued that the ICCPR does not grant this right to administrative detainees (i.e. those detained not in the context of criminal proceedings). Another possible reasoning for such an argument, beyond the analysis of the Convention's language, is that the accepted and regular use of classified evidentiary material in administrative detention proceedings (an issue discussed more broadly below) is not applicable in the context of criminal proceedings, where evidence cannot be submitted confidentially. This argument has been challenged on the

## B. Administrative Detention Order Issuance Procedure

In comparison to the Defence Regulations, one of the most fundamental modifications in the ADL is that the authority to issue a detention order is provided to the Minister of Defense rather than the military authorities.<sup>20</sup> This transfer of power reflects the law's application as a civilian measure, originally intended for use against individuals residing within the sovereign territory of Israel. This power is non-delegable and cannot be executed by any other person, save for the authority of the Chief of General Staff (the commander of the IDF) to issue a temporary, non-renewable order for 48 hours where there is reasonable cause to believe that the circumstances would permit such an order to be issued by the Minister of Defense.<sup>21</sup> This clause was included so as to ensure the immediate availability of a competent senior office holder in the exceptional event that the civilian authority is unavailable.<sup>22</sup>

Orders may only be issued for a period not exceeding six months, and the Minister of Defense may issue an additional order only immediately prior to an order's expiration. In the event that the Minister of Defense does issue an additional detention order, it too is limited to a maximum of six months.<sup>23</sup>

The authority of the Minister of Defense and the Chief of General Staff to employ the measures provided under the ADL is limited only to times of emergency, as declared by the Knesset in accordance with Israel's Basic Law: The Knesset.<sup>24</sup> In consideration of the continuing conflicts in which Israel has been embroiled from its inception to this day, the Knesset has repeatedly renewed the state of emergency, such that it continues to be in force at the current time – and thus the ADL has been applicable as from its promulgation to today. Nonetheless, the Knesset is currently

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grounds that providing the reasons for detention to a detainee is integral for any detainee, no matter the framework in which he or she are being held, and while explaining that other treaties and decisions by the European Court of Human Rights suggest that the obligation should apply in all contexts. *See* DOSWALD-BECK, *supra* note 17, at 265. Similarly, the UN Human Rights Committee recently suggested, in its interpretation of Article 9, that the term “arrest” in Article 9 refers to any apprehension of a person that commences a deprivation of liberty – not necessarily in a criminal context. *See* General Comment 35, *supra* note 18, § 13. In the authors' view, it is appropriate to highlight in this regard the difference between the *reasons* for arrest, which Article 9 explicitly deals with, and the *evidentiary material* substantiating the arrest, which Article 9 does not address and which are viewed differently in the separate contexts of criminal proceedings and administrative proceedings. *See infra* note 71.

<sup>20</sup> ADL, 5739-1979, § 2, 33 LSI 89, (1978-79) (Isr.).

<sup>21</sup> *Id.* §§ 2(c), 11.

<sup>22</sup> It appears that this provision was relied upon only once, in an instance in which the courts eventually annulled the detention order. *See* AdminA 1/82 Qawasma v. Minister of Defense 36(1) PD 666 (1982) (Isr.). The appellant was initially convicted by a military court which was established and operated then under the Defence Regulations (and is no longer active today), for being a member of an unlawful organization and placing a bomb in a place where likely to cause death or injury, and was sentenced to 18 years of imprisonment. The decision was challenged by the appellant on the basis of a procedural flaw and subsequently overturned, in response to which the state lodged an appeal with the Military Court of Appeals. Concurrently to the appeal being filed, the Chief of General Staff issued a temporary order for administrative detention in order to keep the appellant in detention, which was followed by an additional order issued by the Minister of Defense. This order was subsequently upheld by the District Court and then appealed to the Supreme Court. The Supreme Court remarked that it was clear that the detention order had been issued for the purpose of holding the appellant until the Military Court of Appeals had passed its judgment, and not for the object for which the ADL allowed the Minister of Defense to issue such orders. It therefore annulled the order.

<sup>23</sup> ADL § 2(b).

<sup>24</sup> Basic Law: The Knesset, 1959, 24 LSI 257, § 38 (Isr.).

considering a draft bill to remove the ADL's dependence on the Emergency Declaration (as part of a broader legislative effort intended to reduce the declaration's significance in different matters of national security).<sup>25</sup>

### C. Grounds for Administrative Detention

In addition to the above modifications, the ADL also narrowed the scope of grounds for detention. Under the ADL, the Minister of Defense may issue an order only where there is "reasonable cause to believe that reasons of state security or public security require that a particular person be detained."<sup>26</sup> This objective standard for detention replaced the previous subjective standard provided under the Defence Regulations.<sup>27</sup>

The judiciary has interpreted this threshold in a restrictive manner. Under the new standard, convincing evidentiary material<sup>28</sup> must indicate to "a degree of near certainty" that unless the detention order is issued, national or public security would be seriously harmed.<sup>29</sup> The Israel Supreme Court has consistently stated that administrative detention is an exceptional measure, which may only be employed under special and exceptional circumstances.<sup>30</sup> The court has also emphasized that a person cannot be detained because of an opinion that he or she holds, and that administrative detention does not constitute "a pill used to relieve the public's stress"; rather, it is a tool intended

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<sup>25</sup> This suggestion was initially introduced in Draft Bill for The Fight Against Terror, 5881-2011, HH No. 1408 § 120 (Isr.). It has since been carved out from this draft bill and is currently being discussed separately by the relevant committee in the Knesset, together with other proposed amendments to the ADL. Generally, the broader effort to diminish the significance of the emergency declaration is being conducted within the background of ongoing debate and criticism over the practice of continuous extensions of the state of emergency. A petition against these extensions, arguing that it is no longer justified and needed, had been recently rejected by the Supreme Court. In its decision, the court encouraged the Ministry of Justice to continue promoting legislative amendments aimed at gradually separating the pieces of Israeli legislation that were still dependent on the emergency declaration (and suggested that such work be hastened), and agreed that the desired situation is that eventually all such connections would be removed. At the same time, it recalled Israel's unique security situation, as a democracy whose mere existence is still being threatened, and rejected the petition. *See* HCJ 3091/99 *Ass'n of Civil Rights in Israel v. The Knesset*, paras. 15-18 (1999) (unpublished) (Isr.).

<sup>26</sup> ADL § 2(a).

<sup>27</sup> Rudolph, *supra* note 10, at 150.

<sup>28</sup> As an evidentiary issue, while the past behavior of a person can be relied upon as an indication that he or she poses a threat in the future and contribute to the reasons for issuing a detention order, the tool of administrative detention may not be used as a "stimulus for punishment" (especially in instances where criminal proceedings are not feasible, as will be discussed below). *See* AdminA 7/88 *Anonymous v. Minister of Defense* 42(3) PD 133, 136 (1988) (Isr.).

<sup>29</sup> AdminA 4/96 *Ginzberg v. Minister of Defense* 50(3) PD 221, 223 (1996) (Isr.). In a slightly different wording, the standard has been defined as requiring that "it is close to certain that the detainee would commit grave offences unless his liberty is deprived by way of detention." *See* AdminA 8788/03 *Federman v. Minister of Defense* 58(1) PD 176, 190-91 (2003) (Isr.). The threshold recently suggested by the UN Human Rights Committee uses different language but seems to carry a similar meaning, in referring to "a present, direct and imperative threat." *See* General Comment 35, *supra* note 18, § 15.

<sup>30</sup> AdminA 4/94 *Ben-Horin v. State of Israel* 48(5) PD 329, para. 7 (1994) (Isr.); AdminA 8607/04 *Fahima v. State of Israel* 59(3) PD 258, para. 8 (2004) (Isr.).

solely to negate an actual danger.<sup>31</sup> Accordingly, the ADL is employed in a relatively small number of cases.<sup>32</sup>

The order must be based on an *individual* threat. This approach is apparent in one of the seminal cases regarding the use of preventive detention in Israel, the *Lebanese Detainees Case*. In this case the Supreme Court emphasized that an order may only be issued with regards to a person who poses an individual threat to the security of the state or to public security, and that administrative detention under the ADL cannot be employed if an individual threat is not determined with regards to each detainee, even where such detention would serve broader interests of national security. The case concerned the continued detention of individuals affiliated with terrorist organizations who were no longer considered to pose a threat that justified continued detention, but whom the state nevertheless asked to keep detained against the background of a difficult negotiation regarding captive Israeli soldiers.<sup>33</sup>

The individual threat requirement does not necessarily mean that the ADL cannot be used against a person who is not himself *directly* involved in conducting terrorist acts. The Supreme Court has not negated the possibility that a threat justifying

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<sup>31</sup> HCJ 3280/94 Federman v. Ilan Biran, Commander of IDF Forces in Judea and Samaria, para. 5 (1994) (unpublished) (Isr.).

<sup>32</sup> For example, during the three years from the beginning of 2011 until the middle of 2014, one ADL detention order was issued. In the second half of 2014, in face of increasingly volatile security circumstances in eastern Jerusalem, five orders were issued. An atypical leap occurred in 2015, when 38 orders were issued, and in 2016, when 26 orders were issued (as well as eight orders that replaced expired orders). Most of these orders were issued against Palestinians who reside in eastern Jerusalem (following a spate of stabbing and other terrorist attacks in Jerusalem and other Israeli cities that began in October 2015); persons who planned to carry out terror attacks in Israel on behalf of the Islamic State (ISIS) organization; and against persons who reside in the West Bank but possess Israeli nationality or citizenship (some affiliated with Palestinian armed groups, while others belonged to a group of Israeli extremists acting against the Israeli government and against Palestinian residents in the West Bank). The number of orders issued in these years was provided by the Israeli Ministry of Defense.

<sup>33</sup> CFH 7048/97 *Lebanese Detainees Case*, 54(1) PD at 731. The decision was made with regards to ten Lebanese nationals who were brought to Israel in the 1980s and convicted for membership in hostile forces and involvement in attacks against the IDF and the South Lebanon Army. *Id.* at 3. Following the end of their terms of imprisonment, they continued to be held in Israel, at a certain stage by force of orders issued by the Minister of Defense under the ADL. *Id.* at 4. While the Israeli authorities acknowledged that the persons no longer personally posed a threat to national security and, under other circumstances, would have been ordinarily deported from Israel, the state wished to continue to hold the persons as leverage in the context of a difficult negotiation being conducted at the time for the release of missing persons from the Israeli security forces, some of whom were assumed to have been held in Lebanon for several years incommunicado. *Id.* The state's position was that the return of captive IDF personnel is an interest that falls within the purview of the national security interests grounds under the ADL, and that the detainees' release would cause actual harm to this interest. *Id.* at 8. In the first decision of the Supreme Court on this case, the majority opinion, delivered by Chief Justice Barak, agreed with this position, arguing that as the well-being of Israeli security forces is part of the national security interest, the return of missing soldiers (as part of ensuring their well-being) is also in the national security interest. Thus, the Minister of Defense had authority under the ADL to issue an administrative detention order. ADA 10/94 *Anonymous v. Minister of Defense*, 53(1) PD 97, 106-07 (1997) (Isr.). The Supreme Court then accepted a request to hold a further hearing on this case, with a wider panel of judges. In its decision on this further hearing, the Supreme Court reversed its previous ruling. The court, in a majority opinion again delivered by Chief Justice Barak, held that as it was agreed that the detainees no longer posed an *individual* threat to the security of the state and were being held in an attempt to gain the release of Israelis held in captivity, they could not continue to be held by force of the ADL, which required an *individual* assessment of the threat posed by each person. CFH 7048/97 *Lebanese Detainees Case*, 54(1) PD at 731-32. The state's position, and the court's position in its initial decision, was supported in the dissenting opinion by Justice Cheshin: "There is not the slightest doubt in my mind [...] that the purpose of the return home of prisoners and missing persons [...] is at the deepest core of the concept of 'national security'." *Id.* at 747.

administrative detention can be created as a result of what was termed “organizational activity” within a hostile organization (e.g., financial activity within the organization that enables its terror activity), and not necessarily from “physical” terrorist actions that the person has carried out.<sup>34</sup> The court explained that in some cases the threat posed from organizational activity might be much more severe than the threat posed by physical actions.<sup>35</sup> Under that rationale, the Supreme Court has affirmed the administrative detention of members in designated terrorist organizations who are involved in such activity. At the same time, the Court has recognized that organizational-civilian activity in these organizations is intertwined integrally with military activity and that any attempt to distinguish between the two is artificial and misguided.<sup>36</sup> The court observed that the organizational-civilian activity and the military activity feed each other, and that the former is intended to create infrastructure for the latter by ensuring the flow of funds, resources and conscription of manpower for the purposes of carrying out the military functions of the organization.<sup>37</sup> Notwithstanding, the court clarified that when deciding to put a person in administrative detention based on his or her “organizational activity,” authorities should take into account whether the person is in the senior echelon of the organization (as opposed to detention based on direct involvement in terror activities, where rank is not necessarily a factor).<sup>38</sup>

Reading these cases together with the *Lebanese Detainees Case*, it seems that the Supreme Court accepts that the element of individual threat can be inferred from the individual’s general (non-military) activity in a terrorist organization, relying on the threat the organization poses as a whole. However, the court has drawn the line in cases where the reason for the detention is independent from the individual’s own personal conduct, and is rather solely based on wider security considerations. The court has prohibited the latter.

One of the fundamental principles expressed repeatedly throughout the relevant case law is the use of administrative detention as a measure of last resort, which should be employed only when criminal or other legal proceedings are not an option. The courts have stated that where the security of the state and the public can be ensured through the employment of regular criminal procedures or other effective legal measures, there

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<sup>34</sup> AdminA 1/88 Agbariya v. State of Israel 42(1) PD 840, 844 (1988) (Isr.).

<sup>35</sup> *Id.*

<sup>36</sup> HCJ 5287/06 Za’atri v. Commander of the IDF Forces in the West Bank, para. 7 (2006) (unpublished) (Isr.) (while this case concerned administrative detention in the West Bank, the court’s general observations may be seen as equally relevant to the ADL context). In that case, the court affirmed the administrative detention of two senior activists of Hamas in the West Bank on the basis of their “organizational,” non-military, activity. While referring to the inability to distinguish between the military and civilian functions of certain terrorist organizations, the court cited a prior decision affirming detention as a part of a criminal case, which concerned the criminal offenses in Israeli domestic law of membership and activity within a terrorist organization. The terrorist organization in that case was the Popular Front for the Liberation of Palestine. *See* Different Requests – Criminal (DRC) 6552/05 Abidat v. State of Israel, paras. 11-12 (2005) (unpublished) (Isr.).

<sup>37</sup> HCJ 6404/08 Abu Maria v. Commander of the IDF Forces in the West Bank, para. 9 (2008) (unpublished) (Isr.) (while this case concerned administrative detention in the West Bank, the court’s general observations may be seen as equally relevant to the ADL context). In that case, the court affirmed the administrative detention of an activist in the Palestinian Islamic Jihad, involved with “organizational-financial” activity in support of the terror infrastructure of the organization. The court cited the two cases mentioned in the above footnote, and two other decisions given in the context of criminal cases. *See* DRC 6505/07 Corrad v. State of Israel (2007) (unpublished) (Isr.); CA 3827/06 Anonymous v. State of Israel (2007) (unpublished) (Isr.).

<sup>38</sup> AdminA 5302/14 State of Israel v. Anonymous, para. 6 (2014) (unpublished) (Isr.) (the court clarified its decision in HCJ 5287/06 Za’atri v. Commander of the IDF Forces in the West Bank, para. 7 (2006) (unpublished) (Isr.)).

will be no justification for the employment of administrative detention.<sup>39</sup> The Supreme Court explained the precedence of criminal proceedings mainly in that they enable the detainee to better confront the evidentiary material brought against him.<sup>40</sup> While it is common to use confidential evidentiary material in administrative detention proceedings (indeed, the ability to rely on such material is one of the reasons states turn to such proceedings), in criminal proceedings all evidentiary material used to support an allegation must be disclosed to the accused.

Nevertheless, even while reinforcing and repeating the precedence of criminal proceedings, in many instances the courts have acknowledged that such proceedings may not always be viable for achieving preventive security. This is due to conceptual differences – criminal proceedings are punitive, while administrative proceedings are preventive – and to the need, in certain cases, to avoid disclosing confidential information<sup>41</sup> (the treatment of confidential evidentiary material by the Israeli courts in the context of administrative detention proceedings will be discussed in further detail below).

As with criminal proceedings, less harmful administrative measures are considered preferable to administrative detention.<sup>42</sup> In this regard, a proposed reform of the ADL currently being considered in the Knesset would compile, under the ADL, a detailed list of less harmful administrative measures, to further facilitate the consideration of potential alternative measures by the Minister of Defense.<sup>43</sup>

In order to issue an extension of a detention order, the Minister of Defense must conduct a new and revised assessment of the existence and scale of the threat posed by the detainee. The evidentiary material required is dependent on the circumstances of the individual case. While the provision of new evidentiary material is not necessarily a prerequisite,<sup>44</sup> in some cases the courts have required new evidentiary material in order to approve an extension.<sup>45</sup>

The courts have also considered the exceptional occasion where a person, at the end of a period of incarceration following a criminal verdict, is still considered to present a distinct threat which necessitates administrative detention. The courts have remarked

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<sup>39</sup> AdminA 2/82 Lerner v. Minister of Defense 42(3) PD 529, 531 (1982) (Isr.). The UN Human Rights Committee has recently stressed this principle in its interpretation of Article 9 of the ICCPR, noting that administrative detention would “normally amount to arbitrary detention if other effective measures addressing the threat, including the criminal justice system, would be available.” See General Comment 35, *supra* note 18, § 15.

<sup>40</sup> HCJ 5784/03 Salame v. Commander of IDF Forces in Judea and Samaria 57(6) PD 721, para. 6 (2003) (Isr.); HCJ 9441/07 Agbar v. Commander of IDF Forces in Judea and Samaria 62(4) PD 77, para. 6 (2007) (Isr.) (both cases concerned administrative detention in the West Bank, but the court’s observation is equally relevant to the ADL context).

<sup>41</sup> AdminA 4/96 Ginzberg v. Minister of Defense 50(3) PD 221, para. 5 (1996) (Isr.); HCJ 5784/03 *Salame*, at para. 6 (in the context of administrative detention in the West Bank).

<sup>42</sup> AdminA 8788/03 Federman v. Minister of Defense 58(1) PD 176, 188-89 (2003) (Isr.). See also AdminA 7/94 Ben Yosef v. State of Israel, para. 3 (1994) (unpublished) (Isr.).

<sup>43</sup> This suggestion was initially introduced *in* Draft Bill for The Fight Against Terror, 5881-2011, HH No. 1408 § 120 (Isr.). It has since been carved out from this draft bill and is currently being discussed separately by the relevant committee in the Knesset, together with other proposed amendments to the ADL (see *supra* note 25). Among the lesser measures included in the draft bill are orders concerning the prohibition of leaving the country, restrictions regarding being present or residing in a certain place or area, the obligation to notify the police on one’s whereabouts, the prohibition of possessing or using certain items or materials, the prohibition of communicating with a certain person or a group of persons, and restrictions regarding work or occupation.

<sup>44</sup> AdminA 7/97 Anonymous v. State of Israel, para. 4 (1997) (unpublished) (Isr.).

<sup>45</sup> See *infra* note 58.

that it will not necessarily require new evidentiary material to justify issuing a detention order on his release from incarceration. In such an event, significant weight – in the detainee's favor – must be given to time already spent in incarceration.<sup>46</sup>

#### D. Judicial Review

The Defence Regulations did not explicitly provide for a judicial review process. There was some involvement by the Supreme Court in administrative detention matters, but it existed on the basis of a general authority to cancel unlawful detentions anchored in another law, and in practice mostly focused on technical and procedural flaws in the detention procedure.<sup>47</sup> Thus, the most notable innovations of the ADL were the introduction of a multi-tiered system of judicial review as an integral and explicit requirement of the detention process, and the significant widening of the scope of this judicial review. Likewise, the right to legal representation, which was also not explicitly provided for in the Defence Regulations (yet protected and promoted by the Supreme Court nonetheless), was formally introduced.<sup>48</sup>

##### 1. The Judicial Review Process

In accordance with the ADL's system for review, a detainee must be brought, in person, before the President of a District Court, within 48 hours from the moment of being taken into custody.<sup>49</sup> The 48 hour timeframe sets a maximal temporal limit, and should be read in conjunction with the obligation that a court must decide on the

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<sup>46</sup> HCJ 2233/07 Anonymous v. Military Commander in Judea and Samaria, para. 9 (2007) (unpublished) (Isr.) (while this case concerned administrative detention in the West Bank, the court's determination is equally relevant to the ADL context).

<sup>47</sup> Rudolph, *supra* note 10, at 150-51. For two cases where the Supreme Court annulled a detention order on the basis of technical or procedural flaws, see HCJ 7/48 Al-Karbutli v. Minister of Defense, 2 PD 5, 13 (1948) (Isr.) (the order was annulled because the advisory committee which was required to consider objections made by the detainee had not been appointed at the time when the detention order was issued); HCJ 95/49 Al-Khouri v. Chief of General Staff 4(1) PD 34, 46 (1950) (Isr.) (where the detention order was annulled because it did not specify the place of detention).

<sup>48</sup> The right to legal representation derives from the fact that the proceedings take place before a court, and is further acknowledged and regulated in section 7 of the ADL, which grants the Minister of Justice the authority to limit the capacity to represent persons in proceedings under the law to those attorneys who are authorized to act before court martials (without denying the detainee the right to choose which specific attorney will represent him). For a case in which the Supreme Court stressed the right to legal representation in the context of administrative detention even before the enactment of the ADL, see HCJ 193/67 Kahvage v. Prisons Commissioner, 21(2) PD 183 (1967) (this case is reviewed *in* Bracha, *supra* note 11, at 310). Recently, the UN Human Rights Committee interpreted Article 9 of the ICCPR in a way that permits the body reviewing the administrative detention to be a court or another tribunal possessing the same attributes of independence and impartiality as the judiciary, and that Article 9 requires access to independent legal advice, preferably selected by the detainee. *See* General Comment 35, *supra* note 18, § 15. The ADL, which provides a right to review before a court and allows the detainee to choose an attorney, reflects the higher standards in both aspects.

<sup>49</sup> The District Court is the second highest court in Israel, and acts as both a court of first instance for major criminal and civil matters, as well as an appellate court for lower instances. Each one of the six District Courts in Israel is presided over by a President, appointed by the Minister of Justice upon the nomination of a special committee. *See* Basic Law: The Judiciary, 1984, 38 LSI 101 (Isr.); Courts Law (Consolidated Version), 1984, 38 LSI 271, (1983-84) (Isr.).

lawfulness of the detention “without delay.”<sup>50</sup> The initiation of the judicial review proceeding is not dependent on the detainee’s request, and a detainee who is not brought before the court within 48 hours must be released.<sup>51</sup>

Where an order is not annulled by the President of the District Court, periodic review is required at least every three months (counting from the court’s most recent decision in the matter).<sup>52</sup> Each periodic review requires a *de-novo* assessment of whether continued detention is justified.<sup>53</sup>

In principle, periodic reviews are conducted with the detainee present. However, if the detainee is not present, the detention order will not necessarily be automatically annulled.<sup>54</sup>

The decisions of the President of the District Court, both with regard to initial and to periodic reviews, may be appealed to the Supreme Court (to be heard by a single court judge).<sup>55</sup>

## 2. Authorities and Discretion of the Review Court

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<sup>50</sup> This is one of the requirements under IHRL concerning detention. See ICCPR, *supra* note 18, art. 9(4); DOSWALD-BECK, *supra* note 17, at 270. While this obligation has seemingly not been explicitly expressed in jurisprudence concerning the ADL (possibly because in the small number of cases in which this law was applied, detainees were brought before the court without undue delay), the Supreme Court has recognized and applied this requirement in other contexts of detention. See HCJ 3239/02 Marab v. Commander of IDF Forces in Judea and Samaria 57(2) PD 349, 368-69 (2002) (Isr.). In this case, the Supreme Court annulled a military order which extended the initial detention period before judicial review in the West Bank to 18 days (the rationale behind this proposed extension was the scope of the intensive fighting and mass detentions that took place at that time, which placed a strain on the capabilities and resources of the authorities handling the detentions).

<sup>51</sup> ADL, 5739-1979, § 4(a), 33 LSI 89, (1978-79) (Isr.). In this regard, the minimal requirement set by IHRL is that the detainee shall be entitled to such review on request. See ICCPR, *supra* note 18, art. 9(4); DOSWALD-BECK, *supra* note 17, at 270.

<sup>52</sup> ADL § 5. Such requirement applies even where the detention order is not issued for the maximum six months. In comparison to IHRL standards, under the ICCPR there is no explicit requirement of conducting periodic reviews, but the U.N. Human Rights Committee noted the importance of “sufficiently frequent review.” U.N. Human Rights Committee, Ahani v. Canada, Communication No. 1051/2002, para. 10(2), U.N. Doc. CCPR/C/80/D/1051/2002 (Mar. 29, 2004). See also General Comment 35, *supra* note 18, §§ 12, 21. This issue was also considered in several cases of the European Court of Human Rights, where the court required that periodic reviews would take place at reasonable intervals, whose length would be assessed according to the particular circumstances of each case. See DOSWALD-BECK, *supra* note 17, at 271.

<sup>53</sup> ADL § 5 (“Where a detention order has been confirmed under this Law . . . the President of the District Court shall conduct a *de-novo* discussion regarding the detention no later than three months after confirmation thereof under section 4 or after a decision under this section or within a shorter period prescribed by him in his decision . . .”); HCJ 9441/07 Agbar v. Commander of IDF Forces in Judea and Samaria 62(4) PD 77, para. 7 (2007) (Isr.).

<sup>54</sup> HCJ 4255/08 Sa’adi v. IDF Commander in Judea and Samaria, para. 5 (2008) (unpublished) (Isr.). While this case concerned a detention order under the administrative detention framework in the West Bank, it is relevant to all three frameworks.

<sup>55</sup> ADL § 7. However, the courts have stated that cases may be heard before a panel of three judges where circumstances so warrant. See AdminA 7/97 Anonymous v. State of Israel, para. 4 (1997) (unpublished) (Isr.). On the issue of appeals, too, the ADL seems to go beyond IHRL obligations, which does not provide for a right of appeal against the decision of a reviewing body.

The review court may uphold the order, shorten its duration, or annul it.<sup>56</sup> The ADL explicitly states that the court must order the release of the detainee if it concludes that the underlying reasons for the order were not objective reasons of state or public security, that the order was made in bad faith or that it was made for irrelevant considerations.<sup>57</sup> The law does not further elaborate on the scope of the court's discretion.

Nevertheless, the Supreme Court has clarified that the ADL provides only limited instances where the court *must* annul an illegal detention order, yet the court's powers to intervene are not limited to such instances alone. Therein, the court has independent discretion to make a substantial examination as to whether a detention order is necessary (i.e. if the "near certainty" standard is met and whether there are other available less harmful alternatives), and if so, to assess for how long the order should stand.<sup>58</sup> In cases of appeal, the Supreme Court is not limited in any way in the scope of its review over the decision of the district court, and makes a *de-novo* scrutiny of the justification to issue a detention order.<sup>59</sup>

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<sup>56</sup> ADL § 4(a) (with regard to the District Court); ADL § 7(a) (with regard to the Supreme Court). The authority to annul the order coincides with Article 9(4) of the ICCPR, which requires the court to have the capacity to release a detainee held unlawfully.

<sup>57</sup> ADL § 4(c) (with regard to the District Court); ADL § 7(a) (with regard to the Supreme Court).

<sup>58</sup> AdminA 2/86 Anonymous v. Minister of Defense 41(2) PD 508, 514-15 (1986). In exercising this type of judicial review, the court in fact examines the lawfulness of the detention order with the same discretion the administrative authority has – unlike regular judicial review over administrative acts, which is narrower in scope and does not aim to replace the discretion of the administrative authority. See AdminA 265/15 Jit v. State of Israel, para. 4 (2015) (unpublished) (Isr.). Where the court orders a shortening of the duration of a detention order, the executive authority will not be able to renew the detention order at the end of the period, unless one of the following events have occurred – either the court shortened the duration *with the intent* that *the executive* will reconsider, approaching the end of this period, whether the continued detention is still justified; or, after the judicial review, a renewed assessment by the executive showed a substantial development in the detainee's dangerousness, due to either *new* information concerning the detainee's dangerousness or to a substantial change in the security circumstances that enhances the dangerousness posed by the detainee (even without any new information concerning the detainee personally). In either case, a renewal of the order will undergo judicial review. See HCJ 2320/98 Al-Amla v. Commander of IDF Forces in Judea and Samaria 52(3) PD 346, 363 (1998) (Isr.) (while this case concerned administrative detention in the West Bank, the court's determination is equally relevant to the ADL context). The wide discretion of the judiciary and the role that it plays in the substantive scrutiny of preventive detention orders in Israel coincides with the IHRL standard offered by the UN Committee of Human Rights. The Committee opined that judicial review of the lawfulness of administrative detention cannot be a mere formality limited to an examination of the compliance with procedures under domestic law, but must rather assess whether the detention meets the substantive requirements for lawful detention set out in Article 9(1) of the ICCPR – including whether the detention is "arbitrary." See U.N. Human Rights Committee, A. v. Australia, Communication No. 560/1993, para. 9(5), U.N. Doc. CCPR/C/59/D/560/1993 (Apr. 30, 2003). Similar remarks were made by the European Court of Human Rights and the Inter-American Commission of Human Rights. See DOSWALD-BECK, *supra* note 17, at 273. The UN Committee of Human Rights further opined that the notion of "arbitrariness" should not be equated with "against the law" but must be interpreted more broadly as to include elements of inappropriateness, injustice, lack of predictability and due process of the law, as well as elements of reasonableness, necessity and proportionality. See General Comment 35, *supra* note 18, § 12. Even though the Israeli courts have typically been viewed as wielding broad discretion (a view also espoused by the courts themselves), some authors have questioned whether this claim of broad authority finds sufficient expression in practice. See Mara Rudman & Mazen Qupty, *The Emergency Powers (Detention) Law: Israel's Courts Have a Mission – Should They Choose to Accept It?*, 21 COLUM. HUM. RTS. L. REV. 469, 486-87 (1990); Shiri Krebs, *Lifting the Veil of Secrecy: Judicial Review of Administrative Detentions in the Israeli Supreme Court*, 45(3) VAND. J. TRANSNAT'L L. 639 (2012). In this regard, see also *infra* notes 63, 279-80.

<sup>59</sup> AdminA 8788/03 Federman v. Minister of Defense 58(1) PD 176, 189 (2003) (Isr.); AdminA 2860/16 Mugarbi v. State of Israel, para. 10 (2016) (Isr.).

But a formal description of the court's authorities hardly covers the full picture. The Supreme Court has evolved to play a significant role in working to resolve appeals outside the scope of formal judicial decisions. It has actively imposed instructions on parties appealing to the court to reexamine or reassess their submissions, suggested that parties reconsider their positions prior to judgment, and promoted compromises between the sides which allow for withdrawing the appeal from the court.<sup>60</sup> In some cases, the court has even acted as a mediator between the parties, recording any agreements reached.<sup>61</sup> Indeed, some commentators have noted the high rate of cases withdrawn shortly before the arrival of the date of the court hearing.<sup>62</sup> In some cases, the court has upheld particular detention orders yet simultaneously provided specific instructions, recommendations or suggestions directed at the state authorities.<sup>63</sup> In this manner the court has made the activities surrounding the prospect for intervention under the court's wide authorities more prominent than actual judicial intervention.

A focal element in the court's assessment of the lawfulness of administrative detention, which is of particular importance with regard to periodic reviews, is the Israeli administrative law principle of proportionality. This principle requires that the means used to realize the state's objective must be in proper proportion to the objective whose achievement is being sought.<sup>64</sup> In applying the principle of proportionality, the court examines the probability of achieving the security objective by employing the tool of detention and the suitability of the detention in achieving that objective; the existence of alternative means to achieving the objective whose harm to the person's liberty is lesser; and the severity of the harm to the person's liberty by the imposition of detention as against the objective sought to be achieved.<sup>65</sup>

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<sup>60</sup> Daphne Barak-Erez & Matthew C. Waxman, *Secret Evidence and the Due Process of Terrorist Detentions*, 48 COLUM. J. TRANSNAT'L L. 3, 43-44 n. 174 (2009). Barak-Erez and Waxman provide examples where sides agreed to limit the remaining detention period in lieu of repealing the petition, or where the court stated it would not approve an additional future extension of the detention without new intelligence material – which typically satisfied the petitioners, who then agreed to repeal the petition in question. *See, e.g.*, HCJ 2286/09 *Nashata v. Military Judge* (2009) (unpublished) (Isr.); HCJ 5809/08 *Nachla v. Judge of the Military Court of Appeals* (2008) (unpublished) (Isr.).

<sup>61</sup> Krebs, *supra* note 58, at 680.

<sup>62</sup> *Id.* at 675 (finding that 36% of appeals with regard to administrative detention orders issued in the West Bank examined were withdrawn in this manner).

<sup>63</sup> Among these remarks from the court were “requests for the state to reconsider its position, recommendations not to prolong the detention in the future, or statements that in order to issue further detention orders, new and updated materials would be required,” as well as “general future legal instructions on administrative detentions, such as instructing the state to interrogate the administrative detainees immediately after their arrest.” *Id.*

<sup>64</sup> The proportionality principle includes three subtests. The first subtest (the “rational means” test) requires that the means used by the administrative body rationally lead to the realization of the objective. The second subtest (the “least injurious means” test) requires the administrative body to injure the individual to the least extent possible when employing the means. The third subtest (the “proportionate means” test) requires that the damage caused to the individual by the means used by the administrative body in order to achieve its objectives must be of proper proportion to the gain brought about by the means. For a general review of the proportionality principle, see HCJ 2056/04 *Beit Sourik Village Council v. Government of Israel* 58(5) PD 805, paras. 40-41 (2004) (Isr.), *translation available at* [http://elyon1.court.gov.il/files\\_eng/04/560/020/A28/04020560.a28.pdf](http://elyon1.court.gov.il/files_eng/04/560/020/A28/04020560.a28.pdf). Although the principle of proportionality has relevance with regards to several aspects of administrative detention (including the obligation to prefer criminal proceedings over administrative detention, where viable), this article will mostly focus on the influence of the third subtest in relation to prolonged detention. It is worth noting that under Israeli law, the principle of proportionality is also a constitutional one, used to examine the validity of legislative acts; however, this aspect of the proportionality principle will also not be considered in this article.

<sup>65</sup> CFH 7048/97 *Lebanese Detainees Case* 54(1) PD at 744-45.

In the context of *extending* administrative detentions, these tests may lead to a different result with the passage of time. Indeed, the Supreme Court has emphasized that as the period of detention grows longer, “reasons of greater weight” are needed in order to justify an additional extension of the detention, which themselves will reach a “breaking point,” where the detention ceases to be proportional.<sup>66</sup>

### 3. Treatment of Secret Evidentiary Material

In judicial review proceedings under the ADL, the court may deviate from the standard rules of evidence if “it is satisfied that this will be conducive to the discovery of the truth and to ensuring justice.”<sup>67</sup> In such a case, the court must specify in its decision the reasons for such deviation.<sup>68</sup> In particular, the court may conduct part of the hearings *ex parte* (including questioning the representatives of the intelligence agencies), or accept evidentiary material without disclosing it to the detainee, where it is convinced that exposing the evidentiary material or testimony would harm state security or the safety of the public.<sup>69</sup> The justifications for withholding evidentiary material are typically securing the identities of intelligence sources (for reasons of secrecy or personal security), ensuring the continued confidentiality of intelligence gathering methods, or enabling the testimony of witnesses who fear testifying publicly.<sup>70</sup>

Instead of access to all the classified information, the detainee is provided with an unclassified intelligence summary, which at a minimum must provide the core of the allegations against him in a manner which is accepted by the authorities as not harming state security.<sup>71</sup> The Supreme Court has remarked that evidentiary material may be

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<sup>66</sup> *Id.* at 744. The UN Human Rights Committee has adopted a similar view in its most recent interpretation of Article 9 of the ICCPR. *See* General Comment 35, *supra* note 18, § 15 (“[T]he burden of proof lies on State Parties to show that the individual poses such a threat and that it cannot be addressed by alternative measures, and this burden increases with the length of the detention.”).

<sup>67</sup> ADL, 5739-1979, § 6(a), 33 LSI 89, (1978-79) (Isr.).

<sup>68</sup> *Id.* § 6(b).

<sup>69</sup> *Id.* § 6(c); AdminA 8607/04 Fahima v. State of Israel 59(3) PD 258, para. 9 (2004) (Isr.). In contrast, in the context of criminal proceedings, the courts cannot convict on the basis of evidence that is not disclosed to all parties. While the Israeli courts have been noted for their activist approach in examining confidential evidentiary material, potential disadvantages of this approach have also been noted, including the risk that the reliance on the court’s approach in this matter may be invoked “to justify a very limited disclosure of information to the detainee.” *See* Barak-Erez & Waxman, *supra* note 60, at 18-24, 34.

<sup>70</sup> Eyal Noon, *Administrative Detention in Israel*, 3 PLILIM 168, 170-71 (1993) (Hebrew). *See also* DOSWALD-BECK, *supra* note 17, at 275 (“The fear is that letting the suspects know which material is being used could enable those suspects to deduce how the government came to know about such information. This could jeopardize the safety of the informant or prevent use of the same information collection method in the future.”)

<sup>71</sup> The UN Human Rights Committee has recently suggested that Article 9 requires disclosing to the detainee of “at least, the essence of the evidence on which the decision is taken.” *See* General Comment 35, *supra* note 18, § 15. While disclosure of allegations and disclosure of evidentiary material overlap in some cases, in most cases they have a completely different meaning. The standard proposed by the UN Human Rights Committee is not expressed in the language of Article 9, which only requires in this context that an arrestee shall be informed “of the reasons for his arrest” (emphasis added). Another difficulty in this proposed standard is that it practically annuls the possibility to use administrative detention in the majority of relevant cases, as the need to resort to administrative detention (rather than to criminal proceedings) often arises precisely *when* the essence of the evidentiary material cannot be disclosed. It is unclear if the Israeli model regarding the treatment of classified evidentiary material, which tries to compensate for the inability to disclose evidence to the detainee with a larger role given to the reviewing courts, was fully considered in this context by the UN Human Rights Committee prior to the publication of its analysis.

withheld from the accused only where the disclosure of such material would have a definite negative impact on the security interests of the state; in contrast, a “potential, but negligible and distant” risk of such negative impact is insufficient for ruling on the non-disclosure of evidentiary material.<sup>72</sup> The Israeli courts have consistently noted the difficulty in relying on evidentiary material that is not disclosed to the detainee, and acknowledged that the lack of disclosure impairs the detainee’s ability to properly counter the allegations against him.<sup>73</sup>

Subsequently, Israeli courts have developed practices of judicial review which are aimed at mitigating, as much as possible, the potential infringement that the non-disclosure of evidentiary material may have upon the rights of the detainee. Although the Israeli judicial system is fundamentally adversarial, the Supreme Court has required that in administrative detention cases the court take an exceptionally activist and interventionist approach.<sup>74</sup> In *ex parte* hearings where the detainee and his attorney are not present, the court has seen itself as required to represent the detainee’s interests and act, in the court’s language, as the detainee’s “temporarily appointed defense attorney,”<sup>75</sup> by becoming “a mouthpiece for the detainee”<sup>76</sup> and by “the court itself exhausting a consideration of the possible lines of defense the detainee could have raised if he himself could personally have viewed the evidentiary material against him.”<sup>77</sup>

In order to fulfill this duty properly, the court has expressed a responsibility to be particularly strict in its judicial review of the detention order, and to exercise special caution in its assessment of the evidentiary material presented *ex parte*.<sup>78</sup> Indications upon which an assessment could be made include the number of intelligence items considered, whether the information came from one source or several sources, and whether the source is human or otherwise (where credibility is less difficult to assess).<sup>79</sup>

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<sup>72</sup> HCJ 765/88 Shakhshir v. the Commander of the IDF Forces in the West Bank 43(1) PD 529, 539 (1989) (Isr.).

<sup>73</sup> See, e.g., AdminA 8607/04 *Fabima*, at para. 9; HCJ 9441/07 *Agbar* v. Commander of IDF Forces in Judea and Samaria 62(4) PD 77, para. 9 (2007) (Isr.). The reliance on secret evidentiary material, which is also common in administrative detention cases in other democratic countries that face national security threats, has long been a main source of controversy with regard to this exceptional legal tool.

<sup>74</sup> AdminA 6183/06 *Gruner* v. Minister of Defense, para. 6 (2006) (unpublished) (Isr.). Generally, the dominance of the judiciary in the process of administrative detention reflects the overall prevalent culture of judicial intervention in Israel and the significant influence that the courts wield over most aspects of the institutions, authorities and management of the state. Indeed, the Supreme Court is usually regarded by scholars as an interventionist court. See, e.g., Stephen J. Schulhofer, *Checks and Balances in Wartime: America, British and Israeli Experiences*, 102 MICH. L. REV. 1906, 1918 (2004). For the court’s own approach on judicial interventionism in the specific context of detention, see, e.g., HCJ 3239/02 *Marab* v. Commander of IDF Forces in Judea and Samaria 57(2) PD 349, 367 (2002) (Isr.) (“Judicial intervention [...] guarantees the preservation of the delicate balance between individual liberty and public safety.”) and 31 (“Judicial review is an integral part of the detention process. Judicial review is not external to the detention, it is an inseparable part of the development of the detention itself.”). The activist approach adopted by the judiciary in Israel has not been limited to review of administrative detentions, but has been prevalent in many cases where human rights are concerned. See Stephen Goldstein, *The Protection of Human Rights by Judges: The Israeli Experience*, in JUDICIAL PROTECTION OF HUMAN RIGHTS: MYTH OR REALITY? 55 (Mark Gibney & Stanislaw Frankowski eds., 1999).

<sup>75</sup> HCJ 9441/07 *Agbar*, at para. 9.

<sup>76</sup> AdminA 8788/03 *Federman* v. Minister of Defense 58(1) PD 176, 187 (2003) (Isr.).

<sup>77</sup> AdminA 8607/04 *Fahima* v. State of Israel 59(3) PD 258, para. 9 (2004) (Isr.).

<sup>78</sup> *Id.*; see also AdminA 8788/03 *Federman*, at 187.

<sup>79</sup> AdminA 8788/03 *Federman*, at 187; HCJ 5994/03 *Sadder* v. Commander of the IDF Forces in the West Bank, para. 6 (2003) (unpublished) (Isr.) (“Information relating to a number of events is not the same as information relating to a sole event; information from one source is not the same as information from various sources; and information based solely upon statements of agents and informants is not the same as

The court's purpose in the scrutiny of evidentiary material is two-fold – to assess whether the existing evidentiary material justifies the detention order, and to assess whether the evidentiary material must remain confidential (notwithstanding the authorities' own independent duty to disclose as much information to the detainee as possible under the security constraints<sup>80</sup>). If the court finds that the disclosure of the evidentiary material would not infringe upon state security, it will be disclosed.<sup>81</sup>

A basic tenet that enables this method of review is the capacity of the court to review and analyze all the available evidentiary material, including through unlimited access to classified materials. In this regard, the court also has the authority to demand and receive explanations from the authorities that provided the relevant information, and has not hesitated to do so.<sup>82</sup> However, the court has declared that needing to call the informants themselves to testify would be a rare occasion.<sup>83</sup>

The court's conduct in these cases has led some to draw parallels to the judiciary's function in the inquisitorial legal systems traditionally employed in European countries.<sup>84</sup> In this vein, Barak-Erez and Waxman have termed the model of judicial overview over administrative detention developed by the Supreme Court as the "judicial management" model for judicial review.<sup>85</sup> It is thus distinguished from the "special advocate" model, which is utilized in states such as Canada and the United Kingdom.<sup>86</sup> Under the "special advocate" model, court proceedings preserve their adversarial nature, and the court appoints a special security-cleared counsel for the detainee (in addition to any appointed regular counsel) who is given access to the confidential material. The special advocate is charged with refuting the state's arguments and evidentiary material in closed adversarial hearings, and seeks disclosure of additional secret evidentiary material to the detainee.<sup>87</sup> However, the special advocate is not considered as fully

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information that is also based upon or reinforced by documents attained by the security services or intelligence stemming from the use of special devices") (while this case concerned administrative detention in the West Bank, the court's observation is equally relevant to the ADL context).

<sup>80</sup> ADA 2595/09 Sofi v. State of Israel, para. 21 (2009) (unpublished) (Isr.) (while this case concerned an incident under the Incarceration of Unlawful Combatants Law, this particular aspect is nevertheless relevant to all three preventive detention frameworks).

<sup>81</sup> ADA 6/97 Anonymous v. State of Israel, para. 5 (1997) (unpublished) (Isr.).

<sup>82</sup> AdminA 8788/03 *Federman*, at 189.

<sup>83</sup> The question of whether the judicial review process should include questioning the informants themselves was discussed in relative detail in the case of HCJ 4400/98 Braham v. Judge Colonel Shefi 52(5) PD 337, 346 (1998) (Isr.) (which dealt with an administrative detention case in the West Bank, but is relevant in this regard to the ADL as well). In this case, the Supreme Court refrained from deciding if, and when, such a step should be taken, but remarked that if such a step would be taken, it would be considered exceptional and subject solely to the discretion of the reviewing judge, as part of the balance conducted between essential security considerations and the rights of the detainee. Had the judge decided to summon the informant for questioning, the state would have faced the dilemma of whether to refrain from using the relevant material (and possibly dismiss the order) so that the informant not be exposed, or to defer to the court's order. Summoning an informant to testify was briefly regarded in another case (which concerned the ADL) as an occasion which would be "rarest of the rare," and it was not determined whether this would be appropriate at all. *See* AdminA 8788/03 *Federman*, at 187. In another case (which also concerned the ADL) the court opined that direct questioning of an informant by the court was inappropriate. *See* ADA 6/94 Ben-Yosef v. State of Israel, para. 3 (1994) (unpublished) (Isr.).

<sup>84</sup> Barak-Erez & Waxman, *supra* note 60, at 20.

<sup>85</sup> *Id.* at 18, 24.

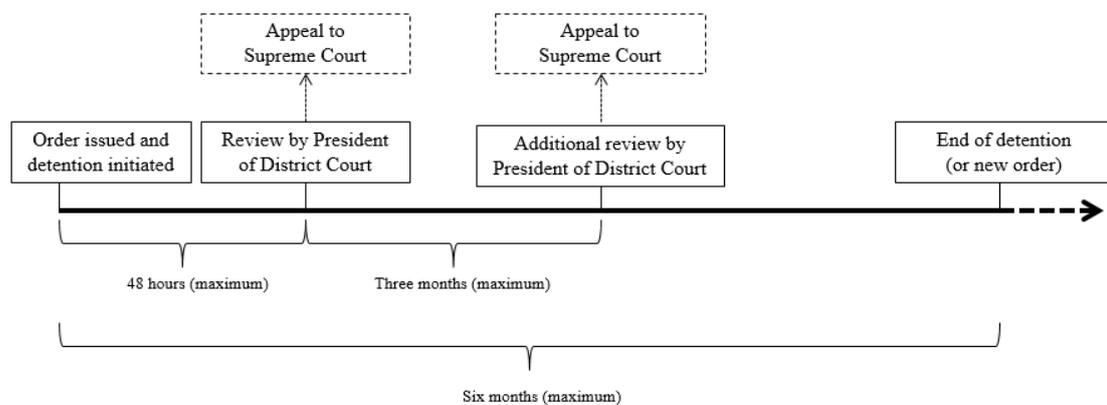
<sup>86</sup> *Id.* at 24-25. The authors note that in theory, the two models are not necessarily mutually exclusive, but in practice there has been very little consideration of how they may be combined, for two main reasons – first, they have a common purpose, and use of one would make the other seem redundant; and second, they reflect opposing conceptions on the role of judges in directly scrutinizing evidence. *See id.* at 35.

<sup>87</sup> *Id.* at 24-25.

responsible for the detainee – the relationship between them is not considered one of attorney-client and thus the advocate’s ethical responsibilities are not clearly delineated.<sup>88</sup> Moreover, the legal systems which employ this model impose restrictions on the special advocate’s communication with the detainee after the confidential material has been disclosed – which might limit their effectiveness.<sup>89</sup>

Contrary to the “judicial management” model, which imports inquisitorial elements to the adversarial judicial system, the “special advocate” model maintains the adversarial character of the judicial systems in which it operates.<sup>90</sup> Juxtaposition of the two models exposes relative advantages in each one of them.<sup>91</sup> As for Israel’s adoption of the “judicial management” model, it could be argued that this is another expression of the interventionist culture in Israel’s judiciary.

Diagram – Typical Detention Process under the ADL:



## II. THE INCARCERATION OF UNLAWFUL COMBATANTS LAW (2002)

### A. Background and General Principles

The Supreme Court’s decision in the *Lebanese Detainees Case* led to proposals for new legislation concerning preventive detention during armed conflict.<sup>92</sup> During the legislative process these proposals underwent a number of substantial alterations, with the eventual result being the enactment in 2002 of the Incarceration of Unlawful Combatants Law (UCL).<sup>93</sup>

<sup>88</sup> *Id.* at 27-28.

<sup>89</sup> *Id.* at 28-29; Krebs, *supra* note 58, at 653. In practice, after gaining access to closed materials, special advocates endeavor to find “open sources” of the materials to which they can refer the detainee and his legal counsel. See Barak-Erez & Waxman, *supra* note 60, at 28-29.

<sup>90</sup> Barak-Erez & Waxman, *supra* note 60, at 37.

<sup>91</sup> *Id.* at 31-47.

<sup>92</sup> See *supra* notes 32-33 and accompanying text.

<sup>93</sup> Incarceration of Unlawful Combatants Law, 5762-2002, SH No. 1834, p. 192 (Isr.) [hereinafter UCL]. An initial version of the draft bill authorized the internment of persons who belong to a force carrying out hostilities against the State of Israel, or who take part in the hostilities carried out by such force, while explicitly stating that “hostilities” include *inter alia* the holding of captive or abducted Israeli nationals, or refusal to return the bodies of deceased Israeli nationals to Israel. The suggestion to include authorization

The purpose of the UCL is to provide a legal tool, through domestic regulation, for preventive detention in the specific context of trans-boundary armed conflicts involving non-state actors (NSAs), in a manner conforming with the international law of armed conflict (LOAC).<sup>94</sup> As such, it allows for the internment of foreign nationals who take part in hostilities against Israel or who are members of a force carrying out such hostilities, in order to remove them from the cycle of hostilities. The law expressly removes from its purview persons who are entitled to prisoner of war (POW) status, whose detention is subject to a separate legal framework regulated under LOAC.<sup>95</sup> In the landmark case of *Iyyad*, the Supreme Court discussed and generally approved the

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for the internment of members of terrorist organizations so as to promote negotiations for the return of captive Israelis – a reason for internment that was prohibited by the Supreme Court in the *Lebanese Detainees Case* – was based upon the understanding that the Supreme Court's ruling in the *Lebanese Detainees Case* was limited to an interpretation of the ADL, but did not apply to internment under a different legal source (such clarification was put forward in this case, implicitly and explicitly, by several Justices). CFH 7048/97 *Lebanese Detainees Case* 54(1) PD at 745, 752-53 (2000) (Isr.). In HCJ 2967/00 Arad v. The Knesset of Israel 54(2) PD 188, 192 (2000) (Isr.), the Supreme Court itself affirmed this understanding, noting that the *Lebanese Detainees Case* concerned the interpretation of the existing ADL, and that the legislator is authorized to initiate legislative changes to Israeli law (which may, in turn, be the subject of another judicial review). Nevertheless, during the legislative process, the abovementioned proposed inclusion providing an expansive meaning of the term “hostilities” was completely removed from the draft bill, and the law, as passed by the Knesset, did not authorize internment merely for the purposes of promoting negotiations for the return of captive Israelis.

<sup>94</sup> However, the language of the UCL does leave room for application in other contexts of armed conflict. The definition of “unlawful combatant” under the UCL (which will be further discussed below), allows for the detention of individuals during hostilities carried out against the State of Israel, without explicitly requiring that such hostilities be carried out by an NSA – thus potentially also capturing inter-state armed conflicts as well. So far this possibility under the UCL has largely been overlooked, probably because of the little practical relevance to the type of contemporary conflicts that Israel faces.

<sup>95</sup> The above description of the UCL's purpose and scope is a result of a combination of the definition of “unlawful combatant” under section 2, together with section 1 of the UCL, which describes the UCL's general purpose (and explicitly states that it is intended to regulate the internment of such “unlawful combatants” in a manner “conforming to the obligations of the State of Israel under the provisions of international humanitarian law”). In *Iyyad* the Supreme Court clarified that the UCL only applies to foreign nationals, and not to Israeli residents or citizens. It refrained from deciding whether the UCL could be applied to residents of the West Bank (as the issue was irrelevant in the context of the case), but seemed to indicate that such internment should be conducted on the basis of the law in force in the West Bank, and not on the basis of the UCL. See CrimA 6659/06 *Iyyad*, 62(4) PD 329, paras. 6-7, 11 (2008) (Isr.). It should be noted that as a response to the court's decision in the *Lebanese Detainees Case*, the original draft proposals for the UCL intended to provide an explicit legislative avenue for holding detainees for the purposes of negotiating for the release of Israeli nationals held hostage. However, subsequent draft legislation underwent a fundamental and substantial alteration, and the UCL does not allow for the holding of persons for such purposes. See *id.* at para. 6.

constitutionality of the UCL under Israeli domestic law, and also generally affirmed the UCL's adherence with existing rules of LOAC.<sup>96,97</sup>

The UCL addresses the grounds and procedural safeguards which apply to internment under the law (as well as the conditions in incarceration, which are not dealt with in this article). In doing so, it aims at striking a proper balance between security needs, on the one hand, and the risk of unjustified detention, on the other. The grounds for internment are shaped in a manner particularly adjusted to a context of hostilities, and specifically those that involve NSAs. The procedural safeguards, including judicial review as an integral part of the internment process, aim to accommodate the possible evidentiary and legal challenges in NSA-related detentions. Several procedural aspects of the UCL were drafted in consideration of the contemporary conflicts with which Israel contends – and specifically, conflicts with military-like NSAs located just across Israel's borders, in which it is assumed that detainees will be brought from enemy territory to be held in Israeli territory.<sup>98</sup>

In this regard, it should be recalled that the UCL does not have extraterritorial applicability; that is, it only applies to internment in Israeli territory. The temporal and material scope it regulates starts from the point where an authorized officer produces the first formal instruction or order of detention under the UCL and ends when the person in question is released or otherwise moved out of the law's track (for example, if the person is moved exclusively to the criminal track). The preceding phase of detention – from initial capture of the detainee until transfer to the authorized officer – is not discussed by the UCL.

Prior to the inception of the UCL, in the event Israel wanted to use its domestic law to put foreign nationals affiliated with NSAs under preventive detention, the sole authority at hand was the ADL (excluding residents of the Gaza Strip and the West Bank, who were subject to the local legislation in each area). Yet, as discussed above, the ADL was primarily designed as a domestic security measure, intended to contend with security threats internal to the state. As such, the ADL is not sufficiently suitable

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<sup>96</sup> *Id.* In this case, the court considered the internment orders issued as against two senior representatives of Hezbollah in the Gaza Strip attempting to establish infrastructure supporting the organization in the area. Initially, these detainees were held by administrative detention orders that were issued under the military legislation existent in the Gaza Strip during the period of IDF control, on the basis of their association with Hezbollah and their participation in the hostilities being conducted against Israel. Following Israel's disengagement from the Gaza Strip and the repeal of the military government in 2005, internment orders were issued as against these persons under the UCL. The detainees challenged the issuance of these detention orders under the UCL, and following a District Court decision affirming the orders, appealed to the Supreme Court, challenging the District Court decision as well as the constitutionality of the UCL and its adherence to international law. The affirmation that the UCL is constitutional and adheres to international law, was not applicable to sections 7 and 8 of the Law, whose examination was not deemed necessary in the eyes of the court at that time. *Id.* at paras. 24–25. The constitutionality and adherence to international law of an amendment to the UCL enacted in 2008, after *Iyyad*, has not been considered in later cases.

<sup>97</sup> Since the UCL is intended to apply in the context of hostilities, the predominant legal regime under international law that would apply to cases of detention under the UCL is LOAC (which, for the purposes of this article, refers to the set of rules under international law that is applicable to the conduct of hostilities, and excludes the distinct set of rules applicable to the situation of belligerent occupation). Questions may arise regarding the applicability or interplay between the LOAC legal regime and the distinct legal regime of IHRL in this context, but, as mentioned above, such questions are outside the scope of this article (*see supra* note 16). In any case, in the authors' appraisal these questions are not of practical significance, as the UCL generally meets IHRL standards (detailed in this article in the context of the ADL).

<sup>98</sup> Some of these procedural aspects include the assumption that Israeli national courts play an integral role in the internment procedure, the high rank of the officers authorized to issue internment orders, and the timeframes set by the UCL.

for the context of a trans-boundary armed conflict – for example, the timeframes for the detention procedure do not reflect the realities extant in hostilities, and the grounds for detention do not specifically consider such circumstances. The unsuitability of the ADL became all the more apparent as Israel was increasingly forced to contend with the evolving nature of contemporary armed conflicts, including the growing capabilities and the enhancement of the military character of various non-state armed groups, and the increasing intensity of such conflicts.

From an international perspective as well, over the last several years there has been a growing need for states to contend with the proliferation of such conflicts. Issues associated with internment have attracted increased attention from the international law community and generated a rich discussion concerning an array of legal dilemmas, many of which remain unsettled.

One of the fundamental questions that has been the subject of considerable debate concerns the classification under LOAC of a trans-boundary conflict to which an NSA is a party, and consequentially, the body of law under LOAC that will be applicable to such a conflict. Today, many view such conflicts as non-international armed conflicts (NIACs).<sup>99</sup> Yet in the context of detention, this classification leaves many open questions, since although international law applicable to NIAC permits

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<sup>99</sup> See, e.g. SANDESH SIVAKUMARAN, *THE LAW OF NON-INTERNATIONAL ARMED CONFLICT* 232 (2012); Jelena Pejic, *Conflict Classification and the Law Applicable to Detention and the Use of Force*, in *INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICTS* 80, 81 (Elizabeth Wilmshurst ed., 2012); Dapo Akande, *Classification of Armed Conflicts: Relevant Legal Concepts*, in *INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICTS*, 32, 72 (Elizabeth Wilmshurst ed., 2012) (surveying the view that classifies trans-boundary armed conflicts between states and NSAs as NIACs); *Hamdan v. Rumsfeld*, 548 U.S. 557, 562 (2006) (U.S. Supreme Court view that NIACs are those conflicts that do not involve “a clash between nations”). As for the latter case, although the renowned ruling in *Hamdan* has been considered a main reference source in this regard, some question the view that the U.S. Supreme Court indeed did select the NIAC classification. See Eran Shamir-Borer, *Revisiting Hamdan v. Rumsfeld's Analysis of the Laws of Armed Conflict*, 21 *EMORY INT'L L. REV.* 601, 608-12 (2007).

states, in principle, to carry out detentions,<sup>100</sup> it provides rather scant detail on the manner in which this may be done.<sup>101</sup>

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<sup>100</sup> While it is widely considered that LOAC *allows* for the use of detention (including by way of internment) in the context of NIACs – *inter alia* due to lack of any prohibition thereof – the question of whether LOAC applicable to NIAC may also provide a *source of authority* to detain, has recently been the subject of an ongoing debate by judicial fora (particularly in connection with United Kingdom detention cases), the International Committee of the Red Cross (ICRC), and various commentators. In the Israeli context this question has been largely redundant, due to the Supreme Court's traditional approach of viewing the armed conflicts in which Israel has been involved as IACs, and as a result of the considerable regulation to which the use of detention powers is subject to in domestic Israeli law. Nevertheless, both Israel's Supreme Court and the Israeli government have previously given indications regarding their views on this question. In 1983, in a prominent case concerning members of armed groups captured and interned in Lebanon by Israeli military forces, the Supreme Court affirmed the existence of an authority in LOAC to intern those individuals, noting that "[LOAC] permits a belligerent to take the necessary measures in relation to an enemy, in order to frustrate its hostile activity, whether by prevention or by response [...] Among the authorities of a belligerent there is, *inter alia*, the authority to detain hostile individuals, who endanger the belligerent due to the nature of their activity [...] [Detention of such individuals] has always constituted a lawful execution of an authority, and so remained [...] The power and authority of a belligerent force to detain civilians who pose a threat to its security exist, even if the force merely conducts a raid or invasion, that do not involve the prolonged holding of a territory." The Supreme Court discussed the belligerent's powers to detain in a general manner, seemingly without intending for it to be limited to a specific type of conflict, and only afterwards discussed the specific provisions applicable to the case at hand (in the case, certain provisions of GC IV). *See* HCJ 102/82 Tzemel v. Minister of Defense 37(3) PD 365, 368-69, 371 (1983) (Isr.). The Israeli government directly addressed this issue in 2007, in its submissions to the Supreme Court in *Iyyad*. In essence, the government argued that, as a party to an armed conflict, it has an inherent authority to intern those who take part in the hostilities against it or who belong to its adversary's armed forces, whether the conflict in question would be classified as an IAC or as a NIAC. This authority forms part of a belligerent's general authority to use force in an armed conflict in order to overcome its adversary, a concept which is anchored in the fundamental principle of military necessity in customary LOAC. In this context, the government further recalled that there is no requirement in LOAC for an action to necessarily be premised upon international *treaty* law. It also asserted that where it is legitimate to attack an individual, it must necessarily be legitimate to exercise a lesser degree of force, and intern the individual in question. However, the court did not relate to these arguments in its decision, instead deciding to treat the conflict in question as an IAC, and as such, referring to the relevant provisions of GC IV. *See* State's Response at paras. 239-258 (March 1, 2007) to CrimA 6659/06 *Iyyad*, <http://www.hamoked.org.il/files/2013/110553.pdf> (Hebrew) [hereinafter *Iyyad* State Response]; *infra* note 111 and accompanying text. Further elaboration on this issue is outside the scope of this article.

<sup>101</sup> This applies especially with regard to the permitted grounds for detention (or internment) and procedural safeguards during detention (or internment) – two aspects on which this article focuses. Thus, Common Article 3 of the Geneva Conventions, one of the primary legal sources applicable to NIACs, deals in part with protection of detainees, but mainly focuses on protections relating to the humane treatment thereof, as well as to procedural guarantees in criminal proceedings. As such, it does not provide guidance regarding the possible grounds for detention or internment or the application of procedural safeguards in the context of the internment process itself. Likewise, Article 5 of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts [hereinafter AP II], which concerns the protection of detainees and internees, also does not address the issues of grounds for detention/internment or procedural guarantees. AP II, June 8, 1977, 1125 U.N.T.S 609. In addition it only applies to a certain subset of NIACs. As regards customary international law, the ICRC asserts that "[a]rbitrary deprivation of liberty is prohibited" as a matter of customary law applicable both to IAC and NIAC. *See* 1 INT'L COMM. OF THE RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 344 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005). However, the proposed rule in question does not seem to add much in the way of concrete guidance regarding legal grounds for detention or internment, or applicable procedural safeguards in the context thereof (likewise, the ICRC's reliance on predominantly IHRL sources to substantiate the existence of this rule in NIAC may raise additional questions. *Id.* at 347-52) Another possible source for such guidance could be Article 75 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S 609 [hereinafter AP I]. Many view this Article as reflective of customary law applicable in both international and non-international conflicts. However, in the context of

Others, including the Supreme Court of Israel, view this type of conflict as an international armed conflict (IAC).<sup>102</sup> Unlike the case with NIAC, internment in IAC is regulated in great detail in treaty law, under two different conventions – the Geneva Convention Relative to the Treatment of Prisoners of War (hereinafter GC III), which regulates the status of POW granted to “lawful” combatants of a party to the conflict (and to additional special classes) upon internment;<sup>103</sup> and the Geneva Convention Relative to the Protection of Civilian Persons in Time of War (hereinafter GC IV), which regulates the internment of civilians under belligerent occupation or who are aliens in the territory of a party to a conflict.<sup>104</sup> The IAC classification raises a dilemma. One approach would be to treat those “unlawful combatants,” who take part in hostilities but are not members of regular armed forces, as a subset of “civilians,” and grant them the protections offered under GC IV. A different approach would be to assert that they fall outside the scope of GC IV, arguing that the protections it provides were not intended to apply to unlawful combatants, and that such persons are only entitled to subsidiary basic protections under LOAC that are applicable to any person who is not granted with a preferable protection.<sup>105</sup> Likewise, those who view armed conflicts

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the current discussion, this provision is similar to Common Article 3 of the Geneva Conventions both in nature and (largely) in substance, and as such, shares its shortcomings. In this regard, *see* Bellinger & Padmanabhan, *supra* note 17, at 206-09; Jelena Pejic, *Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence*, 87 INT'L REV. RED CROSS 375, 377 (2005).

<sup>102</sup> See in particular the position of the Supreme Court in CrimA 6659/06 *Iyyad*, at para. 9. Dapo Akande expresses the view that, in a case where a state uses force against an NSA extraterritorially with the consent of the territorial state in which the NSA is based, the conflict would be governed by NIAC law, but where no such consent was given, the conflict would be governed by IAC law. This is because, in the second case, the two states would be involved in an IAC between themselves, and the conflict between the foreign state and the NSA cannot be separated from that inter-state conflict. Akande, *supra* note 99, at 73-77. Some scholars have proposed that trans-boundary conflicts involving NSAs should be regarded as a new class of armed conflict. *See, e.g.*, Roy Schöndorf, *Extra-State Armed Conflicts: Is There a Need for a New Legal Regime?*, 37 N.Y.U. J. INT'L L. & POL. 1, 5-6 (2004). However, these proposals have not gained significant acceptance. *See* Akande, *supra* note 99, at 71.

<sup>103</sup> Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135. Under Article 4 of GC III, the definition of the term “Prisoner of War” refers, *inter alia*, to soldiers serving in regular armed forces of states, or members of organized militias which belong to states and answer certain criteria (in addition to several other categories enunciated in Article 4, including certain classes of civilians). A POW may be interned for the duration of the hostilities merely due to his status as such. Once interned, a POW is not entitled under GC III to any kind of judicial or quasi-judicial review over his internment, except in cases where there is doubt regarding his status as a POW. In such an event, Article 5 of GC III provides that a competent tribunal is charged with the authority to make a determination.

<sup>104</sup> Geneva Convention Relative to the Protection of Civilian Persons in Time of War arts. 27, 41-43, 78, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287. Under GC IV, civilians may be interned during situations of international armed conflicts on an individual basis. This may only be done “if the security of the Detaining Power makes it absolutely necessary” in the case of aliens in the territory of a party to the conflict (Article 42), or “if the Occupying Power considers it necessary, for imperative reasons of security” in the case of occupation (Article 78), for as long as these reasons remain applicable. GC IV provides that civilian internees are entitled to have their cases reviewed by an “appropriate court or board” upon internment as well as on an ongoing and periodic basis.

<sup>105</sup> For some of the different views on this matter, *see generally* Knut Dörmann, *The Legal Situation of “Unlawful/Unprivileged Combatants,”* 85 INT'L REV. RED CROSS 45 (2003); Curtis A. Bradley, *The United States, Israel & Unlawful Combatants*, 12 GREEN BAG 2d 397, 404-05 (2006); Bellinger & Padmanabhan, *supra* note 17, at 217; Kenneth Watkin, WARRIORS WITHOUT RIGHTS? COMBATANTS, UNPRIVILEGED BELLIGERENTS, AND THE STRUGGLE OVER LEGITIMACY 2 (2005), <http://reliefweb.int/sites/reliefweb.int/files/resources/52332277E2871AF7C125704C0037CF99-hpcr-gen-09may.pdf>. The subsidiary protections usually referred to by those who argue that unlawful combatants fall outside the scope of the Geneva Conventions are included in Common Article 3 of the Geneva Conventions (which is widely regarded today as reflecting

involving an NSA as NIAC, while attempting to explore the latitude a NIAC classification may offer through drawing analogies to the parallel IAC context, would have to contend with a similar question.<sup>106</sup>

In light of these dilemmas, two significant international initiatives in recent years have been aimed at clarifying or setting standards for detention in conflicts involving NSAs – the “Copenhagen Process” and the ICRC Initiative on Strengthening International Humanitarian Law.<sup>107</sup> These initiatives have faced a number of challenges, including defining grounds for internment, distinctions between different types of conflicts involving NSAs,<sup>108</sup> distinction between different types or phases of detention, feasibility of providing various procedural safeguards in differing situations, the compliance of NSAs with the law, and other important issues.

The achievement of the UCL is in providing workable solutions that overcome many of these challenges, while fulfilling its declared purpose of conforming with existing rules of LOAC.<sup>109</sup> It does so by staying within the limits of GC IV, which sets the most stringent standards for internment under existing LOAC, and thus ensuring that internment under the UCL complies with LOAC whether a conflict is classified as

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customary international law applicable in every type of conflict); Article 75 of AP I, *see supra* note 101; and other basic protections under international customary law.

<sup>106</sup> *See, e.g.*, Ryan Goodman, *The Detention of Civilians in Armed Conflict*, 103 AM. J. INT'L L. 48, 50 (2009) (suggesting using the rules that apply to IACs as an analogy that “set an outer boundary of permissive action” in NIACs, and later analyzing the latitude they provide); Ashley S. Deeks, *Administrative Detention in Armed Conflict*, 40 CASE W. RES. J. INT'L L. 403, 433-35 (2009) (suggesting states apply GC IV principles and Article 75 of AP I to detentions in NIACs as a matter of policy, and enumerating the advantages in so doing).

<sup>107</sup> The “Copenhagen Process” is an initiative led by Denmark and with the participation of a closed list of invited states. The process yielded the Copenhagen Process Principles and Guidelines – a set of recommended guiding rules on detentions in international military operations. *See* Bruce Oswald & Thomas Winkler, *The Copenhagen Process: Principles and Guidelines on the Handling of Detainees in International Military Operations*, 83 NORDIC J. INT'L L. 128, 129 (2014). The ICRC Initiative on Strengthening International Humanitarian Law, which is ongoing, is currently focusing on the issue of detentions in NIACs. For further background, *see* ICRC, *Strengthening IHL Protecting Persons Deprived of their Liberty in relation to Armed Conflict* (Apr. 1, 2017), <https://www.icrc.org/en/document/detention-non-international-armed-conflict-icrcs-work-strengthening-legal-protection-0>. The issue of conditions of detention, which is not discussed in this article, has been also largely considered in both initiatives.

<sup>108</sup> Different subsets of conflicts involving NSAs carry different factual and legal characteristics, and in many respects clearly require different and nuanced approaches. Such, a civil war is not equivalent to an extraterritorial conflict against an NSA, and even within the latter category there may be different sub-types (such as conflict against an NSA hosted by a neighboring third state, conflict against an NSA hosted by a non-contiguous third state or a conflict against an NSA de-facto ruling a territory which does not belong to any state). Assumptions regarding, for example, the degree of control the detaining state or the NSA holds over the relevant territory, whether the detaining state intends to bring the detainees to detention facilities in its own territory, the distance between the detaining state's own territory and the theater of operations, whether the authorities in the host state are cooperating with the detaining state or not, and other relevant factors, may affect the requirements and expectations regarding, *inter alia*, the nature and level of conditions of detention, the feasibility of providing different procedural safeguards (including judicial review), and relevant timeframes. For typologies of NIACs offered by scholars in the ICRC, *see* Jelena Pejic, *The Protective Scope of Common Article 3: More than Meets the Eye*, 93 INT'L REV. RED CROSS 189, 193-95 (2011); Sylvain Vit , *Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations*, 91 INT'L REV. RED CROSS 69, 75-83 (2009).

<sup>109</sup> UCL, 5762-2002, SH No. 1834, at § 1 (Isr.). The law – which was passed already in 2002, when much of the debate over the classification of armed conflicts involving NSAs was still relatively nascent – is not explicit on how conflicts against NSAs should be classified, and which specific international law rules apply.

IAC (potentially subject to GC IV) or NIAC (subject only to the more lax standards as discussed above).<sup>110</sup>

In this manner, the state in *Iyyad* offered the court to use GC IV as a yardstick for determining if the UCL conforms to LOAC, despite arguing that the authority to detain and intern unlawful combatants is recognized in customary LOAC and is not dependent on the provisions of GC IV (here, the state did not express its position regarding the classification of armed conflicts involving NSAs, nor specifically the conflict between Israel and Hezbollah, which was at the center of this case).<sup>111</sup> The Supreme Court, in turn, reiterated its traditional approach of generally viewing the armed conflicts between Israel and terror organizations operating from outside its borders as IACs<sup>112</sup> and viewing unlawful combatants as a subset of the civilian classification; however, it ultimately refrained from determining whether GC IV applies to detainees under the UCL. Rather, the court confirmed the state's assertion that such a determination is not needed, as the UCL meets the standards provided by GC IV regardless.<sup>113</sup> The court still used GC IV as a yardstick throughout its decision, ultimately finding that the UCL complies with its standards, and with regard to several aspects, goes beyond them.<sup>114</sup>

In the limited experience gained so far with the application of the UCL, it has appeared to be an effective tool in achieving its purpose. Indeed, one scholar has already suggested that states wishing to introduce domestic internment schemes for similar contexts consider the experience acquired through the UCL.<sup>115</sup> Certain aspects of the law could also serve as a source of inspiration for the international initiatives mentioned above.

## B. Internment Order Issuance Procedure

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<sup>110</sup> Goodman, *supra* note 106, at 50 (“States have accepted more exacting obligations under IHL in international than in noninternational armed conflicts. That is, IHL is uniformly less restrictive in internal armed conflicts than in international armed conflicts. Accordingly, if states have authority to engage in particular practices in an international armed conflict . . . they a fortiori possess the authority to undertake those practices in noninternational conflict.”).

<sup>111</sup> Iyyad State Response, *supra* note 100, paras. 278-356 (and particularly paras. 324 and 336). The state noted that, assuming *arguendo* the conflict would be classified as an IAC, there would still be controversy on the applicable international law that applies to “unlawful combatants” (*id.* at paras. 300-314). Subsequently, the state presented the different possible interpretations regarding the legal regime that applies to unlawful combatants – mainly, either that GC IV applies or that unlawful combatants are only provided with subsidiary basic protections under LOAC – without taking a clear stand, but rather tried to show that the law accords with every possible interpretation (*id.* at paras. 315-356). For more on the issues of the applicable legal regime that applies to unlawful combatants and the authority to detain in an armed conflict, *see supra* notes 99-106 and accompanying text.

<sup>112</sup> At the same time, the court noted that existing rules of international law are not completely attuned to the realities of contemporary conflicts, and that they should be construed in a fashion which takes into account the changing reality. *See* CrimA 6659/06 *Iyyad*, 62(4) PD 329, para. 9 (2008) (Isr.). The court did not explain this arguable categorization of conflicts against NSAs, but instead referred on that matter to its previous decision in Targeted Killings Case. HCJ 769/02 Public Committee against Torture v. State of Israel 57(6) PD 285, paras. 18, 21 (2006) (Isr.) [hereinafter Targeted Killings Case]. As mentioned before, today many view these types of conflicts as NIACs, and this may affect the view of the Israeli Supreme Court in a future discussion of this question.

<sup>113</sup> CrimA 6659/06 *Iyyad*, at paras. 12-13.

<sup>114</sup> The court's scrutiny of some specific aspects will be elaborated on below.

<sup>115</sup> YUVAL SHANY, HEBREW U. OF JERUSALEM, RESEARCH PAPER NO. 03-12, THE ISRAELI UNLAWFUL COMBATANTS LAW: OLD WINE IN A NEW BOTTLE? 1 (Tomer Broude, ed., 2012), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1985473](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1985473).

The authorities under the UCL are mostly granted to the military apparatus, with judicial supervision and review conducted by the civilian authorities.

The UCL puts the authority to issue internment orders in the hands of the most senior military commanders – the Chief of General Staff and specifically authorized officers with the rank of Major-General (the second highest rank in the IDF) (hereinafter Authorized Senior Officer).<sup>116</sup> Where an Authorized Senior Officer has reasonable cause to believe that a person being held by state authorities falls within the definition of an “unlawful combatant”<sup>117</sup> as provided under the UCL, and the release of this person would harm state security, he may issue an internment order against that person.<sup>118</sup> If there is no such reasonable cause, the person must be released. According to an IDF internal procedure, the Authorized Senior Officer must examine all information at his disposal concerning the detainee, and consult a legal adviser in the IDF’s Military Advocate General’s Corps before making a decision (to the extent such consultation is feasible under the circumstances).<sup>119</sup> If an internment order is issued, it must specify the grounds for the internment to the extent that the inclusion of such details does not harm state security.<sup>120</sup>

Prior to the order being issued, the detainee is entitled to be heard before a specifically authorized officer with the rank of at least Lieutenant-Colonel (hereinafter the Hearing Officer). According to the IDF’s internal procedure, the detainee must be informed in his native language that he is being detained, and receive an explanation for the reasons for his detention (in an unclassified intelligence summary which at a minimum describes the core of the allegations). The Supreme Court has viewed the purpose of this procedure as both to prevent mistakes in identifying a detainee and to

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<sup>116</sup> UCL, 5762-2002, SH No. 1834, at §§ 3(b), 11(a) (Isr.).

<sup>117</sup> The definition of an “unlawful combatant” will be discussed in detail below as part of the discussion regarding the substantial grounds justifying internment.

<sup>118</sup> UCL § 3(b)(1).

<sup>119</sup> It seems that the practice of consultation with a legal adviser before making a decision answers, to a large extent, one of the criticisms of the UCL mechanism. According to this critique, the authority to issue internment orders should have been placed in the hands of a legal-military body, and not solely the Chief of General Staff, since the centralization of power in the hands of the latter may be seen as granting excessive power to a military authority whose assessments will generally not be challenged by civilian courts lacking expertise in security matters. *See* Shlomy Zachary, *Between the Geneva Conventions: Where Does the Unlawful Combatant Belong?*, 38 ISR. L. REV. 378, 402-03 (2005). Another response to this critique is that experience shows (specifically in relation to the UCL, but also generally) that Israeli courts do not hesitate to delve into difficult security matters, including in the midst of ongoing hostilities. It should also be recalled that the Justices of the Supreme Court are “repeat players” in judicial reviews under the UCL (and the other preventive detention frameworks), which allows them to gain accumulated expertise with security matters specifically related to preventive detention. This is also applicable to some District Court judges.

<sup>120</sup> UCL § 3(b)(2). In the case of *Sofi*, in which the sitting Justice opined that the internment order did not sufficiently detail the reasons for internment, the same Justice did express approval of the fact that additional information was provided to the internee regarding the reasons for internment during the subsequent judicial review. *See* ADA 2595/09 *Sofi v. State of Israel*, para. 22 (2009) (unpublished) (Isr.). On the international law level, treaty law applying to NIACs, as well as GC IV, do not provide detailed instruction on this matter, but Article 75(3) of AP I requires that every internee be promptly informed of the reasons for his internment. Article 75(3) also requires that the information should be provided in a language the internee understands – a practice which is indeed followed during the internee’s hearing process under the UCL (to be elaborated on below). Israel is not a party to AP I, and additionally, AP I only applies to IACs (while the conflicts the UCL applies to should not necessarily be classified as such), but many view Article 75 to AP I as generally reflecting customary international law, both in IACs and NIACs. *See* Bellinger & Padmanabhan, *supra* note 17, at 206-07.

allow the detainee to confront the allegations made against him.<sup>121</sup> If the Hearing Officer does not order the release of the detainee, the detainee's claims are later brought before the Authorized Senior Officer, prior to his decision on whether to issue an internment order.<sup>122</sup> This requirement for prior hearing, which does not appear in GC III or GC IV, serves as an additional safeguard against unjustified detention in that it acknowledges the possible complexity in identifying NSA fighters, particularly on a battlefield which is intertwined with a civilian presence.

The above two steps are integral to the procedure for internment under the UCL. In addition, the law provides for an additional, optional, preliminary phase, prior to these two steps, where specifically authorized officers with the rank of Captain or higher are granted the authority to issue a temporary instruction for detention of maximum 96 hours where they have reasonable grounds to assume that a person fulfills the definition of an "unlawful combatant."<sup>123</sup> Within that timeframe, the detainee must be brought before the Hearing Officer, and his case must be subsequently considered and decided by an Authorized Senior Officer. If no internment order is issued within the 96 hours timeframe, the detainee should be released.<sup>124</sup>

This authority intends to address the interim phase starting when the captured person has been brought to Israeli territory from the combat zone until his integration and processing into the internment track. It also introduces another buffer against unjustified detention, in that an additional authorized entity exercises discretion over the justifiability of the detention at an early stage in the process.

This authority was not originally present in the UCL. It was introduced through an amendment enacted in 2008 (hereinafter 2008 Amendment)<sup>125</sup> following the experience of the Second Lebanon War in 2006 between Israel and the Lebanon-based terror organization Hezbollah, during which considerable temporal gaps were identified between the time when the detainee had been brought into Israeli territory and the point at which the case was brought before an Authorized Senior Officer.

In certain scenarios where detention is expected to occur on a substantially larger scale, the Government may trigger special provisions under the law which alter some of these authorities and timeframes.<sup>126</sup> Under these provisions, the duration of temporary detention instructions may be lengthened from 96 hours to seven days; the rank of the officer charged with hearing the submissions of the detainee may be reduced from

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<sup>121</sup> CrimA 6659/06 *Iyyad*, 62(4) PD 329, para. 39 (2008) (Isr.). (with regard to the identification purpose); AdminA 2595/09 *Sofiz*, at para. 19 (with regard to the argumentation purpose).

<sup>122</sup> UCL § 3(b)(1). According to section 3(b)(3) of the UCL, the order may be issued without the internee being present; however, where this occurs, the detainee must be informed regarding the order as soon as possible.

<sup>123</sup> UCL §§ 3(a), (c). According to the IDF internal procedure, the instruction can only be given on the basis of information regarding the specific detainee – whether by intelligence or by information which concerns the circumstances of his capture.

<sup>124</sup> UCL § 3(c). While the wording of the UCL states that the person is to be released if this requirement is not met (unless other lawful grounds for detention exist), this issue has not yet been raised in court.

<sup>125</sup> Incarceration of Unlawful Combatants Law (Amendment and Sunset Clause), 5768-2008, SH No. 2178 p. 828 (Isr.).

<sup>126</sup> UCL § 10A. According to the UCL, where the Government has notified the Knesset Foreign Affairs and Security Committee of a state of war or "military actions necessary for the defense of the state and public security" (as required under the Israeli Basic Law: The Government, section 40), it may declare that the situation requires the triggering of these special provisions under the UCL. Such a declaration requires initial and periodic approval by the Knesset Foreign Affairs and Security Committee.

Lieutenant-Colonel to Captain; and the rank of those capable of acting as Authorized Senior Officers may be reduced one rank to Brigadier-General.<sup>127</sup>

There is no maximum duration for which an internment order under the UCL may apply, and it does not require renewal or extension. In *Iyyad*, the Supreme Court attributed this aspect to the basic rationale of the UCL – preventing unlawful combatants from returning to the cycle of combat for the duration of hostilities – and noted that the same rationale underlies internment under GC III<sup>128</sup> and GC IV.<sup>129</sup> The court stated that the overarching presumption under the UCL is identical, in a way that an internment order will only remain valid for the duration of the hostilities.<sup>130</sup>

At the same time, the Supreme Court has also observed that the UCL does not permit unending internment. While acknowledging the uncertainty in predicting the end of hostilities between states and terror organizations, which typically do not have a clear delineation of time,<sup>131</sup> the court concluded that the safeguards provided under the UCL ensure that internees will not be held for longer than required for “material security considerations.”<sup>132</sup> This observation was primarily based on the requirement for periodic judicial reviews, where the justification for the continuing internment is examined in light of the evidentiary material indicating the individual threat posed by the internee, and in consideration of the time that has passed since the issuance of the internment order.<sup>133</sup> The issue of judicial review will be discussed more thoroughly below.

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<sup>127</sup> These provisions did not originally appear in the UCL. They were first introduced in the 2008 Amendment, in the form of a sunset clause, which expired in 2010. They were then reinstated, with some procedural changes, as a permanent amendment in 2016. The explanatory memorandum to the bill proposing the amendment stated that subjecting such provisions to a short lifespan (referring to the previous sunset clause), whose duration may be arbitrary, is unsuited to the volatile security situation in the region, since any future need of such provisions may be urgent. Specifically, the explanatory memorandum recalled that the conflicts in the Gaza Strip of December 2008 to January 2009 and November 2012 flamed almost instantly (the draft bill was submitted before the 2014 Gaza Conflict). At the same time, the explanatory memorandum stressed that the conditions for the activation of the provisions – governmental decision and parliamentary approval – provide a safeguard in so that the provisions would only be used in a restrained fashion, for a limited time, and only in situations of necessity. *See* Explanatory Memorandum to Draft Bill for The Incarceration of Unlawful Combatants Law (Amendment No. 3), 5773-2013, HH No. 1088 pp. 1092-93 (Isr).

<sup>128</sup> GC III, *supra* note 103, at art. 118 (requiring the release of POWs after the cessation of “active hostilities”). Although the language of Article 118 does not, by its language, require reciprocity from the parties to the conflict, in practice negotiations and a degree of reciprocity have proved necessary. *See* Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT'L L. 239, 254 (2000).

<sup>129</sup> GC IV, *supra* note 104, at arts. 132-133 (requiring the release of an interned civilian as soon as the reasons which necessitated the internment cease to exist, and in any case no later than the close of hostilities). *See also* CrimA 6659/06 *Iyyad*, 62(4) PD 329, para. 46 (2008) (Isr.).

<sup>130</sup> *See id.* The latter requirement is embedded in the UCL under the definition of “unlawful combatant,” which requires the internee’s connection to hostilities conducted against the State of Israel.

<sup>131</sup> *Id.* The concern that conditioning an individual’s release on the end of hostilities could result in a *de-facto* “life imprisonment” has been raised by several commentators. *See, e.g.*, Bellinger & Padmanabhan, *supra* note 17, at 228-29.

<sup>132</sup> CrimA 6659/06 *Iyyad*, at para. 46.

<sup>133</sup> *Id.* This principle coincides with Article 132 of GC IV, which requires the release of a detainee as soon as the reasons which necessitated his internment no longer exist, and with Article 75(3) of AP I, which requires the release of detainees with the minimum delay possible, and as soon as the circumstances justifying the detention have ceased to exist. The solution of requiring an individual threat posed by each detainee (as the UCL provides) was later raised by commentators and embraced by the U.S. administration. *See* Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2125 (2005) (explaining that this approach is akin to reconceptualizing the end of the conflict in terms of the individual rather than the NSA); Bellinger & Padmanabhan, *supra* note 17, at 231 (supporting this approach while rejecting others, and noting the U.S. stance in this regard).

One could note two additional ways the order may be annulled before the end of hostilities. The first might occur where the person concerned is not brought for the initial judicial review within the requisite timeframe.<sup>134</sup> The second lies within the ongoing responsibility imparted by the UCL on the executive authority – when an Authorized Senior Officer believes that the internee no longer falls under the UCL definition of “unlawful combatant,” or alternatively, that his release would not harm state security, the law orders him to annul the internment order and release the internee.<sup>135</sup>

Notwithstanding the protracted nature of the armed conflicts in which Israel is embroiled, the Supreme Court’s conclusion that the UCL does not provide for unending internment has been reflected in practice. Statistics show that out of 58 internment orders issued under the UCL since its promulgation in 2002, the majority of them endured for a few days, weeks or months, and only a few orders endured for over two years.<sup>136</sup> The longest period of internment under the UCL concerned the two internees in *Iyyad*, for approximately three years and 11 months. As at the time of writing, there is one internee being held under the UCL.<sup>137</sup>

### C. Grounds for Internment

As mentioned above, the Authorized Senior Officer must determine that the detainee falls under the definition of “unlawful combatant” in order to issue an internment order.

The first condition to this determination is that the detainee is not entitled to POW status under LOAC.<sup>138</sup> The second, and cumulative, condition is that the person must fall within one of the two following categories:

- a) The person has participated, directly or indirectly, in hostilities against the State of Israel (the “participation alternative”); or
- b) The person is a member of a force carrying out hostilities against the State of Israel (the “membership alternative”).

In relation to the membership alternative, there are two possibilities for determining whether a particular “force” exists and is carrying out hostilities against the State of Israel. Under the first possibility, explicitly offered by the UCL, it can be presumed on the basis of a certificate provided by the Minister of Defense stating that a particular force indeed is carrying out hostilities against the State of Israel. This factual

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<sup>134</sup> UCL, 5762-2002, SH No. 1834, at § 5(b) (Isr.). As with section 3(c), the wording of the UCL states that the person must be released if this requirement is not met (unless other lawful grounds for detention exist); however, this issue has not yet been applied in practice.

<sup>135</sup> UCL § 4.

<sup>136</sup> According to information provided by the relevant authorities in the IDF, two orders were issued in 2002, two in 2005, ten in 2006 (in the context of the Second Lebanon War), two in 2007, one in 2008, 37 in 2009 (in the context of the 2008-2009 Gaza Conflict), one in 2010, one in 2014 (in the context of the 2014 Gaza Conflict), one in 2015 and one in 2017. In total, 58 orders have been issued since the promulgation of the UCL. According to Krebs, who reviewed 27 orders which reached the Supreme Court, from the total 55 orders issued prior to Krebs’ article (considering that orders that were in force for a short timeframe would not reach the court, and that some internees were released before an appeal reached the court), 12 orders endured for less than one year, seven orders for between one and two years, and eight orders for over two years. *See* Krebs, *supra* note 58, at 667.

<sup>137</sup> Since March 2017. This information was provided by the relevant authorities in the IDF.

<sup>138</sup> UCL § 2.

assumption may be refuted by the interneer.<sup>139</sup> Under the second possibility, which the UCL does not explicitly provide, the matter can be proven in court, on the basis of an intelligence report provided by the state.<sup>140</sup> Either way, the UCL does not offer substantial criteria to aid such a determination, such as the level of organization required or its nexus to the overall hostilities. The UCL also does not specify how membership in such force should be determined.<sup>141</sup>

The Supreme Court has provided guidance in *Iyyad* on the interpretation of the definition of “unlawful combatant” under the UCL. With regard to the participation alternative, the court held that it is insufficient to show a “remote, negligible or marginal contribution” to the hostilities being conducted against Israel.<sup>142</sup> Rather, it must be shown that the person in question made a contribution to the hostilities in a manner that is likely to indicate his personal dangerousness.<sup>143</sup> The court acknowledged the difficulty in predetermining the extent of contribution that would suffice, and stated that such decisions will be made according to the circumstances of each specific case.<sup>144</sup>

With regard to the membership alternative, the court has held that it is insufficient to show “some kind of a tenuous connection” with an adversary force. At the same time, the court clarified that the membership alternative does not necessitate direct or indirect involvement in the hostilities themselves, and “it is possible that the connection and contribution to the organization might take other expressions that would suffice to include the person in the cycle of hostilities in its broad sense” – and to thereby justify internment.<sup>145</sup>

Once proven that a person, who is not entitled to POW status, fulfills one of these two alternatives, he falls under the definition of “unlawful combatant.” Nonetheless, an internment order may only be issued if the Authorized Senior Officer believes that the person’s release would harm state security.<sup>146</sup>

While black letter law presents this qualification separately from the definition of “unlawful combatant” – and seemingly as a cumulative requirement for internment – in *Iyyad* the Supreme Court viewed the element of individual threat as inherently embedded into the definition of “unlawful combatant” as construed and qualified by the court. In other words, the court’s approach is that once it is proved that a person, who is not entitled to POW status, fulfills one of the two alternatives under the “unlawful combatant” definition, as construed by the court, there is no *separate* requirement to prove that the person’s release would pose a threat to state security.<sup>147</sup>

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<sup>139</sup> UCL § 8. As mentioned above, the constitutionality of the provision which allows for a presumption to be made has likewise not been addressed by Israeli courts, due to the fact that in *Iyyad* the state did not rely on this provision, and it has not been challenged since.

<sup>140</sup> See CrimA 6659/06 *Iyyad*, 62(4) PD 329, para. 25 (2008) (Isr.).

<sup>141</sup> For example, by a formal enjoinder with a force or rather by functional participation in the force's activities.

<sup>142</sup> CrimA 6659/06 *Iyyad*, at para. 21.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> UCL, 5762-2002, SH No. 1834, at § 3(b)(1) (Isr.).

<sup>147</sup> CrimA 6659/06 *Iyyad*, 62(4) PD 329, para. 21 (2008) (Isr.) (“[F]or the purpose of internment under the [UCL], the state must furnish administrative proof that the [person] is an “unlawful combatant” with the meaning that we discussed.... [P]roving the conditions of the definition of an ‘unlawful combatant’ in the aforesaid sense naturally includes proof of an individual threat that derives from the type of involvement in the organization”), para. 24 (“[P]roving fulfillment of the conditions of the definition of ‘unlawful combatant’ in s[ection] 2” of the UCL includes proving the individual dangerousness “that arises from the type of involvement in an organization as explained above.”). This understanding of *Iyyad* was reiterated in, *e.g.*, ADA

This is a sensible reading of the law – participation in hostilities or membership in a hostile force is essentially an expression of a security threat, while two independent and separate phases of scrutiny that disregard this interrelation seem to be somewhat artificial. In this regard, an important insight could be deduced from the manner in which the court construed the membership alternative – the fact that the threat requirement was integrated within it by requiring that the *connection* to the terror organization not be tenuous, without explicitly requiring that the person fulfill certain type of roles in the force, indicates the court's position that membership in a hostile force could *ipso facto* be considered a threat justifying internment.

Interestingly, the UCL also provides for a rebuttable presumption to be made regarding the assessment of an individual's threat to state security; this presumption has yet to be invoked by the state in practice. Under the UCL, a person who “is a member of a force conducting hostilities against the State of Israel or who has participated in hostilities conducted by such a force, either directly or indirectly, shall be deemed to be a person whose release would harm State security, as long as the hostilities conducted by such force against the State of Israel have not yet ceased, unless proved otherwise.”<sup>148</sup> Namely, if the state would invoke this presumption, the burden of proof with regard to the existence of a threat then shifts to the detainee. However, the state may only invoke this presumption once it has proven the detainee's membership in a hostile force or participation in hostilities.

Queries arise when one considers the threat presumption in light of the court's reading of the threat element as already embedded within the definition of “unlawful combatant.” It could be asked if as a result, the threat presumption becomes redundant, or alternatively, to what extent should the presumption lower the threshold of proof – whether in evidentiary or substantial terms – of the threat element, as it is embedded within the definition of “unlawful combatant.” Although the court in *Iyyad* explicitly acknowledged the latter question and seemed to imply that relying on the threat presumption would lower the threshold for internment to some extent, it refrained from providing clear-cut answers.<sup>149</sup> Instead, it relied on the state's position that its current policy is to refrain from using the threat presumption, and to prove, through its own endeavors, the individual threat with regard to each designated internee.<sup>150</sup> Accordingly,

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1510/09 *Atamana v. State of Israel*, para. 8 (2009) (unpublished) (Isr.) (“For the classification of a person as an “unlawful combatant” for the purposes of the law, the existence of individual dangerousness is required (section 2 of the UCL). This personal dangerousness exists in one of two ways: either the detainee took part in the hostilities against the State of Israel, or he belongs to a force carrying out hostilities against the state.”). In tension with the *Iyyad* decision, in a few cases of regular appeals against District Court decisions, the threat element was nevertheless analyzed as a separate requirement, without an explanation for the possible deviation from *Iyyad*. It is reasonable to suggest that these rulings are to be considered less authoritative than the leading decision of *Iyyad* (and therefore should not be viewed as overturning *Iyyad*), where the court had an in-depth discussion of this issue. See ADA 2595/09 *Sofi v. State of Israel*, paras. 7, 13 (2009) (unpublished) (Isr.); AdminA 7750/08 *Anonymous v. State of Israel (Abu Fariah)*, paras. 6-8. (2008) (unpublished) (Isr.); AdminA 6594/14 *Najar v. State of Israel* (2014) (unpublished) (Isr.).

<sup>148</sup> UCL § 7.

<sup>149</sup> Mainly, it remains unclear whether the court was referring to the lowering of the substantial legal or evidentiary threshold (or both).

<sup>150</sup> CrimA 6659/06 *Iyyad*, at para. 24 (“[S]ince the state has refrained until now from invoking the presumption in s[ection] 7 of the [UCL], the questions of the extent to which the said presumption reduces the requirement of proving the individual threat for the purpose of internment under the [UCL] ... do not arise. We can therefore leave these questions undecided ...”). Nevertheless, the presumption provided under the UCL has received criticism from those who view unlawful combatants as protected persons and thus subject to the provisions of GC IV. According to this argument, the presumption in section 7 of the UCL diverges from GC IV as it supposedly removes the requirement of individual risk and allows for “almost

the court did not see a need to examine whether or not the presumption is constitutional or if it accords with international law.<sup>151</sup>

In the vast majority of cases following *Iyyad*, the state could, and as a matter of policy, did, provide evidentiary material for each internee indicating both participation in hostilities and an affiliation with a hostile force. The result has been several decisions where the court has not definitively stated what weight was afforded to different evidentiary material in reaching its decision.<sup>152</sup> This practice, together with the limited employment of the UCL to date – as well as the fact that the precise details of the concerned person's hostile activities that were obtained from intelligence are usually classified and are not fully specified in the published decisions – make it difficult at the current time to precisely delineate the boundaries of each alternative and the interplay between them.

Nevertheless, examples drawn from case law may indicate some of the activities that would be probably viewed as participation in hostilities, including regular operational activity in an armed force,<sup>153</sup> launching rockets,<sup>154</sup> gathering military intelligence,<sup>155</sup> building explosives and instructing others on use,<sup>156</sup> and developing military equipment.<sup>157</sup> On the other hand, the activity of a member in the civilian-political wing of Hamas, in acquiring an assault rifle and having limited operational involvement, was regarded by the court as falling short of direct or indirect participation

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arbitrary detention.” Zachary, *supra* note 119, at 400-01. It should nevertheless be noted that this argument was expressed before the *Iyyad* decision, which as detailed above interpreted the definition of “unlawful combatant” in a manner which integrates the element of individual threat.

<sup>151</sup> The court did reject the appellants' argument that the threat presumption obviates the need to prove an individual threat, explaining that if the definition of “unlawful combatant” inherently includes the threat requirement, and given that the state has to prove that the person falls under the definition before it is able to invoke the threat presumption, the state will necessarily have to prove the existence of an individual threat in each case. *See* CrimA 6659/06 *Iyyad*, at para. 21. Nevertheless, the court did not decide on the extent the presumption could reduce the requirement of proving an individual threat (as noted above), and subsequently, whether this would violate Israeli constitutional law and LOAC principles. *Id.* at para. 24. The threat presumption has not been invoked by the state following this decision, and therefore has not yet been scrutinized. Nevertheless, in a later case, where a District Court judge upheld an internment order but was not clear on whether he relied upon the threat presumption in his decision, the argument against the constitutionality of the presumption was again raised during the appeal to the Supreme Court. However, the Supreme Court found it again unnecessary to discuss the issue, since it found that personal dangerousness was sufficiently proved without relying on the presumption. *See* CA 7446/08 Sa'id v. State of Israel, para. 40 (2008) (Isr.) (unpublished case).

<sup>152</sup> In some cases, the court has not explicitly stated which one of the two alternatives was relied upon. *See, e.g.* ADA 9256/09 Anonymous v. State of Israel, para. 3 (2009) (unpublished) (Isr.); Different Order (DO) (BS) 30524-03-10 State of Israel v. Abu Magasib, paras. 5-8 (2010) (unpublished) (Isr.).

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> CA 7446/08 Sa'id, at para. 5.

<sup>156</sup> AdminA 3133/11 Sarsak v. State of Israel (2011) (unpublished) (Isr.). The decision did not explicitly note that the internee in question had used his unique capabilities in this regard, but did relate his capabilities to his activity in the Palestinian Islamic Jihad and his significant role in the organization.

<sup>157</sup> Different Requests (DR) (Jer.) 8734/09 State of Israel v. Anonymous (2009) (unpublished) (Isr.). One can think of many other specific examples for direct and indirect participation. For instance, Ryan Goodman considers logistical support provided to fighters as an activity that could be regarded as an indirect support that justifies internment. Goodman specifically refers to the types of activities included in Article 4(A)(4) of GC III, which relate to transportation, communication, supplies, labor and welfare services. On the other hand, Goodman regarded political sympathy or affiliation with the enemy power to be short of indirect participation, and opined that detaining solely for intelligence-gathering purposes someone who has no meaningful connection to the hostilities is also not based on a valid security rationale. *See* Goodman, *supra* note 106, at 54-55.

in hostilities.<sup>158</sup> The activity of weapon smuggling was approached differently in two separate cases brought before the Supreme Court – in one case it was seen as insufficient to cross the UCL's threshold, but in another case it was viewed as a type of indirect participation in hostilities that justified internment under the UCL.<sup>159</sup>

With regard to the membership alternative, the court has affirmed an internment order solely on this basis only in a very few cases.<sup>160</sup> This is one of the reasons why the Israeli courts have yet to struggle with clearly determining many of the components of the membership alternative. For example, the court has yet to set a clear threshold for the level of organization required from a “force” or to offer criteria to determine “membership” within a force. Rather, the court has drawn conclusions on such issues on an *ad-hoc* basis. One other possible reason for the court's limited examination of components comprising the membership alternative may be because the main Gaza- and Lebanon-based NSAs carrying out hostilities against Israel provide relatively “clear-cut” cases, due to their high level of organization and their relatively structured membership mechanisms.<sup>161</sup>

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<sup>158</sup> ADA 2595/09 Sofi v. State of Israel, para. 9 (2009) (unpublished) (Isr.). The court noted that there was “some” operational activity, without specifying its degree or nature. Assumedly, the court was referring to limited involvement in operational activities.

<sup>159</sup> The most recent case, decided in 2017, is AdminA 4521/17 Abu Taha v. The State of Israel (2017) (unpublished) (Isr.). This case concerned a private smuggling contractor who was involved in smuggling weapons, as well as funds, to terror organizations in the Gaza Strip (although he was not identified with any specific organization, and moreover, dealt with smuggling of different contraband intended also for civilian purposes). Due to this activity, the person was found to be indirectly participating in hostilities and posing a security threat in a way that justified his internment under the UCL. This decision seemingly contradicts the *Abu Fariah* decision from 2008. See AdminA 7750/08 *Abu Fariah*, para. 12 (2008) (unpublished) (Isr.). The latter case presented relatively similar facts, with a private smuggling contractor involved in weapons smuggling to several terror organizations in the Gaza Strip, without being clearly identified with any specific one. The judge in that case determined that this activity did not amount to direct or indirect participation in hostilities, and that the membership alternative was also not properly fulfilled (*Id.* at para. 11). On that basis, and despite the judge's conclusion that the person did pose a security threat, the judge annulled the internment order, and suggested that the ADL was a more appropriate tool for detention in these circumstances (*Id.* at para. 17). The presiding Judge in *Abu Taha* did not explain his different conclusion to *Abu Fariah*. Perhaps it could be explained in the fact that since *Abu Fariah* was discussed, the threat posed by weapons smuggling to the Gaza Strip was realized and demonstrated in three rounds of intensive fighting between Israel and the terror organizations in the Gaza Strip.

<sup>160</sup> This may be for the same reasons presented above that lead to a difficulty in precisely delineating the boundaries between the two alternatives at the current time. An additional possible reason is reflected in a case where the court was presented with evidentiary material that attested to both the participation alternative and the membership alternative; the court preferred to rely on the participation alternative. See ADA 1510/09 *Atamana v. State of Israel*, para. 8 (2009) (unpublished) (Isr.).

<sup>161</sup> This is not necessarily the case with other NSAs operating worldwide. For example, determination of membership with regard to Al-Qaeda (in consideration of the grey areas and factual difficulties sometimes involved in such an effort) has provoked much debate amongst scholars and in U.S. courts. For an overview of different approaches in this regard, see Diane Webber, *Preventive Detention in the Law of Armed Conflict: Throwing Away the Key?*, 6 J. NAT'L SEC. L. & POL'Y. 167, 185-86 (2012). In the authors' view, some of the arguments of those who question the ability to determine membership within an NSA (e.g., due to factual assumptions regarding possible lack of uniform or regular conscription procedures in some NSAs), have merit in some cases, and the implications of these arguments should be considered under the unique specific circumstances of each specific case. However, one should be cautious not to overstretch these factual assumptions to every NSA, thus making them over-inclusive and over-conclusive. For example, entities like Hamas (in Gaza) and Hezbollah (in Lebanon) have distinct organizational sophistication, and defining membership within them should not necessarily be a difficult task. See also Kenneth Watkin, *Opportunity Lost: Organized Armed Groups and the ICRC “Direct Participation in Hostilities” Interpretive Guidance*, 42 N.Y.U. J. INT'L L. & POL. 641, 678 (2010) (“[Mao Tse-tung's writings] accurately reflect the diversity of forces that may fight against state armed forces. It has not been uncommon for non-state armed forces to wear uniforms, be

However, one case has provided important guidance with regard to the possible nature of the “force” and its required nexus with the overall hostilities.<sup>162</sup> In the case of *Sofi*, the internee in question was a Gaza-based senior Hamas member involved in the “Dawa” apparatus of the organization, which formally operates under the civilian-political wing but is also directly linked to recruitment of militants to its military wing.<sup>163</sup> The court stated that no clear dichotomy can be drawn between the civilian-political and the military wings of Hamas in this context, and that the internee’s activities themselves as a senior functionary in the “Dawa” apparatus showed that there is no distinct boundary.<sup>164</sup> The court subsequently affirmed the internment order under the membership alternative (alongside its conclusion that the person’s activities fell short of indirect participation in the hostilities, and therefore did not fulfill the participation alternative).<sup>165</sup> In another recent case which resembles the facts in *Sofi*, another judge of the Supreme Court affirmed, under the membership alternative, the internment of a member in the “organizational” echelon of the Palestinian Islamic Jihad who was also involved in the activities of the organization’s military wing (albeit without going into the same depth of reasoning and detailed factual presentation which existed in *Sofi*).<sup>166</sup>

The importance of the *Sofi* decision (as well as the other case mentioned above) is the clarification that the definition of a “force,” in connection to the membership alternative, is not restricted only to the armed or military wing of a party to the conflict. Rather, it may refer generally to the NSA itself, and enables internment of those who act under its civilian-political (or otherwise non-military) segments, if such segments materially support the military effort of the NSA.<sup>167</sup> Such clarification seems to be consistent with the Supreme Court’s statement in *Iyyad* that internment of a person under the membership alternative requires the person’s connection and contribution “to

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organized, and in a number of ways act like regular armed forces” (and the author later listing examples for such types of forces, including Hezbollah and Hamas)). Additionally, it should also be recalled that the universally-accepted GC III, in Article 4(A)(2), which refers to members of certain “militias” as POWs, already implicitly acknowledges that determination of membership is an achievable task.

<sup>162</sup> AdminA 2595/09 *Sofi*, at para. 21. It should be noted that in the *Abu Fariah* case, the court did try to provide a general test in order to determine which entity would constitute a “force” under the law, but the result was a rather flexible and vague product, and the proposed test has not been adopted in later cases. The court opined that the entity “must be a body which carries out, actively and in an organized fashion, hostile terror activity against the State of Israel. The paradigmatic force which enters under that definition is of course a ‘terror organization.’ The court then, however, immediately added: “Of course it is not an exhaustive and obligating definition, but as the circumstances of a certain body would go further away from being a terror organization [...] we will less tend to view it as a force.” On this basis, the court concluded that a family business managing a significant private enterprise of weapons smuggling did not constitute such a “force.” It subsequently annulled the internment order, after it found that the participation alternative was also not fulfilled (as mentioned above). AdminA 7750/08 *Abu Fariah*, at para. 11.

<sup>163</sup> The meaning of the term “Dawa” in Arabic is “propaganda,” or “a call to join.” See ADA 2595/09 *Sofi* v. State of Israel, para. 2 (2009) (unpublished) (Isr.). The “Dawa” apparatus of Hamas generally works to broaden popular support in favor of Hamas’ activities, by carrying out social activities, education and raising money.

<sup>164</sup> AdminA 2595/09 *Sofi*, at paras. 11-12, 17. The court also noted, as a consideration for the justification of the internment, the seniority of the person in question as well as his broad influence, while noting that the dangerousness attributed to senior activity in a terror organization is no less than the dangerousness of a ground operative. *Id.*; see also *id.* at paras. 13-16.

<sup>165</sup> AdminA 2595/09 *Sofi*, at para. 9.

<sup>166</sup> AdminA 1623/16 *Anonymous v. State of Israel* (2016) (unpublished) (Isr.). Distinct from Hamas, the Palestinian Islamic Jihad does not possess a full-fledged civilian wing. This means the “organizational” activity within the organization would likely to be somehow tied to its military activity.

<sup>167</sup> It is important to stress that the expansion in *Sofi* would only apply to the context of detentions; the case did not deal with the definition of a “force” in a targeting context. AdminA 2595/09 *Sofi*, at para. 21.

the cycle of hostilities in its broad sense.”<sup>168</sup> This conclusion, that activity conducted through certain types of non-military segments of a terror organization may also indicate a threat, is also reflective of prior Supreme Court decisions with regard to preventive detention in other contexts, discussed above.<sup>169</sup> In the specific context of hostilities it also seems consistent, by analogy, with Article 4(A)(4) of GC III, which allows for internment of formally authorized civilians who accompany armed forces and support them with, for example, transportation, communication, supplies, welfare or labor services.<sup>170</sup>

The court in *Sofi* did not explore the outer limits of this approach to the notion of a “force,” but based on the emphasis the court put in its reasoning on the organizational link between the “Dawa” apparatus and the military wing, it is doubtful that the court would have approved the internment if such a linkage did not exist. However, in late 2014, a decision delivered by another Justice of the Supreme Court did not apply such an assertion. In the case of *Najar*, the court relied upon the membership alternative to uphold the internment of a senior explosives expert in Hamas’ civilian police force in the Gaza Strip, without addressing whether or not there existed any organizational link between Hamas’ civilian police and its military wing – in what seems to be the lowering of the *Sofi* threshold.<sup>171</sup> At the same time, the court conducted an independent scrutiny of the particular threat posed by the person, and concluded that in light of his vast knowledge in explosives, his specific role in Hamas’ civilian police, and his personal connection to members of the military wing, he posed a threat that justified his continued detention by Israel.

Apart from what seems to constitute a deviation from *Sofi*, this decision seems to deviate also from *Iyyad*, in examining the definition of “unlawful combatant” and the existence of a threat as two separate requirements.<sup>172</sup> Thus, *Najar* illustrates the fact that the UCL’s jurisprudence has not fully settled. It could be argued that the reason for the court’s apparent deviations from *Iyyad* and *Sofi* are actually the result of a certain peculiarity in the definition of “unlawful combatant” under the UCL. According to this

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<sup>168</sup> CrimA 6659/06 *Iyyad*, 62(4) PD 329, para. 21 (2008) (Isr.). Shany has suggested that here the Supreme Court was referring to functions such as recruiting activities and fund-raising for terror organizations. See Shany, *supra* note 115, at 12.

<sup>169</sup> This type of connection to the military activities of the NSA is very similar to the “organizational activity” the Supreme Court has found sufficient to justify administrative detention in Israel and the West Bank. See *supra* notes 34-37 and accompanying text.

<sup>170</sup> One of the classes of persons that Article 4(A)(4) of GC III defines as POWs (subject to internment) is “[p]ersons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model.” This definition is not applicable to the UCL context since it concerns POWs, where a precondition to the applicability of the UCL is a lack of such status. However, this does not preclude using the definition as a source of analogy for the present purposes.

<sup>171</sup> AdminA 6594/14 *Najar v. State of Israel* (2014) (unpublished) (Isr.) In reaching the conclusion that the membership alternative was fulfilled, the court relied also on the close contact the detainee himself (rather than the police or his specific department in the police) had with members of the military wing of Hamas.

<sup>172</sup> The court in *Sofi* also conducted a separate examination, thereby deviating from *Iyyad*. AdminA 2595/09 *Sofi*, at para. 13. However, while examining the membership alternative, the court in *Sofi* did in fact qualify the alternative with an element of threat – the court was not appeased by the mere belonging of the detainee to the “Dawa” apparatus, but found it necessary to stress the link between the “Dawa” apparatus and the military wing of Hamas, as well as the strong affiliation between the detainee and Hamas. *Id.* at paras. 14-16. In contrast, the court in *Najar* drew a clearer separation between the requirements. AdminA 6594/14 *Najar*, at paras. 8-9.

argument, what the court sought in its final result was to prevent the risk of *future* participation in the hostilities by the person were he to be released; however, since the existing language of the participation alternative in the UCL only addresses – *prima facie* – *past* participation in hostilities, the court's method to achieve its aims was to soften the interpretation of the membership alternative and “compensate” with an independent scrutiny of the threat element.<sup>173</sup> It should also be noted that, as in most preventive detention cases, confidential information was presented to the court concerning the internee, which may have played some role in the court's final decision.

In *Iyyad*, the Supreme Court construed the different components of the grounds for internment in light of the relevant provisions in LOAC, and subsequently determined that the grounds complied with existing international law.<sup>174</sup> The court acted under the conservative assumption that persons defined under the UCL as “unlawful combatants” constitute a subset of the “civilian” classification, and do not belong to a third category under LOAC between civilians and combatants.<sup>175</sup> Likewise, the court also classified internment under the UCL as a type of administrative detention, noting that GC IV enables internment of civilians when essential security needs so require.<sup>176</sup> It further stressed that each act of internment is conditional on an individual threat

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<sup>173</sup> A source that could be seen as supporting the court's decision – upholding the internment order – may be found in the ICRC's commentary for GC IV, which stipulates that a person's knowledge or qualifications may be an acceptable indication for a threat that justifies internment. These are the same elements that appeared to premise the justification to intern Najar. See INT'L COMM. RED CROSS, COMMENTARY: IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR, 258 (Jean S. Pictet gen. ed., 1958) [hereinafter GC IV COMMENTARY].

<sup>174</sup> In doing so, however, the court did not consider the compliance of section 7 (the threat presumption) and section 8 (factual determination regarding the hostilities conducted by a force) with international law, on the basis that the state did not rely on these provisions in the present case. Focusing on the more-contentious threat presumption, it is submitted that the court's conclusions would not be different if, and when, there arises a need to scrutinize the presumption in light of international law – even if such scrutiny is conducted (as in *Iyyad*) in light of the stringent standards of GC IV and the individual threat requirement. The presumption does not make redundant the individual threat requirement, but only assumes such threat exists in certain circumstances as a factual matter. It thus does not allow for arbitrary arrest, as it may be used only after the state itself has shown the person's membership or participation within a certain organization (as implicitly required in section 7). While it is true that the presumption takes the grounds for internment one step closer towards the type of internment in GC III and its assumption regarding the inherent, non-contestable, threat posed by any member of an armed force, it does not actually go as far as GC III. Rather, it takes into consideration the unique characteristics of detaining unlawful combatants – including difficulties in their identification and their capacity to disengage from the organization at their own will – and allows them to refute (during or before judicial review) the threat presumption. As the state remarked in *Iyyad*, the threat presumption will be of particular practical significance in the event that large scale detentions of belligerent fighters occurs, where no additional information concerning such fighters (except for the basic awareness of their membership or participation) is available, and where there would be practical difficulties in thoroughly investigating each person and establishing a separate and individual groundwork of evidentiary material for the internment. *Iyyad* State Response, *supra* note 100, at para. 110.

<sup>175</sup> The court relied for that matter on its prior decision in the *Targeted Killings Case*. Although the *Targeted Killings Case* discussed the distinction between combatants and civilians in the context of targeting and not in the context of detention, the court in *Iyyad* did not thoroughly address whether the two contexts deserve differing treatment in this regard. See CrimA 6659/06 *Iyyad* 62(4) PD 329, para. 12-13 (2008) (Isr.); HCJ 769/02 *Targeted Killings Case* 57(6) PD 285, para. 26 (2006) (Isr.)

<sup>176</sup> CrimA 6659/06 *Iyyad*, at paras. 16-17. The Supreme Court referred to Article 27 of GC IV, which generally allows a party to the conflict to take measures of control and security in regard to civilians, as may be necessary as a result of the war (and regarded it as the “basic principle” in GC IV in relation to types of detentions under the Convention). The court also referred to Articles 42 and 78, which specifically allow for the measure of administrative detention if the security of the Detaining Power “makes it absolutely necessary” or if “imperative reasons of security” so require, respectively.

posed by the person,<sup>177</sup> and subsequently interpreted both the participation alternative and the membership alternative in a manner which embeds within them the individual threat element (as discussed above). On this reasoning the court rejected the appellants' claims that the UCL did not comply with international law standards.<sup>178</sup>

The affirmation that the participation alternative complies with the standard required under LOAC in relation to the internment of civilians is almost self-evident – it is legitimate for a detaining authority to see the need in curtailing the capacity of an individual to participate in hostilities as an “imperative reason of security,” provided that the prospects for such participation are high enough.<sup>179</sup>

The same affirmation regarding the membership alternative, with the implicit interpretation that membership in a hostile force could *ipso facto* be considered a threat (as presented above), provides an important indication regarding the way the Supreme Court construes the existing standard for internment under GC IV, particularly with regard to internment of NSA members within the context of hostilities. Indeed, in the authors' view, this understanding – that mere membership in a hostile organization could indicate an individual threat – is not novel, and has already been recognized in the ICRC Commentary to GC IV.<sup>180</sup> It lies within the wide latitude GC IV offers to

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<sup>177</sup> CrimA 6659/06 *Iyyad*, at paras. 18-19. The court based this assertion on Israeli domestic law, and also noted that it is required under the principles of international law.

<sup>178</sup> *Id.* at paras. 20-21. As noted above, the court analyzed the UCL in light of GC IV, which sets the most stringent standards for internment under existing LOAC. Were the Supreme Court to classify the situation as a NIAC, it is possible to assume that the court would have reached the same conclusion by inference, on the basis of the reasoning that if states are permitted to exercise a detention power in an IAC, then states are *a fortiori* permitted to exercise the same detention power in a NIAC. Goodman, *supra* note 106, at 50, 56-57. Another path the court knowingly refrained from taking in *Iyyad*, which probably would have ended with comparable practical results, is to treat unlawful combatants as fighters and not as civilians. It is presumed that if *Iyyad* were ruled on today, the Supreme Court could have considered the additional support this stance has gained since *Iyyad* among scholars, which might have changed its basic perspective on this issue. A related factor which could have tipped the scale in this regard is the wide acceptance that the status-based approach has gained in recent years in the context of targeting, which enables treating unlawful combatants as fighters and not as civilians. Indeed, the proposed doctrines concerning the status-based approach in targeting differ on important aspects (most notably as to whether the determination of membership should necessarily be based on *de-facto* continuous combat function (the ICRC position), or whether it may also be based on a wider notion of membership (as critiques of the ICRC position have suggested)). However, these doctrines all revolve around the same basic idea, which seems to reflect an inevitable reality in contemporary armed conflicts – considering those who are part of armed groups as fighters rather than civilians, and subjecting them to a military action due to their status as such. Of course, apart from this basic notion, any status-based detention doctrine would be significantly different from a targeting doctrine, due to the conceptual difference between these two measures and the manner in which LOAC views them (a difference which was also briefly referred to in CrimA 6659/06 *Iyyad*, at para. 12). For example, such differences could find expression in wider delineation of the “detainable” group compared to the “attackable” group (*Sofi* could serve as a point of reference in this regard), and possibly in a more relaxed test to determine whether a membership exists. With regard to the status-based targeting doctrines, see NILS MELZER, ICRC, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 27 (2009), <https://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf>; Michael N. Schmitt, *Status of Opposition Fighter in Non-International Armed Conflict*, 88 INT'L L. STUDIES 119 (2012); Watkin, *supra* note 161, at 641; SIVAKUMARAN, *supra* note 99, at 359-62.

<sup>179</sup> This is also applicable when the participation is indirect. See Goodman, *supra* note 106, at 53 (“Individuals may constitute a threat to security either because of their direct participation in hostilities or because of their engagement in hostile action that falls short of direct participation. I refer to the latter, residual category as ‘indirect participation in hostilities.’”).

<sup>180</sup> GC IV COMMENTARY, *supra* note 173, at 258. The commentary notes with regards to Article 42 of GC IV, “a belligerent may intern people . . . if it has serious and legitimate reason to think that they are members of organizations whose object is to cause disturbances . . . .” The following paragraph goes on to clarify “[o]n the other hand, the mere fact that a person is a subject of an enemy national cannot be considered as

belligerents in this regard.<sup>181</sup> Moreover, it could be asserted that if mere membership has been seen as legitimate internment grounds under GC IV in consideration of its original context, it should by inference also be considered appropriate grounds for internment when transposed into the context of trans-boundary hostilities against NSAs.<sup>182</sup> This inference reflects the declared predilection of the Supreme Court to interpret existing LOAC, within its boundaries, in consideration of the new-era armed conflicts.<sup>183</sup> It also seems in line with the sensible perception, offered by various commentators, that if the law permits taking a certain action against a lawful combatant, the law should *a fortiori* permit taking the same action against an unlawful combatant.<sup>184</sup> Additionally, status-based internment of NSA's members has also found a place in recent state *opinio juris*,<sup>185</sup>

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threatening the security where he is living . . . . To justify recourse to [internment or assigned residence] the State must have a good reason to think that the person concerned, by his activities, knowledge or qualifications, represents a real threat . . . ." *Id.* This comment came to stress that the detaining authority should consider the *particular* situation of a person prior to deciding on his internment. *See* Hans Peter Gasser & Knut Dörmann, *Protection of the Civilian Population*, in *THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW* 231, 316 (3d ed., D. Fleck ed., 2013) ("In exercising their discretion [the detaining authorities] must take into account the personal situation of the person concerned"). The detaining authority cannot rely on nationality or other criterion which does not concern the person's particular characteristics or conduct. Reading together the two comments cited above, it could be understood that according to the ICRC commentary, individual membership in a hostile organization is considered a characteristic or conduct of a particular nature, which could justify internment. The "activities" which the commentary refers to in the latter quotation should be read to include the willing enjoinment (or the decision to continue the membership) to such organization. The particular nature of membership in an organization involved in the hostilities, in the context of internment, was analyzed by the Tel Aviv District Court in the light of the general concept of an individual's responsibility for his own actions, in the first case which concerned the UCL (the case predated *Iyyad*; however, the internees in question were released before the case could reach the Supreme Court): "Being part of a force which is carrying out hostilities against the State of Israel is, in itself, a positive act. Joining an organization or force acting against the state is, by virtue of such enjoinment, an act which carries significance. This significance is twofold: joining [the force] is indicative of identification with the aim of the organization or force. At the same time, [joining the force], by its very nature, is intended to take part, one way or another, in the activities of the organization or force, for the purposes of advancing its aims. When these aims are intended to harm the security of the state and its citizens, the significance of joining the ranks of the force or the organization receives the character of activity for the purpose of actualizing such aims." *See* DR (TA) 92690/02 State of Israel v. Ubeid, para. 2 (2003) (unpublished) (Isr.).

<sup>181</sup> GC IV COMMENTARY, *supra* note 173, at 257 ("It did not seem possible to define the expression 'security of the State' in a more concrete fashion. It is thus left very largely to Governments to decide the measure of activity prejudicial to the internal or external security of the State which justifies internment . . . ."); Gasser & Dörmann, *supra* note 180, at 316 (with regard to the standard for internment under the Convention, the author concludes that "GC IV gives the authorities great latitude").

<sup>182</sup> The interpretation provided under the ICRC commentary quoted above was given in relation to Article 42 of GC IV, which concerns the internment of alien nationals in the territory of a party to the conflict (such as the Japanese nationals present in the U.S. during World War II). GC IV COMMENTARY, *supra* note 173. One may conclude that the grounds for internment presented in GC IV in this context cannot be narrower than those pertaining to the internment of unlawful combatants in the context of hostilities.

<sup>183</sup> CrimA 6659/06 *Iyyad*, 62(4) PD 329, para. 9 (2008) (Isr.) ("interpret the existing [LOAC] in a manner that is consistent with the new realities," where "the phenomenon of terrorism... is changing the face and characteristics of armed conflicts and those who participate in them").

<sup>184</sup> *See, e.g.,* Goodman, *supra* note 106, at 56 ("[I]f the law permits states to subject *lawful* combatants to measure Y, the law *a fortiori* permits states to subject *unlawful* combatants to the same measure.").

<sup>185</sup> For example, this seems to be the U.S. position. The source of congressional authorization in U.S. domestic law to detain members and supporters of Al-Qaeda, the Taliban and "associated forces" lies in the Authorization for Use of Military Force (AUMF) enacted by Congress shortly after the 9/11 terrorist attacks. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001). The position of the Obama Administration on how the vague authority in the AUMF should be construed was expressed in March 2009 in a brief filed in one of the habeas cases filed by Guantanamo detainees to the U.S. District Court for the District of Columbia. The Administration claimed, under the presumption that the AUMF detention authority must be construed in accordance with the "laws of war," that it extends both to members of groups

and is advocated by scholars.<sup>186</sup> It may also be worth recalling that as a matter of principle, internment of some civilians based on their formal affiliation is explicitly recognized in LOAC under the often-overlooked Article 4(A)(4) of GC III.<sup>187</sup> Indeed, a case where an internment order is issued solely on membership grounds, without providing any additional information whatsoever on the person's actual activity or military training within the organization, has yet to occur in the context of the UCL. While it remains to be seen how the Israeli courts would address such a case, the guiding principles set in *Iyyad* – staying within the latitude offered by LOAC – seem to enable such an eventuality.<sup>188</sup>

A different question to be considered is whether an internment order under the UCL should be regarded as a last resort measure, to be issued only when criminal proceedings are unavailable (as with administrative detention orders under the ADL). In *Iyyad*, the Supreme Court seemed to be hesitant in importing its ruling in the ADL context to the UCL. On the one hand, the court cautiously recalled its traditional determination that it is generally more appropriate to prefer criminal proceedings over administrative detention where it is feasible to do so. On the other hand, the court refrained from specifically declaring that the UCL should be viewed as a tool of last resort, as the ADL is traditionally labeled. Moreover, the court rejected the appellants' argument that they should have been criminally prosecuted rather than interned, even though it seemingly did not consider whether there was sufficient admissible evidence to initiate such proceedings. Rather, the court justified this ruling simply by noting the fundamental difference between the punitive purpose of criminal proceedings and the preventive purpose of the UCL.<sup>189</sup> Although the court was not overly clear in describing and explaining what appears to be a rather cautious approach, it seems that the source for this approach was the intuition that the rationale of preventive detention under the UCL is different from the rationale of preventive detention under the ADL. It is possible that the court chose not to explore this reasoning further because the alternative of

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covered by the AUMF, as well as to non-members who provide substantial support to these groups. See Respondent's Memorandum Regarding the Government's Detention Authority Relative to Detainees Held at Guantanamo Bay, *Hamlily v. Obama*, 616 F. Supp. 2d. 63 (D.D.C. Mar. 13, 2009) (No. 05-763), ECF No. 175. See also BENJAMIN WITTES ET AL., THE EMERGING LAW OF DETENTION 2.0: THE GUANTANAMO HABEAS CASES AS LAWMAKING in HARV. L. SCH. & BROOKINGS PROJECT IN LAW & SECURITY 25-27 (2011).

<sup>186</sup> See, e.g., *Bellinger & Padmanabhan*, *supra* note 17, at 218 (stating that “[u]nlawful combatants, like lawful combatants, are subject to detention based on their status as combatants” (albeit without the privileges of a POW), and adding there is a need to more clearly define what manner of relationship is required between an individual and an enemy organization for that purpose).

<sup>187</sup> Article 4(A)(4) of GC III also regards as POWs (and thus subject to internment) civilians who formally accompany the armed forces of a party to the conflict, on condition they were authorized to do so by the armed forces and provided with identity cards for that purpose.

<sup>188</sup> It might be that Ryan Goodman reads the *Iyyad* decision differently. After stating that “although membership in an organization may constitute indirect participation, there are strong reasons to conclude that mere membership is insufficient,” Goodman quotes *Iyyad*, while implying it supports the former assertion: “[T]he Supreme Court of Israel recently upheld a detention law through a narrowing construction. [According to the decision,] the detaining power must rely on the individual's particular ‘connection and contribution to the organization... that are sufficient to include him in the cycle of hostilities in its broad sense.’”. Goodman, *supra* note 106, at 54-55. However, the part that Goodman omitted from the citation makes the meaning of the sentence rather different (if not the opposite): the original sentence aims to stress that the membership *does not* necessarily require *direct or indirect* participation, clarifying that it is possible that the individual's “connection and contribution to the organization will be expressed in other ways that suffice to include him in the cycle of hostilities in its broad sense.” *CrimA 6659/06 Iyyad*, at para. 21. This context and full content of the court's statement, in the authors' view, does not support Goodman's first assertion regarding the so-called narrow interpretation of the court.

<sup>189</sup> *CrimA 6659/06 Iyyad*, at paras. 33, 47.

criminal proceedings was not an issue of substantial concern in this specific case.<sup>190</sup> In the authors' view, it would have been beneficial if the decision explained this subject in more detail, and drew a clearer distinction between the UCL and the ADL in this regard. Such a distinction may have rested on the following reasoning.

Both criminal proceedings and administrative detention under the ADL are tools belonging to the same toolbox of domestic measures ensuring national security. Criminal proceedings are the rule and administrative detention is the exception, and when a democratic state weighs them against one another it must employ the former, if feasible to do so. In the realm of hostilities, to which the UCL belongs, this is not the case – internment is not a last resort, but one of the most basic tools for removing belligerents from the cycle of hostilities.<sup>191</sup> Criminal proceedings are subject to inherent handicaps in such a context.<sup>192</sup> Imposing an obligation to prefer criminal proceedings over internment in the hostilities context would also belie the fact that LOAC – the predominant legal regime under international law in such context – does not obligate a belligerent to rely upon its domestic law to carry out detentions against the adversary during an armed conflict.<sup>193</sup>

Ultimately, deciding whether to conduct criminal proceedings against unlawful combatants is the prerogative of the detaining state;<sup>194</sup> it is not a legal obligation but a

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<sup>190</sup> The court provided the premises for this distinction when weighing the ADL against the UCL in a more general context. It generally distinguished between the main purpose of the ADL, which is to serve as a tool to contend with threats to state security arising from internal entities, that is usually invoked with regard to isolated individuals for relatively short periods of time; and the main purpose of the UCL, which serves to remove foreign entities who operate as a part of terrorist organizations from returning to the cycle of hostilities. *Id.* at para. 35. However, when specifically discussing the relation between criminal proceedings and internment under the UCL, the court did not explicitly reiterate this distinction or try to develop it further.

<sup>191</sup> See, e.g., Deeks, *supra* note 106, at 403-04 (“When a state is engaged in an armed conflict, one of the most important activities that the state may undertake is detention. The most familiar type of detention during armed conflict is the detention by one state of its opponent’s armed forces: when possible, a state’s armed forces will detain their opponents on the battlefield so as to prevent those fighters from continuing to take up arms.”).

<sup>192</sup> Bellinger & Padmanabhan, *supra* note 17, at 202, 211-12; Webber, *supra* note 161, at 168.

<sup>193</sup> In the majority of the cases concerning the UCL that have followed *Iyyad*, the court has not further considered the relation between criminal proceedings and the UCL. However, in the decision of *Sofi*, the presiding Justice briefly remarked – without clarifying the deviation from *Iyyad* – that as the internment continues, the authorities and the court should consider whether criminal proceedings become more of a viable alternative. See ADA 2595/09 *Sofi v. State of Israel*, para. 25 (2009) (unpublished) (Isr.). This remark may be seen as disregarding the deep conceptual difference between the overall frameworks of the ADL and the UCL, as described above. In another recent case discussed in the District Court of Be’er Sheva, the presiding Judge noted that criminal proceedings should be preferred over internment under the UCL, if indictment is possible in relation to the aspects of sufficient admissible evidence and a potential for conviction (referring to *Sofi* and *Iyyad*). Notwithstanding, the Judge thought he had a limited role in reviewing the discretion of the State authorities in this regard, and was satisfied with the State representative’s statement that criminal proceedings were considered and eventually dismissed for lack of sufficient admissible evidence (the State representative did not address the question of preference of criminal proceedings in principle). See Other Orders (OO) (BS) 56417-03-17 *The State of Israel v. Abu Taha* (2017) (unpublished) (Isr.). In the appeal before the Supreme Court, the presiding Judge refrained from explicitly analyzing the question of preference of criminal proceedings, but rather was satisfied with a similar statement made by the State representative and noted that the internee did not explain why the criminal authorities’ decision was wrong or unreasonable. See AdminA 4521/17 *Abu Taha*.

<sup>194</sup> YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 46 (3d ed., 2016) (“[The unlawful combatant] is therefore exposed to penal charges for any offence committed in breach of the domestic legal system”); George Aldrich, *The Taliban, Al Qaeda, and the Determination of Illegal Combatants*, 96 AM. J. INT’L. L. 891, 893 (2002) (“[Unlawful combatants] may be lawfully prosecuted and punished under national laws for taking part in the hostilities and for any other crime [...]”).

question of legal policy. That decision can be made on a case-by-case basis, or as a broader policy decision concerning a certain conflict.<sup>195</sup> The UCL provides a valuable case study in this regard – its express reliance on LOAC clearly indicates the choice to work in principle with the hostilities toolbox; but at the same time, it contains a provision clarifying that an unlawful combatant interned under the law may be subjected to parallel criminal charges, and *vice versa*.<sup>196</sup>

As for the nature of the evidentiary material required when issuing an order, the Supreme Court held in *Iyyad* that the foundation of “reasonable cause” requires “clear and convincing evidence,” with importance placed on the “quantity and quality of the evidence, and its degree of currency.”<sup>197</sup> The court clarified that as the intended purpose of the internment is to negate anticipated future threats to state security, one can “learn of these threats from concrete information concerning the internee’s past acts.”<sup>198</sup> Nevertheless, in order to justify the internment itself, “satisfactory evidence is required, and a single piece of evidence about an isolated act carried out in the distant past is insufficient.”<sup>199</sup> In setting this standard, the court relied upon its past decisions regarding administrative detentions under the other two frameworks covered by this article. It is yet to be seen if, and how, the invocation of the threat presumption would lower this high threshold.

#### D. Judicial Review

The UCL contains a multi-tiered apparatus of judicial review administered by the civilian judicial system, very similar to that of the ADL. While conducting judicial reviews under the UCL, the Supreme Court has largely relied upon its practice and decisions concerning the ADL, and with regard to certain aspects (such as the rules of evidence and procedure and the scope of judicial intervention), the court has treated both laws virtually the same. However, there are some necessary differences, which

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they may have committed”); ALLAN ROSAS, THE LEGAL STATUS OF PRISONERS OF WAR: A STUDY IN INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS 305 (1976) (“[Unlawful combatants] may be punished under the internal criminal legislation of the adversary for having committed hostile acts in violation of its provisions [...]”). Unlawful combatants are different in that sense from POWs, who – by virtue of being lawful combatants – cannot be prosecuted for merely taking part in hostilities (but may be prosecuted for war crimes). *See* DINSTEIN, *supra*.

<sup>195</sup> Two categories of policy considerations may apply here. One category touches upon practical and legal limitations to the application of the criminal system in the scenario of hostilities, such as the difficulties in the collection of evidence from a battlefield (especially outside a state’s territory), difficulties in applying state laws extraterritorially where the relevant incident occurred, and other similar practical difficulties. *See* Bellinger & Padmanabhan, *supra* note 17, at 212. Such practical or legal limitations may arise in a specific case or with regard to a specific conflict on the whole. The second category of policy considerations consists of wider, more principled interests. For example, a state may choose to indict unlawful combatants, as a criminal conviction enables the state to stigmatize the person and the activities of the organization with whom he is associated. In this regard, it has even been suggested (specifically with regard to the UCL) that the creation of a distinct domestic legal mechanism for persons defined as “unlawful combatants” grants such persons a measure of legitimacy, which they would not have enjoyed would they had continued to be treated as regular criminal offenders. *See* ROBBIE SABEL, INTERNATIONAL LAW 442 (1st ed., 2003) (Hebrew).

<sup>196</sup> UCL, 5762-2002, SH No. 1834, at §9 (Isr.). Obviously, this provision also recognizes that internees held under the UCL are not granted impunity from criminal prosecution – unlike the case with POWs.

<sup>197</sup> CrimA 6659/06 *Iyyad*, 62(4) PD 329, para. 22, 46 (2008) (Isr.).

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

relate to the different grounds expressed by each framework, as well as differences in the timeframes provided under them.

As with the ADL, those detained under the UCL are entitled to be represented by legal counsel.<sup>200</sup>

### 1. The Judicial Review Process

Under the UCL, an internee must be brought before a judge of the District Court no later than 14 days from when the temporary detention instruction is given, or alternatively, from the day the internment order is issued (the earlier of the two). This is an integral part of the order issuance process and is not dependent on the internee's request. If the internee is not brought before the District Court within the provided timeframe he must be released, unless there are alternative grounds for his detention.<sup>201</sup>

In addition to initial judicial review, the UCL provides for ongoing periodic review, in that the internee must be brought before the District Court every six months for re-assessment of the internment order.<sup>202</sup> This requirement does not preclude the authorities from conducting internal reviews on a more frequent basis.<sup>203</sup> It also does not preclude the District Court from shortening the time until the next periodic review.<sup>204</sup>

In *Iyyad*, the Supreme Court considered both the fourteen day and the six month period to be in line with the standards of GC IV. It further stressed that with regard to initial reviews, the fourteen days bar is maximal and that an internee should be brought before a court as soon as circumstances permit.<sup>205</sup>

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<sup>200</sup> Under section 6(a) of the UCL, a person who has been detained (by temporary detention instruction or internment order) is entitled to meet with legal counsel at the earliest time at which such meeting could be held without harming state security, but in any case no later than seven days following the issuance of the instruction or order (whichever is earlier). Under section 6(c), if a detainee appears at a court hearing without legal representation, the judge must notify him of his right to such representation, and by request on behalf of the detainee, the judge is authorized to appoint a public defense attorney to represent him. Section 6 of the UCL also provides for specifically authorized senior officials to delay the detainee's initial meeting with counsel for up to an additional three consecutive days (beyond the first seven days), on security grounds or in order to protect a person's life, and provides a right of appeal to the District Court over such decision. This delay can be further extended by decision of a District Court judge, pursuant to a request from the State Attorney, to a maximum of 21 days in total. Any decision of the District Court in this regard may be appealed to the Supreme Court. Under section 5(a1) of the UCL, where a detainee who has been temporarily deprived of legal representation is brought to a court hearing without legal representation present, that detainee is entitled to have another hearing, on request, once representation has been secured.

<sup>201</sup> UCL §5(b).

<sup>202</sup> *Id.* at § 5(c).

<sup>203</sup> For example, in ADA 9257/09 Anonymous v. State of Israel (2009) (unpublished) (Isr.), the court's decision recalled that the state representative remarked during the court hearing that such internal review is conducted every 30 days with regard to the specific appellant.

<sup>204</sup> *See, e.g.*, DR 8734/09 State of Israel, at para. 12 (in the course of a periodic review under the UCL, the District Court decided to affirm the continuation of the internment but held that the subsequent periodic review would be conducted in four months instead of six).

<sup>205</sup> With regard to the maximum 14 days period for initial judicial review, the court cited the duty to conduct the review "as soon as possible" or "with the least possible delay," GC IV, *supra* note 104, arts. 43, 78; as well as the similar standard under IHRL, ICCPR, *supra* note 18, art. 3(9), which requires that the review be conducted "promptly;" and noted that the manner in which this duty should be implemented is dependent on the circumstances of each case. The court concluded that in light of the foreseen circumstances for the use of the UCL, 14 days is a reasonable time limit, but that within this timeframe, the review should be

Moreover, the court noted that while Article 43 of GC IV deems review before an “administrative board” to be sufficient, the UCL requires the review to be conducted before a District Court judge.<sup>206</sup> Another related aspect in which the UCL can be seen to go beyond the requirements of GC IV and which the court did not specifically mention is the unconditional requirement to conduct judicial review not dependent on the internee’s request.<sup>207</sup>

The review process is afforded to any internee under the UCL, including those held under the membership alternative. In comparison, this right is not offered to status-based internees under GC III.<sup>208</sup> This could be because status-based internment of NSA’s members requires additional safeguards against unjustified detention beyond those required for the internment of regular soldiers under GC III, due to the potential uncertainties in determining membership and its continuity in the context of NSAs. At the same time, as mentioned above, it should be recalled that the drafters of GC III had already acknowledged the possibility of internment for NSA’s members, and did not seek to require any special review procedure specifically for them.<sup>209</sup>

The decisions of the District Court in the initial judicial review, and in each periodic review, may be appealed to the Supreme Court (to be heard by a single judge).<sup>210</sup> The existence of a right to appeal was regarded in *Iyyad* to be another aspect in which the UCL goes beyond the requirements of GC IV.<sup>211</sup>

## 2. Authorities and Discretion of the Review Court

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conducted as soon as possible under the circumstances. With regard to the frequency of the periodic review, the court referred to Article 43 of GC IV, which demands a review to be conducted at least “twice yearly.” *See* CrimA 6659/06 *Iyyad*, at paras. 41-42.

<sup>206</sup> CrimA 6659/06 *Iyyad*, at para. 42. It should be noted that the 2008 Amendment allowed for the Minister of Justice, on agreement with the Minister of Defense, to delegate the review process to military review tribunals and military tribunals of appeals which would be established for that purpose – an option intended for an emergency situation where it is deemed unreasonable to continue conducting the review procedures before the civilian courts. As with the other provisions introduced by the 2008 Amendment, this option reflected possible practical requirements existent in a state of hostilities – particularly in situations where the civilian courts are unable to function properly due to circumstances brought about by the ongoing hostilities or are burdened with a high caseload as a result of the hostilities. This provision expired at the close of the sunset clause in 2010, but unlike the special provisions regarding authorities and timeframes (*see supra* notes 126-127 and accompanying text) this part was not later reinstated as a permanent part of the law, and the current law does not contain it.

<sup>207</sup> GC IV, *supra* note 104, arts. 43, 78, which set the highest standard in LOAC in this regard, grant an internee the right to bring his case for review, but do not require a mandatory review procedure conducted independent of the detainee’s request. As discussed above, applicable IHRL also does not set such a requirement.

<sup>208</sup> As mentioned above, under GC III, *supra* note 103, art. 5, the only requirement for assessment arises where there is a lack of certainty regarding the status of a person as a POW (by a “competent tribunal”). The drafters of the UCL indeed intended for the judicial review process to cover a potential obligation under GC III, *supra* note 103, art. 5. *See* Explanatory Memorandum to Draft Bill Incarceration of Members of Hostile Forces who are not Entitled to a Prisoner of War Status, 5762-2002 HH No. 2883 p. 416 (Isr.) (this was originally the proposed name of the UCL).

<sup>209</sup> GC III, *supra* note 103, art. 4(A)(2).

<sup>210</sup> UCL, 5762-2002, SH No. 1834, at §5(d) (Isr.).

<sup>211</sup> *Id.*; CrimA 6659/06 *Iyyad*, at para. 42. Such right does not exist under GC IV or international law regulating NIACs (which could be considered by some as applicable in the context of the UCL), nor under GC III (which, as discussed earlier, is inapplicable to the current context but may be turned to as a source for analogy). As mentioned above, this right also does not exist under IHRL.

Within the initial review procedure the court is tasked with determining whether the substantial conditions for internment under the UCL are sufficiently met. If not, it must annul the order.<sup>212</sup> Contrary to the ADL, the UCL expressly provides the court only with the authority to annul the order, and does not provide explicit authority for shortening the order. In *Iyyad*, however, the Supreme Court held it is also authorized “to restrict and to shorten” the order’s duration.<sup>213</sup>

As for periodic reviews, the District Court is not required to re-evaluate the lawfulness of the internment order.<sup>214</sup> Rather, the court assesses whether the internee’s release would harm state security, or whether there are special grounds justifying the internee’s release, and subsequently annuls the internment order if necessary.<sup>215</sup> In line with the Supreme Court’s above-mentioned determination in *Iyyad*, the review court may restrict the order’s duration during the periodic review.<sup>216</sup>

The Supreme Court has the same broad authorities and conducts the same kind of review as the District Court in each respective proceeding.<sup>217</sup> Each periodic review can be appealed to the Supreme Court, and the UCL does not limit the number of times an internee may file such appeals.

In reviewing internment orders, both initially and periodically, the Israeli judiciary has exercised wide discretion, while following in many respects its approach in applying the ADL. In particular, the courts’ reviews have comprised an assessment of the case both on the factual and legal grounds, on the basis of all the available material (including classified information), and have included a substantial (and not only technical) examination of the justifiability of the internment. Importantly, the Israeli administrative law principle of proportionality has played a significant role during periodic reviews, allowing the court to make an independent decision on whether a person still poses an individual threat which justifies his enduring internment.<sup>218</sup> In this regard, the Supreme Court noted that the time passed since the initial issue of the order

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<sup>212</sup> UCL § 5(a).

<sup>213</sup> CrimA 6659/06 *Iyyad*, 62(4) PD 329, para. 46 (2008) (Isr.).

<sup>214</sup> ADA 1510/09 *Atamana v. State of Israel*, para. 10-11 (2009) (unpublished) (Isr.); CA 7446/08 Sa’id v. State of Israel, paras. 34-35 (2008) (Isr.) (unpublished case); ADA 2595/09 *Sofi v. State of Israel*, para. 24 (2009) (unpublished) (Isr.). In some of the first cases where periodic reviews were conducted under the UCL, there seemed to be some confusion regarding the different substantial nature of initial and periodic reviews. For example, in *Abu Fariah*, which dealt with a periodic review, the Judge re-examined if the internee met the conditions of “unlawful combatant” under the UCL. AdminA 7750/08 *Abu Fariah* (2008) (unpublished) (Isr.).

<sup>215</sup> UCL § 5(c). This important provision underwent fundamental changes during the legislation process of the UCL. According to an initial version of the draft bill, the default was to continue the internment of a person until the Minister of Defense declared the end of hostilities between Israel and the terror organization in question, or any time prior as declared by the Chief of General Staff of the IDF. Up until such date, the Chief of General Staff would be required to consider, every six months, and in consultation with an advisory committee, whether there are “special grounds” justifying the internee’s release. A later version of the draft bill further clarified that “special grounds” may include humanitarian considerations. These proposed arrangements had greater similarity to the POW internment regime under GC III (although not full similarity; as, for example, in GC III there is no requirement to conduct a periodic review of a POW’s internment). These proposed versions of the provision provoked controversy during the deliberations regarding the proposed legislation in the Knesset, and eventually, in the final draft bill, the role of the review body was passed to the civilian court system, and the grounds for release were supplemented – significantly – with the primary consideration of the ongoing threat to state security posed by the detainee.

<sup>216</sup> CrimA 6659/06 *Iyyad*, at para. 46.

<sup>217</sup> UCL § 5(d).

<sup>218</sup> CrimA 6659/06 *Iyyad*, at para. 46.

constitutes a relevant consideration in the periodic review,<sup>219</sup> but has also added that a prolonged internment period cannot in itself justify release.<sup>220</sup> In at least one case the District Court has ordered the release of an internee following a periodic review, citing the time already spent in incarceration as a significant factor in its decision.<sup>221</sup>

Applying the proportionality principle in its traditional manner to assessments of the appropriate duration for internment under the UCL may raise some questions. Traditionally, the proportionality principle has been applied in administrative detention cases in Israel and the West Bank by balancing security interests, that is, the need to prevent the threat posed by the person in question against that person's right to liberty. The application of the proportionality principle to such assessments is based upon the notion that as time passes, the risk posed by the detainee may be reduced or even annulled, and that concurrently, the personal liberty of the detainee should receive greater weight in the overall consideration.

In *Iyyad*, the court seemingly replicated the traditional application of proportionality from the ADL context into the UCL context, without expressing any reservation or need to adjust. However, in the authors' view, applying the proportionality principle to the UCL in this manner creates difficulties, especially when the internment is based upon the membership alternative. By applying the principle of proportionality in reviewing the continued internment of members of NSAs, the court has in fact acknowledged, albeit implicitly, that, while membership in an NSA could form sufficient grounds to intern an individual in the first place, it is not sufficient to automatically keep such a person in internment. This is a different line of thought from the rationale guiding the continued internment of POWs under LOAC, that membership in an armed force entails an inherent and ongoing threat justifying internment as long as the hostilities are ongoing. Nevertheless, the court did not provide an explanation for the different treatment afforded to UCL internees, or require adjustments in the application of the proportionality principle that would accommodate their particular situation. Still, it could be plausibly assumed that the more the affiliation of the NSA member and his parent organization resembles that of a belligerent soldier and the armed forces he belongs to, then in reviewing the continued internment of the former on the basis of the internee's membership within the organization, the court would apply standards more similar to those applicable to POWs – even if not identical.<sup>222</sup>

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<sup>219</sup> *Id.*

<sup>220</sup> ADA 6658/11 Anonymous v. State of Israel, para. 4 (2011) (unpublished) (Isr.). The court also clarified that an up-to-date assessment of the need for internment should be conducted individually with regards to each review. In that case, the internment had continued for over two years at the time of the review.

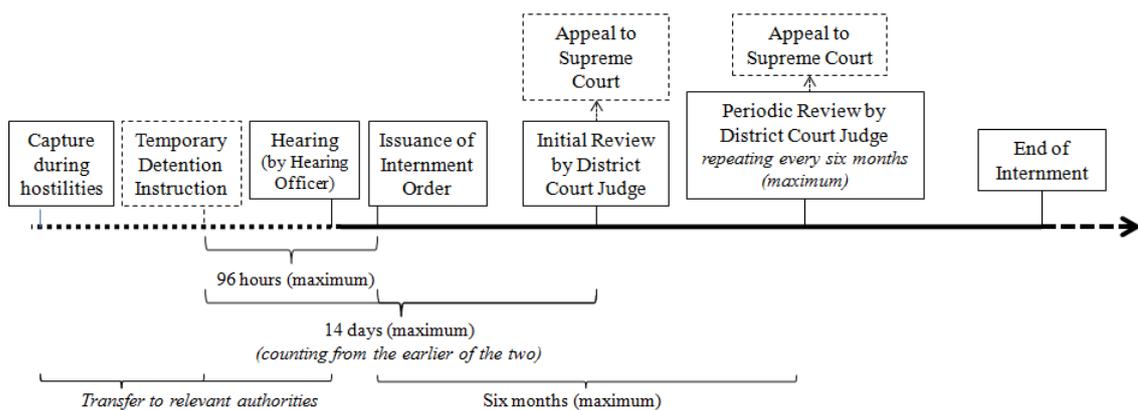
<sup>221</sup> CIC (Jm.) 40211-03-10 State of Israel v. Isawy, paras. 10-11 (2010) (unpublished) (Isr.). The court noted that: "The effect that the time factor can have on the question of an internee's dangerousness can be expressed in two ways: first, there is a basis to presume that the length of time the person is incarcerated impacts on his willingness to return and rejoin the cycle of hostilities after his release; and second, there is a basis to presume that the length of time that the person is removed from the ongoing terror activities and removed from his [acquaintances in connection to these activities] may impact on the potential that the internee will be received anew in the activities from which he was removed, which in the meantime may have already went through changes. It should also be added, that there must be congruence between the substance of the suspicions leveled against the person and the length of his incarceration." *Id.*

<sup>222</sup> Difficulties may also rise in relation to the participation alternative. If, when considering the appropriate length of the detention, the court conducts the traditional balancing test of the proportionality principle, the court might focus on the acts of the individual in each case, and not necessarily take into consideration the relation between the parties to the conflict to the overall context of the armed conflict, as – one might argue – it should do when examining detentions in such a context. In the authors' view, the court could find a way

### 3. Treatment of Secret Evidentiary Material

The approach to secret evidentiary material mirrors that of the ADL. The District Court is not bound by the rules of evidence which apply in criminal proceedings, and may conduct *ex parte* proceedings and withhold the provision of evidentiary material to the internee where deemed necessary for reasons of state or public security.<sup>223</sup> As with the ADL, the Israeli courts have acknowledged the need to withhold confidential information from internees in certain circumstances, and expressed their obligation to act as the internee's representative during the proceedings, including by requiring detailed explanations of material from the authorities.<sup>224</sup> In this regard, the courts have expressed a responsibility to reduce, as much as possible, the "fog" surrounding the internee, and to ensure that the internee receives as much information regarding his internment as permissible under the circumstances.<sup>225</sup>

Diagram – Typical Detention Process under the UCL:



to inject into its deliberations the overall context of the armed conflict. While applying the proportionality principle, it could start from the usual narrow examination as a starting point, but add some weight to the scale of security interests which would be derived from the overall threat posed by the adversary belligerent. Indeed, at least in some cases it seems that the court intuitively conducted the balance in this manner. *See, e.g.,* ADA 6434/09 Anonymous v. State of Israel, para. 10 (2009) (unpublished) (Isr.) (“When adding [the evidentiary material against the internee] to the picture portrayed by the state in regard to the situation today in the Gaza Strip, the inevitable conclusion is that the threat posed by the appellant does not only derive from the knowledge and the technological capacity to harm the security of the state”). However, turning this seemingly subtle practice into a structured doctrine may be beneficial, as it would direct the discretion of the judges in a more organized manner and ensure uniform implementation. It should nevertheless be stressed that the suggestion to make the narrow balance test broader does not go so far as to provide an authority to hold detainees merely as “bargaining chips” – at the core of the examination would always be the individual threat posed by the detainee (by virtue of his participation or membership), and absent such threat the internment could not be continued. This would be in line with *the Lebanese Detainees Case*.

<sup>223</sup> UCL, 5762-2002, SH No. 1834, at § 5(e) (Isr.).

<sup>224</sup> CrimA 6659/06 *Iyyad*, 62(4) PD 329, para. 43 (2008) (Isr.).

<sup>225</sup> ADA 2595/09 *Sofi v. State of Israel*, para. 18 (2009) (unpublished) (Isr.).

### III. THE ORDER CONCERNING SECURITY PROVISIONS (WEST BANK)

#### A. Background and General Principles

At the close of the 1967 Six Day War, Israel controlled the area widely known today as the West Bank, previously governed under the British Mandate (up until 1948), and subsequently by Jordan (from 1948 until 1967). Notwithstanding the legal complexities of the area and its status under international law,<sup>226</sup> in practice it has since been governed by military government in accordance with the law of belligerent occupation.<sup>227</sup>

Many of the British Mandatory regulations that applied in the West Bank during the period of the British Mandate were still in force in the area in 1967, and were subsequently inherited by the Israeli military government.<sup>228</sup> Among these powers was the authority for carrying out administrative detention similar to the authority under the Defence Regulations in Israel, discussed above (both were inherited from the same British legislation that was in force until 1948 in Mandatory Palestine). This authority was subsequently adopted into a governance order issued by the Military Commander of the West Bank promptly following the establishment of the military government.<sup>229</sup>

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<sup>226</sup> A detailed description of the history of the West Bank and the divergent views regarding its legal status is outside the scope of this article. For an in-depth consideration of these issues, see Meir Shamgar, *Legal Concepts and Problems of the Israeli Military Government – the Initial Stage*, in MILITARY GOVERNMENT IN THE TERRITORIES ADMINISTERED BY ISRAEL 1967-1980: THE LEGAL ASPECTS 13, 34-36 (Meir Shamgar, ed., Alpha Press 1982); EYAL BENVENISTI, THE INTERNATIONAL LAW OF OCCUPATION 203-12 (2d ed., 2012); Benjamin Rubin, *Israel, Occupied Territories*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW – VOLUME VI 416-24 (Rudiger Wolfrum ed., 2013); Meir Shamgar, *The Observance of International Law in the Administered Territories*, 1 ISR. Y.B HUM. RTS. 262 (1971); Yehuda Z. Blum, *The Missing Reversioner: Reflections on the Status of Judea and Samaria*, 3 ISR. L. REV. 279 (1968).

<sup>227</sup> Israel has not accepted the *de-jure* application of GC IV to its administration of the West Bank, but has declared the *de-facto* application of the humanitarian provisions of the Regulations Respecting the Laws and Customs of War on Land, Annex to Hague Convention No. IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, U.N.T.S. 539 [hereinafter Hague Regulations], and GC IV, as well as the “basic principles of natural justice” observed in Israel. See Shamgar, *The Observance of International Law in the Administered Territories*, *supra* note 226, at 266-67; HCJ 7015/02 Ajuri v. Commander of IDF Forces in the West Bank 56(6) PD 352, para. 13 (2002) (Isr.). However, the Supreme Court has applied the 1907 Hague Regulations to the West Bank independent of this declaration, while viewing them as reflecting customary international law applicable in the territory. See, e.g., HCJ 393/82 Jama’it Askan v. Commander of IDF Forces in Judea and Samaria, 37(4) PD 785, 792 (1983) (Isr.). In Supreme Court cases regarding the West Bank, relevant provisions of GC IV have been largely applied without determining their customary status or their *de-jure* applicability, instead relying on Israel’s traditional declaration of *de-facto* applicability (although in cases from the last decade, GC IV provisions have been applied without necessarily recalling Israel’s declaration). In addition, Israeli administrative law has also been applied by the Supreme Court to the conduct of Israeli authorities in the West Bank. *Id.* at 809.

<sup>228</sup> For a more detailed discussion of the regulatory activities of the Jordanian authorities between 1948 and 1967 with regards to the West Bank, see Dov Shefi, *Human Rights in Areas Administered by Israel: United Nations Findings and Reality*, 3 ISR. Y.B. HUM. RTS. 337, 344-45 (1973). For an overview of the regulations that were incorporated into the Israeli military government following June 1967, see Shamgar, *supra* note 226, at 267-71.

<sup>229</sup> For an overview of the initial Order on Security Provisions, and the administrative detention authorities included therein, see Dov Shefi, *The Reports of the U.N. Special Committees on Israeli Practices in the Territories – A Survey and Evaluation*, in MILITARY GOVERNMENT IN THE TERRITORIES ADMINISTERED BY ISRAEL, *supra* note

Over the years, the Military Commander of the West Bank promulgated a number of amendments, resulting in a more developed system regulating the use of administrative detention. One of the most significant amendments occurred in 1980, when following the enactment of the ADL in Israel, a Military Order was introduced in the West Bank largely bringing the existing system in line with the provisions of the ADL, and thus explicitly providing similar safeguards.<sup>230</sup> The other significant amendment occurred in 1988, where in response to the violence in the West Bank at the time (the first *Intifada*), special provisions were introduced in response to the immense strain imposed on the Israeli security authorities and the military justice system (hereinafter the Special Provisions).<sup>231</sup> Today all the regulations and amendments concerning administrative detention have been amalgamated into the Order Concerning Security Provisions (Consolidated Version) (no. 1651) 2009 (OSP)<sup>232</sup>, including the Special Provisions, which remain in force at present.

The OSP is based upon a similar rationale as is the ADL in Israel – it is a preventive detention measure intended to contend with domestic threats posed by individuals present in the West Bank, where alternative measures (including criminal proceedings) are unavailable.<sup>233</sup> And indeed, there has been a large assimilation between the OSP and the ADL. The core provisions of the two legislations are virtually identical, and subsequently, they share the same basic principles and overlapping jurisprudence (to the extent that the courts regularly cite cases regarding each framework interchangeably).

But there are still principal differences between the frameworks. Whereas the ADL is intended only to apply within the territory of a sovereign state, the OSP operates in a military governed territory outside Israeli territory, thus assuming a challenging security reality. This leads to several differences between the frameworks, including regarding the detention order issuance procedure and the judicial instances which conduct the judicial review (both will be discussed below).

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226, at 306-08. Hadar notes that as with the application of the Defence Regulations 1945 in Israel prior to the introduction of the ADL, the wide powers bestowed by the provisions regarding administrative detention in force in the West Bank from 1967 were restricted by internal army orders. *See* Hadar, *supra* note 13, at 287-88.

<sup>230</sup> Order Concerning Security Provisions (Amendment no. 18) (Judea and Samaria) (no. 815) 46 KMZM 246 (1980) (Isr.) (amending Order Concerning Security Provisions (Judea and Samaria) (no. 378) 21 KMZM 733 (1970) (Isr.), which provided the source of authority for administrative detention at the time). One of the most significant changes introduced under this Order was the authority granted to military judges to annul or shorten detention orders. Prior to this amendment, military judges were only afforded the power to make recommendations to the Military Commander of the West Bank.

<sup>231</sup> Order Concerning Administrative Detentions (Special Provisions) (Judea and Samaria) (no. 1226) 76 KMZM 180 (1988) (Isr.). Initially, these provisions required a renewal order every six months; however, due to the security challenges extant in the West Bank that continued over the years, in 2005 the Special Provisions were declared to remain in force until a decision of the Military Commander of the West Bank ordering otherwise. *See* Order Concerning Administrative Detentions (Amendment no. 30) (Judea and Samaria) (no. 1555) 209 KMZM 3855 (2005) (Isr.).

<sup>232</sup> Order Concerning Security Provisions (Consolidated Version) (Judea and Samaria) (no. 1651) 234 KMZM 1 (2009) (Isr.) [hereinafter OSP].

<sup>233</sup> In response to an argument made by an Israeli national who was detained under the OSP, the Supreme Court clarified that the authority under the OSP is not restricted to Palestinian residents of the West Bank, but can also be exercised against Israeli citizens who are present in the West Bank. *See* HCJ 3280/94 Federman v. Ilan Biran, Commander of IDF Forces in Judea and Samaria, para. 3 (1994) (unpublished) (Isr.). At the same time, the Supreme Court clarified that a Palestinian person holding permanent Israeli residency but actually living in the West Bank (and planning to carry out a terrorist attack in Israel), could be detained under the ADL (rather than the OSP). *See* ADA 8967/14 Anonymous v. State of Israel, para. 3 (2015) (Isr.).

Besides structural differences, there is a noticeably more frequent use of the OSP than the ADL. Statistics show that this use has fluctuated over the years, in close correlation with the state of the security situation at the time in the area.<sup>234</sup> Besides the ongoing perilous security situation, another significant reason for the increased employment of the detention powers under the OSP is the particular practical difficulties in the West Bank in employing alternative and less-harmful administrative measures as a substitute for administrative detention.<sup>235</sup> That said, a more comprehensive research on that issue is outside the scope of this article.

On the level of international law, the predominant legal regime relevant to a discussion of the OSP is that of the law of belligerent occupation, including the Hague Regulations and GC IV.<sup>236</sup> The latter provides specific provisions in Articles 41-43 and 78, which allow for, and regulate, administrative detention. The relevant aspects of these provisions will be considered as against the OSP below.

## B. Administrative Detention Order Issuance Procedure

The West Bank is generally administered by a military government,<sup>237</sup> which international law charges with the responsibility to ensure safety and public order in the territory.<sup>238</sup> In this light, the OSP provides that the Military Commander of the West Bank – as the highest ranking officer in the area (a Major-General) – is the entity granted primary authority for issuing administrative detention orders.<sup>239</sup> The Special Provisions

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<sup>234</sup> For example, according to statistics received from the IDF Military Courts Unit (and originally obtained from the Israel Prison Service), at the end of 2006, which saw a high level of violence, 821 persons were being held in administrative detention under the OSP. This number increased to 858 detainees in 2007. At the end of 2008, reflecting the decreased tension in the security situation in the West Bank, the number significantly decreased to 568 detainees. At the end of 2009 this number decreased significantly again, to 278 detainees. Two-hundred and ten detainees were being held at the end of 2010, 316 at the end of 2011, 178 at the end of 2012, and 152 at the end of 2013. The year 2014, characterized by a surge in the security tension in the West Bank, was concluded with 465 detainees under the OSP. The year 2015, which saw a sharp rise in violence in October of that year, ended with 594 persons held under the OSP. At the end of 2016 there were 536 detainees being held under the law.

<sup>235</sup> For example, the imposition of house arrest or the requirement to regularly appear before the authorities are measures which are usually less available in the West Bank, in consideration of the transfer of powers and responsibilities from the IDF military government in certain areas of the West Bank to the Palestinian Authority, and the resulting incapacity to carry out the requisite level of enforcement of these measures in many such areas.

<sup>236</sup> As noted above, this article does not discuss the applicability of IHRL in the context of belligerent occupation, or its interplay with the law of belligerent occupation, and the divergent views on these matters (*see also* notes 16 and 97 above). In any case, in the authors' appraisal these questions are not of practical significance, as the OSP generally meets IHRL standards (detailed above in the context of the ADL).

<sup>237</sup> Nevertheless, under the "Oslo Accords," Israel transferred powers and responsibilities over certain areas of the West Bank and various functions previously held by the military government to the Palestinian Authority. *See generally* Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip (Sep. 28 1995).

<sup>238</sup> Hague Regulations, *supra* note 227, art. 43; GC IV, *supra* note 104, art. 64.

<sup>239</sup> OSP §§ 273(a) (with regard to the regular provisions), 285(a) (with regard to the Special Provisions). The Supreme Court has discussed the nature of this authority in light of the impact of administrative detention on individual rights, and stressed the need to conduct the proper balance. *See, e.g.*, HCJ 11026/05 Anonymous v. Commander of IDF Forces in the West Bank, para. 5 (2005) (unpublished) (Isr.) ("In considering the issuance of an administrative detention order, the Military Commander must balance the administrative

allow for the delegation of this authority to select high-ranking commanders (in practice, these commanders typically hold the rank of Colonel) (hereinafter Authorized Military Commander).<sup>240</sup>

The Authorized Military Commander is required to review and consider all relevant material prior to issuing a detention order.<sup>241</sup> As a matter of practice, and although not explicitly required in the OSP, the Authorized Military Commander does not issue orders without prior review by military prosecutors from the Military Prosecutorial Service in the West Bank (who are subsequently responsible for presenting cases before the military courts regarding any issued orders).<sup>242</sup>

A detention order cannot exceed a maximum duration of six months.<sup>243</sup> The Authorized Military Commander may issue an additional administrative detention order concurrently with the expiration of the former one if the grounds upon which the person was detained still exist at the end of this period, and the cumulative period of detention is viewed as proportional to the ongoing security threat requiring the detention. Again, this order may only be issued for a maximum duration of six months.<sup>244</sup>

### C. Grounds for Administrative Detention

Under the OSP, an Authorized Military Commander may only issue an administrative detention order where there is a reasonable basis to believe that the detention is “necessary for the security of the [West Bank] or for public security”<sup>245</sup> and if the detention is “absolutely necessary for clear security purposes.”<sup>246</sup> This provision reflects the rigorous standard set by Article 78 of GC IV for administrative detentions, demanding a necessity deriving from “imperative reasons of security.”<sup>247</sup>

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detainee’s right to personal liberty against the security considerations. The art of balancing between the severe impingement upon personal liberties on the one hand and public security on the other is not easy. This art is the responsibility of the Military Commander; the discretion on the subject is his.”)

<sup>240</sup> OSP § 285(a). The regular provisions prohibit the Military Commander of the West Bank from delegating the authorities regarding administrative detention. OSP § 282. However, they do allow, under section 273(c), for certain officers (authorized by the Military Commander of the West Bank as “Military Commanders” in a more general context, under section 3 of the OSP) to order the temporary detention of a person for a maximum of four days, if the officer believes that the person in question falls under the conditions which justify administrative detention under the OSP. This timeframe cannot be extended, and before it expires, the person must be brought for judicial review (presumably after the Military Commander of the West Bank has issued a regular detention order).

<sup>241</sup> The military court clarified that this includes material which may raise doubts regarding the existence of the threat suggested. *See* Mil. Appeal ADA 29/00 Military Court of Appeals (Judea & Samaria), Barghouti v. Commander of IDF Forces in Judea and Samaria (2001) (unpublished) (Isr.).

<sup>242</sup> These are the sole two responsibilities of the Military Prosecution regarding administrative detention. The Military Prosecution is not authorized to decide regarding the length of an administrative detention, which is only under the purview of the Authorized Military Commanders and the courts. *See* Mil. Appeal ADA 3838/07 Military Court of Appeals (Judea & Samaria), Military Prosecution v. Akra (2007) (unpublished) (Isr.).

<sup>243</sup> *Id.*

<sup>244</sup> OSP §§ 273(a) (with regard to the regular provisions), 285(a) (with regard to the Special Provisions).

<sup>245</sup> *Id.* at § 285(a).

<sup>246</sup> *Id.* at § 286A.

<sup>247</sup> GC IV, *supra* note 104, art. 42, concerns administrative detention of aliens in the territory of a party to the conflict and sets a similar threshold by demanding that administrative detention be regarded as “absolutely necessary” to the security of the Detaining Power.

As the OSP essentially sets the same standard as that of the ADL in this regard, and petitions submitted against detention orders issued by the Authorized Military Commander are also heard by the Supreme Court, the courts have given the OSP the same strict interpretation. Thus, when assessing the danger posed by the detainee prior to issuing the order under the OSP, the Supreme Court ruled that it must be done on the basis of “the existence of an actual danger, whose likelihood of eventuality is close to certain,” to the security of the West Bank.<sup>248</sup> Likewise, issuance of a detention order under the OSP has also been regarded by the judiciary to be justified only when “special and exceptional conditions that require the use of this extreme and unusual measure are satisfied.”<sup>249</sup> This similarity between the criteria of each framework derives from the Supreme Court’s declared approach that the significance of the loss of liberty in Israel is essentially no different to that of loss of liberty in the West Bank.<sup>250</sup>

The authorities must make their decisions based on “clear, especially reliable and convincing” evidentiary material.<sup>251</sup> As for the consideration of past behavior, the Military Court of Appeals has adopted the approach of the Supreme Court, according to which such behavior may only be used as a consideration when conducting an assessment of the potential future threat expected to be posed by a detainee; however, it may not constitute an impetus for “punishing” the suspect with administrative detention.<sup>252</sup>

Like the Supreme Court, the Military Court of Appeals has also acknowledged that in certain circumstances activity on behalf of a terrorist organization that is not necessarily of a direct military nature may still warrant administrative detention, due to its support of the military activity and the subsequent threat it poses.<sup>253</sup>

The courts have stressed in the context of the OSP that it is preferable to take criminal steps against someone suspected of hostile activity of a security nature over

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<sup>248</sup> HCJ 3280/94 Federman v. Ilan Biran, Commander of IDF Forces in Judea and Samaria, para. 5 (1994) (unpublished) (Isr.). This is the same test the Supreme Court employs with regard to the ADL. AdminA 4/96 Ginzberg v. Minister of Defense 50(3) PD 221, para. 5 (1996) (Isr.). For example, in the recent case of *Daragme*, the Military Court of Appeals annulled a detention order on the basis that the “near certainty” standard had not been proved by the prosecution. Mil. Appeal ADA 1703/13 Military Court of Appeals (Judea & Samaria), *Daragme v. Military Prosecution* (2009) (unpublished) (Isr.). The court also implied that the reasons for detention may have been of a punitive nature, following the failure of the prosecution to gather sufficient evidence to warrant an indictment against the detainees, who were suspected of murder.

<sup>249</sup> HCJ 9441/07 Agbar v. Commander of IDF Forces in Judea and Samaria 62(4) PD 77, para. 5 (2007) (Isr.) (citing AdminA 8607/04 Fahima v. State of Israel 59(3) PD 258, 262 (2004) (Isr.).

<sup>250</sup> HCJ 9441/07 *Agbar*, at para. 8. *See also* HCJ 2320/98 Al-Amla v. Commander of IDF Forces in Judea and Samaria 52(3) PD 346, 361 (1998) (Isr.).

<sup>251</sup> Mil. Appeal ADA 2136/09 Military Court of Appeals (Judea & Samaria), *Military Prosecutor v. Jaabri* (2009) (unpublished) (Isr.).

<sup>252</sup> Mil. Appeal ADA 2479/09 Military Court of Appeals (Judea & Samaria), *Ahmed v. Military Prosecutor* (2009) (unpublished) (Isr.).

<sup>253</sup> Mil. Appeal ADA 2715/06 Military Court of Appeals (Judea & Samaria), *Nahleh v. Military Prosecutor* (2006) (unpublished) (Isr.); Mil. Appeal ADA 2997/16 Military Court of Appeals (Judea & Samaria), *Ahgrab v. Military Prosecutor* (2016) (unpublished) (Isr.) (referring to activity related to finance and funds transfer); Mil. Appeal ADA 2695/16 Military Court of Appeals (Judea & Samaria), *Sawitti v. Military Prosecutor* (2016) (unpublished) (Isr.) (referring to arms trade); Mil. Appeal ADA 3728/16 Military Court of Appeals (Judea & Samaria), *Alrashaida v. Military Prosecutor* (2016) (unpublished) (Isr.) referring to arms trade). On the other hand, organizational activity within Hamas’ student association, for example, was determined by the court as insufficient to justify administrative detention, resulting in the annulment of the detention order. *See* Mil. Appeal ADA 2130/16 Military Court of Appeals (Judea & Samaria), *Ahmed v. Military Prosecutor* (2016) (Isr.). *See also* the Supreme Court’s decisions on the issue of civilian-organizational activity (some of which concerned administrative detention cases under the OSP), *supra*, notes 34-37 and accompanying text.

administrative detention, and thus the authorities should strive to bring a detainee to a criminal trial.<sup>254</sup> Again, this is similar to administrative detention under the ADL.

In accordance with the principle of proportionality under Israeli administrative law, which is generally applied also to the Israeli authorities' conduct in the West Bank,<sup>255</sup> where detention orders are renewed and the detention period grows longer, the grounds for renewing orders receive greater and stricter scrutiny, and a heavier burden is placed upon the Authorized Military Commander to show the dangerousness of the detainee.<sup>256</sup> Herein, it is possible that evidentiary material that was considered adequate for the initial detention order would not by itself be sufficient if a longer period of detention is requested.<sup>257</sup>

#### D. Judicial Review

The judicial review regarding OSP orders is unique in comparison to the ADL and UCL, in that it relies – at least in the first and second instances of review – on the military courts system operating in the West Bank. Like the ADL and UCL, however, a detainee under the OSP may ultimately bring his case before the Supreme Court of Israel, as a third instance of review.

The military courts were established in the West Bank shortly after Israel established the military government in the territory.<sup>258</sup> A Military Court of Appeals was

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<sup>254</sup> HCJ 6843/93 *Katmash v. Commander of IDF Forces in Judea and Samaria*, para. 5 (1994) (unpublished) (Isr.); HCJ 9441/07 *Agbar*, at para. 5; HCJ 5784/03 *Salame v. Commander of IDF Forces in Judea and Samaria* 57(6) PD 721, para. 6 (2003) (Isr.); *See also* HCJ 7015/02 *Ajuri v. Commander of IDF Forces in the West Bank* 56(6) PD 352, 373 (2002) (Isr.) (citing previous decisions in declaring that administrative measures must abide by the principle of proportionality, and that as a result, “the measure adopted must be the one that causes less harm”); HCJ 253/88 *Sejadia v. Minister of Defense* 42(3) PD 801, 821 (1988) (Isr.) (ruling that administrative detention orders may only be employed where the individual threat “... cannot reasonably be prevented by adopting regular legal measures (a criminal proceeding) or by an administrative measure that is less severe from the viewpoint of its consequences”). An implementation of this requirement can be seen, for example, in the case of *Akra*, where the Military Court of Appeals annulled a detention order, while criticizing the military authorities for failing to carry out an appropriate examination of less-harmful alternatives to administrative detention. *See* Mil. Appeal ADA 3838/07 Military Court of Appeals (Judea & Samaria), *Military Prosecution v. Akra*, para. 5 (2007) (unpublished) (Isr.).

<sup>255</sup> *See* HCJ 393/82 *Jama'it Askan v. Commander of IDF Forces in Judea and Samaria*, 37(4) PD 785, 810 (1983) (Isr.).

<sup>256</sup> *See* HCJ 11026/05 *Anonymous v. Commander of IDF Forces in the West Bank*, paras. 6-7 (2005) (unpublished) (Isr.) (“The longer the administrative detention is, the heavier becomes the burden upon the Military Commander to demonstrate that the detainee poses a danger”); HCJ 2233/07 *Anonymous v. Military Commander in Judea and Samaria*, para. 8 (2007) (unpublished) (Isr.) (“The longer the detention continues, the greater the weight of the detainee’s right to exercise his individual liberty against the weight of the public interest”); Mil. Appeal ADA 1458/04 Military Court of Appeals (Judea & Samaria), *Binat v. Military Prosecutor* (2004) (unpublished) (Isr.).

<sup>257</sup> *See, e.g.*, HCJ 5784/03 *Salame*, at para. 8 (“The strength of the evidence necessary to justify administrative detention may change over time. Evidence that would justify issuing an order [...] might not constitute sufficient cause to extend that detention. And evidence justifying an extension [...] might be insufficient for a further extension [...]. In any event, the evidence presented [...] must be examined in order to assess whether it proves the danger posed by the detainee at a level that justified his further detention”); HCJ 11006/04 *Kadri v. Commander of IDF Forces in Judea and Samaria*, para. 6 (2004) (unpublished) (Isr.) (where the court noted that as the cumulative detention period increases, new evidentiary material concerning the threat posed by the detainee may be required).

<sup>258</sup> Hague Regulations, *supra* note 227, art. 43; GC IV, *supra* note 104, art. 66.

added to the system in 1988.<sup>259</sup> The main responsibility of the military courts system is penal adjudication (reflecting Article 66 of GC IV), but throughout the years the courts were also ordained by the Military Commander of the West Bank with some specific administrative authorities – one of which is to review orders under the OSP.<sup>260</sup> The appointment of the military court to review detention orders meets the requirement under Article 78 of GC IV, discussed above.<sup>261</sup>

The military courts function today completely independently from the IDF chain of command and from the MAG Corps.<sup>262</sup> The OSP confers upon these courts independent professional discretion.<sup>263</sup> Their decisions are binding on the Military Commander of the West Bank, who does not have an authority to annul or change them in any way. In the notable case of *Al-Amla*, the Supreme Court confirmed and emphasized the superior authority of the military courts over the authority of the Military Commander of the West Bank in assessing the threat posed by an administrative detainee.<sup>264</sup>

Detainees are entitled to have legal representation of their choosing in proceedings before the military courts.<sup>265</sup>

## 1. The Judicial Review Process

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<sup>259</sup> In the case of HCJ 87/85 Arjub v. Commander of IDF Forces in Judea and Samaria 42(1) PD 353 (1988) (Isr.), the Supreme Court noted that the respondent is not legally obliged to establish an appellate instance in the West Bank, but nevertheless recommended the state do so on policy grounds. Further to this decision, and against the background of the large increase in the number and scale of cases during the First Intifada, the Military Court of Appeals was established in the West Bank through the Order Concerning Security Provisions (Amendment no. 58) (no. 1265) (Judea and Samaria) 77 KMZM 134 (1989) (Isr.). For more detail, see UZI AMIT-COHEN ET AL., ISRAEL, THE 'INTIFADA' AND THE RULE OF LAW 97-98 (Israel Ministry of Defense Publications, 1993).

<sup>260</sup> BENVENISTI, *supra* note 226, at 216.

<sup>261</sup> As mentioned above, GC IV, *supra* note 104, art. 78 requires the review to be conducted by a “competent body,” which does not necessarily have to be a judicial tribunal. GC IV, *supra* note 104, art. 43, which regulates the administrative detention of alien persons in a territory of a party to the conflict, explicitly offers administrative boards as alternatives to judicial tribunals. The ICRC commentary to GC IV names these two alternatives also in the context of Article 78. See GC IV COMMENTARY, *supra* note 173, at 368-69.

<sup>262</sup> While judges in the military courts are formally appointed by the Military Commander in the West Bank, they are selected by a seven-member committee comprising four retired and presiding judges, a representative of the Israel Bar Association, and two officers in the IDF with the rank of Major-General. Promotion of a judge by the Military Commander requires the recommendation of the President of Military Court of Appeals. Finally, a judge may be removed from his position only by a decision of the previously mentioned committee, or by the President of the Military Court of Appeals for organizational reasons. See OSP §§ 11-14.

<sup>263</sup> Section 8 of the OSP (titled “Independence”) provides that in matters of adjudication, judges are subject only to the law in force in the West Bank. See also BENVENISTI, *supra* note 226, at 216. In recent years, the military courts have gone so far as to claim to have some administrative powers and even constitutional powers, not explicitly granted under the law applicable in the West Bank.

<sup>264</sup> In this case, the Supreme Court clarified that in the event the military courts rule on the cessation of a detention order, the Military Commander cannot extend that order. He may, however, petition the Supreme Court against the decision of the military court. See HCJ 2320/98 Al-Amla v. Commander of IDF Forces in Judea and Samaria 52(3) PD 346, 360-62 (1998) (Isr.).

<sup>265</sup> Section 76 of the OSP provides that an accused is entitled to legal representation in criminal proceedings. Although the section refers explicitly only to this type of proceedings, in practice it is applied to other types of proceedings which take place in the military courts. Section 74 of the OSP provides that legal counsel may be either Israeli or local Palestinian counsel.

The OSP provides that a detainee must be brought before a military court judge within four days for initial assessment of the detention order, while the Special Provisions extended this timeframe to eight days.<sup>266</sup> Within this timeframe, however, the detainee should be brought before the court as soon as possible.<sup>267</sup> The judicial review process is integral to the detention procedure and is not dependent on the detainee's request. The military courts have annulled detention orders in instances where judicial review was conducted within the eight-day timeframe but without the presence of the detainee, or where the detainee was held unlawfully prior to the issuance of the detention order.<sup>268</sup>

Considering that each detention order may not exceed six months, the obligation to conduct judicial review regarding each issuance (or renewal) of a detention order ensures accordance with the standard offered by Article 78 of GC IV, which requires review of an administrative detention by a competent body "if possible every six months." Where the detention is ordered through the regular provisions of the OSP (rather than the Special Provisions), the OSP provides that the court must conduct a renewed assessment of the detention order every three months at the most.<sup>269</sup>

Each decision of the military courts may be appealed to the Military Court of Appeals, which is comprised of senior judges and provides another judicial review buffer. Instances of appeal are to be heard before a single judge.<sup>270</sup> Subsequently, each side may petition the Supreme Court against the judgment of the Military Court of Appeals (to be heard before a panel of three judges). The detainee may petition the Supreme Court regarding each renewal order, where they are upheld by the Military Court of Appeals.

The process of transferring a case over to the Supreme Court of Israel, as part of the civilian judicial system, brings with it an additional unofficial level of legal review.

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<sup>266</sup> OSP §§ 275(a) (with regard to the regular provisions), 287(a) (with regard to the Special Provisions).

<sup>267</sup> See HCJ 11026/05 Anonymous v. Commander of IDF Forces in the West Bank, para. 8 (2005) (unpublished) (Isr.) ("The judicial review must take place as close as possible to the beginning of the administrative detention"); HCJ 3239/02 Marab v. Commander of IDF Forces in Judea and Samaria 57(2) PD 349, 368-71 (2002) (Isr.) ("... the question of detention is to be brought promptly before a judge..."). See also HCJ 253/88 Sejadia v. Minister of Defense 42(3) PD 801, 820 (1988) (Isr.) ("The time until the hearing of the appeal is therefore a very important and substantive issue, since, as stated, only then can a detainee contest his detention and present his claims for release. [...] Administrative detention without effective judicial review is subject to errors in fact or judgment which result in the denial of an individual's liberty without any substantive basis. Therefore, every effort must be made to prevent such phenomena. [...] The authorities should make every effort to reduce the gap between the time of detention and appeal filing and the judicial review"). In the event the administrative detention begins with a temporary detention instruction issued by a military commander under 273(c) of the OSP, this four-day period begins at the time the execution of the temporary instruction is carried out, and not from the later time at which a regular detention order is subsequently issued by the Military Commander of the West Bank (see *supra* note 240).

<sup>268</sup> Mil. Appeal ADA 3596/06 Military Court of Appeals (Judea & Samaria), Military Prosecution v. Jibril (2006) (unpublished) (Isr.); Mil. Appeal ADA 2036/09 Military Court of Appeals (Judea & Samaria), Military Prosecution v. Sa'afin (2009) (unpublished) (Isr.); Mil. Appeal ADA 183/02 Military Court of Appeals (Judea & Samaria), Gr'ar v. Military Prosecutor (2003) (unpublished) (Isr.). In all these cases, the Military Court of Appeals clarified that the absence of the detainee in the hearing does not automatically annul the detention order, but is a factor when conducting the balancing exercise between the threat posed by the detainee and his right to liberty. In *Jibril*, the court reasoned that the presence of the detainee is a highly significant part of the judicial review process, *inter alia*, so as to provide him with the right to speak before the court.

<sup>269</sup> OSP § 276.

<sup>270</sup> OSP § 288. The Military Court of Appeals has stated that appeals will be heard before a panel of three judges only in exceptional circumstances (thereby adopting a similar approach to that of the Supreme Court with regard to the ADL). See Other Requests (OR) 3681/07 Military Court of Appeals (Judea & Samaria), Military Prosecution v. Anabi (2007) (unpublished) (Isr.).

The State Attorney of Israel, or a representative on his behalf, is responsible for representing the state before the Supreme Court in administrative detention cases. Upon examination of the material prior to the hearing at the Supreme Court, the State Attorney may decide not to proceed with the case (and thus cause an annulment of the detention order) or may enter into an agreement with the detainee's representatives if deemed appropriate.<sup>271</sup>

In total, there are three regular stages of judicial review over administrative detention orders issued under the OSP, in addition to the preliminary legal review of a military prosecutor and later review by the State Attorney. As a result, a detention order issued under the OSP may go through more layers of legal review than that of each of the ADL and the UCL.

## 2. Authorities and Discretion of the Review Court

The OSP explicitly provides the military court with the authority to uphold, annul or shorten the duration of detention orders, in the exact language of the ADL.<sup>272</sup> The replication of the ADL framework is not only in letter, but also in the jurisprudence and practice of the military courts.<sup>273</sup> The military courts regularly review orders on grounds of both facts and law, conduct substantial examinations of the orders' lawfulness and apply the proportionality principle when assessing the detention's duration.<sup>274</sup>

In practice, the authority to shorten the duration of detention orders is applied by the military courts in one of two variations. According to the first variation, which the court calls "substantial shortening," the shortening of the order's duration is accompanied with a ruling that the order cannot be renewed at the end of the shortened period, unless a renewed assessment by the Authorized Military Commander during this period shows there is a substantial development in the detainee's dangerousness – due to either *new information* concerning the detainee's dangerousness, or to a substantial change in the *security circumstances* that enhances the dangerousness posed by the detainee (without necessarily any new information concerning the detainee personally). According to the second variation, which the court calls "non-substantial shortening," a potential renewal of the order at the end of the shortened period will not be subjected to the above-mentioned prerequisite; however, the shortening will ensure the Authorized Military Commander thoroughly reexamines the justification for the continued detention at the end of this period. In either case, a renewal will be subjected

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<sup>271</sup> Barak-Erez & Waxman, *supra* note 60, at 43.

<sup>272</sup> OSP § 287(a). The Supreme Court has remarked that "judicial review over the detention proceedings is significant [...]. [It] is an internal and integral part of the administrative detention order's legality." See HCJ 5784/03 Salame v. Commander of IDF Forces in Judea and Samaria 57(6) PD 721, para. 7 (2003) (Isr.). See also AdminA 2/86 Anonymous v. Minister of Defense 41(2) PD 508, 515-16 (1986) (Isr.); HCJ 3239/02 Marab, at 368-69.

<sup>273</sup> This practice is supported by the Supreme Court. See HCJ 2320/98 Al-Amla v. Commander of IDF Forces in Judea and Samaria 52(3) PD 346, 361 (1998) (Isr.) ("[D]espite the differences between the [ADL] that applies in Israel and the [OSP] that applies in the West Bank, there is no basis for distinguishing in this respect between judicial review of a detention order under the [ADL] and judicial review of a detention order under the [OSP]"). See also AdminA 8788/03 Federman v. Minister of Defense 58(1) PD 176, 184 (2003) (Isr.); HCJ 9441/07 Agbar v. Commander of IDF Forces in Judea and Samaria 62(4) PD 77, para. 8 (2007) (Isr.).

<sup>274</sup> Examples for these characteristics could be found in any of the military courts cases cited in this article.

to another judicial review. This application of the shortening authority is based on its interpretation by the Supreme Court in the *Al-Amla* case.<sup>275</sup> The military courts have even slightly broadened their range of authorities beyond that expressed explicitly by the Supreme Court and the OSP – since 2009 they have claimed and exercised an authority to *uphold* an order for its original duration while subjecting its potential future renewal to a prerequisite of substantial development in the detainee's dangerousness (similar to the “substantial shortening” authority).<sup>276</sup> Such decisions have been called by the military courts “qualified affirmation.”

With regard to orders upheld by the first instance and appealed against, the Military Court of Appeals conducts a *de-novo* assessment of the order and may exercise the same authorities as in the first instance.<sup>277</sup> If the order is upheld again and petitioned against to the Supreme Court, the latter makes another (third) *de-novo* assessment of the order.<sup>278</sup> The Supreme Court occasionally tries to resolve appeals without formal judicial intervention, as described above.<sup>279</sup>

Statistics indicate the military courts have wielded considerable intervention in administrative detention cases, whether by annulling orders, “substantial shortening,” “non-substantial shortening,” or by “qualified affirmation.”<sup>280</sup> Presumably, the

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<sup>275</sup> See HCJ 2320/98 *Al-Amla*. In some cases, the military courts have ordered to shorten the duration of detention orders despite the Military Commander's declaration that a detention order will not be extended.

<sup>276</sup> This authority was first claimed and exercised by the military court of first instance in 2008, and affirmed in 2009 by the Military Court of Appeals in *Nazzal*. Mil. Appeal ADA 4621/08 Military Court of Appeals (Judea & Samaria), *Nazzal v. Military Prosecution* (2009) (unpublished) (Isr.). Following *Nazzal*, it has been routinely implemented by the military courts in the West Bank. It may be asked with regard to “qualified affirmation” authority, as well as regarding the “substantial shortening” authority, why the detainee would still be detained for the rest of the period, if already determined that he or she will be shortly released – hence, that they no longer pose a threat. A similar question may be raised in relation to the parallel practice of the Military Commander to occasionally commit before the court that a detention order would be the last one before the detainee is released. The latter practice was recently challenged in a case discussed before the Military Court of Appeals. The court upheld this practice, noting that such a commitment considers in advance the rest of the detention's period as an alleviating effect on the dangerousness of the detainee. See Mil. Appeal ADA 3778/16 Military Court of Appeals (Judea & Samaria), *Afana v. Military Prosecutor* (2016) (unpublished) (Isr.).

<sup>277</sup> OSP § 288 (with regard to the authorities of the Military Court of Appeals); Mil. Appeal ADA 1703/13 Military Court of Appeals (Judea & Samaria), *Daragme v. Military Prosecution* (2009) (unpublished) (Isr.) (an example for the *de-novo* nature of the review).

<sup>278</sup> Krebs, *supra* note 58, at 667.

<sup>279</sup> See *supra* notes 60-63 and accompanying text.

<sup>280</sup> According to the data received from the IDF Military Courts Unit, out of 2,934 issues or renewals of administrative detention orders under the OSP in 2006, the military courts annulled 168 orders, and applied the shortening authority with regard to 1818 orders (the data provided did not distinguish between “substantial shortening” and “non-substantial shortening”); in 2007, out of 3,059 orders, 137 were annulled, and the shortening authority was applied with regard to 1,652 orders; in 2008, out of 2,222 orders, 154 orders were annulled, and the shortening authority was applied with regard to 1,154 orders. Statistics provided in relation to the years 2009-2016 did distinguish between “substantial shortening” and “non-substantial shortening,” and included the new category of “qualified affirmation” (which has been routinely implemented since 2009). Thus, in 2009, out of 1,307 orders, 47 orders were annulled, 108 orders were “substantially” shortened, 366 orders were “non-substantially” shortened, and 91 orders were subjected to “qualified affirmation”; in 2010, out of 714 orders, nine orders were annulled, 22 orders were “substantially” shortened, 214 orders were “non-substantially” shortened, and 20 orders were subjected to “qualified affirmation”; in 2011, out of 855 orders, 21 orders were annulled, 26 orders were “substantially” shortened, 246 orders were “non-substantially” shortened, and nine orders were subjected to “qualified affirmation”; in 2012, out of 699 orders, 15 orders were annulled, 27 orders were “substantially” shortened, 155 orders were “non-substantially” shortened, and 57 orders were subjected to “qualified affirmation”; in 2013, out of 421 orders, seven orders were annulled, 13 were “substantially” shortened, 71 orders were “non-substantially” shortened, and 17 orders were subjected to “qualified affirmation”; in 2014, out of 1277 orders, 23 orders

interventionist approach and guidance of the Supreme Court have influenced this practice, at least in part.<sup>281</sup>

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were annulled, 43 orders were “substantially” shortened, 200 orders were “non-substantially” shortened, and 43 orders were subjected to “qualified affirmation”; in 2015, out of 1,299 orders, 10 orders were annulled, 33 orders were “substantially” shortened, 125 orders were “non-substantially” shortened, and 102 orders were subjected to “qualified affirmation”; and in 2016, out of 1,848 orders, 30 orders were annulled, 80 orders were “substantially” shortened, 179 orders were “non-substantially” shortened, and 127 orders were subjected to “qualified affirmation.” The data above does not include the number of orders that were annulled or shortened by the military commander without judicial intervention (usually up to tens of orders each year – for example, in 2016 the Military Commander shortened or annulled 54 orders), as well as the number of orders with regard to which the Military Commander committed before the court to refrain from extending. It should also be noted that the number of orders issued in each year includes extensions of existing orders, so the number of detainees is lower than the total number of orders (for the total number of detainees held at the end of each year *see, supra* note 234).

<sup>281</sup> While the numerous Supreme Court decisions regarding administrative detention strongly indicate an interventionist approach, the practical impact of such an approach has been questioned in an empirical analysis of Supreme Court decisions (from the years 2000-2010) regarding preventive detention conducted by Shiri Krebs. Krebs found that “[i]n the first decade of the twenty-first century, the Israeli Supreme Court performed judicial review of over 322 administrative detention cases. Out of these, not even a single case resulted in a judicial decision to release the detainee,” except for the *Lebanese Detainees Case*, where the release order was not based upon an individual threat assessment – a fact which subsequently led Krebs to decide not to include it in her analysis. Krebs, *supra* note 58, at 672. Notwithstanding, Krebs admits that some of these decisions did shorten the detention order or led the state to amend its declared legal authority for the detention. *Id.* at 673-675. Krebs acknowledges that the Supreme Court has developed more subtle courtroom dynamics which have had an impact on the parties’ efforts to resolve cases, but still concludes that the inherent challenges facing the court in this context make conducting “independent judicial review of detention exceedingly challenging, if not impossible.” *Id.* at 644. However, these statistics, when viewed alone, may be misleading, as they could also serve to support a very different claim. First, one may argue that these statistics indicate that the authorities have internalized the strict approach of the judiciary towards administrative detention, and subsequently display caution when issuing administrative detention orders. Second, importantly, it should be recalled that an administrative detention case appears before the Supreme Court as a second judicial instance (in cases concerning the ADL and UCL) or even as a third judicial instance (in cases concerning the OSP, which comprise the vast majority of cases Krebs reviewed). Thus, each case that reached the Supreme Court has already been scrutinized and affirmed by the lower courts (as well as undergoing scrutiny by those representing the authorities in the courts). Orders which were viewed as unjustified by the lower courts were presumably already annulled at that level, and did not reach the Supreme Court – and thus did not appear in Krebs’ research (for data concerning judicial intervention by military courts in relation to OSP orders in the years 2006-2016, *see supra* note 280). In other words, Krebs’ findings might just as well prove the high degree of the effectiveness of judicial review conducted by the lower courts, guided by the spirit and precedents set by the Supreme Court, in a way that undermines Krebs’ conclusion. Third, as Krebs herself notes, outside the formal avenue for judicial review, the Supreme Court has developed an additional role for itself – by promoting out-of-court settlements and negotiations. *Id.* at 679-80, 688-91; *see also* the comment made by the Supreme Court itself regarding this role, in HCJ 9441/07 Agbar v. Commander of IDF Forces in Judea and Samaria 62(4) PD 77, para. 5 (2007) (Isr.). Krebs notes the high number of withdrawn cases attributed to compromises reached or revisions conducted outside the courtroom, and makes specific reference to a number of cases whereby the court shortened detention orders or suspended its judgment to allow the state to consider alternative options provided by the court, including reviewing its submissions or withdrawing the case (notwithstanding, Krebs finds fault with this practice as well). Krebs, *supra* note 58, at 689-91. Another relevant factor is that administrative detention cases are appealed almost automatically to the Supreme Court as a result of its easy accessibility and the detainee’s granted right to appeal, often regardless of the weight and quality of the information indicating the threat posed by the detainee (which the detainee is often not fully aware of). The Supreme Court itself raised this issue in HCJ 9441/07 Agbar, at para. 5: “We patiently deal with such petitions which constantly come before us, even though in reality they are applications for leave to appeal to a third instance, and some of these petitions have no merit. Counsel for the petitioner does not always know the real facts, and they are disclosed in the privileged evidence. Indeed, our experience in very many administrative detention cases, if truth be told, is that the privileged material that we are authorized to see under the law at the request of the petitioners

### 3. Treatment of Secret Evidentiary Material

On this issue too, the OSP follows the letter of the ADL, permitting the military courts to deviate from the standard rules of evidence, and to conduct *ex parte* hearings, where relevant information is confidential and not releasable to the detainee or his attorney.<sup>282</sup> Subsequently, the military courts employ the “judicial management” model used by the Supreme Court with regard to the ADL and the UCL, discussed above.<sup>283</sup> Thus, they have the capacity to review all available evidentiary material and to assess its credibility<sup>284</sup> and carry the responsibility to represent the interests of the detainee while doing so.<sup>285</sup> In this regard, the Military Court of Appeals has likewise ruled that all information must be provided to the detainee, unless such disclosure poses a security threat.<sup>286</sup> At the same time, the military courts have also recognized the dangers in revealing intelligence sources, in that it could endanger the lives of those affected by the information provided, or negate the possibility of using the source again.<sup>287</sup>

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is usually serious and *prima facie* justifies detention, but it is based on methods of collecting information that cannot be disclosed because it may strongly harm the security interest in general or specific persons.”

<sup>282</sup> OSP §§ 290-291.

<sup>283</sup> *Supra* notes 84-91 and accompanying text.

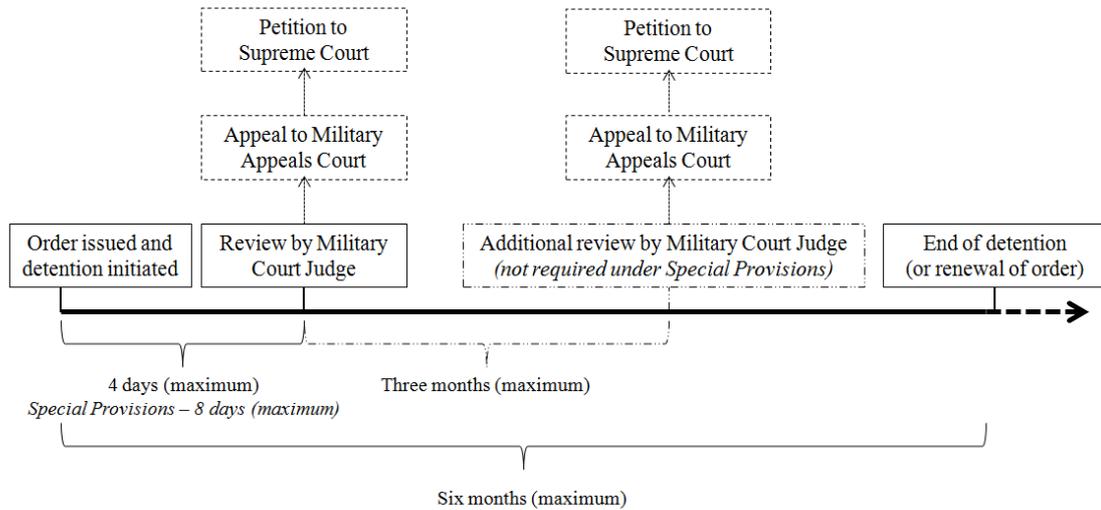
<sup>284</sup> HCJ 5784/03 Salame v. Commander of IDF Forces in Judea and Samaria 57(6) PD 721, para. 7 (2003) (Isr.); Mil. Appeal ADA 2136/09 Military Court of Appeals (Judea & Samaria), Military Prosecutor v. Jaabri (2009) (unpublished) (Isr.). The Military Court of Appeals has explicitly ruled that the raw primary material must be attached to the intelligence summaries that are submitted to the court. *See* Mil. Appeal ADA 1145/02 Military Court of Appeals (Judea & Samaria), Military Prosecution v. Awis (2002) (unpublished) (Isr.).

<sup>285</sup> HCJ 9441/07 *Aghar*, at para. 9.

<sup>286</sup> Mil. Appeal ADA 9/01 Military Court of Appeals (Judea & Samaria), Abdullah v. Commander of IDF (2001) (unpublished) (Isr.).

<sup>287</sup> *Id.*

Diagram – Typical Detention Process under the OSP:\*



\* The Special Provisions are currently in force

### CONCLUSION: KEY COMPARISONS AND LESSONS

This article has aimed to present an in-depth survey of the Israeli experience with regard to preventive detention – the particulars of the different legislative acts that provide the authority to detain administratively and their manner of interpretation and application by the Israeli judicial instances. An attempt to compare the three frameworks shows that they share fundamental procedural safeguards, but at the same time, incorporate characteristics and nuances which are unique to each. These variants reflect the somewhat different balancing point that each framework aims to achieve between, on the one hand, the need to contend with threats to national security, and, on the other hand, the obligation to avoid unjustified detention.

It seems that the primary explanation for the frameworks' varying characteristics is the factual circumstances in which each one is assumed to operate, and subsequently, the predominant applicable legal regime under international law. The ADL is designed to operate as a domestic security tool, employed by the state as a last resort in extreme circumstances of dire threats to its internal security posed by individuals. Therefore, a typical instance of recourse to its provisions would be primarily governed by IHRL. In contrast, the UCL is intended to apply to foreign nationals partaking in hostilities against the State of Israel in the context of an armed conflict, particularly those that involve NSAs as parties. Therefore, the predominant legal regime under international law relevant for its application would be LOAC. The OSP regulating administrative detentions in the West Bank, as with the ADL, is intended to act as a domestic security instrument, but does so in a different legal and factual context. Due to its application in the West Bank, the OSP falls within the purview of the relevant provisions of the law of belligerent occupation applied in the territory, and under the governance of the military authorities – thus considering the inherent tension between the military authorities and the local residents, on the basis of the ongoing armed conflict underpinning the factual circumstances.

One of the prominent differences between the frameworks is the apparatus – civilian or military – charged with the authorities and duties concerning the detention

order. Under the ADL, it is the civilian apparatus which is given this power, reflecting the ordinary nature of the relationship between a democratic state and its citizens. Thus, it is the executive branch responsible for issuing the order, and the civilian courts charged with its review. In contrast, the detention procedure under the UCL is primarily operated by the military, in consideration of the law's operation within a context of an armed conflict. However, the reviewing authority is in the civilian courts system, in consideration of the UCL's presumption that internees would be brought and held within Israel, and that the civilian judicial system would be capable of conducting each internee's judicial review. Under the OSP, the military authorities in the West Bank are responsible for issuing detention orders, as part of their responsibilities as the military government administering the West Bank. Likewise, and contrary to the UCL, judicial review is first conducted through the military courts system present in the West Bank as part of its military government. The military courts follow the guidance and decisions of the Supreme Court of Israel, in a manner that practically unifies their jurisprudence with that of the ADL.<sup>288</sup>

Another difference concerns the timeframe for bringing the detainee before the court for the initial review. Under the ADL, the maximum of 48 hours is the shortest of all three frameworks, reflecting the requirements of Israeli law and the legal obligation of a state under IHRL to bring a detainee before the courts promptly. The extended maximum of 14 days provided by the UCL considers the assumed existence and characteristics of an armed conflict, including potential large-scale detentions, and the need for the full processing of each detainee in accordance with the law's requirements under these circumstances. In this regard, it is intended to reflect several other particularities which might affect the capacities of the executive and judicial authorities in Israel to handle detainees during active hostilities (such as potential disruptions to their abilities to operate due to the exposure to the rigors of war), as well as the need to physically transfer detainees between the different military and state authorities and bring each detainee, in person, before the courts. Under the OSP, the maximum timeframe, extending to eight days (under the provisions in force today), is regulated in a manner which is supposed to take into consideration the volatile security situation in the West Bank and the challenges it invokes, including the possibility that in periods where the security situation is particularly precarious, there may be an increase in the number of detainees.

These differences also find expression in the grounds on which persons may be detained. Under the ADL and the OSP, a person may only be detained where there is near certainty that serious harm would be caused to state or public security unless that person is detained. The UCL also provides for grounds for detention which focus on the individual's conduct, but – due to its applicability in a context of hostilities – explicitly refers in this regard to the participation in hostilities by the person detained or his membership in a force which carries out such hostilities. The express inclusion of the membership alternative and the manner in which it has been construed by the Supreme Court reflects an understanding that, particularly in the context of a trans-boundary armed conflict involving an NSA, mere membership in an NSA can testify to an individual threat.

An additional difference regards the maximum duration for detention permitted by each framework. While under the ADL and the OSP individual detention orders may only be issued for a maximum of six months (notwithstanding the possibility to renew if necessary), the UCL provides that once an internment order is issued, there is no

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<sup>288</sup> See HCJ 2320/98 Al-Amla v. Commander of IDF Forces in Judea and Samaria 52(3) PD 346 (1998) (Isr.).

explicit ceiling on the length of time that the internment may continue. This reflects the underlying purpose of the UCL, which is to remove the person from the cycle of hostilities. Therefore, there is no requirement for an exact time limitation on the internment – rather, the limitation exists in the form of a proviso that only for as long as the hostilities continue, the justification for the person's internment may still be of relevance. Thus, the protection against unending internment is not a maximal time bar, but the existence of an underlying factual situation. Nevertheless, the UCL explicitly provides that the Chief of General Staff must annul any internment orders when the circumstances providing for its existence are no longer valid, and additionally, that each internee must be brought before the courts every six months for review of the continuing justifiability of the internment order. Since during periodic review hearings the courts have applied a substantive examination comparable to the one employed under the ADL and the OSP, the practical difference between the frameworks is much narrower than what may have been assumed upon a strict reading of the law itself. However, this nuance reflects once again the differing conceptual composition underlying the frameworks.

Similarly, the approach of each mechanism to the status of criminal proceedings as a viable alternative further reflects the differing normative frameworks. As the ADL and the OSP operate within a context of internal security, a criminal trial is the common and preferable tool, and administrative detention is a last-resort exception. The UCL belongs to a paradigm of hostilities, where internment is a basic tool, and criminal proceedings are a limited instrument that may be employed as a matter of state policy.

Aside from these differences, the three frameworks include fundamental similarities, some of which can be found in the letter of the law, while others have been crystallized through jurisprudence. One basic similarity appearing in the letter of each law relates to the overall structure of the detention procedure – detention orders are to be issued by senior office holders, they are to be reviewed by a court, and initial-phase detention (prior to the first instance of review) is specifically addressed by each framework. Additional similarities appearing in the legislation of each framework are the existence and characteristics of a multi-level judicial (rather than non-judicial) review, with the pinnacle of such review being the Supreme Court. In all three frameworks the judicial review constitutes an integral part of the process and is not dependent on a detainee's request, and every detainee is afforded the right to eventually have his case heard before the Supreme Court without the prior requirement to seek permission. This reflects the institutional dominance of the judiciary (and particularly the Supreme Court) in Israel, and the sensitivity with which the administrative detention tool is treated. Likewise, all three frameworks require a periodic judicial review subject to multi-level judicial oversight similar to that of initial reviews, providing for ongoing assessments by the courts. In all cases, the courts have the overriding authority to annul the detention order.

Further similarities have evolved from the jurisprudence regarding each framework – making the interaction of the courts with these laws both a common expression of the similarities between the three frameworks, as well as a factor for further coalescence between them. In the judicial practice concerning each framework, the court reviews the orders both on factual and legal grounds, including through a substantial scrutiny of the lawfulness of the detention. When doing so, it applies to each law shared legal standards, such as the need to demonstrate an individual threat in each case in order to justify detention; the understanding that non-military activity in a hostile organization may pose a threat severe enough to justify detention; and the application of the proportionality principle when assessing prolonged detention.

Likewise, in carrying out these judicial reviews, the courts have demonstrated another shared characteristic through their embrace of the “judicial management” model in the treatment of secret evidentiary material. Each judicial instance has the capacity to undertake an exhaustive and critical scrutiny of the entire evidentiary material and takes upon itself to represent the detainee’s interests while so doing. The significant interaction of the Supreme Court with all three preventive detention frameworks – in its role as the highest level of judicial review and as a final address for contested orders under each framework – has proven to be highly influential in this context. In this role, the Supreme Court has subjected the district and military courts to shared legal precedents and principles, both with regard to substantive law and procedure, and has guided them with an interventionist spirit.

At the same time, ongoing attention should be paid to unsuitable impositions or duplications of certain aspects of one framework onto another. The temptation to do so may derive from an intuitive attraction to existing jurisprudence on administrative detention and subsequent overemphasis to the similarities between the frameworks, at the cost of insufficient attention to the different underlying conceptions and legal regimes under international law relevant to each context. Such a risk is particularly prominent when considering the subjection of the relatively young UCL, which assumes ongoing hostilities involving a foreign entity, to legal precedents created within the context of domestic security.

The risk for such problematic duplication is apparent when regarding the issue of defining criminal proceedings as a preferred alternative to administrative detention. As discussed above, the Supreme Court in *Iyyad* refrained from characterizing the UCL as a measure of last resort, but at the same time did not draw a clear distinction between the ADL and the UCL in this context, even though such a distinction would have seemed appropriate. In the authors’ appraisal, in at least one case this has led the presiding Supreme Court Justice to inattentively treat the UCL as one would treat the ADL and the OSP.<sup>289</sup> This seems to diverge from the cautious approach the Supreme Court employed in *Iyyad*, and, perhaps, be insufficiently considerate as to the different international legal regime underpinning the UCL.

Another potentially problematic duplication concerns the application of the Israeli administrative law proportionality principle to the assessment of the duration of prolonged detentions under the UCL. Here too, in the authors’ view, a deeper internalization of the notions underpinning the UCL may lead to a reconsidering of whether a blanket duplication of the proportionality principle is suitable, in particular concerning internment on the basis of membership in a hostile force.

The above discussion suggests that both the similarities and the differences between the three preventive detention frameworks employed by Israel are there for a reason. The factual context that each framework assumes and attempts to address necessitates certain variants in their structure and particulars. Likewise, each framework is designed so that it corresponds and complies with the distinct legal regime under international law most relevant to the assumed factual context. Inasmuch as the expected challenges presented by each factual context allow, and inasmuch as the relevant legal regime under international law contains flexibility, the basic tenets of the Israeli legal system coalesce to create three mechanisms with fundamental similarities. These similarities find several expressions in the letter of each law and have also evolved in the relevant jurisprudence, together creating a wide common denominator of protections against unjustified detention.

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<sup>289</sup> *Supra* note 193.

The Israeli case may be considered informative also when looking on a broader level at how states incorporate international law into their domestic regulation and jurisprudence. Where international law is clear, Israeli law concerning preventive detention corresponds with it rather straight-forwardly. This is the case with the main provisions of the ADL and OSP, which explicitly reflect the relevant standards in the applicable international law. Where international law is disputable or less established – as is the situation with many aspects the UCL relates to – Israeli authorities have sought to ensure the law stays within the latitude that international law offers and contend with ambiguities in different ways. Thus, in some respects the Israeli legislature or judiciary have made legal assumptions in the detainee's favor – such as with providing detainees in transnational conflicts between a state and an NSA with the stringent standards of GC IV, although its applicability is contested; with requiring the authorities to show an individual threat to justify detention in each case; and with applying mandatory judicial review. In other respects, legal dilemmas have been avoided by seeking practical solutions or by applying rules and practices from Israeli law – for example, applying the proportionality principle from Israeli law to prolonged detention, thereby reducing dilemmas stemming from indefinite detention; and utilizing the Israeli “judicial management” model, in order to contend with the difficulty of keeping secret evidentiary material from the detainee. With regards to some aspects, international law is still evolving, and emerging Israeli law has utilized the latitude to create practice that could contribute to the formation of customary international law – for example, this seems to be the case with the approach to status-based detention, and how to delimit hostile organizations whose members may be detained.

The current era has seen a dramatic rise in the magnitude and severity of the threat of transnational terrorism, which has consistently challenged states seeking to provide security for their citizens. This threat is often aimed against democratic states, with robust legal systems for individual protections. In seeking national security solutions within the constraints that such systems provide, states may benefit from the experience of others facing similar challenges. Israel's own legal experience with preventive detention in varying situations may be useful for states employing similar measures as well as international initiatives seeking to develop international law.