A. Supreme Court, Criminal Appeals - Paras 1 to 14

[**See also** Israel, The Targeted Killings Case]

N.B. As per the disclaimer, neither the ICRC nor the authors can be identified with the opinions expressed in the Cases and Documents. Some cases even come to solutions that clearly violate IHL. They are nevertheless worthy of discussion, if only to raise a challenge to display more humanity in armed conflicts. **Similarly, in some of the texts used in the case studies, the facts may not always be proven;** nevertheless, they have been selected because they highlight interesting IHL issues and are thus published for didactic purposes.

A. Supreme Court, Criminal Appeals

[**Source**: Supreme Court of Israel, Iyad v. State of Israel,[1] CrimA 6659/06, 11 June 2008, available at http://elyon1.court.gov.il/files_eng/06/590/066/n04/06066590.n04.pdf, footnotes omitted]

The Supreme Court of Israel sitting as the Court of Criminal Appeals

[…]

The appellants:

1. A 2. B v. The respondent:

State of Israel

[…]

JUDGMENT

President D. Beinisch:

We have before us appeals against the decisions of the Tel-Aviv-Jaffa District Court […], in which the

detention of the appellants under the Internment of Unlawful Combatants Law […] (hereafter: 'the Internment of Unlawful Combatants Law' or 'the law') was upheld as lawful. Beyond the specific cases of the appellants, the appeals raise fundamental questions concerning the interpretation of the provisions of the Internment of Unlawful Combatants Law, […] and to what extent the law is consistent with international humanitarian law.

The main facts and sequence of events

1. The first appellant is an inhabitant of the Gaza Strip, born in 1973, who was placed under administrative detention on 1 January 2002 pursuant to the Administrative Detentions […] Order […]. The detention of the first appellant was extended from time to time by the military commander and upheld on judicial review by the Gaza Military Court. The second appellant is also an inhabitant of Gaza, born in 1972, and he was placed under administrative detention on 24 January 2003 pursuant to the aforesaid order. The detention of the second appellant was also extended from to time and reviewed by the Gaza Military Court.

On 12 September 2005 a statement was published by the Southern District Commander with regard to the end of military rule in the territory of the Gaza Strip. On the same day, in view of the change in circumstances and also the change in the relevant legal position, internment orders were issued against the appellants; these were signed by the chief of staff under section 3 of the Internment of Unlawful Combatants Law, which is the law that is the focus of the case before us. […] [O]n 20 September 2005 the chief of staff decided that the detention orders under the aforesaid law would remain valid.

1. On 22 September 2005 a judicial review proceeding began in the Tel-Aviv-Jaffa District Court […] in the appellants' case. On 25 January 2006 the District Court held that there had been no impropriety in the procedure of issuing internment orders against the appellants and that all the conditions prescribed in the Internment of Unlawful Combatants Law were satisfied, including the fact that their release would harm state security. The appellants appealed this decision to the Supreme Court, and on 14 March 2006 their appeal was denied […]. In the judgment it was held that from material that was presented to the court it could be seen that the appellants Israel, The Targeted Killings Case were clearly associated with the Hezbollah organization and that they participated in combat activities against the citizens of Israel before they were detained. The court emphasized in this context the individual threat presented by the two appellants and the risk that they would return to their activities if they were released, as could be seen from the material presented to the court.

[…]

The Internment of Unlawful Combatants Law – the background to its legislation and its main purpose

1. The Internment of Unlawful Combatants Law gives the state authorities power to detain 'unlawful combatants' as defined in section 2 of the law, i.e., persons who participate in hostilities or are members of forces that carry out hostilities against the State of Israel and who do not satisfy the conditions that grant a prisoner of war status under international humanitarian law. As we shall explain below, the law allows the internment of *foreign* persons who belong to a terrorist organization or who participate in

hostilities against the security of the state, and it was intended to prevent these persons returning to the cycle of hostilities against Israel.

[…]

Interpreting the provisions of the law

1. 7. […]

[W]e should first consider the interpretation of the main arrangements prescribed in the Internment of Unlawful Combatants Law. […]

[…]

1. With regard to the presumption of conformity to international humanitarian law, as we have said, section 1 of the law expressly declares that its purpose is to regulate the internment of unlawful combatants '… in a manner that is consistent with the commitments of the State of Israel under the provisions of international humanitarian law.' The premise in this context is that an international armed conflict prevails between the State of Israel and the terrorist organizations that operate outside Israel […] [**See also** Israel, The Targeted Killings Case, paras 18-21].

The international law that governs an international armed conflict is enshrined mainly in the Hague Convention (IV) Respecting the Laws and Customs of War on Land (1907) (hereafter: 'the Hague Convention') and the regulations appended to it, whose provisions have the status of customary international law […]; the Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, 1949 (hereafter: 'the Fourth Geneva Convention'), whose customary provisions constitute a part of the law of the State of Israel and some of which have been considered in the past by this court […]; and the Protocol Additional to the Geneva Convention of 12 August 1949 Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1977 (hereafter: 'the First Protocol'), to which Israel is not a party, but whose customary provisions also constitute a part of the law of the State of Israel […]. In addition, where there is a lacuna in the laws of armed conflict set out above, it is possible to fill it by resorting to international human rights law […].

[…]

[…] [I]t should be noted that when we approach the task of interpreting provisions of the statute in a manner consistent with the accepted norms of international law, we cannot ignore the fact that the provisions of international law that exist today have not been adapted to changing realities and the phenomenon of terrorism that is changing the form and characteristics of armed conflicts and those who participate in them […]. In view of this, we should do our best in order to interpret the existing laws in a manner that is consistent with new realities and the principles of international humanitarian law.

1. In view of all of the aforesaid, let us now turn to the interpretation of the statutory definition of ‘unlawful combatant’ and the interpretation of the conditions required for proving the existence of a ground for detention under the law. […]

The definition of ‘unlawful combatant’ and its scope of application

1. Section 2 of the law defines ‘unlawful combatant’ as follows:

‘Definitions 2. In this law -–

‘Unlawful combatant’ – a person who took part in hostilities against the State of Israel, whether directly or indirectly, or who is a member of a force carrying out hostilities against the State of Israel, who does not satisfy the conditions granting a prisoner of war status under international humanitarian law, as set out in article 4 of the Third Geneva Convention of 12 August 1949 relative to the Treatment of Prisoners of War;…’

This statutory definition of ‘unlawful combatant’ relates to those persons who take part in hostilities against the State of Israel or who are members of a force that carries out such hostilities, and who are not prisoners of war under international humanitarian law. In this regard two points should be made: first, from the language of the aforesaid section 2 it can clearly be seen that it is not essential for someone to take part in hostilities against the State of Israel; his being a member of a ‘force carrying out hostilities’ – i.e., a terrorist organization – may include that person within the definition of ‘unlawful combatant.’ We will discuss the significance of these two alternatives in the definition of ‘unlawful combatant’ later (paragraph 21 below).

Second, as we said above, the purpose clause in the law refers expressly to the provisions of international humanitarian law. The definition of ‘unlawful combatant’ in the aforesaid section 2 also refers to international humanitarian law when it provides that the law applies to someone who does not enjoy a prisoner of war status under the Third Geneva Convention. As a rule, the rules of international humanitarian law were not intended to apply to the relationship between the state and its citizens (see, for example, the provisions of article 4 of the Fourth Geneva Convention, according to which a ‘protected civilian’ is someone who is not a citizen of the state that is holding him in circumstances of an international armed conflict). The express reference by the legislature to international humanitarian law, together with the requirement stipulated in the wording of the law that there is no prisoner of war status, show that the law was intended to apply only to *foreign* parties who belong to a terror organization that operates against the security of the state. We are not unaware that in the draft law of 14 June 2000 there was a provision that stated expressly that the law would not apply to Israeli inhabitants (and also to inhabitants of the territories), except in certain circumstances that were set out therein […]. This provision of statute was omitted from the final wording of the law. Notwithstanding, in view of the express reference made by the law to international humanitarian law and the laws concerning prisoners of war as stated above, we are drawn to the conclusion that according to the wording and purpose of the law it was not intended to apply to local parties (citizens and residents of Israel) who endanger state security. For these there are other legal measures that are intended for a security purpose, which we shall address later.

It is therefore possible to summarize the matter by saying that an 'unlawful combatant' under section 2 of the law is a foreign party who belongs to a terrorist organization that operates against the security of the State of Israel. This definition may include residents of a *foreign* country that maintains a state of hostilities against the State of Israel, who belong to a terrorist organization that operates against the security of the state and who satisfy the other conditions of the statutory definition of 'unlawful combatant.' This definition may also include inhabitants of the Gaza Strip which today is no longer held under belligerent occupation. In this regard it should be noted that since the end of Israeli military rule in the Gaza Strip in September 2005, the State of Israel has no permanent physical presence in the Gaza Strip, and it also has no real possibility of carrying out the duties required of an occupying power under international law, including the main duty of maintaining public order and security. Any attempt to impose the authority of the State of Israel on the Gaza Strip is likely to involve complex and prolonged military operations. In such circumstances, where the State of Israel has no real ability to control what happens in the Gaza Strip in an effective manner, the Gaza Strip should not be regarded as a territory that is subject to a belligerent occupation from the viewpoint of international law, even though because of the unique situation that prevails there, the State of Israel has certain duties to the inhabitants of the Gaza Strip […] [**See** Israel, Power Cuts in Gaza]. In our case, in view of the fact that the Gaza Strip is no longer under the effective control of the State of Israel, we are drawn to the conclusion that the inhabitants of the Gaza Strip constitute foreign parties who may be subject to the Internment of Unlawful Combatants Law in view of the nature and purpose of this law.

With regard to the inhabitants of the territory (Judaea and Samaria) that is under the effective control of the State of Israel, […] I tend to the opinion that in so far as this is required for security reasons, the administrative detention of these inhabitants should be carried out pursuant to the security legislation that applies in the territories and not by virtue of the Internment of Unlawful Combatants Law. […]

Conformity of the definition of 'unlawful combatant' to a category recognized by international law

1. The appellants argued before us that the definition of 'unlawful combatant' in section 2 of the law is contrary to the provisions of international humanitarian law, since international law does not recognize the existence of an independent and separate category of 'unlawful combatants.' In their view there are only two categories in international law, 'combatants' and 'civilians,' who are subject to the provisions and protections enshrined in the Third and Fourth Geneva Conventions respectively. In their view international law does not have an intermediate category that includes persons who are not protected by either of these conventions.

With regard to the appellants' aforesaid arguments we should point out that the question of the conformity of the term 'unlawful combatant' to the categories recognized by international law has already been addressed in our case law in *Public Committee against Torture in Israel v. Government of Israel*, in which it was held that the term 'unlawful combatants' does not constitute a separate category but is a sub-category of 'civilians' recognized by international law [**See** Israel, The Targeted Killings Case]. This conclusion is based on the

approach of customary international law, according to which the category of 'civilians' includes everyone who is not a 'combatant.' We are therefore dealing with a negative definition. […]

In this context, two additional points should be made: *first*, the finding that 'unlawful combatants' belong to the category of 'civilians' in international law is consistent with the official interpretation of the Geneva Conventions, according to which in an armed conflict or a state of occupation, every person who finds himself in the hands of the opposing party is entitled to a certain status under international humanitarian law – a prisoner of war status which is governed by the Third Geneva Convention or a protected civilian status which is governed by the Fourth Geneva Convention […].

Second, it should be emphasized that *prima facie* the statutory definition of 'unlawful combatant' under section 2 of the law applies to a broader group of people than the group of 'unlawful combatants' discussed in *Public Committee against Torture in Israel v. Government of Israel*, in view of the difference in the measures under discussion: the judgment in *Public Committee against Torture in Israel v. Government of Israel* considered the legality of the measure of a military operation intended to cause the death of an 'unlawful combatant.' According to international law, it is permitted to attack an 'unlawful combatant' only during the period of time when he is taking a direct part in the hostilities. By contrast, the Internment of Unlawful Combatants Law addresses the measure of internment. For the purposes of detention under the law, it is not necessary that the 'unlawful combatant' will take a direct part in the hostilities, nor is it essential that his detention will take place during the period of time when he is taking part in hostilities; all that is required is that the conditions of the definition of 'unlawful combatant' in section 2 of the law are proved. This statutory definition does not conflict with the provisions of international humanitarian law since, as we shall clarify clear below [*sic*], the Fourth Geneva Convention also permits the detention of a protected 'civilian' who endangers the security of the detaining state. Thus we see that our reference to the judgment in *Public Committee against Torture in Israel v. Government of Israel* was not intended to indicate that an identical issue was considered in that case. Its purpose was to support the finding that the term 'unlawful combatants' in the law under discussion does not create a separate category of treatment from the viewpoint of international humanitarian law, but constitutes a sub-group of the category of 'civilians.'

1. Further to our finding that 'unlawful combatants' are members of the category of 'civilians' from the viewpoint of international law, it should be noted that this court has held in the past that international humanitarian law does not grant 'unlawful combatants' the same degree of protection to which innocent civilians are entitled, and that in this respect there is a difference from the viewpoint of the rules of international law between 'civilians' who are not 'unlawful combatants' and 'civilians' who are 'unlawful combatants.' […]. As we shall explain below, in the present context the significance of this is that someone who is an 'unlawful combatant' is subject to the Fourth Geneva Convention, but according to the provisions of the aforesaid convention it is possible to apply various restrictions to them and inter alia to detain them when they represent a threat to the security of the state.

[…]

1. In summary, in view of the purpose clause of the Internment of Unlawful Combatants Law, according to which the law was intended to regulate the status of ‘unlawful combatants’ in a manner that is consistent with the rules of international humanitarian law, and in view of the finding of this court in *Public Committee against Torture in Israel v. Government of Israel* that ‘unlawful combatants’ constitute a subcategory of ‘civilians’ under international law, it is possible to determine that, contrary to the appellants’ claim, the law does not create a new reference group from the viewpoint of international law, but it merely determines special provisions for the detention of ‘civilians’ (according to the meaning of this term in international humanitarian law) who are ‘unlawful combatants.’

[1] The appellant in this case was initially referred to as Anonymous, but his name was subsequently released. [Note of the authors]

Paras 15 to 23

The nature of detention of ‘unlawful combatants’ under the law – administrative detention

1. Now that we have determined that the definition of ‘unlawful combatant’ in the law does not conflict with the two-category classification of ‘civilians’ and ‘combatants’ in international law and the case law of this court, let us turn to examine the provisions of the law that regulate the detention of unlawful combatants. Section 3(a) of the law provides the following:

‘Internment of unlawful combatant

3. (a) If the chief of staff has a reasonable basis for believing that a person who is held by state authorities is an unlawful combatant and that his release will harm state security, he may make an order with his signature requiring his internment in a place that he will determine (hereafter – an internment order); an internment order will include the reasons for internment without harming the security needs of the state. …’

Section 7 of the law adds in this context a probative presumption, which provides the following:

‘Presumption 7.

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

The appellants argued before us that the detention provisions provided in the law *de facto* create a third category of detention, which is neither criminal arrest nor administrative detention, and which is not recognized at all by Israeli law or international law. We cannot accept this argument. The mechanism provided in the law is a mechanism of administrative detention in every respect, which is carried out in

accordance with an order of the chief of staff, who is an officer of the highest security authority. As we shall explain below, we are dealing with an administrative detention whose purpose is to protect state security by removing from the cycle of hostilities anyone who is a member of a terrorist organization or who is taking part in the organization's operations against the State of Israel, in view of the threat that he represents to the security of the state and the lives of its inhabitants.

1. It should be noted that the actual power provided in the law for the administrative detention of a 'civilian' who is an 'unlawful combatant' on account of the threat that he represents to the security of the state is not contrary to the provisions of international humanitarian law. Thus article 27 of the Fourth Geneva Convention, which lists a variety of rights to which protected civilians are entitled, recognizes the possibility of a party to a dispute adopting 'control and security' measures that are justified on security grounds. The wording of the aforesaid article 27 is as follows:

'… the Parties to the conflict may take such measures of control and security in regard to protected persons as may be necessary as a result of the war.'

With regard to the types of control measures that are required for protecting state security, article 41 of the convention prohibits the adoption of control measures that are more severe that [*sic*] assigned residence or internment in accordance with the provisions of articles 42-43 of the convention. Article 42 enshrines the rule that a 'civilian' should not be interned unless it is 'absolutely necessary' for the security of the detaining power. Article 43 goes on to oblige the detaining power to approve the detention in a judicial or administrative review, and to hold periodic reviews of the continuing need for internment at least twice a year. Article 78 of the convention concerns the internment of protected civilians that are inhabitants of a territory that is held by an occupying power, and it provides that it is possible to employ various security measures against them for essential security reasons, including assigned residence and internment. Thus we see that the Fourth Geneva Convention allows the internment of protected 'civilians' in administrative detention, when this is necessary for reasons concerning the essential security needs of the detaining power.

1. In concluding these remarks we should point out that the appellants argued before us that the aforesaid provisions of the Fourth Geneva Convention are not appropriate in their case. According to them, articles 41-43 of the convention concern the detention of protected civilians who are present in the territory of a party to a dispute, whereas the appellants were taken into detention when they were in the Gaza Strip in the period prior to the implementation of the disengagement plan and the departure of IDF forces from the Gaza Strip. In view of this, the appellants argued that there is no provision of international humanitarian law that allows them to be placed in administrative detention, and therefore they argued that their detention under the Internment of Unlawful Combatants Law is contrary to the provisions of international law.

With regard to these arguments we shall reply that the detention provisions set out in the Fourth Geneva Convention were intended to apply and realize the basic rule provided in the last part of article 27 of the convention, which was cited above. As we have said, this article provides that the parties to a dispute may adopt security measures against protected civilians in so far as this is required as a result of the war. The

principle underlying all the detention provisions provided in the Fourth Geneva Convention is that it is possible to detail [sic] 'civilians' for security reasons in accordance with the extent of the threat that they represent. According to the aforesaid convention, there is a power of detention for security reasons, whether we are concerned with the inhabitants of an occupied territory or we are concerned with foreigners who were found in the territory of one of the states involved in the dispute. In the appellants' case, although the Israeli military rule in the Gaza Strip has ended, the hostilities between the Hezbollah organization and the State of Israel have not ended, and therefore the detention of the appellants in the territory of the State of Israel for security reasons is not inconsistent with the detention provisions in the Fourth Geneva Convention.

The ground for detention under the law – the requirement of an individual threat to security and the effect of the interpretation of the statutory definition of 'unlawful combatant'

1. It is one of the first principles of our legal system that administrative detention is conditional upon the existence of a ground for detention that derives from the individual threat of the detainee to the security of the state. […]
2. It should be noted that the individual threat to the security of the state represented by the detainee is also required by the principles of international humanitarian law. Thus, for example, in his interpretation of articles 42 and 78 of the Fourth Geneva Convention, Pictet emphasizes that the state should make use of the measure of detention only when it has serious and legitimate reasons to believe that the person concerned endangers its security. In his interpretation Pictet discusses the membership of organizations whose goal is to harm the security of the state as a ground for recognizing a threat, but he emphasizes the supreme principle that the threat is determined in accordance with the individual activity of that person. In Pictet's words:

'To justify recourse to such measures, the state must have good reason to think that the person concerned, by his activities, knowledge or qualifications, represents a real threat to its present or future security' […].

1. No one before us disputes that the provisions of the Internment of Unlawful Combatants Law should be interpreted in accordance with the aforesaid principle, which make administrative detention conditional upon proving the existence of a ground that establishes an individual threat. Indeed, an examination of the provisions of the law in accordance with the aforesaid principles shows that the law does not allow anyone to be detained arbitrarily, and that the power of detention under the law is conditional upon the existence of a ground of detention that is based on the individual threat represented by the detainee: *first*, the definition of 'unlawful combatant' in section 2 of the law requires proof that the detainee himself took part or belonged to a force that is carrying out hostilities against the State of Israel, the significance of which we shall address below. *Second*, section 3(a) of the law expressly provides that the ground of detention under the law arises only with regard to someone for whom there is a reasonable basis to believe 'that his release will harm state security.' Section 5(c) of the law goes on to provide that the District Court shall set aside a detention order that was issued pursuant to the law only when the release of the detainee 'will not harm state security' (or when there are special reasons that justify the release). To this we should add that according to the purpose of the law, the administrative detention is intended to prevent the 'unlawful combatant' from returning to the cycle of hostilities, thus indicating that

he was originally a part of that cycle.

The dispute between the parties before us in the context under discussion concerns the level of the individual threat that the state is liable to prove for the purpose of administrative detention under the law. This dispute arises because of the combination of two main provisions of the law: *one* is the provision of section 2 of the law that according to a simple reading states that an 'unlawful combatant' is not only someone who takes a direct or indirect part in hostilities against the State of Israel, but also someone who is a 'member of a force carrying out hostilities.' The *other* is the probative presumption provided in section 7 of the law, according to which a person who is a member of a force that carries out hostilities against the State of Israel shall be regarded as someone whose release will harm the security of the state unless the contrary is proved. Relying on the combination of these two provisions of the law taken together, the state argued that it is sufficient to prove that a person is a member of a terrorist organization in order to prove his individual threat to the security of the state in such a manner that gives rise to a ground for detention under the law. By contrast, the appellants' approach was that relying upon a vague 'membership' in an organization that carries out hostilities against the State of Israel as a basis for administrative detention under the law makes the requirement of proving an individual threat meaningless, which is contrary to constitutional principles and international humanitarian law.

1. Deciding the aforesaid dispute is affected to a large degree by the interpretation of the definition of 'unlawful combatant' in section 2 of the law. As we have said, the statutory definition of 'unlawful combatant' contains two limbs: one, 'a person who took part in hostilities against the State of Israel, whether directly or indirectly,' and the other, a person who is 'a member of a force carrying out hostilities against the State of Israel,' when the person concerned does not satisfy the conditions granting a prisoner of war status under international humanitarian law. These two limbs should be interpreted with reference to the security purpose of the law and in accordance with the […] international humanitarian law that we discussed above, which require the proof of an individual threat as a ground for administrative detention.

With regard to the interpretation of the first limb that concerns 'a person who took part in hostilities against the State of Israel, whether directly or indirectly,' […] we are drawn to the conclusion that in order to detain a person it is not sufficient for him to have made a remote, negligible or marginal contribution to the hostilities against the State of Israel. In order to prove that someone is an 'unlawful combatant,' the state needs to prove that the detainee made a contribution to the waging of hostilities against the state, whether directly or indirectly, in a manner that can indicate his individual threat. Naturally it is not possible to define the nature of such a contribution precisely and exhaustively, and the matter will be examined on a case by case basis according to the circumstances.

With regard to the second limb that concerns a person who is 'a member of a force carrying out hostilities against the State of Israel,' here too we require an interpretation that is consistent with the […] international humanitarian law that we discussed above: on the one hand it is insufficient to show any tenuous connection with a terrorist organization in order to be included within the cycle of hostilities in the broad meaning of this

concept. On the other hand, in order to establish a ground for detention with regard to someone who is a member of an active terrorist organization whose self-declared goal is to fight unceasingly against the State of Israel, it is not necessary for that person to take a direct or indirect part in the hostilities themselves, and it is possible that his connection and contribution to the organization will be expressed in other ways that are sufficient to include him in the cycle of hostilities in its broad sense, in such a way that his detention will be justified under the law.

Thus we see that for the purpose of detention under the law at issue, the state is liable to prove with administrative proofs that the detainee is an 'unlawful combatant' with the meaning that we discussed, namely that the detainee took a direct or indirect part that involved a contribution to the fighting – a part that is not negligible or marginal – in the hostilities against the State of Israel, or that the detainee belongs to an organization that is carrying out hostilities, in which case we should consider the detainee's connection and the nature of his contribution to the cycle of hostilities of the organization in the broad sense of this concept.

It should be noted that providing 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. It should also be noted that only after the state has proved that the detainee satisfies the conditions of the statutory definition of 'unlawful combatant' can the state make use of the probative presumption set out in section 7 of the law, according to which the release of the detainee will harm state security as long as the contrary has not been proved. It is therefore clear that section 7 of the law does not negate the duty imposed on the state to prove the threat represented by the detainee, which derives from the type of involvement in the relevant organization that is required in order to prove him to be an 'unlawful combatant' under section 2 of the law. In view of this, we are drawn to the conclusion that the argument that the law includes no requirement of an individual threat goes too far and should be rejected.

Proving someone to be an 'unlawful combatant' under the law – the need for clear and convincing administrative evidence

1. In our remarks above, we discussed the interpretation of the definition of 'unlawful combatant.' According to the aforesaid interpretation, the state is required to prove that the detainee took a direct or indirect part, which was of significance, in the hostilities against the State of Israel, or that the detainee belonged to an organization that carries out hostilities, all of which while taking into account the connection and the extent of his contribution to the organization's cycle of hostilities. In these circumstances a person's detention may be required in order to remove him from the cycle of hostilities that harms the security of the citizens and residents of the State of Israel. The question that arises in this regard is: what evidence is required in order to persuade the court that the detainee satisfies the conditions of the definition of an 'unlawful combatant' with the aforesaid meaning.

[…] In view of the importance of the right to personal liberty and in view of the security purpose of the aforesaid law, the provisions of sections 2 and 3 of the law should be interpreted in such a way that the state is liable to prove, with clear and convincing administrative evidence, that even if the detainee did not take a

direct or indirect part in the hostilities against the State of Israel, he belonged to a terrorist organization and made a significant contribution to the cycle of hostilities in its broad sense, in such a way that his administrative detention is justified in order to prevent his returning to the aforesaid cycle of hostilities.

The significance of the requirement that there is clear and convincing evidence is that importance should be attached to the quantity and quality of the evidence against the detainee and the degree to which the relevant intelligence information against him is up to date; this is necessary both for proving the detainee to be an 'unlawful combatant' under section 2 of the law and also for the purpose of the judicial review of the need to continue the detention, to which we shall return later. Indeed, the purpose of administrative detention is to prevent anticipated future threats to the security of the state, and naturally we can learn of these threats from tangible evidence concerning the detainee's acts in the past […]. Notwithstanding, for the purposes of long-term detention under the Internment of Unlawful Combatants Law, adequate administrative evidence is required, and a single piece of evidence with regard to an isolated act carried out in the distant past is insufficient.

1. It follows that for the purposes of detention under the Internment of Unlawful Combatants Law the state is required to prove with clear and convincing evidence that, even if the detainee did not take a significant direct or indirect part in the hostilities against the State of Israel, he belonged to a terror organization and made a contribution to the cycle of hostilities in its broad sense. It should be noted that this requirement is not always easy to prove, since proving that someone is a member of a terrorist organization is not the same as proving that someone is a member of a regular army, because of the manner in which terrorist organizations work and the manner in which people join their ranks. The court held in *Public Committee against Torture in Israel v. Government of Israel* that unlike lawful combatants, unlawful combatants do not as a rule carry any clear and unambiguous indication that they belong to a terrorist organization […] [**See also** Israel, The Targeted Killings Case, para. 24]. Therefore proving that someone belongs to an organization as aforesaid is not always an easy task. Notwithstanding, the state is required to prove with sufficient administrative evidence the nature of the detainee's connection to the terrorist organization, and the degree or manner of his contribution to the broad cycle of hostilities or operations carried out by the organization.

It should also be noted that in its pleadings before us, the state discussed how the power of detention provided in the Internment of Unlawful Combatants Law was intended to apply to members of terrorist organizations in a state of ongoing hostilities in an area that is not under the full control of the State of Israel, where in the course of the hostilities a relatively large number of unlawful combatants may fall into the hands of the security forces and where there is a need to prevent them returning to the cycle of hostilities against Israel. The special circumstances that exist in situations of this kind require a different course of action from the one that is possible within the territory of the state or in an area subject to a belligerent occupation. In any case, it may be assumed that the reality under discussion may give rise to additional difficulties of assembling evidence with regard to whether those persons detained by the state during hostilities on the field of battle belong to a terrorist organization and how great a threat they are.

Paras 24 to 53

The probative presumptions provided in sections 7 and 8 of the law

1. As we have said, section 7 of the law provides a presumption according to which a person who satisfies the conditions of the definition of 'unlawful combatant' shall be regarded as someone whose release will harm the security of the state as long as the hostilities against the State of Israel have not come to an end. This is a rebuttable presumption, and the burden of rebutting it rests with the detainee. We should emphasize what we said above, that the presumption provided in the aforesaid section 7 may be relevant only after the state has proved that the detainee satisfies the conditions of the definition of 'unlawful combatant.' In such circumstances it is presumed that the release of the detainee will harm state security as required by section 3(a) of the law.

[…]

(3) The judicial review of detention under the law

1. Section 5 of the law, which is entitled 'Judicial review,' provides in subsections (a) to (d) the following arrangement:

'Judicial review 5.

a. a. An internee shall be brought before a judge of the District Court no later than 14 days from the date of issuing the internment order; if a District Court judge finds that the conditions provided in section 3(a) are not satisfied, he shall cancel the internment order.
   b. If the internee is not brought before the District Court and the hearing before it is not begun within 14 days of the date of issuing the internment order, the internee shall be released unless there is another ground for his detention under the law.
   c. Once every six months from the date of issuing the order under section 3(a) the internee shall be brought before a judge of the District Court; if the court finds that his release will not harm state security or that there are special reasons that justify his release, it shall cancel the internment order.
   d. A decision of the District Court under this section may be appealed within thirty days to the Supreme Court which shall hear the appeal with one judge; the Supreme Court shall have all the powers given to the District Court under this law.
   e. …
   f. …'
b. […]

The appellants' argument before us was that the frequency of once every six months is insufficient and disproportionately violates the right to personal liberty. With regard to this argument, we should point out that the holding of a periodic review of the necessity of continuing the administrative detention once every six months is consistent with the requirements of international humanitarian law. Thus article 43 of the Fourth Geneva Convention provides that:

‘Any protected person who has been interned or placed in assigned residence shall be entitled to have such action reconsidered as soon as possible by an appropriate court or administrative board designated by the Detaining Power for that purpose. If the internment or placing in assigned residence is maintained, the court or administrative board shall periodically, and at least twice yearly, give consideration to his or her case, with a view to the favourable amendment of the initial decision, if circumstances permit.’

From the aforesaid article 43 it can be seen that holding a periodic review of a detention order ‘at least twice yearly’ is consistent with the requirements of international humanitarian law, in a manner that supports the proportionality of the arrangement provided in section 5(c) of the law. Moreover, whereas section 43 of the Fourth Geneva Convention is satisfied with the holding of an administrative review that is carried out by an administrative body, the Internment of Unlawful Combatants provides that a District Court judge is the person who should carry out a judicial review of the detention orders under the aforesaid law, and his decision may be appealed to the Supreme Court which shall hear the appeal with one judge […].

[…]

(6) The length of the detention under the law

1. From the provisions of sections 3, 7 and 8 of the Internment of Unlawful Combatants Law it can be seen that a detention order under the law need not include a defined date for the end of the detention. The law itself does not provide a maximum period of time for the detention imposed thereunder, apart from the determination that the detention should not continue after the hostilities of the force to which the detainee belongs against the State of Israel ‘have ended’ […].

It should immediately be said that making a detention order that does not include a specific time limit for its termination does indeed raise a significant difficulty, especially in the circumstances that we are addressing, where the ‘hostilities’ of the various terrorist organizations, including the Hezbollah organization which is relevant to the appellants’ cases, have continued for many years, and naturally it is impossible to know when they will end. In this reality, detainees under the Internment of Unlawful Combatants Law may remain in detention for prolonged periods of time. […]

As we have said, the purpose of the Internment of Unlawful Combatants Law is to prevent ‘unlawful combatants’ as defined in section 2 of the law from returning to the cycle of hostilities, as long as the hostilities are continuing and threatening the security of the citizens and residents of the State of Israel. For similar reasons the Third Geneva Convention allows prisoners of war to be interned until the hostilities have ended, in order to prevent them returning to the cycle of hostilities as long as the fighting continues. Even where we are concerned with civilians who are detained during an armed conflict, international humanitarian law provides that the rule is that they should be released from detention immediately after the specific ground for the detention has elapsed and no later than the date when the hostilities end […].

[…]

From general principles to the specific case

1. As we said at the outset, the appellants, who are inhabitants of the Gaza Strip, were originally detained in the years 2002-2003, when the Gaza Strip was subject to a belligerent occupation. At that time, the administrative detention of the appellants was effected by virtue of the security legislation that was in force in the Gaza Strip. Following the end of military rule in the Gaza Strip in September 2005 and the cancellation of the security legislation in force there, on 20 September 2005 the chief of staff issued detention orders for the appellants under the Internment of Unlawful Combatants Law.

On 22 September 2005 the Tel-Aviv-Jaffa District Court began the initial judicial review of the appellants' case. From then until now the District Court has held four periodic judicial reviews of the appellants' continuing detention. The appeal against the decision of the District Court not to order the release of the appellants within the framework of the initial judicial review was denied by this court on 14 March 2006 […].

1. In their pleadings before us, the appellants raised two main arguments with regard to their specific cases: first, it was argued that according to the provisions of the Fourth Geneva Convention, Israel should have released the appellants when the military rule in the Gaza Strip ended, since they were inhabitants of an occupied territory that was liberated. Second, it was argued that even if the Internment of Unlawful Combatants Law is constitutional, no ground of detention thereunder has been proved with regard to the appellants. According to this argument, it was not proved that the appellants are members of the Hezbollah organization nor has it been proved that their release would harm state security.
2. We cannot accept the appellants' first argument. The end of military rule in the Gaza Strip did not oblige Israel to release automatically all the detainees held by it who are inhabitants of the Gaza Strip, as long as the personal threat that the detainees represented continued against the background of the continued hostilities against the State of Israel. This conclusion is clearly implied by the arrangements set out in articles 132-133 of the Fourth Geneva Convention. Section 132 of the aforesaid convention provides the general principle that the date for the release of detainees is when the grounds of detention that originally led to their detention no longer exist. The first part of article 133 of the convention, which relates to a specific case that is included within the scope of the aforesaid general principle, goes on to provide that the detention will end as soon as possible after the hostilities have ended. Article 134 of the convention, which concerns the question of the place where the detainees should be released, also relates to the date on which hostilities end as the date on which detainees should be released from detention. Unfortunately, the hostilities of the terrorist organizations against the State of Israel have not yet ended, and they lead almost on a daily basis to physical injuries and mortalities. In such circumstances, the laws of armed conflict continue to apply. Consequently it cannot be said that international law requires Israel to release the detainees that were held by it when the military rule in the Gaza Strip came to an end, when it is possible to prove the continued individual threat presented by the detainees against the background of the continued hostilities against the security of the state.
3. […] The material shows clearly the close links of the appellants to the Hezbollah organization and their role in the organization's ranks, including involvement in hostilities against Israeli civilian targets. In view of this, we have been persuaded that the individual threat of the appellants to state security has been

> proved, even without resorting to the probative presumption provided in section 7 of the law […]. In view of the aforesaid, we cannot accept the appellants' claim that the change in the form of their detention – from detention by virtue of an order of the IDF Commander in the Gaza Strip to internment orders under the law – was done arbitrarily and without any real basis in evidence. As we have said, the change in the form of detention was required by the end of the military rule in the Gaza Strip, and that was why it was done when it was done. The choice of internment under the Internment of Unlawful Combatants Law as opposed to detention under the Emergency Powers (Detentions) Law was made, as we explained above, because of the purpose of the law under discussion and because it is appropriate to the circumstances of the appellants' cases.

The appellants further argued that their release does not represent any threat to state security since their family members who were involved in terrorist activities have been arrested or killed by the security forces in such a way that the terrorist infrastructure that existed before they were detained no longer exists. They also argued that the passage of time since the appellants were arrested reduces the risk that they represent. With regard to these arguments it should be said that after we inspected the material brought before us, we have been persuaded that the arrest or death of some of the appellants' family members in itself does not remove the security threat that would be represented by the appellants, were they released from detention. We were also persuaded that, in the circumstances of the case, the time that has passed since the appellants were first detained has not reduced the threat that they present. […]

In view of all of the aforesaid reasons, and after we have studied the material that was brought before us and have been persuaded that there is sufficient evidence to show the individual security threat represented by the appellants, we have reached the conclusion that the trial court was justified when it refused to cancel the internment orders in their cases. It should be pointed out that there is naturally increasing significance to the passage of time when we are dealing with administrative detention. Notwithstanding, at the present time we have found no reason to intervene in the decision of the trial court.

[…]

Therefore, for all of the reasons set out above, we have reached the conclusion that the appeals should be denied.

[…]

Justice E.E. Levy:

I agree with the comprehensive opinion of my colleague, the president.

[…]

Justice A. Procaccia:

I agree with the profound opinion of my colleague, President Beinisch.

[…]

Case decided as stated in the opinion of President D. Beinisch.

Given today, […] 11 June 2008 […].

B. Supreme Court, Administration Detention Appeals

[**N.B**.: Following the judgement in *Iyad v. State of Israel*, the Supreme Court rendered other decisions concerning the application of the Internment of Unlawful Combatants Law, including the one discussed below]

[**Source**: Supreme Court of Israel, A. v. State of Israel, Adm. Det. App. 7750/08, 23 November 2008, unofficial translation]

In the Supreme Court

[…]

The Appellant:

A.

v.

The Respondent:

State of Israel

[…]

JUDGMENT

Before me is an appeal of a decision of the Tel Aviv-Jaffa District Court […] of 16 July 2008 […], in the framework of the periodic examination of the internment of the appellant, in accordance with section 5(c) of the Unlawful Combatants Law […].

1. On 8 November 2007, the appellant was detained by IDF forces in the framework of their activity in the

area where he lived in the Gaza Strip. On 19 December 2007, the head of the Operations Branch in the IDF ordered, pursuant to the authority delegated to him by the Chief of Staff in accordance with section 3 of the Unlawful Combatants Law, his internment as an unlawful combatant.

2. […] [T]he District Court […] approved, on 2 June 2008, continuation of the appellant's internment. […] The court held that the appellant proved by his acts that he acquired – by himself and together with his father and brothers – expertise in the strategic smuggling of weapons into the Gaza Strip in large and significant quantities. The court pointed out that, after being detained by security forces, the area "responded" in a way that indicated his part in the hostilities against the State of Israel. The court further held that release of the appellant would prejudice state security and that the danger he posed had not faded during the time that had passed since his internment.
3. On 16 July 2008, the appellant's matter was again brought before the Tel Aviv-Jaffa District Court for periodic review […]. In its decision, the court held that the appellant is connected to a "family cell" operating in the Gaza Strip, a family cell that acquired, *inter alia*, expertise of the highest level in the sphere of weapons smuggling, and that the family cell is to be viewed as a hostile force, which carried out and is carrying out hostilities against the state. The court stressed the appellant's dominant position in this family cell and the independent danger that he posed to state security.

[…]

1. […] [T]he internment of the appellant was made pursuant to his being declared an unlawful combatant. […]
2. […] [T]he Law specifies two alternatives (which may, of course, overlap) as an initial condition for internment, which form the basis for declaring a person an unlawful combatant. One, the person *himself* took part in hostilities against the State of Israel, and two, the person is a member of the force carrying out hostilities. As section 3(b)(1) of the Unlawful Combatants Law states, from the moment that a particular person is an unlawful combatant, the chief of staff may, if he finds an additional condition is satisfied – that is, that his release will prejudice state security – order his internment. […]
3. In our case, after studying the privileged information presented before me, I was convinced that, in the case of the appellant, the second conditions is indeed satisfied; that is, his release, under the currently existing circumstances in the Gaza Strip, will harm state security to an extent justifying use of the harsh tool of denying his liberty by means of detention. Without going into detail, it is sufficient to say that the evidence presented before me indicates that the danger posed by the appellant does not result solely from his family connections, and is evident from his individual acts. […]
4. Notwithstanding the above, I did not find that the first condition was satisfied in the appellant's case, that is, that he is an "unlawful combatant" within the meaning of the term in section 2 of the Unlawful Combatants Law. As stated, this section specifies two possibilities for inclusion in this definition – "group" (being a member of a force carrying out hostilities) or "personal" (taking part in hostilities, directly or indirectly). Even though the respondent does not contend this explicitly, it appears from its contentions that the circumstances of the appellant combine the two possibilities. Whether one or the other, in light of the cautious interpretation that must be given to the definitions in this law, I do not find that the appellant comes within the boundaries of these definitions.

[…]

1. In our case, […] I did not find it could be said that the appellant is a member of a force carrying out hostilities against the State of Israel. […] [T]he information against the appellant relates to his engaging in weapons smuggling. In the framework of the evidence presented before me, I did not find evidence related to any real organizational *belonging* of the appellant, or to his activity in the *framework* of one terrorist organization or another. Therefore, I did not find that the appellant comes within the "group" alternative.
2. In this regard, I cannot accept the holding of the District Court, whereby the family cell to which the appellant belongs can be deemed a hostile force, so as to satisfy the requirements of section 2 of the Unlawful Combatants Law.

[…]

[I]t is not sufficient that the person be in the ranks of some entity that is hostile to the state and whose existence endangers its security, but it must be an entity that carries out, in an active and organized manner, hostile terrorist activity against the State of Israel. […]

1. In the "personal" alternative also, I did not find that the appellant comes within the definition of "unlawful combatant" under section 2 of the Law. This possibility involves, as stated, a person taking part in hostilities, directly or indirectly. In the appellant's case, I did not find any evidence indicating that he took a real part in hostilities directed against Israel. As stated, the evidence against him related primarily, but not only, to his engaging in weapons smuggling. Indeed, it is possible to argue that this information […] indicates that the appellant took an indirect part in hostilities. […] However, in applying the cautious principles of interpretation that are required as stated in implementing the Unlawful Combatants Law, I did not find that, in this context, the contribution of the appellant to these acts can be deemed a contribution that constitutes *taking part* in the hostilities, as the Law requires. […]
2. I also reached this conclusion following a fundamental constitutional examination of the appellant's internment. As is the case with every administrative act, this act, too, must satisfy, *inter alia*, the principle of proportionality, for it not to deviate from the boundaries of the law authorizing it. In our case, the appellant's internment under the Unlawful Combatants Law raises the question of whether there is a means that causes lesser harm and achieves the same objective. In this case, I find that, in his case, administrative detention under the Emergency Powers (Detentions) Law […] (hereafter: the Administrative Detention Law), is sufficient.2
3. The Administrative Detention Law empowers the Minister of Defense to order the detention of a person for a period not to exceed six months, if he finds "a reasonable basis to assume that reasons of state security or public security" require his detention (section 2(a) of the law). […]
4. […] [A]s was held in *Iyad*, the principal purpose of the Unlawful Combatants Law relates to aiding and advancing the state's battle against terrorist bodies that have declared total war against it. As such, it is itself intended to prevent the return of activists in these organizations, and of those who take part in terrorist attacks against the state, to the cycle of hostilities. Conversely, the purpose of the Administrative Detention Law is to prevent danger to state security by individual persons and for specific reasons. […]
5. Therefore, it cannot be said that the extent of the appellant's contribution to hostilities carried out by terrorist organizations justifies using the means of internment under the Unlawful Combatants Law, and

it is sufficient to hold him in administrative detention under the Administrative Detention Law. As stated, the evidence presented before me clearly indicates he poses a danger to state security. However, prevention of this specific dangerousness comports more with the arrangements set out in the Administrative Detention Law – which despite their severe harm, are far less extreme than the harm of the arrangements specified in the Unlawful Combatants Law.

6. Therefore, the appeal is accepted […].

Given today, […] 23 November 2008 […].

[…]

Discussion

A. Qualifications of the conflict and of the persons under discussion

1. *(Part A, para. 9)* Do you agree with the Court that there is an international armed conflict between the State of Israel and "terrorist organizations"? How are international armed conflicts defined? What is the law applicable to the situation? According to the Court? According to you? (GC I-IV, Art. 2)
2. *(Part A, para. 11)* Do you agree with the Court that the occupation of Gaza ended in September 2005 when Israeli troops withdrew? Could Israel still be regarded as an occupying power even though its troops are no longer present on the territory? Which duties does Israel still recognize itself as having towards the inhabitants of the Gaza Strip? What legal basis do they arise from? (GC IV, Art. 6(1); P I, 3(b))
3. *(Part A, paras 11 and 12)* Does the definition of unlawful combatant as given in Section 3 of the Unlawful Combatants Law have any basis under IHL *(para. 12)*? Is the interpretation of the concept of unlawful combatants given here by the Court the same as the one it gave in the Targeted Killings case? Why does the Court say that the two definitions are necessarily different? Do you agree? [**See** Israel, The Targeted Killings Case, para. 31]
4. *(Part A, para. 14)* Do you agree with the Court that there is no intermediate status between the categories of combatants and civilians? What is the status of the Palestinians detained by Israel? According to the Court? According to you? Are they protected persons? Why? What protection are they afforded? (GC IV, Art. 4)

B. Legal basis for detention

1. a. *(Part A)* What was the legal basis, under IHL, for the appellants' detention before September 2005? According to the Court? (GC IV, Arts 27, 78)
   b. *(Part A)* What was the legal basis, under IHL, for the appellants' detention after September 2005? According to the Court? Do Arts 41 and 42 apply here even though the appellants were first arrested outside Israel's own territory? (GC IV, Arts 27, 41-42)
   c. *(Part A, para. 17)* Do you agree with the appellants that their detention is unlawful under IHL because none of the provisions contained in GC IV apply? What was the status of the Gaza Strip during the Disengagement Plan? What are the consequences of your answer for the legality of the appellants' detention?
   d. *(Part A, para. 17)* According to the Court, in GC IV "there is a power of detention for security reasons, whether we are concerned with the inhabitants of an occupied territory or we are

concerned with foreigners who were found in the territory of one of the states involved in the dispute". Does this mean that protected persons may be arrested in the territory of a party to a conflict by the enemy forces, without it being occupied by the latter? Would this be in accordance with GC IV's definition of occupation? Is there a basis in IHL for the detention of civilians arrested neither in an occupied territory nor in the Detaining Power's own territory?

2. *(Part A)* Was Israel allowed to transfer the detainees to its own territory at the end of occupation? May civilian internees arrested in occupied territories be transferred to the Detaining Power's own territory? Does Art. 49 of GC IV prohibiting "[i]ndividual (…) forcible transfers, as well as deportations of protected persons", apply to civilian internees? In a situation where internees are transferred to the territory of the Detaining Power, which set of rules should apply to them after their transfer?
3.
    a. *(Part A, para. 52)* Should the detainees have been released at the end of occupation, in September 2005? Do you agree with the Court that the obligation to release them at the end of occupation is not an obligation under IHL? (GC IV, Arts 49 and 132-134)
    b. *(Part A, paras 46 and 52)* How should the requirement of release "as soon as possible after the close of hostilities" be interpreted (GC IV, Art. 133)? What does the close of hostilities mean in a situation such as the present one, where sporadic fighting carries on for years?
4.
    a. *(Part A, paras 20-23)* How does the Court interpret the "individual threat" requirement? Does IHL require an individual assessment of the threat posed by a person before deciding upon that person's detention? (GC IV, Arts 27(4), 41-43 and 78) According to the Court, when may a person be detained as an "unlawful combatant"? What elements are required to authorize detention? Does the Court say whether the same elements are required for the continuation of detention? Should they be required?
    b. *(Part A, paras 15 and 24)* Is the presumption of constituting a security threat provided for in Section 7 of the Unlawful Combatants Law in accordance with IHL? May a person be interned for the mere fact that he or she belongs to a hostile armed group, independently of that person's individual conduct? Is this in compliance with the requirement for an individual assessment? (GC IV, Arts 42 and 78)
    c. *(Part A, para. 23)* When can a person be considered to belong to a hostile, illegal organization? How can such a connection be proved?
5. *(Part A, para. 40)* Are the provisions of the said Law relating to the judicial review of detention in accordance with IHL? What are the requirements set by IHL with regard to the judicial review of detention? Must the review be judicial or may it also be administrative? What is the utility of a judicial review if the detainees concerned have no access to the evidence against them? Must they have access to such evidence under GC IV? (GC IV, Arts 43 and 78)

C. Participation in hostilities

[**See also** Israel, The Targeted Killings Case]

1. *(Part A, para. 13)* Do you agree with the Court that IHL "does not grant 'unlawful combatants' the same degree of protection to which innocent civilians are entitled"? Does this assertion have a legal basis in IHL? What restrictions may apply to them? Does it make a difference whether they are themselves in an occupied territory or in the territory of the party in whose hands they are? What restrictions, if any, may

be applied to the detainees in the present case? May the same restrictions be applied to them before and after September 2005? Were they deprived of any protection under GC IV? (GC IV, Art. 5)

2.

a. *(Part A, para. 21)* When does someone become an “unlawful combatant”? What does the requirement of having made a significant contribution to the hostilities mean? Are the nature and degree of the contribution similar to the definition of participation in hostilities given by the HCJ in the Targeted Killings case? [**See** Israel, The Targeted Killings Case, para. 33]
b. *(Part B)* Could weapon smuggling be considered to constitute a direct participation in hostilities? A security threat justifying internment under GC IV? According to the Court? According to you? If the appellant had been a member of an organization conducting hostilities against Israel, could he have been considered an “unlawful combatant” for the purpose of the Unlawful Combatants Law? Even if he were only smuggling weapons?
c. *(Part B, para. 13)* Why should the appellant be detained under the Administrative Detention Law rather than under the Unlawful Combatants Law? What is the difference between the two forms of detention? As far as the legal basis in IHL is concerned? Under Israeli law? Does the requirement that less harmful measures must be used when available have any basis under IHL?