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# **Position Paper on the Proposed Law: Imprisonment of Illegal Combatants**

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The Proposed Law aims to grossly expand Israel's powers with regards to administrative detention. The Law will enable the country to hold Lebanese citizens who were kidnapped and brought to Israel, Palestinian residents of the Occupied Territories and even Israeli citizens without trial.

Both the purpose of the Proposed Law and the manner in which it seeks to attain that purpose are unacceptable. The Proposed Law establishes sweeping definitions and grants broad powers to the military, and as such contravenes fundamental principles of democracy, a Supreme Court ruling, and international humanitarian law, which Israel has pledged to uphold.

## **Background**

In the past, Israel held 21 Lebanese civilians in administrative detention. They were designated as bargaining chips for a possible exchange for Israelis held captive or missing as a result of the war in Lebanon, particularly for the release of navigator Ron Arad or information regarding his fate. In December 1999, Israel released five of the Lebanese civilians, and, in March 2000, it released another detainee.

In April 2000, the Supreme Court ruled that the law pursuant to which these civilians were being held does not allow the administrative detention of persons who do not endanger state security. Since the Lebanese civilians were being held as bargaining chips, and the state never claimed that the individuals themselves endanger security in any way, the court ordered their release. Following the judgment, Israel released 13 of the Lebanese civilians. Israel refused to release the remaining two, Mustafa Dirani and Sheikh 'Abd al-Karim 'Obeid. To enable the state to continue to hold them as bargaining chips, the government drafted a proposed law allowing such detention and side-step the Supreme Court's decision.

In the meantime, to legitimize the detention of Dirani and 'Obeid, the state changed its argument and contended that they endanger state security, thus allowing their administrative detention under existing law. The Tel-Aviv District Court has repeatedly accepted the state's argument and approves Dirani and 'Obeid's detention once every several months on those grounds. Despite this, the government has not withdrawn the proposed law.

The Proposed Law underwent several changes. The first draft was blatantly "tailored" to Dirani and 'Obeid and was clearly intended to enable the state to continue to hold them as bargaining chips for the release of Israelis held captive or missing. The Proposed Law, with slight alterations, passed its first reading in the Knesset and was forwarded to the Foreign Affairs and Defense Committee for deliberation. During the deliberations, jurists, the Knesset's legal advisor, the Committee's legal advisor, the Israel Bar Association, and human rights organizations vehemently opposed the Proposed Law, leading to further changes. However, these changes were cosmetic, and the essence of the proposed law remained the same: allowing administrative detention of persons who do not endanger state security. In the meantime, the Knesset

Foreign Affairs and Defense Committee approved the Law for second and third readings in the Knesset plenum.

## **Principal elements of the Proposed Law**

The Proposed Law defines “illegal combatant” as a “person who takes part in hostile activity against Israel, directly or indirectly, or belongs to a force engaged in hostile activity against the State of Israel” who is not entitled to the status of prisoner of war under international humanitarian law.

Pursuant to the proposed law, when the Chief of Staff thinks that a person being held by Israel is an “illegal combatant” and that his release is liable to endanger state security, he may issue an order for the administrative detention of the individual. The order may be given in the detainee’s absence, but the detainee must be informed of the order at the earliest possible time and given an opportunity to argue against the order before an officer holding the rank of Lieutenant Colonel. The arguments are forwarded to the Chief of Staff.

Within 14 days from the time that the order was issued, the detainee must be brought before a district court, which shall determine whether the detainee is an “illegal combatant.” Detainees who remain in detention must be brought every six months before a district court judge. The judge is empowered to cancel the order if the judge determines that release of the detainee will not harm state security. Decisions of the district court judge may be appealed to the Supreme Court.

The Proposed Law establishes the presumption that the release of any person who comes within the category of “illegal combatant” will harm state security as long as that force continues to be engaged in hostile activity against Israel. This presumption remains until proven otherwise.

Proceedings under the Proposed Law are conducted *in camera*. The court is allowed to examine evidence without disclosing it to the detainee or the detainee’s attorney where the judge thinks that disclosure would harm state security or public safety. Detainees are allowed to meet with their attorneys as soon as possible, but the state may prevent the meeting for seven days.

The detention order does not prevent the criminal prosecution of the “illegal combatant.” The holding of criminal proceedings does terminate the effect of the order, and persons who are prosecuted and sentenced to imprisonment may be detained after serving their sentences.

The proposed Law applies retroactively to “illegal combatants” held in Israel prior to the Law taking effect.

## **Combatants and Civilians under International Law**

The Proposed Law states that it is based on international humanitarian law. Therefore, the relevant provisions of international humanitarian law should be reviewed before examining the sections of the Proposed Law.

International humanitarian law does not contain a category known as “illegal combatant.” It establishes only two categories of persons involved in a conflict: combatants and civilians.

A “combatant” is any person who belongs to the armed forces of a party to a conflict. This definition does not only apply to combatants of a regular army, but also to combatants in militias belonging to one of the sides to the conflict, provided that the combatants meet a number of conditions. For example, they must openly bear their weapons and distinguish themselves from civilians by uniforms or other markings that enable them to be identified from a distance. The First Protocol to the Geneva Conventions expands the definition of “combatant” to include, in certain circumstances, guerrilla forces. Israel did not sign this protocol, and therefore does not recognize the latter as combatants.

Only persons defined as combatants are allowed to take part in war. These combatants are allowed to use force and perform acts that would be considered criminal in a civilian context, such as murder, assault, and causing damage to property, without being considered offenders.

Combatants who are held by the country against whom they were fighting are entitled to the status of prisoner of war under the Third Geneva Convention, which requires the state holding them to safeguard their lives, health, and dignity. A POW may be held in POW camps, but cannot be prosecuted under the penal code for the acts they committed during the war, unless they violated the laws of war. Even in this case, their status as a POW is not impaired. POWs may, *inter alia*, send and receive letters, be visited by the Red Cross, and practice their religion. Immediately upon termination of hostilities, they must be returned to their country, even where a peace agreement has not been signed.

Persons who are not combatants are civilian. Civilians, unlike combatants, are not allowed to take part in the hostilities. If they do, they are not entitled to the status of POW, and may be prosecuted under the penal law of the country that arrested them.

Civilians, including those who took part in hostilities, benefit from the protections of the Fourth Geneva Convention Relative to Civilians in Time of War. Some of the rights provided to civilians under this convention may be denied only when granting the rights would significantly harm the security of the occupying state. Even where these rights are denied, the prisoner must be treated humanely, and, when prosecuted, the proceedings must be conducted in accordance with the Convention. For example, the prisoner must be brought to trial as rapidly as possible, receive due process, and be released after serving the sentence imposed.

The Fourth Geneva Convention also allows civilians of the adversary state to be held in administrative detention, but detention under this article is only allowed if the individual constitutes a concrete danger to the security of the state. It is absolutely

forbidden to use administrative detention as a means of collective punishment, and each case of detention must be determined on its individual merits. In any event, the need for the detention must be examined as soon as possible by a court or administrative tribunal. If the court or tribunal maintains the detention, it shall be subject to periodical review, at least twice a year, to determine whether it is justifiable to continue the detention.

## **From the general to the specific: the Proposed Law under International Law**

The proposed law contravenes almost all these rules of international law, from creating the new category of “illegal combatant” to sweeping and almost unlimited use of administrative detention.

### **- Nullifying the distinction between combatants and civilians**

The Proposed Law seeks to create a new category in international law, one of “illegal combatant.” This category contains persons who are neither civilians nor combatants, and thus not entitled to the protections of international humanitarian law granted to civilians or combatants.

The category stated in the proposed law equally applies to persons who take an active part in hostilities and those who do not take an active part, if they belong to a “force engaged in hostile activity against the State of Israel.” Thus, under the Proposed Law, a person working in the medical clinic of a combatant force is given the same status as a member of the force’s military arm who kills an Israeli civilian, because the Proposed Law’s explicit presumption that they endanger Israel’s security applies to both. By treating these persons equally, the Proposed Law eliminates the distinction, upon which international humanitarian law is based, between combatants and civilians.

Furthermore, the Proposed Law applies a special law to a particular group of people only because the members of the group are fighting Israel or belong to a force that is fighting against it. Thus, persons entitled to certain rights pursuant to their status as civilians or combatants under the rules of international humanitarian law will not benefit from them in Israel, but will benefit from them everywhere else. This definition makes a mockery of international law, whose primary purpose is to establish common standards in all countries and to prevent a state from engaging in hostilities according to rules it alone established.

### **- Sweeping use of administrative detention**

The Proposed Law’s primary sanction against an “illegal combatant” is administrative detention. As noted, under international humanitarian law, combatants are entitled to POW status and civilians who take part in hostilities are tried under the penal law. Administrative detention of civilians is allowed,

as an exceptional procedure only, when absolutely necessary for state security and no alternative exists.

The Proposed Law turns administrative detention into the principal measure used against persons classified as “illegal combatants.” While it allows them to be tried under the penal law, they may be administratively detained after completing their sentence. This provision renders the criminal proceeding meaningless, subordinating it to the administrative detention proceeding, in violation of international humanitarian law.

According to the Proposed Law, the detention order remains in effect as long as 1) the court is convinced that the individual’s release would endanger state security and 2) the force to which the individual belongs continues hostilities against Israel. These two conditions mean, in practice, that Israel can hold an almost infinite number of persons in administrative detention for an unlimited period of time.

Regarding the first condition, the Proposed Law’s presumption that the release of “illegal combatants” will endanger state security places the burden of proof on the detainees that they will not endanger Israel’s security. This requirement violates the fundamental legal principle that a person is innocent until proven otherwise. Furthermore, it is difficult to envisage how detainees can prove that they will not endanger Israel’s security, because a substantial portion of the evidence against them is confidential and the state does not have the burden of proving the contrary. In addition, the Proposed Law does not define the term “state security,” thus enabling broad interpretation. Israel has shown that this term can be interpreted in many ways, including the holding of bargaining chips for the exchange of Israelis held captive. Such a broad interpretation leaves detainees almost no chance for release.

As for the second condition, the Proposed Law provides that the Minister of Defense determines whether hostile activity has ceased. The minister’s certification that hostile activity has not ended is sufficient proof for the court, unless proved otherwise. Here, too, it is difficult to envisage how detainees can prove that the minister erred in making this determination.

In light of the above, the Proposed Law clearly enables the prolonged administrative detention of persons who do not endanger Israel’s security. The detention can last as long as the individual comes within the Proposed Law’s broad definition of “illegal combatant.” Because the presumptions established in the Proposed Law preclude meaningful judicial review of the particular case, judicial review is incapable of preventing the sweeping use of administrative detention. Thus, the Proposed Law will enable Israel to continue to hold individuals who pose no security threat in administrative detention, including as bargaining chips for the release of captured Israelis. Such a law contravenes both the express ruling of the Supreme Court and international law.

- **Retroactive application of the Proposed Law**

The Proposed Law provides that it applies retroactively to persons who are being held on the date of commencement of the Law and come within the broad definition of “illegal combatants.” This provision will enable the state to continue to hold Sheikh ‘Obeid and Dirani in administrative detention without having to repeatedly prove in court that they endanger state security. In addition, Israel can also apply the law against Palestinians currently serving prison sentences and administratively detain them after they complete their sentence, on grounds that they are “illegal combatants.”

Retroactive legislation, which alters an individual’s status and rights from those that existed prior to the enactment of the law, contravenes international humanitarian law and violates fundamental principles of Israeli law and of international law. Regarding retroactive legislation, the President of the Supreme Court, Aharon Barak, stated: “The prohibition on retroactive legislation is one of the minimal conditions in the absence of which justice is impossible.”

## **Conclusion**

The Proposed Law allows Israel to administratively detain thousands of persons. The law will apply both to residents of the Occupied Territories, Lebanese civilians abducted from Lebanon and brought to Israel, and Israeli civilians classified as belonging to “a force engaged in hostile activity against the State of Israel.”

In the past, Israel showed that it considers sweeping administrative detention a legitimate practice. During the first *intifada*, it administratively detained, pursuant to military orders applying in the Occupied Territories, tens of thousands of Palestinians. According to these orders, the state must prove that the detainee endangers state security. In practice, the courts approved detentions solely on the basis of general statements made by General Security Service agents. If the state is not even required to make such statements, a strong likelihood exists that it will make even more sweeping use of administrative detention.

Israel currently has statutes enabling the administrative detention of persons who endanger state security, both in Israel and in the Occupied Territories. An additional statute, which expands currently existing powers, is unnecessary. The government’s attempt to enact an “improved” administrative detention statute, which would grant it additional powers, indicates its intention to make greater use of administrative detention than it has done until now.

The Proposed Law ostensibly seeks to establish a general principle for holding “illegal combatants.” However, examination of the circumstances in which the Proposed Law was presented and its wording leads to the conclusion that it is intended, first and foremost, to enable Israel to continue to hold individuals who pose no security threat in administrative detention, as if the Supreme Court had not spoken out on the matter. The attempt of the drafters of the Proposed Law to use legislation to preserve an unjust status quo is not befitting inclusion among the statutes of a democratic state.

Any Israeli law must comply with the limitation clause of the Israeli Basic Law: Human Liberty and Dignity, which states that, "There shall be no violation of rights under this Basic Law except by a Law befitting the values of the State of Israel, designed for a proper purpose, and to an extent no greater than required or in accordance with such a law pursuant to authority expressly stated therein." The Proposed Law does not meet any of these conditions.

The primary objective of international humanitarian law is to protect the victims of war and occupation. Most of international humanitarian law is directed toward that specific end. Israel has consistently, and contrary to the position held by the international community, denied residents of the Occupied Territories rights accorded them under the Fourth Geneva Convention. It is dismaying that, when Israel finally invokes provisions of this convention, it distorts their interpretation, as well as the spirit of international humanitarian law as a whole, in order to justify the violation of human rights.