ADMINISTRATIVE DETENTION OF UNLAWFUL COMBATANTS IN ISRAEL AND THE UNITED STATES

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Executive Summary

Administrative detention is a preventive measure that may be used only in emergency situations because otherwise it would violate the requirement of non-arbitrariness of deprivation of personal liberty. It serves to protect national security against individuals who pose a threat during the times of armed conflict.

In the last decade, the issue of administrative detention of unlawful combatants has gained on significance. This thesis critically analyzes the scope of the regimes in Israel and the United States. The respective regimes are carefully examined and illustrated by the most important cases of the Supreme Courts of both countries.

During emergency situations, some fundamental rights may be restricted. Limitations of the right to personal liberty and of the due process rights occur when administrative detention is employed. However, certain level of due process must be maintained at all times. The central objective of this paper is to assess the appropriate standard of due process afforded to unlawful combatants while protecting national security.

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List of abbreviations

AP	Additional Protocol to the Geneva Conventions
ARB	Administrative Review Board
AUMF	Authorisation for Use of Military Force
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CIA	Central Intelligence Agency
CSRT	Combatant Status Review Tribunal
ECHR	European Convention of Human Rights
EPDL	Emergency Powers (Detention) Law
GC	Geneva Convention
GSS	General Security Service
GTNM	Guantanamo
IACHR	Inter-American Commission of Human Rights
ICCPR	International Covenant of Civil and Political Rights
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
IDF	Israel Defence Forces
IHL	international humanitarian law
IHRL	international human rights law
ISC	Israeli Supreme Court
IUCL	Incarceration of Unlawful Combatants Law
MCA	Military Commissions Act
MO	military order
NGO	non-governmental organization
POW	prisoner of war
UK	United Kingdom
UN	United Nations Organization
US	United States of America
US SC	United States Supreme Court
WoT	war on terror
WW	world war

Introduction

Administrative detention is detention without charge or trial, authorized by administrative order rather than by judicial decree. It is allowed under international law, but, because of the serious injury to due process rights inherent in this measure and the obvious danger of abuse, international law has placed rigid restrictions on its application. Administrative detention is intended to prevent the danger posed to state security by a particular individual.[1]

Administrative detention is a preventive means that has been in the last couple of years, in the aftermath of the 9/11 attacks, used very frequently by some countries in the fight against terrorism. Israel, the United States, the United Kingdom, Malaysia and other countries employed in prevention against terrorist suspects who try committing further attacks or threaten State security in other way.

Administrative detention should not be confused with detention in criminal proceedings. There are several differences between them, most notably, administrative detention should be of preventive nature (does not aim to punish) and it affords less due process rights. Unlike criminal detention, it is an exceptional measure not allowed to be used outside emergency situations. It will be shown that it is based more on the rules of international humanitarian law (IHL) even though it must conform to international human rights law (IHRL) provisions, too.

A number of human rights are eroded once administrative detention is employed, the right to liberty of a person and the due process rights being the most obvious examples. Even though those rights are not absolute and can be limited, the limitations must comply with appropriate

[1] Definition available at the B'Tselem (The Israeli Information Center for Human Rights in the Occupied Territories) website on administrative detention:
http://www.btselem.org/english/Administrative_Detention/Index.asp

provisions of international human right instruments. All the requirements of derogation clauses must be fulfilled.

Joan Fitzpatrick, in her work 'Human Rights in Crisis', admits that administrative detention is a permitted measure in certain circumstances. She emphasizes that certain rights of detainees must be preserved even during emergencies, although she is critical that drafters did not include the prohibition of arbitrary detention among non-derogable rights.[2] Fitzpatrick also stresses the importance of non-binding rules of IHRL.[3]

Before moving further, it must be made clear that this thesis will not deal with administrative detention in general. The regime of detention of unlawful combatants will be under scrutiny. There are various definitions of unlawful combatants and the scope of the notion is dependent on them accordingly. One of the definitions, which are accepted is that unlawful combatants are:

> all persons taking a direct part in hostilities without being entitled to do so and who therefore cannot be classified as prisoners of war on falling into the power of the enemy.[4]

Most of the authors dealing with the issue of unlawful combatants accept that the Geneva Conventions (the GCs) apply to them. Knut Dormann, as one of them, refers to Article 5 of GC IV which allows derogations from the rights afforded by the Convention if 'protected

[2] See Joan Fitzpatrick: Human Rights in Crisis: The International System for Protecting Rights During States of Emergency, University of Pennsylvania Press, 1994, p. 38-41
[3] Ibid., p. 44
[4] Knut Dormann: The Legal Situation of "Unlawful/Unprivileged Combatants", In: International Review of the Red Cross, March 2003, Vol. 85, No. 849, p. 46

persons' endanger State security. He thinks that unlawful combatants clearly fall within the ambit of this article and thereby other articles of GC IV must be applicable, too.[5]

Other authors reject the applicability of the GCs. Yoram Dinstein does not agree with their classification as a sub-group of civilians. He recalls the US case *Ex parte Quirin*.[6] This thesis, however, shares rather the Dormann's view.

The research used will be based on comparative method and the regimes subject to comparison are those of the United States and Israel. Why those two countries? The answer is simple. Both regimes use similar definitions for the term unlawful combatant, both establish significant restrictions on detainees' rights and both allow for indefinite detention. Israel and the US have used administrative detention for several periods of their history. In Israel, it was mainly in relation to *Intifadas* – armed conflicts in the Palestinian Occupied Territories. In the US, administrative detention was used during WW II to intern both American citizens and non-citizens of Japanese ancestry.

The issue of unlawful combatants in the US gained significance after the detention camp in Guantanamo (the GTNM) Bay was established. The US has detained there persons captured in Afghanistan and elsewhere, named them (unlawful) enemy combatants and denied them any access to courts to challenge the legality of their detention.[7] Fortunately, the US SC via its decisions in four Guantanamo cases afforded them process before a tribunal to determine their status and recognized their right to file habeas corpus petitions.

[5] Ibid, p. 49-50
[6] See Yoram Dinstein: Unlawful Combatancy, In: Israel Yearbook on Human Rights, vol. 32 (2002), p. 249
[7] See Military Order of November 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, Section 7(b)(2)

The notion of 'unlawful combatant' may seem to be new in the US law and policy. However, the history of it dates back to World War II (WW II) and the case called *Ex parte Quirin*[8] in which the US Supreme Court (the US SC) defined it for the first time. The period of WW II was significant in the US in relation to administrative detention in general. President Roosevelt issued Executive Orders which allowed military commanders to detain persons of Japanese ancestry for the protection of State security.

In Israel, the term was first employed by the Israeli Supreme Court (the ISC) in the so-called *Targeted Killings* case.[9] However, even before that, Justice Cheshin referred to it in the case which resulted in adoption of the Israeli law on detention of unlawful combatants – the *Bargaining Chips* case.[10]

The restriction (or deprivation) of personal liberty is sometimes necessary in democratic societies. Although States have an obligation not to interfere with personal liberty, they have also positive obligations – to protect the rights of individuals under their jurisdiction. If the security of a State is threatened, it means that the right to life (and other rights) of such individuals is in danger. The two obligations clash and must be balanced. The main purpose of this thesis is to assess the appropriate level of due process protection of security detainees called by the detaining authorities 'unlawful combatants' and that way to contribute to the debate on the issue. The appropriate due process standard will be proposed in the light of detailed comparison of the Israeli and American models and should serve as an advice for future.

[8] See Ex parte Quirin, 317 U.S. 1 (1942)
[9] See The Public Committee Against Torture in Israel and Palestinian Society for the Protection of Human Rights and the Environment v the Government of Israel et al., HCJ 769/02, 11 December 2005
[10] See John Does v Ministry of Defence, CrimFH 7048/97, 12 April 2000

Some authors have already examined in their works the issue of administrative detention. For example, Stanislaw Frankowski and Dinah Shelton focused rather on preventive detention as such and included there also criminal detentions. Their work is based on the comparative perspective of various preventive detention models.[11] Jelena Pejic tried in her article to assess procedural rights that should be afforded to detainees in administrative detention during armed conflicts.[12] However, the determination of the appropriate due process standard taking into account not only individual rights of detainees but also the security needs lacked. This thesis' contribution should therefore be to fill in the blank space in the public debate.

The thesis is divided into three chapters. The first chapter defines relevant terms and the scope of provisions of IHRL and IHL governing those terms. The most important notions of this thesis are: 'administrative detention' and 'unlawful combatants'. Thus, the first chapter is focused on them.

Administrative detention is a measure that is governed by both systems of international law mentioned. Each one sets different requirements under which it is allowed. In order to understand it properly, all the relevant rules applicable to administrative detention regime will be scrutinized.

As this measure may be employed only in emergency situations, the requirements for proper derogations will be reviewed briefly. The powers of the Executive are usually increased during emergencies, and detention regimes are often established by it. David Dyzenhaus

[11] See Stanislaw Frankowski and Dinah Shelton (eds.): Preventive Detention – A Comparative and International Law Perspective, Dordrecht: Martinus Nijhoff Publishers, 1992

[12] See Jelena Pejic: Procedural Principles and safeguards for internment/ administrative detention in armed conflict and other situations of violence, In: International Review of the Red Cross, Vol. 87, No. 858, June 2005

warns that courts should be more willing to check on the Executive's exercise of powers. He criticizes the reluctance of courts to deal with political issues.[13]

The subject matter of the second chapter is the overview of regimes of administrative detention in Israel and the US illustrated by relevant case-law of the respective Supreme Courts. Introduction to each State's regime starts with the look back at the historical development of administrative detention.

In relation to Israel, attention is drawn to two instruments which preceded the law on detention of unlawful combatants – the Emergency Powers (Detention) Law valid on the territory of Israel and the Military Order No. 1591 valid on the territory of the West Bank. A few paragraphs are devoted to the ISC decision in the *Bargaining Chips* case.

As regards the US, the second chapter analyzes internment/ administrative detention of people of Japanese origin during WW II. The US SC issued rulings in three significant cases: *Hirabayashi*,[14] *Korematsu*[15] and *Ex parte Endo.*[16] Focus then switches to the current use of detention ordered by the Executive in the War on Terror (the WoT) under the USA PATRIOT Act.[17]

What follows next is the examination of detention of unlawful combatants in the two States. The Israeli law, and the Israeli Supreme Court decision on it[18] are analyzed closely. Unlike in Israel, the US regime is not based on an act. It was via Presidential military order that

[13] See David Dyzenhaus: The Constitution of Law: Legality in a Time of Emergency, Cambridge University Press, 2006, p. 17-19
[14] See Hirabayashi v United States, 320 U.S. 81 (1943)
[15] See Korematsu v United States, 323 U.S. 214 (1944)
[16] See Ex parte Mitsuye Endo, 323 U.S. 283 (1944)
[17] See USA PATRIOT Act - Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (H.R. 3162)
[18] See Plonim v State of Israel (Criminal Appeal) 6659/06

detention of enemy combatants in the WoT was allowed[19]. Detainees are being kept outside the US territory – at GTNM and other places.

The last, third, chapter's central focus is on due process rights afforded to detained unlawful combatants in both countries. The examination is critical and highlights the greatest flaws of the respective regimes. Special attention is given to rulings of the US SC regarding the entitlement of unlawful combatants detained at GTNM to file habeas corpus petitions.

The thesis ends with the proposal of an appropriate due process standard which should be employed if the States aim both at the protection of national security and at the protection of individual rights. The due process rights included in the standard are divided into three groups: those applicable before the status determination proceedings, those applicable during the proceedings, and those applicable after them.

[19] See Supra, note 7

I Defining Relevant Terms

1. 1 Administrative Detention

1. 1. 1 The Scope of the Notion

Administrative detention is a preventive measure which was in the past used mainly during armed conflicts within the framework of IHL against persons who pose a threat to State security. Nowadays, it is present in different variations in several countries all around the world and more often employed outside the context of armed conflicts.[20] It may be used e.g. also within the framework of immigration law. It should be distinguished from the detention in criminal proceedings.

In last decades, the use of administrative detention as a measure in counter-terrorism became frequent. Israel is the country where it has been used for the longest time consecutively in this relation. The United Kingdom employed it in Northern Ireland when the conflicts were the most violent. After the terrorist attacks of 11 September 2001 (the 9/11 attacks), it reached new dimension. The United States declared global WoT and President George W. Bush, acting as the Commander in Chief of the US armed forces, issued the Military Order on Detention[21] by which he legalized detention of certain individuals once the conditions set forth in the order are met.

The history teaches us that the protection of security often brings restrictions on human rights. The period after the 9/11 attacks did not differ that much. They started the process of adoption of national laws aimed against terrorism and terrorists. In the US, the USA PATRIOT Act 2001[22] was adopted. In the UK, it was the Anti-Terrorism, Crime and Security Act[23] also from

[20] Supra, note 12, p. 375
[21] Supra, note 7
[22] Supra, note 17
[23] See the Anti-Terrorism, Crime and Security Act 2001, 2001 c. 24

2001, because of which the UK entered into derogation from Article 5 of the European Convention on Human Rights (the ECHR). Acts based on the same rationale were adopted also in Malaysia and Singapore. Several human rights were eroded besides the right to liberty and due process rights – freedom of expression, freedom of association, freedom from torture and other ill-treatment, right to privacy etc.

Critics of administrative detention of terrorist suspects declare that it should not be employed and there are better ways how to deal with terrorism. Many states preferred rather ordinary criminal law for this task and established new crimes in their criminal codes. Also the United Kingdom switched to criminal detention regime in counter-terrorism. It happened so after the ruling of the House of Lords in *A & Others v Secretary of State*.[24] The Lords held that the indefinite detention of alien prisoners suspected of terrorism, who cannot be removed from the UK, violates the Human Rights Act of 1998.

The International Committee of the Red Cross established several requirements that should be met by States if they wish to employ administrative detention within their jurisdictions. The are as the following: (i) administrative detention is an exceptional measure; (ii) it does not substitute criminal proceedings; (iii) it can be ordered only on the case-by-case bases without discrimination; (iv) it is of temporary nature – may be used only as long as the grounds for it exist; (v) it must be in conformity with the principle of legality.[25]

Administrative detention causes harm also to the right of individuals to have a fair trial. Thus, besides the above-mentioned requirements, certain due process rights must be provided, too. The issue of the appropriate due process will be discussed in the third chapter of this thesis.

[24] See A & Others v Secretary of State, [2004] UKHL 56
[25] Supra, note 12, p. 380-383

1. 1. 2 Administrative Detention under International Law

Administrative detention constitutes a grave restriction of the right to personal liberty and as such cannot be employed as an ordinary measure. It is permitted only via limitation of the right to liberty in conformity with IHRL or as a measure during armed conflicts or in the occupied territory in accordance with IHL. There are different requirements in each of the two branches of international law for the administrative detention to be permitted.

The right to personal liberty is one of the fundamental human rights and one of the basic values of democratic societies recognised by all the major human rights treaties. As a right of the first generation of human rights, it is set forth (among others) in the International Covenant on Civil and Political Rights (the ICCPR)[26] or in the ECHR[27]. It is also included in national constitutions and acts, for example, the Fourth, the Fifth and the Fourteenth Amendment of the US Constitution via due process clauses.

This right is even more significant when we take into account its relation to other human rights. It is inevitable for enjoying of the right to life, the right to freedom from torture or the right to privacy. However, even if IHRL acknowledges such an importance of this right, it acknowledges that certain grounds for its limitation exist, too. The right to liberty was never considered to be absolute. Indeed, the international human rights treaties provide for procedural safeguards of individuals during their arrest and detention. Therefore, it can be deduced that the limitation or the restriction of the right to liberty is permitted.

Under Article 9(1) of the ICCPR, States must comply with the requirements of non-arbitrariness and lawfulness when restricting the right to liberty. They should be met in all

[26] See Article 9(1) ICCPR: "Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law."
[27] See Article 5(1) ECHR: "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: [...]"

kinds of arrest or detention. Typical examples of detentions outside the criminal law involve those stemming from drug addiction, mental illness, educational causes and aims, and immigration law.[28] The fact that all deprivations of liberty must comply with the above-mentioned requirements, whether in criminal cases or in other cases, was emphasized in General Comment 8 on Article 9.[29] By analogy, it can be deduced that they are also applicable to the regime of administrative detention. Even if it was not deducible, paragraph 4 of the General Comment 8 explicitly states the applicability of Article 9 (1, 2, 4 and 5) to preventive detention used for national security reasons.[30]

The notion of *'non-arbitrariness'* seems to be quite ambiguous. It can be interpreted as the requirement that detention must be reasonably necessary to satisfy a legitimate government's interest. The Human Rights Committee in its consideration of a communication (*Van Alphen v the Netherlands*) examined the term of arbitrariness of deprivation of liberty. It was of the opinion that the meaning arbitrariness within Article 9 of the ICCPR is broad. It contains "elements of inappropriateness, injustice, lack of predictability, [...] remand into custody must be necessary in all circumstances [...]".[31] In other case (*A v Australia*), the Committee held that the proportionality principle is also an element which is very relevant. Detention may be considered arbitrary if in light of all circumstances of the case it is considered not to be necessary.[32] The Human Rights Committee considers freedom from arbitrary detention to be a norm *ius congens*.[33]

[28] See Scott N. Carlsson, Gregory Gisvold: Practical Guide to the International Covenant on Civil and Political Rights, Transnational Publishers, Inc., 2003, p. 82
[29] See Human Rights Committee General Comment 8 (Sixteenth session, 1982): Article 9: Right to Liberty and Security of Persons, U.N. Doc. HRI/GEN/1/Rev.6 at 130, paras. 1-4
[30] Ibid., para. 4
[31] See Hugo van Alphen v. The Netherlands, Communication No. 305/1988, 15 August 1990, para. 5.8
[32] See A v Australia, Human Rights Committee Communication No. 560/1993, 3 April 1997, para. 9.4
[33] See Human Rights Committee General Comment 24 (Fifty-second session, 1994): Issues Relating to Reservations Made Upon Ratification or Accession to the Covenant and Optional Protocols, UN Doc. CCPR/C21/Rev.1/Add.6, para. 8

The requirement of *'lawfulness'* means that the detention must be based on law. National 'detention laws' should determine the circumstances, under which an individual may be detained, prescribe the procedure which must be complied with and also procedural safeguards available to detainees.

Another provision applicable to administrative detention is Article 10(1) of the ICCPR. It requires that everyone deprived of his liberty shall be treated in humane way and with respect for the inherent dignity of the human being. This provision complements the ICCPR's Article 7 ban on torture and other ill-treatment.[34]

The regime of administrative detention must be in conformity not only with human rights instruments of a binding character (ICCPR, ECHR, CAT[35] etc.) but also with instruments of non-binding character. The *UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* constitutes one of such instruments. It was adopted by a resolution of General Assembly of the United Nations Organization (the UN).[36] Even though it is not binding upon States, it serves the role of a model with general principles which should be provided as the minimum. The wording of the document's title ('...Any Form of Detention...') indicates that the *UN Body of Principles* apply also to administrative detentions. Individual principles require e.g. humane treatment of detainees[37]; detention to be either ordered or subject to control by a judicial or other authority[38]; or, assistance of a counsel.[39]

[34] See Human Rights Committee General Comment 21(Forty-fourth session, 1992): Replaces general comment 9 (concerning humane treatment of persons deprived of liberty (Article 10)), U.N. Doc. HRI/GEN/1/Rev.6 at 153, para. 3
[35] See The United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the Resolution of GA UN 39/46 of December 1984
[36] See A/RES/43/173, 9 December 1988
[37] Ibid., Principle 1
[38] Ibid., Principle 4
[39] Ibid., Principle 17

As regards the treatment and conditions in detention, the *UN Standard Minimum Rules for the Treatment of Prisoners*[40] should apply. The document contains provisions on registration of prisoners in places of detention[41], clothing and bedding[42], or discipline and punishment.[43]

1. 1. 2. 1 States of Emergency

International human rights treaties allow for limitations of certain human rights. Under the ICCPR, some of them may be restricted if the requirements in article in which they are set forth are met. For example, the freedom of expression - Article 19(2) – may be limited if the restrictions are provided by law and necessary for fulfilling legitimate aims (respect of the rights or reputations of others; the protection of national security or of public order; protection of public health or morals).[44]

The ICCPR also contains a general derogation clause in its Article 4. It permits the States Parties to the Covenant to derogate from their human rights obligations in the event of emergency situation by declaring a state of emergency.[45] State of emergency can be defined, for example, as "a situation of exceptional and actual or imminent danger which threatens the life of the nation."[46] Situations justifying derogations include in principle: political crises (e.g. war, internal unrest), public or natural disasters, and economic crises.[47]

Administrative detention as a means of deprivation of liberty is sometimes necessary for the protection of State security. It is a means which is of very exceptional nature because of the

[40] Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977
[41] Ibid., para. 7
[42] Ibid., paras. 17-19
[43] Ibid., paras. 27-32
[44] See Article 19(2) ICCPR
[45] Ibid., Article 4
[46] See Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights, Annex, UN Doc E/CN.4/1984/4 (1984), para. 39
[47] See Jaime Oraa: Human Rights in States of Emergency in International Law, Clarendon Press, 1992, p. 31

inherent violations of personal liberty and fair trial (due process) rights. Thus, it can be employed only in a state of emergency officially proclaimed in conformity with domestic law. Administrative detention is used to protect the national or public security. It can be deduced that the emergency situation in which it occurs is usually an armed conflict or occupation of territories.

States intending to make derogations under Article 4 are obliged to meet several requirements. The existence of the public emergency threatening the life of the nation must be *officially proclaimed* as prescribed by domestic law – emergencies may not be secret.[48] The Secretary General of the UN shall be *notified* about the provisions which were derogated from and about reasons for doing so.[49] The measures by which the State derogates from its obligations shall be '*strictly required by the exigencies of the situation*', *non-discriminatory* and *not inconsistent with other obligations under international law.*[50]

It must be noted that not all human rights can be derogated from. The ICCPR contains a list of non-derogable rights in Article 4(2). The UN General Comment No. 29 states that also elements of certain fundamental rights are non-derogable. They include, for example, the humane treatment and respect for dignity of persons detained (Article 10(1)); prohibition on taking hostages and of unacknowledged detention; or, protection of the minority rights.[51]

The determination whether an emergency threatening the life of the nation exists is left upon discretion of the State intending to make a derogation. However, this discretion does not remain unchecked. The notification sent to the UN Secretary General serves the purpose of

[48] Supra, note 46, at 42-43
[49] Ibid., p. 44
[50] See Article 4(1) ICCPR
[51] See Human Rights Committee General Comment 29 (Sixty-first session, 2002): States of Emergency (Article 4), CCPR/C/21/Rev.1/Add.11, 31 August 2001, para. 13

monitoring, by the UN Human Rights Committee and other States Parties, of the compliance with the Covenant.[52]

The aim of the State which made the derogation should be the restoration of the state of normalcy.[53] No permanent emergencies are allowed. Thus, the adopted measures, because of which the derogation is made, should also be temporary. Another significant characteristic of derogating measures is their proportionality. It is expressed in words 'strictly required by the exigencies of the situation' in Article 4 of the ICCPR. The proportionality requirement is concerned with the duration, geographical coverage and material scope of the state of emergency itself and also of the measures adopted.[54]

If limiting the liberty of a person, the government (or the relevant person, administrative body) should balance the interests in conflict – the national or public security on the one hand, and the personal liberty on the other. The balancing act is usually difficult to carry out if the national security is at stake. As Professors Cole and Dworkin argued, instead of deciding how to weigh our liberties with our security, we are balancing others' liberties for our security.[55]

One of the features of state of emergency is that the powers of the Executive during emergencies, especially in times of war, are more extensive. The other branches of state power have less influence. Constitutions and human rights must not be violated even during emergencies and it is the role of courts to safeguard them.

David Dyzenhaus criticizes courts which are reluctant to interfere with the Government's decisions and their use of the 'political questions doctrine', saying that some matters are not

[52] Supra, note 46, para. 17
[53] Supra, note 51, para. 1
[54] Ibid., para. 4
[55] Quoted In: Vincent Joel Proux: If the Hat Fits, Wear It, If the Turban Fits, Run for your Life: Reflections on the Indefinite Detention and Targeted Killing of Suspected Terrorists, In: Hastings Law Journal, May 2005, p. 896-897

justiciable. He says that judges sometimes, instead of finding that governmental action goes beyond the law, leave the issue upon the discretion of the Executive.[56]

Israel is a State Party to the ICCPR. It has signed the Covenant in 1966 and ratified in 1991.[57] As there has been a state of emergency since 1948, Israel has derogated from Article 9 when ratifying the Covenant. It considered such derogation necessary because since it was established, Israel "has been the victim of continuous threats and attacks on its very existence as well as on the life and property of its citizens. "[58]

The United States are also a State Party to the Covenant which they signed in 1977 and ratified in 1992.[59] The state of emergency was proclaimed by the President Bush on 14 September 2001.[60] However, the Secretary General of the UN has not obtained so far any notice of derogation from provisions of the ICCPR by the US Government.

1. 1. 2. 2 Armed Conflicts

Administrative detention is a measure which has been primarily used under IHL. Even in armed conflicts it is considered to be a grave intrusion into personal liberty. The possibility of detaining persons is foreseen by the GCs. Geneva Convention III[61] permits the detention of combatants and affords the prisoner of war (the POW) status to captured combatants. Article 4 of GC III sets the scope of the term combatant. If doubts exist whether the person who committed a belligerent act and was captured is a combatant or a civilian, special tribunal for determining the status of that person should be convened.[62]

[56] Supra, note 13, p. 18-19
[57] See Status of ratification of the ICCPR, UN Treaty Collection, available at: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en
[58] Id.
[59] Id.
[60] See Proclamation 7463: Declaration of National Emergency by Reason of Certain Terrorist Attacks, 14 September 2001
[61] See the Geneva Convention (III) relative to the Treatment of Prisoners of War, Geneva, 12 August 1949
[62] Ibid., Article 5(2)

However, in this thesis, the focus will be rather on administrative detention of civilians. For this reason, Geneva Convention IV[63] is applicable here. It includes, among others, rules on detention of civilians during the times of armed conflict and on detention of residents of the territories occupied by an Occupying Power.

Administrative detention, together with assigned residence, is considered to constitute the measures with maximum level of severity that can be applied against persons protected by GC IV.[64] IHL prohibits collective penalties[65] and because of this prohibition, all cases must be examined separately according to specific circumstances.

The grounds for administrative detention must be 'absolutely necessary' for the protection of security of the State whose authorities employed the measure.[66] Civilians administratively detained are entitled to have their detention reviewed 'as soon as possible by an appropriate court or administrative board'. If the detention is upheld, periodic review (at least twice a year) is afforded to the detainee.[67] Read in the light of Article 5 of GC IV, persons detained must be released if the security reasons do not require the detention any more.

Similarly, Article 78 of the GC IV allows for detention of residents of the occupied territories. It is once again the strictest measure possible and must be necessary for 'imperative reasons of security'.[68] The procedures shall involve the right to appeal and periodic review (once in six moths, if possible) by a 'competent body'.[69] GC IV further deals with the conditions in detention and with the treatment of detainees.[70] It contains numerous provisions on that issue. The detainees are entitled to food, clothing, hygiene, religious practices etc.

[63] See the Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949
[64] Ibid., Article 41(1)
[65] Ibid., Article 33(1)
[66] Ibid., Article 42(1)
[67] Ibid., Article 43(1)
[68] Ibid., Article 78(1)
[69] Ibid., Article 78(2)
[70] Ibid., Part III Section IV

More rules on administrative detention during armed conflicts can be found in Additional Protocols to the GCs. For example, Additional Protocol I (AP I)[71] gives the detainees the right to be informed promptly in the language he understands about the grounds for detention.[72]

Because of the relationship between IHL and IHRL which will be described in another sub-chapter, IHRL must be taken into account as well in relation to administrative detention in armed conflicts. Even if States are making derogations from their IHRL obligations, they must be in accordance with IHL rules. It is worthy to note that the requirements for treatment of detainees under GC IV are quite close, as regards protection, to the regime of IHRL. For example, the *UN Standard Minimum Rules for the Treatment of Prisoners* afford more or less similar standard.

As regards the two state jurisdictions examined in this thesis, both States have ratified the GCs. Israel signed them in 1949 and ratified them in 1951[73]. The US signed in 1949 and ratified in 1955.[74] Both countries are, therefore, bound by the provisions of the GCs.

1. 1. 3 Administrative Detention vis-a-vis Detention in Criminal Proceedings

Administrative detention should be used only when it is absolutely necessary to protect national security in emergency situations. It must not be used as a punishment for crimes. Those who committed crimes should be subjected to ordinary criminal procedures.[75] Criminal detention should have precedence over administrative detention.

[71] See Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977

[72] Ibid., Article 75(3)

[73] See Geneva Conventions of 12 August 1949 (list of signatories and ratifications), available at: http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=375&ps=P

[74] Id.

[75] See International Commission of Jurists: States of Emergency: Their Impact on Human Rights (A Comparative Study by the International Commission of Jurists), Geneva, 1983, p. 461

There are several differences between the regime of detention in criminal proceedings and the regime of administrative detention. While IHRL norms cover detention under criminal law in quite extensive way, administrative detention as such is not covered at all.

Administrative detention is a means which is not a permitted means of restriction of personal liberty in times of normalcy. It would constitute an arbitrary deprivation of liberty. Thus, if it is to be used, a state of emergency must exist and the State facing it must derogate from its human rights obligations or there must be an armed conflict. Detention in criminal proceedings may be used at all times and it is a permitted ground for restriction of personal liberty in IHRL provided that all requirements of relevant articles are fulfilled (e.g. person has committed a crime under criminal code; right to habeas corpus etc.). A person detained under criminal law must have access to due process rights (fair trial rights), too.

Administrative detention is a preventive (*ex ante*) measure. It is used to prevent suspected persons from threatening national or public security. Administrative proceedings in that case try to find out whether an individual poses a danger to security. Criminal detention is an *ex post facto* measure of punitive character. Criminal proceedings are used to ascertain whether an individual committed a criminal offence or not.[76]

If an individual is convicted as a result of criminal proceedings, he is imprisoned for a certain period of time and the grounds for his detention are usually not examined any more. On the other hand, administrative detention shall be reviewed periodically.[77]

Differences exist in relation to due process rights as well. Criminal proceedings afford individual more safeguards than administrative proceedings. The aim of these rights is to decrease the chance of wrongful conviction to minimum. The main idea is that if one innocent

[76] See Joanne Mariner: Indefinite detention of terrorist suspects, 2002, available at: http://writ.news.findlaw.com/mariner/20020528.html

[77] Supra, note 63, Article 43

person is convicted of committing a crime, it is worse that if some guilty persons are acquitted.[78]

Administrative detention regime operates under the opposite rationale. Protection of State security is put above all. Due process rights are seen as something that hinders the protection of security. However, the danger of the slippery slope effect is high and THE possibility of misuse as well.

The main differences regarding the two types of proceedings are that in administrative detention proceedings the evidence is often not disclosed; hearsay evidence is admitted; right to access to a counsel is restricted; detainees are not told the grounds for detention; proceedings are held in camera; cross-examination of witnesses may not be allowed etc. The chances to rebut the allegations of State or military authorities which order detention are very low. Unfortunately, administrative detention is used many times just because the State authorities are unable to provide sufficient evidence or is not willing to reveal its sources of evidence in criminal proceedings.

1. 2 Unlawful Combatants in International Humanitarian Law

As this thesis is focused on the issue of administrative detention of unlawful combatants, it is very important to understand the content of the term 'unlawful combatant'. Unlawful combatants have recently become subjects to administrative detention mainly in Israel and in the United States. It is necessary to note, that even though the main provisions governing the regime of detention of unlawful combatants are those of IHL, the notion itself cannot be found in any of the GCs.

[78] See Robert Chesney & Jack Goldsmith: Terrorism and the Convergence of Criminal and Military Detention Models, In: Stanford Law Review, February 2008, p. 1088

There are two groups of people generally recognized by IHL – combatants and civilians. Combatants are persons who fulfil the criteria of Article 4 of the GC III and Article 41 of the AP I and are entitled to the POW status if captured. They are allowed to take direct part in hostilities.[79] The civilians are persons not described in those articles and they must not be targeted. However, this protection remains only for such time as they do not participate directly in hostilities.[80]

During armed conflicts, the principle of distinction applies[81] as one of the fundamental principles of IHL. So to which group do the unlawful combatants belong? The prevailing view among scholars is that unlawful combatants for a sub-group of civilians.[82] Also the wording of AP I suggests that by describing all persons who do not fulfil the criteria for combatants as civilians.[83]

Unlawful combatants can be defined as e.g. "all persons taking a direct part in hostilities without being entitled to do so and who therefore cannot be classified as prisoners of war on falling into the power of the enemy."[84] Because they are not combatants within the meaning of GC III, they are not entitled to the POW status as lawful combatants. Furthermore, as they take part in hostilities, they loose protection afforded to civilians.[85] They become military targets and subjects to lawful attacks by combatants. However, they may be attacked only during their participation in hostilities. They may be subjected to detention either until the end of hostilities or until the end of prison term (if convicted under criminal law).

Yoram Dinstein does not recognize that unlawful combatants are in fact a sub-group of civilians. He denies them the POW status, too, as he claims that being a lawful combatant is a

[79] Supra, note 71, Article 43(2)
[80] Ibid., Article 51(1)(3)
[81] Ibid., Article 48
[82] See e.g., Knut Ipsen, In: Dieter Fleck (ed.): The Handbook of Humanitarian Law in Armed Conflicts, Oxford University Press, 1995, p. 301
[83] Supra, note 71, Article 50(1)
[84] Supra, note 4, p. 46
[85] Supra, note 71, Article 53(1)

condition *sine qua non* for granting the POW status. He relies on customary IHL which, he states, sanctions "blurring the lines of division between combatants and civilians".[86]

As regards civilians, three groups can be distinguished – civilians who directly participate in hostilities; civilians who do not participate directly in hostilities but still pose a threat to national security; and, civilians who do not pose a threat to national security ('innocent civilians').[87] Under the GCs, only the first group may be targeted during an armed conflict. Both the first and the second group may be detained because of the threat to the State's security which is the rationale for detention of civilians in GC IV.

However, under the above-mentioned definition, only the first group satisfies its requirements. For a person to be considered to participate directly in hostilities, sufficient causal relationship between a particular activity and the harm done to the enemy must exist at the time and place where the activity was carried out.[88] Other activities which can be described as threatening security include subversive activities or actions assisting directly to the enemy.[89]

Upon capture of an individual, in case of doubt about his status, Article 5(2) of GC III should apply and tribunals should be established to determine status of the individual. Lawful combatants, when captured, may be tried only for war crimes, crimes against peace or crimes against humanity. Unlawful combatants may be subjected to criminal proceedings as well. The opinions, whether they can be prosecuted for all their actions or just for those during which they were captured, differ.

In the past, the term 'unlawful combatant' was used to designate those who during armed conflicts were involved in secret operations - espionage, sabotage, or guerrilla warfare. The

[86] Supra, note 6, p. 249
[87] See Ryan Goodman: The Detention of Civilians in Armed Conflict, In: American Journal of International Law, vol. 103, 2009, p. 51
[88] See Yves Sandoz, Christophe Swinarski & Bruno Zimmermann (eds.): Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, Martinus Nijhoff, 1982, p. 516
[89] Ibid, p. 258

targets of these unlawful combatants were of military nature which means that they complied with the principle of distinction applied in IHL. What made their actions unlawful was the way in which they were carried out – without lawful authority.[90]

Nowadays, the term is used in relation to terrorists and civilians who participate in hostilities. What makes their actions unlawful is that terrorists do not distinguish between military and civilian targets and they attack also during times of peace. Civilians who participate in hostilities are designated as unlawful combatants because their participation is not authorized by IHL if they do not fulfil the criteria of combatants under GC III. However, it must be noted that IHL foresees the participation of civilians in hostilities and sanctions it.[91]

GC IV contains several provisions which may be considered to be applicable to unlawful combatants. Article 5 (1) states that civilians who are 'definitely suspected' of hostile activities against the State's security, or those who engaged in such activities, may be deprived of such rights under GC IV whose exercise would be against the interests of security of the State.[92] As the actions of unlawful combatants are threatening the state security, they are also subject to administrative detention regimes established by GC IV. For more detailed description, look back to sub-chapter 1. 1. 2. 2.

If some civilians are deprived of their rights, they still must be treated with humanity. If they face trial, they must not be deprived of due process prescribed by GC IV. The rights deprived of should be re-gained as early as possible, if consistent with the State security.[93] The general protection of all civilians under all circumstances is complemented by Art. 27 of GC IV

[90] See Michael H. Hoffman: Quelling Unlawful Belligerency: The Juridical Status and Treatment of Terrorists under the Laws of War, In: Israel Yearbook on Human Rights, vol. 31, 2001, p. 168
[91] Supra, note 71, Article 51(1)
[92] Supra, note 63, Article 5(1)
[93] Ibid., Article 5(3)

which contains, among others, prohibition of discrimination and protection against all kinds of violence.[94]

In any event, if unlawful combatants do not benefit from better treatment under GC IV, Article 45(3) of AP I refers to the protection of Article 75 of AP I, applicable at all times. It contains fundamental guarantees established as the minimum protection of persons without any distinction.[95] It is considered to reflect customary IHL and thereby it is applicable also to States which did not ratify AP I. Common Article 3 of the GCs is also reflective of customary IHL and applicable to unlawful combatants.

For all the reasons explained in this sub-chapter it is clear that unlawful combatant are protected by IHL and the minimum safeguards applicable to them are provisions of Common Article 3 of the GCs and of Article 75 of the AP I.

1. 3 International Humanitarian Law vs International Human Rights Law

IHL and IHRL are different as regards their origin but both share one goal – protection of human beings. Because the regime of administrative detention of unlawful combatants is based on both IHRL and IHL, it is important to clarify the relationship between the two branches of international law during armed conflicts.

The International Court of Justice (the ICJ) dealt with the relationship of the branches in its two advisory opinions. The ICJ opinions support those views which say that even though IHL and IHRL have overlapping application, they are applied cumulatively.

First, in the *Advisory Opinion on the Legality of Nuclear Weapons*, the ICJ stated that the protection of human rights afforded by the ICCPR does not cease to exist during armed conflicts (except Article 4 derogations). The relationship between IHL and IHRL was

[94] Ibid., Article 27
[95] Supra, note 71, Article 75

described as lex specialis versus lex generalis.[96] Lex generalis should be in times of war interpreted in the light of lex specialis.

Secondly, the *Advisory Opinion on the Palestinian Wall* further elaborated on the issue:

> As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law.[97]

In this relation, some scholars state that the relationship between IHL and IHRL should not be interpreted neither as separation nor as complementary, but as cumulative. The aim of such interpretation is to provide the most effective protection to all human beings at all times.[98]

The fact that IHL and IHRL have overlapping scope is reflected in derogation clauses of the international human rights instruments, too. Article 4(1) of the ICCPR states that the States Parties to the Covenant may derogate from human rights obligations only by measures not inconsistent with their other obligations under international law. The other obligations include the provisions of IHL. The UN Human Rights Committee in its General Comment No. 29 confirmed that during an armed conflict, IHL becomes applicable and shall prevent, together with Article 4 and 5 of the ICCPR, the abuse of emergency powers of a State.[99]

In the field of IHL the Common Article 3 of the GCs is considered to contain rules which shall always be applicable. Also the so-called Martens Clause, which was considered to reflect the minimum humane treatment during armed conflicts in the past, hints at the type of relationship. The interpretation of IHL should be made with regard to 'the principles of

[96] See Legality of the Threat or Use of Nuclear Weapons (ICJ Advisory Opinion) 8 July 1996), para. 25
[97] See Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (ICJ Advisory Opinion), 9 July 2004, para. 106
[98] See e.g. Hans-Joachim Heintze: On the Relationship between Human Rights Law Protection and International Humanitarian Law, In: International Review of the Red Cross, December 2004, Vol. 86, No. 856, p. 794
[99] Supra, note 51, para. 3; see also para. 9

international law derived from established custom, from the principles of humanity and from the dictates of public conscience'.[100] Article 72 of AP I informs that the provisions from the same section are additional to other applicable international law norms on protection of the fundamental rights in times of international armed conflicts.[101]

However, there are some legal issues as regards the applicability of human rights law in armed conflicts. They include the extra-territorial applicability of IHRL and the jurisdiction of the international human rights bodies in relation to cases involving hostilities.[102]

The question whether IHRL applies outside the territory of the State is an important one because military forces of States during armed conflicts often act outside own territory. The ICCPR obliges the States Parties to respect and to ensure the rights set forth in it to all individuals within their territories and subject to their jurisdiction without discrimination.[103] Obviously, the primary jurisdiction of the States is territorial. However, individuals may get under a State's jurisdiction also outside its territory. Thus, the question arises whether States must respect and ensure the ICCPR rights in such situations, too.

The ICJ's *Advisory Opinion on the Palestinian Wall* touched, among others, upon the issue of the extra-territorial application of the ICCPR. It looked at the object and purpose of the Covenant, the *travaux preparatoires* and the case-law of the Human Rights Committee and concluded that the ICCPR applies to actions of a State outside its territory by which it exercises jurisdiction.[104]

[100] See the Preamble of the Hague Convention IV Respecting the Laws and Customs of War on Land, 18 October 1907; the so-called Martens Clause is also reflected in Additional Protocol I, Article 1(2)
[101] Supra, note 71, Article 72
[102] See Noam Lubell: Challenges in Applying Human Rights Law in Armed Conflict, In: International Review of the Red Cross, December 2005, Vol. 87, No. 860, p. 737
[103] See Article 2(1) ICCPR
[104] Supra, note 97, para. 111

The General Comment No. 31 of the Human Rights Committee followed the same approach. It specified that the obligations of States under the Covenant extend to all people within their power or effective control.[105]

As regards the international human rights supervisory bodies, they do not have the jurisdiction to decide on violations of IHL. However, as IHRL applies during the armed conflicts, they retain the jurisdiction at least in this respect. They have also the power to scrutinize derogations made by States and whether they fulfil the necessary criteria.[106] The norms of IHL may be used also as a means of interpretation.

[105] See Human Rights Committee General Comment 31 (Eightieth session, 2004): The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add.13, para. 10
[106] Supra, note 102, p. 742

II. Scope of the Regimes of Administrative Detention in the United States and Israel

2. 1 Administrative Detention in Israel

Since no constitution has been adopted in Israel so far, Knesset started in 1958 to adopt basic laws with the content which can be usually found in constitutions.[107] The right to liberty of a person in Israeli law has basis in the Basic Law: Human Dignity and Liberty from 1992. Section 9 reads as following: "There shall be no deprivation or restriction of the liberty of a person by imprisonment, arrest, extradition or otherwise."[108]

In Israel, administrative detention is a measure which has been frequently used since the State of Israel was established on 14 May 1948. It exists under three different regimes (laws): the Emergency Powers (Detention) Law (the EPDL)[109], the Military Order No. 1591 (the MO 1591)[110] and the Incarceration of Unlawful Combatants Law (the IUCL)[111].

Administrative detention serves to protect national or public security. However, the grounds for detention are defined quite extensively. The extensive interpretation of laws caused that the Israeli authorities have used administrative detention against so-called 'prisoners of conscience' who have been held just because they exercised their rights to freedom of expression and association freely and non-violently.[112]

The Human Rights Committee has already expressed its opinion that administrative detention in Israel is used frequently in various forms. The restrictions on access to counsel and on disclosure of full reasons for the detention make the judicial review less effective. Hence, the

[107] See Knesset website: Basic Laws – Introduction, available at: http://www.knesset.gov.il/description/eng/eng_mimshal_yesod.htm
[108] See Basic Law: Human Dignity and Liberty (5752-1992), Section 9
[109] The Emergency Powers (Detention) Law (5739-1979)
[110] The Military Order No. 1591 Regarding Administrative Detention (Temporary Order) (Judea and Samaria) (5767-2007)
[111] The Incarceration of Unlawful Combatants Law (5762-2002)
[112] See Amnesty International: Administrative detention: Despair, uncertainty and lack of due process, available at: http://www.amnesty.org/en/library/info/MDE15/003/1997

derogation from Article 9 (of the ICCPR) goes further than what is viewed to be permissible.[113]

2. 1. 1 The Emergency Powers (Detention) Law

The regime of administrative detention under the EPDL is an emergency one which is dependent on the existence of the state of emergency in Israel.[114] The state of emergency was declared straight after Israel was established as a result of Arab-Israeli war and has been permanent since then. Under the Basic Law: Human Dignity and Liberty, during states of emergency, rights set forth in it may be restricted or denied for a 'proper purpose', for a period and to an extent not greater than required.[115]

Requirements for declaration of a state of emergency and for adopting emergency regulations can be found in Basic Law: Government[116] from 2001. Knesset is the body to assess whether a situation of public emergency exists in Israel and proclaim its existence either on own or on the Government initiative.[117] The state of emergency may be proclaimed for a period not longer than one year; however, it can be renewed.[118] If the situation is urgent and it is not possible to convene the Knesset, the Government has the power of proclamation itself. The validity of such proclamation expires after 7 days, unless the Knesset affirms or revokes it.[119] The state of emergency in Israel has been renewed year after year and various scholars are of the opinion that emergency became permanent - 'normal' state of affairs in Israel.[120]

[113] See Concluding Observations of the Human Rights Committee: Israel, 21 August 2003, CCPR/CO/78/ISR, (Concluding Observations/Comments), Article 12
[114] Supra, note 109, Section 1
[115] Supra, note 108, Section 12
[116] See the Basic Law: Government (5761 – 2001)
[117] Ibid., Section 38(a)
[118] Ibid., Section 38(b)
[119] Ibid., Section 38(c)
[120] See e.g. Oren Gross: Providing for Unexpected: Constitutional Emergency Provisions, In: Israeli Yearbook on Human Rights, Vol. 33, 2003, p. 13-15

The predecessors of the EPDL in relation to administrative detention were the Defense (Emergency) Regulations, specifically Regulation 111 - Detention. They were adopted in 1945, during the years of the British Mandate in Palestine and incorporated into Israeli law.[121] The Regulation 111 – Detention gave a Military Commander the authority to order detention of an individual for a period up to one year in the place specified in the order.[122] It was superseded by the EPDL in 1979.

The EPDL applies in the territory of Israel proper (not in the occupied territories). This law serves as the basis for restrictions on the right to personal liberty which would be considered normally as arbitrary deprivation of liberty. Therefore, the State of Israel has derogated from its obligations under Article 9 of the ICCPR. Historically, four kinds of persons have been detained under the EPDL regime: (i) foreign individuals, (ii) Israeli Arabs, (iii) orthodox right-wing Jews, and (iv) political opposition activists.[123]

Administrative detention is ordered by the Israeli Minister of Defence when he "has reasonable cause to believe that reasons of state security or public security require that a particular person be detained [...]."[124] The Chief of the General Staff, if he has 'reasonable cause to believe' that conditions are met for the Minister of Defence to issue an order against an individual, may order detention of such individual for a period not longer than 48 hours. The period of time for which administrative detention is ordered can be found in the order itself and shall not exceed six months.[125] The duration of the detention may be extended by the Minister of Defence to another six-month period if he has 'reasonable cause to believe'

[121] See David A. Kirshbaum: Israeli Emergency Regulations & the Defense (Emergency) Regulations of 1945, available at: http://www.israellawresourcecenter.org/emergencyregs/essays/emergencyregsessay.htm
[122] See Subregulation 1 of the Regulation 111 – Detention of the Defense (Emergency) Regulations 1945
[123] See Ales Hanek: Constitutional Aspects of Administrative Detention in Israel since October 2000 (thesis), p. 70
[124] Supra, note 109, Section 2(a)
[125] Id.

that the threat to security persists and the detention is required.[126] The number of such extensions is not limited and hence, theoretically, administrative detainees may be held indefinitely.

Once an individual is arrested, he shall be brought within 48 hours from his arrest before the President of a District Court who may confirm the order, set it aside or shorten the period of detention.[127] Persons administratively detained have their detention orders periodically reviewed by the President of the District Court. It shall happen so at least once within three months.[128] Detainees also have the right to appeal both the initial and the review decisions. Such appeal shall be filed to the ISC and shall be heard by the Court sitting as a single judge.[129]

As was mentioned above, Israel derogated from Article 9 of the ICCPR. However, it must be noted that the use of administrative detention under the EPDL raises further human rights issues. There are serious suspicions that during the interrogation detainees are subjected to torture or other ill-treatment.[130] There are also intrusions into the due process rights of the persons against whom the detention order was issued. The hearings are held *in camera*.[131] The law also allows for 'deviations from rules of evidence', if the District Court's President is satisfied that it will help to discover the truth and to handle the case justly.[132] Evidence may be accepted without the presence of the detainee or his counsel and without the disclosure to them, if the President is of the opinion that the disclosure would threaten state or public security.[133]

[126] Ibid., Section 2(b)
[127] Ibid., Section 4(a)
[128] Ibid., Section 5
[129] Ibid., Section 7(a)
[130] See e.g. Supra, note 112
[131] Supra, note 109, Section 9
[132] Ibid., Section 6(a)
[133] Ibid., Section 6(c)

One of the cases before the ISC in which the Court dealt with the EPDL was *John Does v Ministry of Defence.*[134] It is relevant also from the point of view of unlawful combatants because it was in response to the ruling in this case that the Knesset adopted the IUCL which will be analyzed further in the thesis.

2. 1. 1. 1 John Does v Ministry of Defence

The case is known also as the *Bargaining Chips* case. The petitioners, Lebanese citizens, were taken to Israel between the years 1986-1987 and sentenced in criminal trials. After their imprisonment under criminal law ended, they were kept in detention based on the deportation orders until the Minister of Defence issued administrative detention orders against them, in conformity with the EPDL. The orders were periodically renewed.[135]

However, John Does were not detained because they posed a threat to national security. They were kept in detention in order to serve as 'bargaining chips'/ hostages – Israel tried to negotiate the release of Ron Arad, a navigator of the Israeli army, who had been missing after his plane had crashed.[136] The ISC, sitting as the Criminal Court of Appeals, focused on question whether persons who do not pose a threat to security may be administratively detained as 'bargaining chips'. The Court's opinion was written by President of the ISC, Aharon Barak.

The largest part of the ruling is devoted to the analysis of the EPDL. The Court examined the authority of the Minister of Defence to order administrative detention and applied textual interpretation. It held that the notion of 'national security', as a ground for detention, is broad enough to include also situations where national security is endangered not by the detainee

[134] Supra, note 10
[135] Ibid., para. 1
[136] Ibid., para. 2

himself. The danger may also stem from the actions of other individuals or groups that may be impacted by the detention of that person.[137]

However, the textual interpretation is not the only approach to consider, thus the ISC went on to analyze the purpose of the EPDL. The subjective purpose (the legislator's intent) was alleged not to be clear as the Knesset minutes did not reveal whether or not the application of the EPDL is limited to persons who themselves posed a danger to national security.[138] Hence, the Court turned to the objective purpose of the EPDL.

The objective purpose (the purpose the law was intended to fulfil in Israeli society) was to be derived from the type and character of the law. The Court found two objective purposes: protection of national security and protection of human dignity and liberty. They were reflected in provisions limiting administrative detention regime only for the period of state of emergency and establishing judicial review.[139]

Because the two purposes collide, a balance must be struck between them. The Court came up with the holding that only those may be detained who themselves threaten national security. Detention of persons who pose no danger and who are held as 'bargaining chips' harms their dignity and liberty in 'substantive and deep' way. [140] For these reasons, the ISC ordered the release of the Lebanese hostages.

The *Bargaining Chips* case is important from different point of view, too. The judgment resulted in adoption of a new law – IUCL, under which two Lebanese citizens were held further. In relation to this, dissenting opinion of Justice Cheshin played an important role in introducing the term 'unlawful combatants' into the Israeli law. The opinion will be examined closer later in this thesis.

[137] Ibid., para. 12
[138] Ibid., paras. 12-13
[139] Ibid., paras. 14, 15
[140] Ibid., para. 19

2. 1. 2 The Military Order No. 1591

After the Six-day War in 1967, Israel has been occupying Palestinian territories (the Gaza Strip and the West Bank). The fact that the territories have been under Israeli occupation (meanwhile Israel withdrew from the Gaza Strip), and thus the Geneva Convention IV is applicable, was confirmed in the Advisory Opinion of the International Court of Justice, in which the Court, among others, analyzed the status of the territories:

> At the close of its analysis, the Court notes that the territories situated between the Green Line and the former eastern boundary of Palestine under the Mandate were occupied by Israel in 1967 during the armed conflict between Israel and Jordan. Under customary international law, the Court observes, these were therefore occupied territories in which Israel had the status of occupying Power. Subsequent events in these territories have done nothing to alter this situation.[141]

Administrative detention in Israel is ordered predominantly under the MO No. 1591.[142] It is very worrying because Article 78 of the GC IV clearly states that internment of residents of occupied territories is an extreme and exceptional measure. Even the ISC held that the exception in Article 78 must not be used as a general deterrent or against persons who are not dangerous any more.[143] The less frequent use of the other forms of administrative detention also shows that there are alternative means of protection of State security – criminal proceedings or home arrest.

The Military Order No. 1591 Regarding Administrative Detention is one of the military orders that have been issued by commanders of the Israeli army in the Palestinian occupied territories. It was adopted in 2007 and it is applicable to the West Bank (meaning the regions

[141] Supra, note 97,, para. 71
[142] Supra, note 1
[143] See Ajuri v Commander of Military Forces in the West Bank, HCJ 7015/02, para. 24

of Judea and Samaria), East Jerusalem excluded.[144] It refers to "special circumstances presently existing in the region" and states that "to ensure order and public safety in the region", it is necessary to resort to administrative detention.[145] It shall be valid until the commander of the Israel Defence Forces (the IDF) in the region decides otherwise.[146]

The MO 1591 had more predecessors. In 1970, the Military Order No. 378 was adopted which authorized the regional military commanders to issue administrative detention orders in occupied territories. In 1988, it was amended by the Military Order No. 1229 (for the West Bank) and the Military Order No. 941 (for the Gaza Strip).[147] None of them is valid any more. The MO No. 941 has not been in force since the Israeli withdrawal from the Gaza Strip in 2005. The MO No. 1229 was amended several times and eventually, it was replaced by the MO No. 1591 which has been the basis for administrative detention in the West Bank since then.

Administrative detention in the West Bank is ordered by the regional military commander of the IDF or a military commander authorized by him. "Reasonable cause to believe that reasons of security of the region or public security require that a particular person be detained" serves as the basis for administrative detention order.[148] The action must be necessary for imperative security reasons. The order is issued, similarly to the EPDL, for a maximum period of 6 months, and is subject to extension by the military commander if the security of the region or public security still require it.[149]

The wording of the detention's grounds in the detention order itself is ambiguous and uniform. The wording usually used is: "… because of his being a Hamas operative who

[144] See B'Tselem website: Administrative Detention – the basis for administrative detention in Israeli law, available at: http://www.btselem.org/english/Administrative_Detention/Israeli_Law.asp
[145] Supra, note 110, Preamble
[146] Ibid., Section 13(a)
[147] See Adameer website: Administrative detention, available at: http://www.addameer.org/detention/admin_deten.html
[148] Supra, note 110, Section 1(a)
[149] Ibid., Section 1(a)(b)

endangers the security of the region and its residents … .” The name of the enemy organization varies.[150]

Persons detained under the order of the military commander shall be brought before a military judge within 8 days from the time of his arrest, or released. The judge shall have at least the rank of major and has the power to cancel the order, confirm it or shorten the period of detention.[151] To cancel the order, the detainee must prove to the judge that the order is not based on objective security reasons, or that it was issued in bad faith or from irrelevant considerations.[152] However, even if the judge decides to cancel the order or shorten the period, but the representative of the military commander declares after such decision his intention to appeal, the judge may stay the implementation of the release order for up to 72 hours.[153]

The decision of the judge is subject to appeal to a judge of the Military Court of Appeals. He also possesses the power to stay the implementation of the release order upon the appeal of the representative of the military commander and the stay may last until the judge rules on the appeal.[154]

In relation to the rules of evidence, analogous rules apply as it is in the EPDL. The judge may accept evidence without the presence of the detainee or his representative and he may also decide not to disclose the evidence to them if the requirement is fulfilled that the disclosure would threaten public security or security of the region.[155]

Administrative detention under the MO No. 1591 and under preceding MOs has been the regime with the most detainees when compared to other regimes in Israel. It has been a

[150] See B’Tselem & Hamoked: Without Trial (report), October 2009, p. 19, available at: http://www.btselem.org/Download/200910_Without_Trial_Eng.pdf,
[151] Supra, note 110, Section 4(a)
[152] Ibid., Section 4(b)
[153] Ibid., Section 6(a)
[154] Ibid., Section 5, 6(b)
[155] Ibid., Section 7(c), 8(a)

measure which was used quite frequently in the occupied territories mainly during the so-called *Intifadas.* As it was explained above, GC IV applies to occupied territories and it prohibits collective punishment.[156] When we look at the numbers of detainees that have been detained in the territories, exactly the issue of collective punishment arises.

If we compare the two regimes of administrative detention which do not involve unlawful combatants, we can find some similarities but also some differences. The EPDL is dependent on the existence of a state of emergency, while the MO No. 1591 is dependent on the existence of military occupation of the West Bank. Both regimes give quite a huge amount of discretion to the Minister of Defence and the military commander, respectively. They assess whether an individual poses a threat, whether he should be detained and if so, for how long.

The General Security Service (the GSS) plays also an important role. It proposes to the military commander, against whom he should issue a detention order and for how long. The GSS also submits a summary of material gathered by intelligence. Often, the individual against whom the order is to be issued is handed over to the GSS for interrogation. Such detention 'for purposes of interrogation' usually lasts up to a few weeks.[157] The GSS plays crucial role also during review proceedings. It is its decision what kind of evidence will be used against the detainee. Upon claiming that disclosure of such evidence may threaten security, the evidence may become secret and the detainee will have no knowledge about it.

After the individual is arrested, and possibly interrogated by the GSS, he is brought before the judge. The difference here is twofold. According to the EPDL, the detainee is brought before the *President of a District Court* and it shall happen so within *48 hours* from the date of arrest. According to the MO No. 1591, the detainee is brought before a *military judge* within *8 days* from the day of his arrest.

[156] Supra, note 71, Article 75(2)(d)
[157] Supra, note 150, p. 11

As regards the possibility of appeal, both regimes provide for appeals to higher instances (the ISC and the Military Court of Appeals, respectively). However, the periodic review is to be found only in the EPDL, which means that it provides more frequent judicial review and one more instance of review.

2. 2 Administrative Detention in the US

The Bill of Rights of the Constitution of the US does not define the right to personal liberty as such. However, it does not mean that it is not recognized. It can be inferred from other provisions of the US Constitution. The Fourth Amendment protects persons against 'unreasonable searches'.[158] The Fifth and the Fourteenth Amendment (the Due Process Clauses) prohibit deprivations of liberty without due process.[159]

The US Constitution does not contain any general limitation provision. The permitted manners of restricting fundamental rights were formulated by the US SC. Limitation tests were developed in its jurisprudence and they are based on balancing of colliding interests.

The 'strict scrutiny' test is carried out in those cases in which limitations concern one of the fundamental constitutional rights, or they involve different treatment in relation to people of some race, ethnicity or religion. The Government usually loses (*Korematsu* case was one of the exceptions) when the Court carries out this type o scrutiny. A 'compelling governmental interest' must exist and the distinct treatment must be 'necessary to the accomplishment' of a legitimate purpose.[160]

[158] See The US Constitution: Fourth Amendment
[159] See The US Constitution: Fifth and Fourteenth Amendment
[160] See Legal Information Institute (Cornell University Law School): Strict Scrutiny, available at: http://topics.law.cornell.edu/wex/strict_scrutiny

The 'intermediate scrutiny' test is less demanding. It involves distinction based on e.g. gender. The Government must show 'important governmental objectives'. The measures adopted shall be 'substantially related to achievement of those objectives.[161]

The third type of test is the 'rational basis' scrutiny. It is used when no fundamental right is at issue and no 'suspect classification'. Distinct treatment must be required by 'legitimate' governmental interest and it must be 'reasonably' or 'rationally' related to it.[162] The Government usually passes this type of scrutiny and individual interests give way to the interests of the whole society (nation).

There is no derogation clause in the US Constitution except the suspension of the writ of habeas corpus in times of rebellion of invasion if the public safety reasons so require.[163] The constitutional habeas corpus was suspended only a couple of times, though. The most famous one was during the Civil War by President Abraham Lincoln. As the US SC held in *Ex parte Milligan* case:

> The Constitution of the United States is a law for rules and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances.[164]

However, in spite of the absence of a general derogation clause in the US Constitution, the right to liberty has been restricted in the US a number of times when the country faced public emergency. Such circumstances occurred during the American Civil War, World War II and recently during the WoT. Currently, administrative detention as a means of deprivation of

[161] Id.
[162] Id.
[163] See The US Constitution: Article 1 Section 9 Clause 2
[164] See Ex parte Milligan, 71 U.S. 2 (1866), para. 120

liberty is used against 'unlawful enemy combatants' detained in GTNM and elsewhere, and within the immigration law/ criminal law framework under the USA PATRIOT Act.

2. 2. 1 Evolution of Administrative Detention

Historically, administrative detention in the US has been used mainly against non-nationals. It was like that during World War II when it was used against the citizens of the enemy nations or US citizens of other ancestry. The US SC dealt with three famous cases of internment of US citizens who were, however, of Japanese origin.

After the attack of Japanese armed forces in Pearl Harbor, the US President Roosevelt issued a number of executive orders. One of them was the Executive Order No. 9066[165] by which he authorized military commanders to order restrictions on freedom of movement and personal liberty of persons of Japanese origin, irrespective of their citizenship, in the West Coast. The orders were based on the Enemy Alien Act which has been in force since 1798.[166] The law empowers the President in times of war, invasion or 'predatory incursion' by any foreign nation or government, to apprehend and remove 'all natives, citizens, denizens, or subjects of the hostile nation or government' as enemy aliens.[167] Unfortunately, the US courts were reluctant to go against the decision of the President when national security was at stake.

First of the three 'Japanese cases' before the US SC was *Hirabayashi v United States.*[168] It involved a violation of the curfew order by a student of the University of Washington, what was established as a misdemeanour. Even though, the internment was dealt with only in

[165] See Executive Order No. 9066 (Authorizing the Secretary of War to Prescribe Military Areas), 19 February 1942
[166] See Stefan Sottiaux: Terrorism and the limitation of rights : the ECHR and the US constitution, Oxford : Hart, 2008, p. 241
[167] See 50 USC, Section 21
[168] Supra, note 14

marginal way, the reasoning in this case is important in relation to those which followed. The petitioner claimed that Congress unconstitutionally delegated legislative powers to military commanders, and that the regulation (on curfew) issued by the military commander was discriminatory and violating the Fifth Amendment of the US Constitution.[169]

The US SC obviously did not want to be involved and left the exercise of war powers (i.e. also imposing of curfew orders) on the discretion of the Executive and Congress:

> Where, as they did here, the conditions call for the exercise of judgment and discretion and for the choice of means by those branches of the Government on which the Constitution has placed the responsibility of warmaking, it is not for any court to sit in review of the wisdom of their action or substitute its judgment for theirs.[170]

As regards the discrimination claim, the Court refused to reject the decision of the military commanders and Congress on application of the curfew against persons of Japanese ancestry as unsubstantiated. According to the Court, national security is endangered more by persons having the enemy's origin than by others. The curfew order was considered to be issued and applied 'within the boundaries of the war power'.[171]

[169] Ibid., at 1380
[170] Ibid., at 1382
[171] Ibid., at 1385-1386

2. 2. 1. 1 Korematsu v United States

The *Hirabayashi* ruling was followed by even more famous one – *Korematsu v United States*.[172] The case was decided in December 1944 and the opinion of the Court was delivered by Justice Black. Strong dissenting opinion was written by Justice Murphy.

The petitioner, Fred Toyosaburo Korematsu, was an American citizen of Japanese ancestry whose loyalty to the US was not in doubt. He was convicted of violation of an exclusion order of the Commanding General of the Western Command because he remained in San Leandro, California, a 'Military Area', from where all persons of Japanese origin were excluded by that order.[173] Excluded persons were supposed to appear in assembly centres from where they were moved and detained in relocation centres or conditionally released.

The opinion starts with condemnation of racial animosity. The Court noted that all limitations of civil rights of one racial group are suspicious but not all of them are unconstitutional. Those limitations which pass the most rigid scrutiny are allowed.[174] After these assertions, the Court went on to dismiss any racial prejudice and held that exclusion and subsequent detention of people of Japanese descent from the West Coast was justified because of the existing armed conflict between the US and Japan.

The US SC used the strict scrutiny test for the first time in this case to examine whether racial discrimination in restriction of rights was justified. The restriction passed the scrutiny. The Court used the reasoning from the *Hirabayashi* case to confirm once again that ordering the

[172] Supra, note 15
[173] Ibid., at 215-216
[174] Ibid., at 216

exclusion was within the war powers of the Executive and Congress. It deemed the exclusion order necessary because of the alleged danger posed by disloyal Japanese.[175]

Then, the US SC moved to examine the lawfulness of the detention in relocation and assembly centres. However, as Korematsu was not convicted of failing to report in assembly or relocation centre, but of his violation of the exclusion order, the Court did not find it necessary to rule on the detention regime.[176] It only dismissed the comparison to concentration camps and stated that all that it deals with is an exclusion order which is temporary and not based on racial animosity. The discretion was upon military commanders and the Court refused to declare that their actions were unjustified.[177]

The ruling in *Korematsu* is certainly an example of the 'ends justify means' approach. The Government claimed that it could not segregate loyal Japanese from disloyal and thus the exclusion was the only possibility. However, it constituted a collective punishment which cannot be justified. Because of a few persons, one whole racial group was affected. It is doubtful whether such restriction would pass the strict scrutiny standard nowadays. Dissenting Justice Murphy described the decision as "legalization of racism".[178] Another flaw was that the Court did not take into account that the imminence of the attack was quite low that time. The Court also failed to determine the lawfulness of detention of Japanese in assembly and relocation centres.

Korematsu ruling was eventually overturned in 1983. Based on the evidence confirming suppression, alteration and destroying of evidence by the US Government, the San Francisco

[175] Ibid., at 218
[176] Ibid., at 222
[177] Ibid., at 223-224
[178] Ibid., at 242

District Court vacated the original ruling.[179] However, it must be noted that the US SC ruling has not been overruled ever since.

On the very same day as *Korematsu* was decided, the US SC ruled also on the *Ex parte Mitsuye Endo* case.[180] The petitioner in his habeas corpus petition requested release from the detention in a relocation camp as she claimed (and it was affirmed by the Department of Justice and the War Relocation Authority) to be a loyal citizen with no charges against her and challenged the lawfulness of detention.[181] The Court thus could not avoid ruling on detention regime as it had done in *Korematsu*.

Neither the Executive Order no. 9066 nor the statute ratifying and confirming it[182] deal with the detention of persons. The order established the program of removal of certain persons from designated military areas, not their detention. The relocation centres were established only later after the order was issued.

The Court, however, refused to admit that any power to detain is lacking. It made an analogy. The Executive Order started the evacuation program which was aimed at disloyal persons from whom the threat of espionage or sabotage existed. Thus, loyal people may not be detained purely on the basis of their origin.[183]

Justice Murphy wrote again a powerful opinion. Although he concurred, he went further than Justice Douglas who wrote for the Court, and did not limit the prohibition of detention to

[179] See Robert T. Matsui: Legacy Project: Road to Redress and Reparations, available at: http://digital.lib.csus.edu/mats/timeline.php?item=16
[180] Supra, note 16
[181] Ibid., at 294
[182] See the Act of March 21, 1942, 56 Stat. 173, 18 U.S.C.A.
[183] Supra, note 16, at 302-304

loyal individuals. He stated that the detention of Japanese is an 'unconstitutional resort to racism' which can be justified by no military necessity.[184]

2. 2. 2 Administrative Detention within the US Territory

As it was illustrated above, administrative detention in the US has been used mainly against non-nationals. Nothing has changed after the 9/11 attacks. Both the indefinite detention of unlawful enemy combatants in GTNM and other detention camps, and the rest of the measures adopted in the aftermath of 9/11 are predominantly of discriminatory character and involve racial profiling and stereotyping. Although the Muslim and Arab communities were the main targets, all foreigners in the US territory as well as those planning to travel to US or live there were influenced.

Immigration laws were the means of persecution. The USA PATRIOT Act was passed in Congress in 2001. It amended the Immigration and Nationality Act[185] and established the so-called certification system, similar to that in the UK and Canada. It gave the Attorney General the power to certify aliens if they exercise terrorist activity or are engaged in other activity threatening national security.[186] Such aliens should be detained until their removal or until the Attorney General brings charges against for committing a criminal offence. The maximum period for which an alien may be detained before criminal charges are brought or criminal proceedings start is 7 days.[187]

The law here establishes administrative detention for the purposes of pre-trial interrogation for the period of one week without any trial or even judicial review. What is even worse, if

[184] Ibid., at 307
[185] See The Immigration and Nationality Act (8 U.S.C. 1101 et seq.)
[186] Supra, note 17, Section 412(a)
[187] Id.

the alien in question has not been removed and it is unlikely that he will be removed in 'foreseeable future', his detention may be prolonged for an additional period up to 6 months on the national security or public safety rationale.[188] The Attorney General reviews whether the reasons for certification exist once in six months.[189] The detention may be renewed for indefinite number of times and the detention itself hence may become indefinite. The only possibility to resort to higher instance is via habeas corpus proceedings.[190] The strong position of the Attorney General is obvious.

The USA PATRIOT Act also modified the definition of domestic terrorism in the US law. It criminalized harbouring and concealing of terrorists, modified penalties for acts of terrorism and amended the wording of the federal crime of terrorism.[191] It also reflected the heightened use of surveillance techniques and amended rules on disclosure of evidence obtained in such way.[192]

In relation to immigration law, the USA PATRIOT Act was applied almost immediately. At first, almost 1,000 persons were detained on immigration-related issues. Interrogation was employed widely and almost 5,000 immigrants – men, mostly of Muslim and Arab origin between the ages of 18 and 33, were interviewed regarding the 9/11 attacks even if there was no evidence that any of them has participated in attacks.[193] The interviewing of Muslims and

[188] Id.
[189] Id.
[190] Id.
[191] Ibid., Title VIII
[192] Ibid., Title II
[193] See Susan M. Akram & Kevin R. Johnson: U.S. Measures Against Terrorism: Civil Rights Impact, In: W. Benedek & Alice Yotopoulos-Marangopoulos: Anti-terrorist Measures and Human Rights, Brill/ Martinus Nijhoff, 2004, p. 139-141

Arabs gained frequency when the war in Iraq began. About 11, 000 persons were targeted for interviewing without any obvious criteria except the one of origin or race.[194]

The situation is comparable with the one of US citizens of Japanese ancestry. Even though there was no long-term internment ordered by the Executive as it was during World War II, particular group of people was targeted (profiling), interrogated, subjected to stricter surveillance and several persons were detained under immigration law rules and removed. Indeed, the majority of measures adopted establish discriminatory treatment on the basis of race or nationality.

2. 3 Unlawful Combatants in the Israeli Law

The notion of unlawful combatants has developed in a fast way in Israel. Justice Cheshin in his dissent in the well-known *Bargaining Chips* case used language very similar to the language that was used to describe unlawful combatants later on.

As it is known, the majority led by Chief Justice Barak held that administrative detention of Lebanese citizens for bargaining purpose is not lawful as they do not pose a threat to national security. Justice Cheshin, as one of the three dissenters, opposed the claim that no threat would exist if the Lebanese were released. He used terms as 'war' and 'enemy fighters' in relation to the conflict with Hezbollah and to the petitioners.[195] Cheshin also gave its opinion on status of the petitioners. He dismissed their designation as 'bargaining chips' or 'hostages'.

[194] See Anita Ramasastry: Operation Liberty Shield: A New Series of Interviews of Iraqi-Born Individuals in the U.S. Is The Latest Example of Dragnet Justice, available at: http://writ.news.findlaw.com/ramasastry/20030325.html

[195] Supra, note 10, dissenting opinion of Justice Cheshin, paras. 4-7

He rather described them as 'quasi prisoners of war'.[196] Such language cannot be found in the GCs, thus, they are outside the scope of protection afforded by the GCs.

The first ISC ruling in which unlawful combatants were mentioned for the first time was the *Targeted Killings* case.[197] The ISC affirmed that there are only two groups of people to be distinguished under IHL in armed conflicts: combatants and civilians. No such separate group of persons as unlawful combatants exists *per se*. Based on the rationale of Article 51(3) of AP I, unlawful combatants are civilians who lost protection from targeting for the time when they took direct part in hostilities. They do not enjoy the status of POW when captured.[198]

The Court determined (based on the US SC *Ex parte Quirin* case) that unlawful combatants may be tried for their participation in hostilities, judged, and punished.[199] However, they are not outside any protection of IHL. As the ISC stated:

> [...] unlawful combatants are not beyond the law. They are not "outlaws". God created them as well in his image; their human dignity as well is to be honored; they as well enjoy and are entitled to protection, even if most minimal, by customary international law.[200]

In the *Targeted Killings* ruling, the ISC focused on the issue of unlawful combatants only in relation to their targeting. For the purpose of their detention, the term unlawful combatant is broader in scope due to the law adopted by Knesset – the Incarceration of Unlawful Combatants Law which was upheld by the ISC in the *Plonim* case.

[196] Ibid., at para. 13
[197] Supra, note 9
[198] Ibid., paras. 26-28
[199] Ibid., para. 25
[200] Id.

2. 3. 1 Incarceration of Unlawful Combatants Law

The Incarceration of Unlawful Combatants Law was adopted in 2002 as the response to the ISC ruling in the *Bargaining Chips* case. The IUCL was initially employed to detain the Lebanese citizens after that case. In 2004, the last detainees were released and exchanged for hostages and bodies. Only four days after the ISC dismissed the petition to repeal the law[201], Israel declared the end of military government and withdrew from the Gaza Strip. The MO No. 941 serving as the basis for administrative detention had not been applied there any more. However, the Chief of General Staff issued orders under the IUCL against two Gaza Strip residents who had been detained under the MO No. 941 before.[202]

Since 2005, the IUCL has been used primarily against the inhabitants of the Gaza Strip. After its amendment in 2008, it allows large-scale arrests and administrative detentions. It created the third regime of administrative detention in Israel which is dependent on the existence of an armed conflict.

According to the 2009 unofficial statistics, the IUCL has been used to detain 54 persons so far. The Without Trial[203] report claims that 15 of them were Lebanese nationals and 39 were residents of the Gaza Strip. Most of them were detained during the Operation Cast Lead in 2009, under the new provisions of 2008 amendment to the IUCL.[204]

The definition contained in the IUCL is different from the one presented in the Targeted Killings case – its scope is broader. Under the IUCL, unlawful combatant is:

> a person who has participated either directly or indirectly in hostile acts against the State of Israel or is a member of a force perpetrating hostile acts against the State of Israel, where the conditions prescribed in Article 4 of the

[201] See 'Obeid v State of Israel et al., Criminal Application 3660/03
[202] Supra, note 150, p. 53
[203] Ibid., p. 52
[204] Id.

Third Geneva Convention of 12th August 1949 with respect to prisoners-of-war and granting prisoner-of-war status in international humanitarian law, do not apply to him.[205]

One of its major flaws is that it allows detention of individuals purely on the basis of affiliation – membership in a 'force perpetrating hostile acts' against Israel. The meaning of the term membership is ambiguous. The IUCL does not specify the scope of the term membership – whether it must be active membership or just support. As regards the other ground for designation as an unlawful combatant – participation in hostilities, the wording is not clearer as it does not define the direct or indirect participation.

Administrative detention under the IUCL is ordered by the Chief of General Staff under his hand. He may do so, if he has 'reasonable cause to believe' that: a) an individual held by state authorities is unlawful combatant; and b) his release would harm the state's security.[206] The powers of the Chief of General Staff may be delegated by him to any military officer at least of the rank of major- general.[207] The IUCL establishes also a temporary detention order which may be issued by a military officer of the rank of captain or above. It secures the detention of an individual suspected to be unlawful combatant until the Chief of General Staff decides on the matter.[208] It must happen so within 96 hours counted from when the temporary order was issued. Otherwise, the detainee must be released unless any other reason for his detention exists.[209]

Orders under the IUCL do not specify the period for which they are issued. It means that they can be valid for an indefinite period of time. Although the IUCL states that an administrative

[205] Supra, note 111, Section 2
[206] Ibid., Section 3(b)
[207] Ibid., Section 11
[208] Ibid., Section 3(a)
[209] Ibid., Section 3(c)

detention order shall include the reasons for detention, in practice the grounds are described in a very vague way. For example, an individual is designated as unlawful combatant because "existing intelligence information [...] indicates [...] he is an operative in the framework of the military wing of Hamas."[210]

The person against whom an administrative detention order was issued has the opportunity to rebut the classification of him as an unlawful combatant. He is allowed to file submissions relating to the detention order to an officer (must be at least the rank of lieutenant-colonel) appointed by the Chief of General Staff.[211]

After the order is confirmed by the Chief of General Staff, it is reviewed by a judge of a District Court.[212] The period during which the detainee must be brought before the judge is longer than the periods established by other Israeli administrative detention laws. The maximum period here is 14 days after the individual has been detained, otherwise he shall be released.[213]

Similarly to the EPDL, the IUCL affords the detainee periodic judicial review. The order is reviewed once in 6 months. It shall be quashed by a judge if he finds that the release of the detainee will not harm State security any more or some special circumstances exist justifying his release.[214] Both the initial review and the periodic review are subject to appeal to the ISC. The time-limit for submitting the appeal is 30 days.[215]

Even though the law provides for several levels of review, in practice, the detainee is in weak position. It is because the IUCL established two presumptions against persons designated as

[210] See State of Israel v. Usama Hajaj Musa Zari'i, Misc. Appl. 9285/09
[211] Supra, note 111, Section 3(b)
[212] Ibid., Section 5(a)
[213] Ibid., Section 5(a) (b)
[214] Ibid., Section 5(c)
[215] Ibid, Section 5(d)

unlawful combatants. Although they are rebuttable presumptions, the burden of proof is on the detainee and it is almost impossible for him to rebut any allegations.

The first one is the presumption of harm to State security. It reads as follows:

> For the purposes of this Law, a person who is a member of a force perpetrating hostile acts against the State of Israel or who has participated in hostile acts of such a force, either directly or indirectly, shall be deemed to be a person whose release would harm State security as long as the hostile acts of such force against the State of Israel have not yet ceased, unless proved otherwise.[216]

The effect of this provision is that all unlawful combatants as defined in Section 2 of the IUCL are *a priori* considered to be a threat to State security. Accordingly, if the first condition required for an administrative detention order to be issued (that the individual is an unlawful combatant) is met, the other (that his release would harm State security) is applicable without any further investigation. This presumption may be rebutted; otherwise, it lasts until the end of hostilities between Israel and its enemy.

This brings us to the second presumption. It may be called the presumption of the continuation of hostilities:

> A determination by the Minister of Defence, by a certificate under his hand, that a particular force is perpetrating hostile acts against the State of Israel or that hostile acts of such force against the State of Israel have ceased or not yet ceased, shall serve as proof in any legal proceedings, unless proved otherwise.[217]

[216] Ibid., Section 7
[217] Ibid., Section 8

The flaw here is an obvious one. The Minister of Defence possesses wide discretion in determination whether hostilities exist and who is the enemy. If the presumption of harm to State security lasts until the end of hostilities, it means that it is dependent upon the decision of the Minister of Defence. The assessment is not an objective one but a subjective one. Hence, it is easy to misuse the IUCL to detain certain individuals. All that is required is to designate them as unlawful combatants (either members or participants in hostilities) and certify that hostilities exist between Israel and the enemy to which those individuals belong.

The IUCL regime contains another significant difference when compared to other Israeli regimes of administrative detention – restriction on the right of detainees to meet with their counsel. The contact may be denied on security grounds for the period of 7 days since the beginning of detention.[218] The Commissioner (a military officer authorized by the Chief of General Staff or a GSS investigator authorized by the head of the GSS) may prolong the period without access to a lawyer up to 10 days of confinement if he believes it is 'necessary to prevent harm to state security or to save human life'.[219] Such decision is subject to appeal to the District Court which may, however, also further prolong the restriction up to 21 days from the date of confinement.[220] The decision of the District Court is further subject to appeal to the ISC. All the appellate proceedings are held *ex parte*, unless the court decides otherwise.[221]

The law establishes one more restriction in relation to counsels. In administrative detention proceedings under the IUCL, the Minister of Justice has the power to limit the right of representation only to those counsels who have the authority to act as defence counsels in the

[218] Ibid., Section 6(a)
[219] Ibid., Section 6(a1)
[220] Ibid., Section 6(a2)
[221] Ibid., Section 6(a6)

military courts under an unrestricted authorization.[222] This gives the opportunity to state authorities to choose individuals who will act as such counsels. Thus, the question of their independence comes up.

Similarly to other Israeli regimes, the IUCL in Section 5(e) gives permission to depart from the ordinary rules of evidence. The court may decide to admit evidence in absence of the detainee or his counsel or not to disclose such evidence on the ground of protection of State or public security.[223] Hearings are held *in camera*.[224]

The proceedings under the IUCL are compatible with criminal proceedings. Administrative proceedings may start against an individual even if he is subjected to criminal proceedings. The same is true vice-versa. In other words, criminal proceedings may be initiated against an unlawful combatant in administrative detention.[225]

The 2008 amendment brought one significant change. Large scale hostilities were established as another ground for administrative detention of unlawful combatants. The gist of this new ground is that the Government may declare that large scale hostilities exist in which the State of Israel is involved and that the persons detained are subjected to the IUCL. Such decision must be approved by Knesset Foreign Affairs and Defence Committee, otherwise the validity of such declaration will cease to exist after 5 days.[226] The approved declaration is valid for the period of three months and may be renewed until the end of military operations.[227]

The amendment provides for some slight changes in the IUCL process for this purpose. For example, the powers of the Chief of General Staff are given to Brigadier Generals; the 96

[222] Ibid., Section 6(b)
[223] Ibid., Section 5(e)
[224] Ibid., Section 5(f)
[225] Ibid., Section 9(a)(b)
[226] Ibid., Section 10a(B)
[227] Ibid., Section 10a(C)

hours long period is 7 days.[228] The appeals are heard by military review court and appeals from the Military Review Court are heard by the Military Court of Appeals.[229]

2. 3. 2 Plonim v State of Israel

The leading judgment of the ISC on the IUCL is *Plonim v State of Israel*.[230] It was a case decided on appeal against the decision of the Tel Aviv-Jaffa District Court. The appellants were inhabitants of the Gaza Strip who had been detained in 2002 and 2003, respectively, under the MO No. 941 which was in force in the Gaza Strip at that time. After the end of Israeli military rule, administrative detention orders under the IUCL were issued against them. In its ruling, the ISC focused mainly on the constitutionality of the law and its compliance with the norms of IHL.

The Court began with issues of general character and examined the purpose of the law. It explained that the main purpose of the IUCL is to prevent foreign persons - members of terrorist organizations and persons participating in hostilities – from returning to the battlefield.[231]

Even though the law does not contain express reference to the personal scope, the Court held that it applies only to foreign citizens. The reference in the law to POW status means that it is based on IHL rules. However, as the Court noted, IHL was not meant to apply to relations between the State and its citizens. Therefore, it can be inferred, that the IUCL is applicable only to foreigners who fall under the definition of unlawful combatant.[232]

[228] Ibid., Section 10a(A)
[229] Ibid., Sections 10c-10d
[230] Supra, note 18
[231] Ibid., para. 7
[232] Ibid., para. 11

The ISC included within the notion of foreigners also the residents of the Gaza Strip which, the Court stated, is not any more (since 2005) under belligerent occupation. In the West Bank, the application of the MO was confirmed, although the Court was reluctant to adopt firm position as this was not the subject matter of the case before it.[233]

The ISC moved on to the notion of unlawful combatants and their detention. It repeated the determination made in *Targeted Killings* case on unlawful combatants as a sub-group of civilians. However, it came to the conclusion that the definition of unlawful combatant in the IUCL is more inclusive than the one discussed in the *Targeted Killings* case. It is so because of the different measures under examination. In the case mentioned above, the question of targeting was under scrutiny. The Court held that the targeting of unlawful combatants is possible only when they participate directly in hostilities. In the IUCL, the detention of unlawful combatants is dealt with. According to the Court, the direct participation is not necessary here, it is sufficient if the statutory criteria are fulfilled.[234]

The appellants claimed that the detention under the IUCL is neither criminal one nor administrative one. The ISC, however, did not accept this claim. It considered the detention under the IUCL as a typical administrative detention ordered by a military authority and employed for reasons of security.[235]

Regarding the grounds for detention, Articles 2 (definition of unlawful combatant) and 7 (presumption of threat to security) were determined to be the main two provisions. The Court further interpreted the definition of unlawful combatants. The requirements for designation of a person as unlawful combatant and his subsequent administrative detention must be read in conformity with the basic principles of Israeli Basic Laws and IHL. Thus, the mere showing

[233] Id.
[234] Ibid., para. 12
[235] Ibid., para. 15

that someone is member of a terrorist organization or has taken part in hostilities is not sufficient and a proof of individual threat is required to be shown.[236]

As regards the first definition of unlawful combatant – persons who participate directly or indirectly in hostilities, the Court held that the state authorities must prove (by clear and convincing evidence) that the contribution of an individual to the waging of hostilities was sufficient to indicate his individual threat. Such matter should be examined on the case-by-case basis.[237] As regards the second definition – members of forces waging hostilities against Israel, it is not sufficient to prove some slight link to such force. However, it is not necessary for the State to prove that person designated as unlawful combatant this way, participated in hostilities.[238]

The ISC did not find it necessary to rule on the presumptions established by the IUCL and their compliance with the Basic Laws or IHL. It was satisfied that the State did not rely on them and produced sufficient evidence to show individual threat of the detainees,[239] and that military and security agencies have no difficulty to support the determination of the Minister,[240] respectively.

In last three paragraphs of the opinion, the Court refused to accept the appellants' main arguments. First, they claimed they should be released in conformity with GC IV as the occupation ended in 2005. The Justices opposed and confirmed that there was no obligation upon Israel authorities to release persons who still posed a threat to security.[241] Second, the appellants submitted that even though the IUCL is considered to be constitutional, there are no specific grounds for their detention. Their second claim was dismissed as well by stating

[236] Ibid., para. 21
[237] Id.
[238] Id.
[239] Ibid., para. 24
[240] Ibid., para. 25
[241] Ibid., paras. 51-52

that the evidence shows their relations to Hezbollah including participation in hostilities. The Court was persuaded that even without using the statutory presumptions, the danger posed by appellants to state security was proved.[242]

The decision in the *Plonim* case apparently upheld the broadened scope of the notion unlawful combatant, which was established by the IUCL. The Court refused to deal with the question of the compatibility of the statutory presumption with the Basic Laws and IHL. It is also surprising that the law passed the proportionality scrutiny. Put simply, the way the ISC upheld the law may not be considered as persuasive and it appears that it did not want to interfere with the powers of other branches of state power.

2. 4 Unlawful Combatants in the US Law

The term 'unlawful enemy combatant' in the United States courts' jurisprudence has roots in a case which came before the US SC during WW II – *Ex parte Quirin*. The petitioners were eight German saboteurs and the US SC confirmed their indictment by a military commission set up by the President Roosevelt. The opinion of the Court was delivered by Chief Justice Harlan Stone who described the difference between lawful and unlawful combatants:

> By universal agreement and practice the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations and also between those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.[243]

[242] Ibid., paras. 52-53
[243] Supra, note 8, at 30

Chief Justice gave examples of unlawful combatants – spies and combatants who 'secretly' and 'without uniform' get through the military lines of a belligerent with the aim of 'destruction of life or property'. According to the decision, such persons 'are not entitled to the POW status'. They are considered to be 'offenders against the law of war' and subject to military trial.[244]

After the 9/11 attacks the term unlawful combatants has been used to designate terrorists against whom the US declared war. They are kept in administrative detention at GTNM and elsewhere in the name of the War on Terror.

2. 4. 1 Global War on Terror

The terrorist attacks in the US of 9/11 were not the first and not the last such attacks. However, they were shocking because of the large number of casualties and because the fact that nobody had awaited something like that before.

The response of the US was almost immediate. On 14 September 2001, a state of emergency was proclaimed in the US.[245] Since then, the state of emergency has been renewed annually even by President Barack Obama. The Authorisation for Use of Military Force of 2001 (the AUMF) was adopted by Congress and signed by George W. Bush on 18 September 2001[246] The Congress authorized this way the President to act as the Commander-in-Chief of the armed forces. The AUMF reacted to the 'acts of treacherous violence' and gave the President

[244] Id.
[245] See Declaration of National Emergency by Reason of Certain Terrorist Attacks, Proclamation 7463 of 14 September 2001
[246] See the Authorisation for Use of Military Force 2001, S.J. Res. 23

the power to "to use all necessary and appropriate force against those nations, organizations, or persons" that were according to him involved in the 9/11 attacks.[247]

The US troops were subsequently sent to Afghanistan whose Government (Taliban) did not surrender Osama bin Laden. The War on Terror began by Operation Enduring Freedom on 7 October 2001. The first battlefield was in Afghanistan and the members of Taliban and Al Qaeda forces were designated as enemies. However, military operations against Al Qaeda were conducted also in other States. For example, in 2002, the Central Intelligence Agency (the CIA) carried out an operation in Yemen. A missile was fired from a pilot-less air-fighter and caused death to six persons who were allegedly Al Qaeda members.[248]

The Presidential Military Order of 13 November 2001[249], served as the basis for detention and trial of terrorists – captives in the WoT. The MO states that there is an armed conflict between 'international terrorists' (including Al Qaeda members).[250] Individuals identified as subjects to the MO are non-citizens about whom the US President decides that:

(1) there is reason to believe that such individual, at the relevant times,

(i) is or was a member of the organization known as al Qaeda;

(ii) has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefore, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy; or

[247] Ibid., Section 2
[248] See Joshua D. Freilich, Matthew R. Opesso, Graeme R. Newman: Immigration, Security and Civil Liberties Post 9/11: A Comparison of American, Australian and Canadian Legislative and Policy Changes, In: J. Freilich & R. Guerette (eds.): Migration, Culture Conflict, Crime and Terrorism, Ashgate Publishing, 2006, p. 50
[249] Supra, note 7
[250] Ibid., Section 1(a)

(iii) has knowingly harboured one or more individuals described in subparagraphs (i) or (ii) of subsection 2(a)(1) of this order; and

(2) it is in the interest of the United States that such individual be subject to this order.[251]

The place of detention of such individuals was left on discretion of the Secretary of Defence. The place could be located inside or outside the US territory.[252] The MO established military commissions to try detained individuals and all the detainees subject to it were deprived of any remedy or proceedings before US courts, foreign courts and international tribunals irrespective of location of the detention.[253]

At the beginning of the conflict in Afghanistan, the US claimed that GC III and GC IV will apply to detainees in the armed conflict. Captured persons were supposed to be subjected to status determination in accordance with GC III.[254] However, everything has changed in a couple of months.

On 7 February 2002, President Bush (upon the advices of Deputy Assistant of the Attorney General John Yoo and White House legal counsel Alberto R. Gonzales) determined in his memorandum that the members of both Al Qaeda and Taliban, who had been detained, were "'unlawful combatants'.[255] The memorandum deprived the detainees of protections of the POW status. It justified the decision by claiming that Al Qaeda was not a State Party to the GCs and Taliban did not comply with the requirements of Article 4 of the GC III for 'lawful

[251] Ibid., Section 2(a)
[252] Ibid., Section 3(a)
[253] Ibid., Section 7(b)(2)
[254] See J. R. Schlesinger (et al.): Final Report of the Independent Panel to Review Detention Operations 80 (2004), available at: http://www.defense.gov/news/Aug2004/d20040824finalreport.pdf
[255] See Memorandum to Vice President et al. (Humane Treatment of Taliban and al Qaeda Detainees), 7 February 2002

combatants'.[256] The President also ruled out the application of Common Article 3 of the GCs to the conflict as he considered the conflict to be of an international character.[257] This position has changed only after the US SC *Hamdan* ruling.

There was an intention to create a legal 'black hole'. The US position that unlawful combatants are not entitled to any protection was attacked by many critics. The general opinion among scholars is that the humanitarian minimum must be afforded to detainees during any type of armed conflict. Common Article 3 of the GCs and Article 75 of AP I (reflective of customary IHL) are considered to constitute the minimum and no one can fall outside the protection of the GCs.[258]

Initially, the US military was prepared to convene the tribunals required for determination of status of captured persons. However, as the President's memo determined that detainees are unlawful combatants, nothing remained to be determined even though such determination should be made on the case-by-case basis.[259] Previously, since the war in Vietnam the US had used the status determination tribunals.[260] The state of violation of IHL in relation to conflict in Afghanistan existed until Hamdi v Rumsfeld, after which the Combatant Status Review Tribunals (the CSRTs) were established even though the processes before them have many inherent flaws.

[256] Ibid., Section 2(b)(d)
[257] Ibid., Section 2(c)
[258] See e.g. Matthew C. Waxman: United States Detention Operations in Afghanistan and the Law of Armed Conflict, In: Israel Yearbook on Human Rights, vol. 39, 2009, p. 165; or, Peter Leuprecht: Ways Out of the World Disorder?, In: Pablo Antonio Fernadez-Sanchez (ed.): IHL Series: The New Challenges of Humanitarian Law in Armed Conflicts, Martinus Nijhoff, 2005, p. 55
[259] Ibid., at 167
[260] See Thomas J. Bogar: Unlawful Combatant or Innocent Civilian? A Call to Change the Current Means for Determining Status of Prisoners in the Global War on Terror, In: Florida Journal of International Law, April 2009, p. 52

2. 4. 2 Broadening of the Scope of 'Combatancy' in the War on Terror

The Bush administration effectively justified its actions in the WoT. It designated the persons captured in Afghanistan and elsewhere as 'enemy combatants' in order to target them in conformity with IHL. However, it did not want to recognize their POW status and thus, it declared they are 'unlawful combatants', outlawed their actions and held that they are subject to detention and military trial. The US Government was reluctant to admit they possess any right under the GCs.

Even the Inter-American Commission of Human Rights (the IACHR) has requested the US to determine the status of the GTNM detainees by a 'competent tribunal'.[261] The US refused to do so, perhaps in violation of IHL (Article 5(2) of GC III) and IHRL (Article 9(4) of the ICCPR).

Furthermore, the meaning of the term 'enemy combatant' was expanded by the US Government. First, in the submission in *Hamdi* case[262], the respondents (Department of Defence) used a definition, according to which enemy combatant is an individual who "was part of or supporting forces hostile to the United States or coalition partners, and engaged in an armed conflict against the United States".[263]

Second, the definition for the CSRT procedures, set forth in the Memorandum of the Deputy Secretary of Defence, considers enemy combatant to be:

[261] See Inter-American Commission of Human Rights, Decision on Request for Precautionary Measures (Detainees at Guantanamo Bay, Cuba), 12 March 2002
[262] See Hamdi v Rumsfeld, 542 U.S. 507, 516 (2004)
[263] See US Department of Defence: Fact Sheet (Guantanamo Detainees), 13 February 2004, p. 5, available at: http://www.defense.gov/news/Feb2004/d20040220det.pdf

an individual who was part of or supporting Taliban or Al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.[264]

Here, the meaning of the term enemy combatant is clearly broader. In the Hamdi definition, the act of engaging in hostilities in person was necessary for an individual to be designated as an enemy combatant. In the CSRT definition, it is sufficient for him to support Taliban, Al Qaeda or associated forces.

Third, the Military Commissions Act 2006 (the MCA) brought another change. It designated as unlawful enemy combatants also those who purposefully and materially supported hostilities against the US and its allies, and those who had been previously held to be enemy combatants by the CSRTs. Under the MCA, unlawful enemy combatant is

(i) a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, Al Qaeda, or associated forces); or

(ii) a person who, before, on or after the date of enactment of the Military Commissions Act of 2006, has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defence.[265]

The MCA definition was adopted after a list of chosen detainees from the GTNM detention camp was publicized. It revealed that some of the detainees would not fit into the previous

[264] See Memorandum of the Deputy Secretary of Defence for the Secretaries of the Military Departments et al. (Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at U.S. Naval Base Guantanamo Bay, Cuba), 14 July 2006 p. 1, available at: http://www.defense.gov/news/Aug2006/d20060809CSRTProcedures.pdf

[265] See Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600, 17 October 2006, § 948a

definition.[266] Even some US citizens were designated as enemy combatants. One of them was Yaser Esam Hamdi whose case will be described in the thesis more in detail in the sub-chapter on detainees from Guantanamo Bay Detention Camp.

2. 4. 3 Administrative Detention of Unlawful Enemy Combatants outside Guantanamo

Although GTNM is the most (in)famous detention camp set up during the WoT, persons captured on the battlefield in Afghanistan and Iraq were not transported solely there. Abu Ghraib and Bagram are only two examples of other prisons. The US practice, however, also involves places of detention which are secret and detainees were transferred there – we speak about 'extraordinary renditions' and 'ghost detainees'.

The existence of secret prisons is incompatible with IHRL. The detainees are kept incommunicado (without any contact with families, lawyers or NGOs), lawfulness of their detention is not reviewed and they are often subjected to torture. Such treatment may not be justified by any ends. Secret prisons form an obvious example of arbitrary detention.

Detainees are subjected to extraordinary rendition usually either by deportation or by abduction. After the 9/11 attacks, the President Bush empowered the CIA to eliminate the terrorist threat by killing, capturing or detaining members of Al Qaeda at any place in the world.[267] It was under this authorization that the CIA began to detain terrorist suspects and

[266] Supra note 260, p. 62
[267] See Stephen Lendman: Torture, Paramilitarism, Occupation And Genocide, 25 October 2007, available at: http://www.countercurrents.org/lendman251007.htm

transfer them to the countries well-known for torture practices, or to secret prisons outside the US in order to keep the detainees out of the reach of US courts.[268]

One of such detainees was Maher Arar, a Canadian who had also Syrian citizenship. After his arrest at the JFK airport in New York, he was questioned for 12 days. Subsequently, he was taken to Syria and detained without bringing any charges against him. He spent 10 months in detention and was several times subjected to torture.[269]

Kidnappings have occurred also in relation to detainees transferred to GTNM. In the beginning of 2002, the Bosnian Supreme Court acquainted 6 Algerians of terrorism-related charges. Although they were released, a US military unit arrested them and they were transported to GTNM.[270]

Both, violations of IHL and IHRL rules, took place in Iraq during the period of occupation by the US and its allies. Even though the rules of IHL prohibit transfer of the residents of occupied territories, the prisoners allegedly ended up in countries famous for torture practices in their prisons – Syria, Morocco, Egypt, Jordan etc.[271]

The risk of being subjected to torture or other ill-treatment is especially high in secret detention camps. Various claims about suffering from water-boarding, sexual abuse and psychological duress have been raised by the detainees. Furthermore, the incommunicado

[268] See Chris Miller (ed.): War on Terror, The Oxford Amnesty Lectures, Manchester: Manchester University Press, 2006, p. 66
[269] See Human Rights Watch: The United States' Disappeared (Briefing Paper), p. 6, available at: http://www.hrw.org/backgrounder/usa/us1004/
[270] See Future of European Foreign Policy Seminar: Counterterrorism: Extraordinary Renditions and Human Right Abuses (Briefing Paper), available at: http://www.jhubc.it/future_of_european_foreign_policy/briefingBallas.pdf
[271] Supra, note 269, p. 6

detention itself may amount to ill-treatment treatment prohibited by IHRL. The same can be said about the suffering caused to the family members of those detained.[272]

The Bush Administration initially denied the existence of secret prisons. The President eventually admitted the opposite in 2006. He described such prisons as 'necessary' and the procedures used for obtaining information as 'alternative'.[273] He also announced the transport of some of the ghost detainees to GTNM.[274]

2. 4. 4 Detention of Unlawful Enemy Combatants at Guantanamo

Guantanamo Bay in Cuba is under the effective control of the US since 1903, when a lease agreement was concluded between the countries. A new a contract was agreed in 1934, in which established that mutual obligations will end only if both parties so consent.[275]

In January 2002, the first Al Qaeda and Taliban members were transferred from Afghanistan to GTNM. Contrary to the advices of Pentagon's lawyers and expectations of European leaders, the US Secretary of Defence, Donald Rumsfeld, declared that the GTNM detainees could not be POWs. He refused to convene tribunals under Article 5(2) of GC III to determine detainees' statuses.[276]

The Bush administration considered the GTNM Bay Detention Camp to be outside the jurisdiction of the US courts. It was compared to a 'legal black hole'.[277] However, the US courts did not share that opinion. First case dealing with the jurisdiction of the US courts over

[272] See UN Human Rights Council: Joint Study on Global Practices in Relation to Secret Detention in the Context of Countering Terrorism [...], A/HRC/13/42, 19 February 2010
[273] See Associate Press: Bush Acknowledges Secret CIA Prisons, available at: http://www.msnbc.msn.com/id/14689359/
[274] Id.
[275] See J. A. Sierra: History of Cuba, available at: http://www.historyofcuba.com/history/funfacts/guantan.htm
[276] Supre, note 268, p. 61
[277] See e.g, Johan Steyn: Guantanamo: A Monstrous Failure of Justice, International Herald Tribune, November 28, 2003, available at: http://www.commondreams.org/views03/1127-08.htm

GTNM was the case of *Falen Gherebi*.[278] The US Court of Appeals for the Ninth Circuit dealt with the case and concluded that the Executive does not have the power to detain indefinitely persons (even if they are foreign citizens) in the territory where the sole jurisdiction is exercised by the US without any recourse to a judicial authority.[279] This position was later reaffirmed by the US SC in *Rasul v Bush*.[280]

The treatment of detainees in the GTNM has been in the spotlight since the very first detainees were transferred to the detention camp. There were strong suspicions that torture was applied against them. The detainees were held at the beginning incommunicado and deprived of due process rights. It was only after the ruling in *Hamdi* that some rights were afforded to them.

2. 4. 5 Hamdi v Rumsfeld

The first one of the famous four US SC GTNM cases was the *Hamdi* case.[281] The petition for the writ of habeas corpus was filed by father on behalf of Yaser Esam Hamdi, American citizen, who moved during his childhood with his family to Saudi Arabia. Later, he resided in Afghanistan where he was captured by the Northern Alliance soldiers who cooperated with the US. Hamdi was designated to be an 'enemy combatant' as he allegedly affiliated with Taliban during the armed conflict in Afghanistan. He was transferred to GTNM and later moved to the US territory. The (plurality) opinion of the Court was delivered by Justice Sandra Day O'Connor.

[278] See Falen Gherebi v Bush & Rumsfeld, 352 E3d 1278 (9th Cir. 2003)
[279] Ibid., at 1283
[280] See Rasul v Bush, 542 U.S. 466 (2004)
[281] See Hamdi v Rumsfeld, 542 U.S. 507 (2004)

The US SC examined first the authority of the Executive to detain American citizens as 'enemy combatants'. It held that the detention of individuals who fought for Taliban during the armed conflict was an accepted incident of war. Although under US law "no citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress",[282] detention of American citizens who are enemy combatants was declared lawful as it was authorized by Congress in the AUMF.[283]

Hamdi objected that Congress did not authorize indefinite detention. The Court stated that the detention of combatants is a measure to prevent their return to the battlefield. It accepted the Government's view that hostilities in question are unlikely to end in usual way as the armed conflict is of unconventional character.[284] According to the Court, detention may not last longer than hostilities themselves. However, active combat was still ongoing in Afghanistan; thus, the detention of Hamdi was within the authorization provided by the AUMF.[285]

After the analysis of detention of enemy combatants, the Court went on to examine the due process that should be available to a citizen trying to challenge his enemy combatant status. The Government argued that the separation of powers doctrine should be respected and courts should review only the determination that a citizen is an enemy combatant. Such review would be based on 'some evidence standard' – courts would assume accuracy of any evidence presented by the Government against the individual and examine only whether the evidence constituted a legitimate ground for detention.[286] Furthermore, the Government pointed at practical difficulties which justify restrictions of due process rights, such as protection of secrets of national defence.

[282] See 18 U.S.C. § 4001(a)
[283] Supra, note 281, at 2640
[284] Id.
[285] Ibid., at 2642
[286] Ibid., at 2644

The Court, in accordance with its previous case-law, balanced the individual's interest with the Government's interest:

> It is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad. … We therefore hold that a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker.[287]

The US SC, however, relieved the Government of the burden to provide strong evidence during ongoing armed conflict. It acknowledged that hearsay testimony may be needed to be accepted as the most reliable in such proceedings.[288] Moreover, it held that a presumption in favour of Government's evidence as long as the presumption remains rebuttable and detainees are given fair opportunity to rebut it. The burden of proof is then shifted to the detainee.[289] Moreover, Justice O' Connor proposed that the standards prescribed by the Court could be met also by a military tribunal. She drew attention to existing military regulations and Geneva Conventions.[290]

When the US SC decision in *Hamdi* is compared with the decision of the ISC in *Plonim*, there is an obvious difference. The ISC held that IHL is not applicable to relations between the State and its own citizens; therefore, the IUCL applies only to foreigners. The US SC came to exactly opposite conclusion that US citizens, too, may be detained as unlawful enemy combatants.

[287] Ibid., at 2648
[288] Ibid., at 2649
[289] Id.
[290] Ibid., at 2651

Even though Hamdi was a citizen of the US, the ruling in his case had implications also for other detainees from GTNM. It was after the decision in *Hamdi* that the CSRTs were established.

III Unlawful Combatants and Due Process of Law

Due process rights (or fair trial rights) are rights that should be at one's disposal when he faces trial. They can be found in all major human rights treaties. Even during armed conflicts, IHL affords these rights to persons captured and subsequently tried.

Due process rights standard under IHRL and IHL is very similar. In light of Article 4 of the ICCPR, it can be inferred that even if States are intending derogation from due process rights under international instruments, such derogation may not go below the minimum standard afforded by lex specialis – IHL. It means that the standard remains very similar at times of peace as well as at times of armed conflict.

As it was explained in the first chapter, unlawful combatants may be detained during armed conflicts. If they committed certain unlawful acts, they may be subjected to trial. We thus need to distinguish between two different regimes. First, after their capture, unlawful combatants should be subject to *status determination proceedings*. Second, once they were determined to be unlawful combatants/ civilians who lost their protection and there is a suspicion they have committed some offences, they are brought to *criminal/ military trial*.

It is clear that unlawful combatants face at least one type of proceedings. Due process rights should be afforded in both, though. This thesis will deal with the first type of proceedings as they are relevant for all unlawful combatants captured. However, for the reader's interest, a brief explanation about the operation of military commissions in the US will be provided.

As there are no concrete rules in IHL on how should a tribunal set up under Article 5(2) of the GC III work, *lex generalis* is necessary to apply. In light of the circumstances of armed conflict and for the protection of state security, some restrictions on due process rights can be made. In the following sub-chapters, the focus will be on due process afforded to unlawful

combatants in the status determination proceedings together with the means of review available to detainees both in Israel and in the US. The right to habeas corpus in the US will be scrutinized due to its important role in the Constitution and its relevance in 'unlawful combatants cases' before the US SC.

3. 1 Due Process Afforded by the Israeli Law

The law regulating administrative detention of unlawful combatants in Israel – the IUCL, gives the persons subject to it certain due process rights. When compared to ordinary criminal proceedings, there are several restrictions, though.

The detainees have the right to know the grounds for the detention – they should be included in the incarceration order issued by the military officer.[291] In practice, incarceration order contains only broad and ambiguous description of grounds.

When an individual is detained under a temporary order, he must be brought before the Chief of General Staff within 96 hours or released.[292] When the detention concerns large scale hostilities, the maximum period of the detention under the temporary order is 7 days.[293] If the Chief of General Staff decides that the person is unlawful combatant, the District Court reviews the order within 14 days from the beginning of the detention.[294] The IUCL establishes also periodic review of the detention grounds which should be exercised every 6 months.[295] All review decisions – initial and periodic – may be appealed to the ISC within 30 days.[296]

[291] Supra, note 111, Section 3(a)
[292] Ibid., Section 3(c)
[293] Ibid., Section 10a(A)
[294] Ibid.,, Section 5(a)
[295] Ibid., Section 5(c)
[296] Ibid., Section 5(d)

The presumption of harm to State security and the presumption of continuation of hostilities constitute significant blows to due process rights and presumption of innocence of detainees under the IUCL. Once they are designated as unlawful combatants, they must prove that they release would not cause a danger to State security or that the hostilities have ceased.

The detainees possess the right to have a counsel.[297] However, some limitations exist in relation to this right. The access to the counsel may be denied on security grounds for a period up to 7 days from the beginning of detention.[298] The period without contact may be even extended up to 21 days by the District Court.[299] Moreover, the Minister of Justice have the right to require that counsels representing persons designated as unlawful combatants have unrestricted authorization to do so.[300]

Unless the Court decides otherwise, the hearings under the IUCL are conducted *in camera*.[301] It may also choose to depart from the regular rules of evidence. Evidence which is considered to be sensitive may be withheld from the detainee or presented in the absence of him or his counsel.[302]

3. 1. 1. Critique of the Israeli Proceedings

The main criticism as regards the IUCL is that the main goal of the law was to create a regime that is formed as the combination of administrative detention and POW status. On the one hand, an individual may be detained until the end of hostilities even without participating in them. On the other hand, he can be subjected to criminal prosecution and given limited due

[297] Ibid., Section 6
[298] Ibid., Section 6(a)
[299] Ibid., Section 6(a2)
[300] Ibid., Section 6(b)
[301] Ibid., Section 5(f)
[302] Ibid., Section 5(e)

process rights.[303]

The IUCL regime is clearly very similar to the other Israeli administrative detention regimes. The main differences are that the order is issued for an indefinite period of time; the maximum period without judicial review is 14 days; under the IUCL, the access to the counsel may be restricted for up to 7 days; and also the burden on proof is on detainee to rebut the allegation against him as the IUCL establishes two presumptions. For all these reasons, this regime is more open to misuse and offers fewer safeguards than other regimes.

The IUCL establishes the presumption of individual threat. Thus, practically, the state authorities do not have to prove the individual threat of the person in question. It is sufficient to claim and produce some evidence that an individual is unlawful combatant. The presumption of innocence is in fact non-existent. The burden of proof is on the detainee to bear that his release would not harm state security. The presumption is extremely difficult to rebut – the detainee usually does not know the exact grounds for detention and the evidence against him may be made secret and not disclosed to him or his attorney.

The other presumption established by the IUCL is the one of continuation of hostilities. The law gives discretion to the Minister of Defence to decide whether hostilities exist or continue and such decision serves the role of evidence in legal proceedings.[304] Here, the burden of proof is again on the detainee to bear that hostilities do not exist between Israel and a certain force. It is almost impossible to rebut this presumption in favour of state authorities. It can be manipulated either against certain groups of persons (if the Minister of Defence determines that hostilities are waged between that group and Israel) or against individuals (if state authorities wish to detain someone, it is sufficient for the state authorities to claim that an

[303] Supra, note 150, p. 57
[304] Supra, note 111, Section 8

individual is from a group which was determined by the Minister of Defence as waging hostilities). Even if there is a judicial review in disposal, once the individual was designated unlawful combatant and the Minister of Defence declared that hostilities exist, the significance of periodic review is minimal.

The status determination proceedings may be carried out only after 14 days since the order has been issued. This obviously does not meet the condition set forth in Article 9(4) of the ICCPR which requires that every person deprived of his liberty shall have the right to judicial review of the lawfulness of his detention 'without delay'. It is hard to understand why that period is much shorter in the other regimes if the situations are more or less similar. Also the access to counsel may be restricted up to 21 days from the beginning of the detention. It is too much time that the detainee is without any legal assistance and even the reasons of security cannot justify such restriction.

3. 2 Due Process Afforded by the US Law

The due process rights in the United States have a longstanding tradition. The US Constitution contains two Due Process Clauses – in the Fifth (for the Federation) and the Fourteenth (for the States) Amendment. Both clauses state that no person should be deprived of his life, liberty or property without due process of law.[305] In relation to criminal proceedings, the Sixth Amendment establishes the right to a speedy and public trial by an impartial jury; the right to information on the accusations against him; right to be confronted with witnesses against him; right to process for obtaining witnesses in his favour; and the right to assistance by a counsel. The due process rights under the US Constitution are not absolute, though.

[305] Supra, note 159

Individuals captured in the WoT and kept at GNTM face proceedings in which the due process rights are substantially restricted. This thesis focuses on three types of proceedings: (i) before the Combatant Status Tribunals, (ii) before the Administrative Review Boards, and (iii) before the military commissions.

3. 2. 1 Proceedings Before the Combatant Status Review Tribunals

The CSRTs were established after the rulings in *Hamdi* and *Rasul* and the US claimed they are proper bodies to determine the status of detainees in GTNM. Before that, the designation of captives as enemy combatants was performed by military officers and/ or the Department of Defence. The CSRTs were intended to fulfil the requirements established by Justice O'Connor in *Hamdi* of 'appropriately authorized and properly constituted military tribunal'[306] that had not existed until then. However, the restrictions on due process rights mean that the position of the detainee under status-determination proceedings is weak and the regime does not meet the IHRL-IHL standard.

The Order included in the Memorandum of the Deputy Secretary of Defence of 7 July 2004,[307] was a cornerstone for the creation of the CSRTs. It is applicable only to those administrative detainees who are held as enemy combatants in GTNM and are foreigners.[308] They were given the opportunity to challenge their designation.[309] Another Memorandum (of 14 July 2006)[310] contained a directive implementing the CSRT procedures. It is complementary to the first one. The two documents established non-adversarial proceedings

[306] Supra, note 281, at 2561
[307] See Memorandum of the Deputy Secretary of Defence for the Secretary of the Navy (Order Establishing Combatant Status Review Tribunal), 7 July 2004
[308] Ibid., foreword
[309] Ibid., (c.)
[310] Supra, note 264

whose goal is to determine, on the basis of preponderance of evidence standard, whether a detainee kept at GTNM is an enemy combatant.[311]

The Tribunals exercising the proceedings are composed of three US military officers with 'appropriate security clearance'.[312] The CSRT proceedings are recorded by the Recorder.[313] He has also other responsibilities: examination of the Government Information and drafting an unclassified summary of it; presenting the Government's evidence supporting the designation of the detainee as an enemy combatant; etc.[314]

A Personal Representative and an Interpreter are appointed by the Tribunal. The Personal Representative is a military officer with a security clearance. He should serve the role of a quasi-counsel, although his competences are limited to substitute the ordinary counsel. The Personal Representative assists the detainee in that he explains him the nature of the process and his rights; explains his opportunity to present evidence; helps with collecting, preparing and presenting of relevant information.[315] However, he must not reveal classified information to the detainee even though he has access to it.[316] There is no confidential relationship between the Personal Representative and the detainee.[317]

In the status determination proceedings, predominantly, classified material is used. The consent of the agency holding such material must be obtained first, though. The agency may decide not to permit the use of classified material it holds.[318] If it does so, it must provide

[311] Ibid., Enclosure 1(B)
[312] Ibid., Enclosure 1(C)(1)
[313] Ibid., Enclosure 1(C)(2)
[314] Ibid., Enclosure 2
[315] Ibid., Enclosure 3(B)(1)
[316] Ibid., Enclosure 3(C)(4)
[317] Ibid., Enclosure 3(C)(1)
[318] Ibid., Enclosure 1(D)(2)

either an adequate substitute for the rejected material, or certify that none of the material rejected was in favour of the detainee.[319]

It is important to note that the Tribunal is not bound by the ordinary rules of evidence; it is free to take into account any piece of information or evidence it considers relevant. The use of hearsay evidence is permitted.[320] The burden of proof is on the Government to prove that the detainee, indeed, is an enemy combatant. However, the standard of proof is preponderance of evidence and a rebuttable presumption exists that the Government evidence is 'genuine and accurate'.[321]

The documents governing the CSRT proceedings afford certain rights to detainees. First of all, the administrative detainees at GTNM are notified about the reasons for their detention. The reasons are defined in a vague way and the notice says that the detainees are held because they are suspected of being enemy combatants. The factual basis for the designation as enemy combatants is provided by a written statement from which the classified material is omitted.[322]

The proceedings are convened within 30 days from the date when the Personal Representative reviewed the Government Information, discussed it with the detainee and informed him about the possibility of challenging his status.[323] The detainee may decide either to participate in the proceedings or not to participate. Even if the detainee waived his right of participation, his status must still be reviewed by the Tribunal.[324] Those who elect to participate, have the right

[319] Ibid., Enclosure 1(E)(3)(a)
[320] Ibid., Enclosure 1(G)(7)
[321] Ibid., Enclosure 1(G)(11)
[322] Ibid., Enclosure 4
[323] Ibid., Enclosure 1(G)(4)
[324] Ibid., Enclosure 1(F)(1)(2)

to attend the hearings except the parts involving deliberation, voting or discussing of material whose revelation would threaten national security.[325]

Persons subjected to the CSRT proceedings possess the right to present evidence and call witnesses in their favour. However, there are requirements that the witnesses must be 'reasonably available' and the Tribunal must consider the testimony obtained by them as 'relevant'.[326] The detainees may also decide to provide oral testimony. However, they must not be compelled to testify or answer questions.[327] They have also access to the Government Information via his Personal Representative who may reveal him the unclassified part.[328] As regards the classified parts, the Personal Representative may comment on them before the Tribunal. However, the detainee must not be present.[329]

At the end of the proceedings, the CSRT renders a decision whether the person detained is or is not an enemy combatant. The decision is then reviewed by the Director of the CSRT who may confirm the decision or return it back for further proceedings.[330] If the Tribunal concluded that the detainee is not an enemy combatant, he should be transferred to his country of citizenship for release or other disposition in conformity with applicable laws.[331]

The Detainee Treatment Act 2005 established appeal procedures for the CSRT decisions and appeals are heard by the United States Court of Appeals for the District of Columbia Circuit.[332] However, the right to appeal is limited to the review of

[325] Ibid., Enclosure 1(F)(3)
[326] Ibid., Enclosure 1(F)(6)
[327] Ibid., Enclosure 1(F)(4)(7)
[328] Ibid., Enclosure 1(F)(8)
[329] Ibid., Enclosure 1(H)(7)
[330] Ibid., Enclosure 1(I)(8)
[331] Ibid., Enclosure 1(I)(9)
[332] See the Detainee Treatment Act 2005, L. No. 109-148, 119 Stat. 2680, Section 1005. (2)(A)

a) whether the CSRT proceedings were in conformity with the standard established by the Secretary of Defence; and,

b) to the extent of applicability of the US Constitution and laws, whether such standard is in conformity with them.[333]

3. 2. 1. 1 Critique of the CSRT Proceedings

Even though the US Government created CSRTs to comply with the US SC ruling and with IHL, the regime which was set up is flawed. It simply fails to provide satisfactory due process rights as it the criminal proceedings regime. For a detained individual it is almost impossible task to prove that he is not an enemy combatant.

The GTNM detainees have no real counsel at disposal because the powers of the Personal Representatives are weaker than those of counsels in ordinary criminal proceedings. Furthermore, the Personal Representative is appointed by the Tribunal, which means that the detainees cannot have the counsel of their choice.

Another problem arises in relation to the independence of the Tribunal. It is due to the fact that military officers decide on the deliberations of other military officers who had previously designated the detainees as enemy combatants after they were captured on the battlefield. The CSRTs are not civilian courts and the persons determining detainees' statuses are not judges. Moreover, Article 5(2) of GC III proceedings should be conducted fast and on the State territory where the person was captured.[334] Here, the proceedings are delayed and are carried out outside Afghanistan or other areas where the detainees were seized. It makes the securing of evidence and witnesses much more difficult.

[333] Ibid., Section 1005.(2)(C)
[334] Supra, note 260, p. 79

In any case, the detainees are in a weak position. The standard of proof of Government is only preponderance of evidence. The evidence (predominantly hearsay) submitted by the State is presumed to be 'genuine and accurate'. The burden is then switched to the detainee to prove the opposite is true. However, it is really a heavy one to bear.

The detainees are not aware of all evidence against them as the State agencies may prohibit the disclosure of some evidence by stating it is classified. Such material is presented to the Tribunal in *ex parte* proceedings. Furthermore, State agencies may reject to produce classified material and all that is required from them is that they declare that the piece of material in question was not in favour of the detainee. Even though the Personal Representative does have access to all information that will be presented during the proceedings, he must not reveal the classified material to the detainee and may show him only the unclassified summaries.

The possibility to submit evidence in own favour exists. However, limitations are inherent in the CSRT regime. Witnesses may be called to give a testimony only if the Tribunal considers the witnesses to be reasonably available and the testimony to be relevant. As regards the availability requirement, it is sufficient for a witness to reject to take part in proceedings to be deemed as not reasonably available.[335] For the potential witnesses - members of the US armed forces, it is sufficient if their commanders state that the presence of such witnesses in the proceedings would adversely affect combat or support operations.[336] Another requirement in relation to witnesses is that those in favour of detainees must cover their expenses. The same is not true for the witnesses in the Government's favour.[337] Most likely, all the witnesses in

[335] Supra, note 264, Enclosure 1(G)(b)
[336] Ibid., Enclosure 1(G)(a)
[337] Ibid., Enclosure 1(G)(b)

detainees' favour are outside the US and thus, the high expenses and the distance may discourage them from appearing before the Tribunal.

The CSRTs may come up only with two conclusions. Either a detainee is or is not an enemy combatant. They cannot order the release of the detainee. The possibility of appeal the CSRT decision is limited. Those persons who are confirmed to be 'enemy combatants' are 'unlawful enemy combatants' at the same time. It is so because the Military Commission Act 2006 defined as 'unlawful enemy combatants' also those persons who were determined to be enemy combatants by the CSRT.[338]

3. 2. 2 Administrative Review Boards

The CSRT proceedings are not the only proceedings that the detainees at the GTNM detention camp face. After the CSRT concludes that the detainee is an enemy combatant, he is subject to further detention. Article 43(1) of GC IV, however, requires periodic review of detention of civilians in armed conflicts to be carried out at least twice a year. The periodic review of the detention of individuals detained in GTNM is reviewed by the Administrative Review Board (the ARB).

The ARB process was established by an Order from 11 May 2004,[339] which means that even before the CSRTs were set up. The Order established an annual review process, the aim of which is to determine periodically the need of continued detention of enemy combatants at GTNM.[340] The ARB consists of at least three military officers.[341] It assesses whether

[338] Supra, note 265, Section 948a
[339] See Order of the Deputy Secretary of Defence (Administrative Review Procedures for Enemy Combatants in the Control of the Department of Defence at Guantanamo Naval Base, Cuba), 11 May 2004
[340] Ibid., Section 1
[341] Ibid., Section 2(B)

individuals detained as enemy combatants still pose a danger to national security of the US or its allies in the course of armed conflict.[342] The proceedings before the ARB are not adversarial.[343]

At the end of proceedings, the ARB makes a recommendation. It prepares written assessment on whether a particular detainee still poses a threat. The recommendation is forwarded to the 'Designated Civilian Official'. He is a person appointed by the President and affirmed by the Senate.[344] He selects the ARB and makes the decision based on the ARB's recommendation. He may decide to continue the detention, to release the detainee, or to transfer him to another country.[345]

So far, the ARB proceedings have been used twice to review the GTNM detainees statuses. Between December 2004 and December 2005, the Deputy Secretary of Defence, acting as the 'Designated Civilians Official' required by the ARB Order, made 463 recommendations. Altogether, there were 14 releases, 120 transfers and 329 detainees remained in detention. In 2006, another wave of review was conducted and resulted in 55 transfers and 273 prolonged detentions.[346]

3. 2. 3 Military Commissions

Military Commissions are bodies which carry out criminal proceedings during and after armed conflicts. The proceedings concern war crimes and other crimes committed during armed conflicts.[347] Unlawful combatants are subject to them due to the illegality of their

[342] Ibid., Section 2(A)
[343] Ibid., Section 3(A)
[344] Ibid., Section 3(B)(i)(a)
[345] Ibid., Section 3(E)(vi)
[346] Supra, note 260, p. 62-63
[347] Supra, note 78, p. 1117

actions. Military commissions' purpose is not only to prevent danger from those posing it but proceedings before them serve a punitive role for unlawful actions committed in times of war, too.

The due process rights may be derogated from during emergency situations. During war or public emergencies, the US President, acting as the Commander-in-Chief upon the authorization of Congress, has the power to convene military commissions. Executive orders establishing such commission usually contain rules on their composition and procedures before them.

In the past, military commissions were employed for three purposes: (i) to try persons for violations of IHL; (ii) to administer justice in occupied territories; (iii) to substitute civilian courts when martial law was declared and civilian courts were closed.[348] A number US SC decisions involved them: e.g. *Ex parte Milligan*, or *Ex parte Quirin*. They have been employed also against unlawful combatants in the WoT.

The Bush administration convened military commissions for trying the captured terrorists in the WoT by the MO of 13 November 2001. The MO empowered the Secretary of Defence to issue regulations and orders containing rules on proceedings before military commissions to secure their operation.[349] The detainees under the MO were deprived of the right to remedy and the right to have proceedings before US courts, foreign courts and international tribunals.[350]

[348] See William K. Lietzau: Military Commissions: Old Laws for New Wars, In: Thomas Sparks & Glenn M. Sulmasy: International Law Studies (vol. 81): International Law Challenges – Homeland Security and Combating Terrorism, U.S. Naval War College, 2006, p. 262
[349] Supra, note 7, Section 4(b)(c)
[350] Supra, note 7

The military commissions system under the MO was held to be unconstitutional by the US SC in *Hamdan* case.[351] The Court held that the AUMF activated President's war powers; however, it did not authorize him specifically to convene military commissions.[352] Moreover, the crime of conspiracy whose committing formed the substance of charges against Hamdan, is not a violation of IHL. Because military commissions may try only violations of laws of war, the *Hamdan* trial was without lawful authority.[353] The Court also found that regime under President's MO is not in conformity with Common Article 3 (which was considered to apply) requirement of 'a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples'.[354]

The MO was, however, superseded by the Military Commissions Act 2006. Even though it gives the persons subjected to trial more rights, it still does not meet the proper due process standard. The first person tried under the MCA was David Hicks, an Australian citizen. His sentence was, however, reduced to 9 months as a part of a bargain. Hicks, in return, promised to stay silent about his treatment at GTNM.[355]

Proponents of the military commissions justify their use by stating that ordinary criminal justice system is not appropriate for unlawful combatants. The requirements of due process rights are seen as an obstacle in protection and burden on members of military forces. Especially the issues of secret evidence and its sources are crucial in this relation. The danger of violation of human rights is very high especially once the military commissions are not impartial. The need for due process rights is even greater if the military commission is empowered to impose the capital punishment.

[351] See Hamdan v Rumsfeld 548 U.S. 557 (2006)
[352] Ibid., at 2775
[353] Ibid., at 2785
[354] Ibid., at 2796
[355] See Scott Horton: The Plea Bargain of David Hicks, In: Harper's Magazine, 2 April 2007, available at: http://www.harpers.org/archive/2007/04/horton-plea-bargain-hicks

In 2009, the MCA was amended. The amendment was passed as a part of the Department of National Defence Authorization Act[356] and it improves the due process standard for proceedings before military commissions.

3. 3 Habeas Corpus Proceedings

While the precise scope of the constitutional right to habeas corpus is not entirely clear, the US SC observed that "at its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention".[357]

In the United States, the right to habeas corpus (the right of persons detained to have the lawfulness of their detention reviewed) is a right that is of the utmost importance. It has special status also within the US Constitution. It can be restricted only during narrowly formulated circumstances. Besides the constitutional guarantee of habeas corpus, there is also the statutory right which is governed by federal habeas statute.[358].

The issue of entitlement to habeas corpus arose also in WoT in relation to unlawful combatants detained at GTNM. The Presidential MO denied the detainees any access to US courts and any remedy whatsoever. Thus, the first habeas corpus petitions were filed predominantly by the Center for Constitutional Rights. The two leading cases are *Rasul v Bush* and *Boumediene v Bush*.

[356] See P.L. 111-84, Section 1390
[357] See INS v St. Cyr, 533 U.S. 289 (2001), at 301
[358] See 28 U.S.C. § 2241

3. 3. 1 Rasul v Bush

In *Rasul v Bush*[359], the US SC looked at the scope of jurisdiction of US courts to hear statutory habeas corpus petitions of foreign nationals captured abroad during hostilities and incarcerated at GTNM. Petitioners were 2 Australian and 12 Kuwaiti citizens captured abroad and detained since 2002 at GTNM. The District Court (for Washington, D.C.) dismissed the petitions because of the lack of jurisdiction with reference to US SC *Eisentrager* decision. The Court of Appeals upheld the decision.[360] The US SC granted certiorari. The opinion of the Court was delivered by Justice Stevens.

The statutory right to habeas corpus had its basis in law of Congress which gives that right to 'any person who claims to be held in custody in violation of the Constitution or laws or treaties of the United States'.[361] Petitions may be filed to US courts 'within their respective jurisdictions'.[362]

In the past, the US SC recognized the existence of the right to habeas corpus both during the peace time and war. In *Ex parte Quirin*, the petitioners as enemy aliens detained on the US soil were granted the right, too. On the contrary, in *Eisentrager*[363] (which was followed by the lower courts), the petitioners were enemy aliens detained outside the United States and the US SC denied their petitions for the writ of habeas corpus.[364] Accordingly, in *Rasul*, the Court's role was to examine whether such right applies to aliens kept in territories outside the US but under its control.

Justice Stevens compared the circumstances in *Eisentrager* to those in *Rasul* and found some differences between the cases. Unlike those in *Eisentrager*, the *Rasul* petitioners: 1. were not

[359] Supra, note 280
[360] Ibid., at 2691
[361] See 28 U.S.C.A. § 2241, c(3)
[362] Ibid., at a
[363] See Johnson v. Eisentrager, 339 U.S. 763 (1950)
[364] Supra, note 280, at 2693

nationals of countries waging war against the US; 2. denied any allegations on their participation in aggression against the US; 3. have not been given access to any judicial forum (neither charged nor convicted of any offence); 4. have been detained for two years in the territory under exclusive US jurisdiction and control.[365] Above all, the ruling in *Eisentrager* concerned constitutional habeas corpus not the statutory right.[366]

The Court, again, referred back to its previous jurisprudence when assessing whether the person trying to file habeas corpus petition under the statute must be present within the US territory. In *Braden v 30th Judicial Circuit Court of Kentucky*, the US SC held that the detainee's presence within the territorial jurisdiction of a district court is not a condition sine qua non for that district court to exercise habeas corpus review under the statute.[367] The Court did not focus on characteristics of the detainee but on characteristics of the detaining authority, more precisely on whether "the custodian can be reached by service of process" as "the writ of habeas corpus does not act upon the prisoner who seeks relief, but upon the person who holds him in what is alleged to be unlawful custody."[368]

The potential influence of citizenship was also ruled out. The Court noted that the statute itself does not distinguish between Americans and non-Americans. Aliens possess the same right to the same extent. Since there was no question about the power of US courts to try and convict the petitioners' custodians, similarly, no question could be about the jurisdiction of the district court to hear detainees' habeas corpus petitions.[369]

Congress was certainly not happy with *Rasul* ruling as it overruled the decision by adoption of the Detainee Treatment Act (the DTA) in 2005. The DTA contained a provision stating:

[365] Id.
[366] Id.
[367] See Braden v 30th Judicial Circuit Court of Kentucky, 410 U. S. 484 (1973) at 495
[368] Id.
[369] Supra, note 280, at 2698

[...] no court, justice, or judge shall have jurisdiction to hear or consider

(1) an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defence at Guantanamo Bay, Cuba; or

(2) any other action against the United States or its agents relating to any aspect of the detention by the Department of Defence of an alien at Guantanamo Bay, Cuba, who

(A) is currently in military custody; or

(B) has been determined by the United States Court of Appeals for the District of Columbia Circuit in accordance with the procedures set forth in section 1005(e) of the Detainee Treatment Act of 2005 to have been properly detained as an enemy combatant.[370]

The DTA vested the power of review of the CSRTs' determinations solely with the Court of Appeals for the District of Columbia Circuit and the review itself was limited. However, the DTA regime did not last long as the US SC ruled in *Hamdan* that the Act does not have retroactive effect and the filed petitions cannot become void.[371] Unsurprisingly, *Hamdan* was overruled, too – by the MCA.

3. 3. 2 Boumediene v Bush

Boumediene v Bush[372] was the last of the four famous GTNM detainee cases. Lakhdar Boumediene was one of the Algerians arrested in Bosnia after the Bosnian Supreme Court held they are innocent. In *Rasul*, the issue of entitlement to constitutional habeas corpus was left open. In *Boumediene v Bush*, the US SC recognized the entitlement to constitutional right to habeas corpus for the detainees in GTNM.

[370] Supra, note 332, Section 1005e(1)
[371] Supra, note 351
[372] See Boumediene v Bush, 553 U.S. 723 (2008)

By this decision Congress' effort to keep the detainees out of the reach of US courts was definitely unsuccessful. Congress had previously denied the statutory habeas corpus right to detainees in the DTA and the MCA. As Ronald Dworkin wrote: "The Court could no longer interpret the habeas corpus statute to provide a remedy for Guantanamo detainees, since Congress had changed the statute. But Congress cannot overrule the Constitution ... "[373] The fight for recognition of some minimum rights which was led for years was won; however, the war has not ended yet.

Boumediene majority was very narrow: 5 to 4 votes in favour of petitioners. The judges were split 5 on 4 on the basis of belonging to the liberal wing or to the conservative wing. Justice O'Connor who previously voted in favour of Hamdi and Rasul was succeeded by Justice Alito who voted with the conservative wing.

It is interesting to note that except the *Hamdi* decision where the voting was not very clear (as there was a plurality opinion as well as majority opinion), the Justices who voted in favour of Rasul and Hamdan, voted also for Boumediene – Justices Stevens (wrote *Rasul* and *Hamdan* opinions), Souter, Ginsburg, Breyer and Kennedy. On the other hand, Justices Scalia, Thomas and Chief Justice Roberts have dissented in each case. The Court's opinion in *Boumediene* was written by Justice Anthony Kennedy who was considered to be the 'swing vote'.

The first question dealt with by the Supreme Court was whether the MCA removed from the federal courts' statutory habeas corpus jurisdiction enemy combatants. The Court affirmed the deprivation of jurisdiction in relation to enemy combatants.[374]

The US SC then turned to the question of constitutional habeas corpus – whether the petitioner are allowed or not to claim the protection afforded by the Suspension Clause of the

[373] See Ronald Dworkin: Why It Was a Great Victory, In: The New York Review of Books, Vol. 55, No. 13, 14 August 2008, available at: http://www.nybooks.com/articles/21711
[374] Supra, note 372, at 2242-2244

US Constitution, two factors under scrutiny being their status (enemy combatants) and their location (at GTNM). The Government (acting as the respondent) alleged that no constitutional rights are to be given to non-citizens designated as enemy combatants and detained outside the US territory.[375]

Justice Kennedy started the reasoning in this matter by looking back to history and roots of the writ of habeas corpus as well as to the Court's past jurisprudence on the writ and extraterritorial application of the US Constitution. The focus turned, among others, once again (as in *Rasul*) to *Eisentrager*. Referring to this WW II case and other cases on extraterritoriality, the Court highlighted three factors decisive whether the Suspension Clause applies abroad: 1. citizenship and status of the detainee, as well as whether the status-determination process was adequate; 2. the place of capture and detention; 3. practical obstacles involved in the determination of entitlement to the writ.[376] On the basis of these decisive factors, *Bouemdiene* was distinguished from *Eisentrager* and it was held that the Suspension Clause applies at GTNM detention camp:

> It is true that before today the Court has never held that noncitizens detained by our Government in territory over which another country maintains de jure sovereignty have any rights under our Constitution. But the cases before us lack any precise historical parallel. They involve individuals detained by executive order for the duration of a conflict that […] is already among the longest wars in American history. The detainees, moreover, are held in a territory that, while technically not part of the United States, is under the complete and total control of our Government. Under these circumstances the lack of a precedent on point is no barrier to our holding.[377]

[375] Ibid., at 2244
[376] Ibid., at 2259
[377] Ibid., at 2262

The Court stated that if Congress wished to deprive the detainees of their habeas corpus right, it would need to suspend the habeas corpus. The MCA which deprived the detainees in GTNM of this right was not claimed to be such congressional suspension. Thus, the constitutional provision has full effect.[378]

The Government alternatively submitted that the regime which was constituted by the DTA was adequate substitution for habeas corpus.[379] The DTA established appeal procedures in relation to determinations of the CSRTs, although with limited scope of review. According to the Justice Kennedy's opinion, if the Congress intended the DTA appeal regime to substitute habeas corpus, it would not formulate its provisions the way it did.[380] When deprivation of liberty is the result of an executive order the review of detention is even more necessary than if it is the result of a conviction in criminal trial.[381]

The Court found that proceedings of the DTA regime cannot be regarded as protective as the habeas corpus proceedings. For example, new evidence cannot be admitted; it is not clear whether the Court of Appeal may order the release of detainees; etc. Therefore, the US SC ruled that Congress did not create proper alternative for constitutional habeas corpus right and that review procedures in the Court of Appeals need not be exhausted before submission of the habeas corpus petition.[382]

[378] Id.
[379] Id.
[380] Ibid., at 2265
[381] Ibid., at 2269
[382] Ibid., at 2273-2275

3. 3. 3 The Destiny of Detainees from Guantanamo after Boumediene

The ruling in *Boumediene* did not change everything and it did not change things from one day to another. The GTNM detainees got access to US courts but it did not mean that they are going to be released. After *Boumediene*, dozens of habeas corpus petitions have been filed by the detainees from GTNM.[383]

Many petitions were challenging the authority of the US President to detain persons in the WoT. One of the cases in which courts dealt with the petitions was *Gherebi v Obama*[384] which was decided by the D.C. District Court. The court was of the opinion that based on the AUMF and IHL, the President possesses the authority to detain members of the 'armed forces' of those organization that took part in the 9/11 attacks or members of the 'armed forces' of an organization harbouring members of such an organization.[385] Persons who receive orders from the commanders of the enemy and execute them, may be detained unlike the mere sympathizers, financiers, and propagandists without contact with commanders.[386] The court, however, avoided to answer the question of President's detention powers under the AUMF to detain those who provided 'substantial support' to Taliban and Al Qaeda.

Another similar case was *Hamlily v. Obama* .[387] It was decided by the D.C. District Court, too. The way of the reasoning was similar to *Gherebi* with one important exception. The court rejected 'substantial support' as a ground for detention.[388]

On 22 January 2009, President Obama issued an Executive Order[389] by which he declared closing of the GTNM detention camp within 1 year from the date of the order.[390] He also

[383] See Daily Herald: Dozens of Gitmo Detainees Finally Get Day in Court, 16 November 2009, available at: http://www.heraldextra.com/news/world/article_cfcde080-ee2d-553b-8ee8-813072924ac5.html
[384] See Gherebi v. Obama, 609 F. Supp. 2d 43 (D.D.C. 2009)
[385] Ibid., p. 43
[386] Ibid., p. 44
[387] See Hamlily v. Obama, 616 F. Supp. 2d 63 (D.D.C. 2009)
[388] Ibid., p. 19

entrusted the Secretary of Defence, the Secretary of State and other State agencies to carry out the review of the detainees' detention.[391] The purpose of the review was to determine which people from GTNM should be prosecuted, which transferred and which released.

The final report of the GTNM Review Task Force was written in January 2010. It gives recommendations about the destiny of the unlawful combatants at GTNM. At the time when the review was conducted, there were 240 persons detained there. The report suggested 126 transfers, 48 continued detentions, 36 prosecutions and 30 conditional detentions.[392]

According to the Executive Order of President Obama, the detention camp should have been already closed by now. However, nothing has happened so far. Since the camp at GTNM was established, almost 800 persons have been detained there. Currently, 174 of them still remain under detention, mostly because of diplomatic troubles between Washington and their home countries rather than out of concern they would pose a security threat if freed.[393]

3. 4 The Appropriate Due Process Standard

The importance of due process rights has already been discussed. As it can be seen from the description of regimes of unlawful combatants' administrative detention in Israel and the US, the due process rights there are significantly restricted. It is so despite the fact that both IHL and IHRL afford quite a high standard for their protection. Even if any State derogates from its IHRL obligations, it cannot do it below the IHL standard as other international obligations

[389] See Executive Order No. 13492: Review and Disposition of Individuals Detained at the Guantanamo Bay, 22 January 2009
[390] Ibid., Section 3
[391] Ibid., Section 4(a)(b)
[392] See Guantanamo Review Task Force: Final Report, 22 January 2010, available at: http://www.justice.gov/ag/guantanamo-review-final-report.pdf
[393] See Carol J. Williams: Guantanamo Military Procedures at a Standstill, In: Los Angeles Times, 3 November 2010, available at: http://articles.latimes.com/2010/nov/03/nation/la-na-gitmo-20101103

must be taken into account when derogating. Obviously, the two States under scrutiny do not meet this requirement.

The ICRC established due process proper for the security detainees on the basis of rules of both IHL and IHRL. This thesis tries to add to the minimum and to determine the due process rights on the basis of cumulative approach as regards both branches of international law. The appropriate due process minimum requires striking appropriate balance between individual's personal liberty and security of the society.

The appropriate standard that will be described below is derived from the requirements of GCs III and IV, Common Article 3, AP I, the ICCPR, the Siracusa Principles and the UN Body of Principles, which are combined with the ICRC rules. The rights are divided into three groups: those applicable before the status determination proceedings; those applicable during the proceedings; and those applicable after them.

3. 4. 1 Rights Applicable before the Proceedings

1. Basis in law

The grounds for administrative detention of unlawful combatants as well as rules on the administrative proceedings should be defined clearly and narrowly so that the regime does not become over-inclusive. They must conform to the provisions of domestic and international law. It must be kept in mind that administrative detention is an exceptional measure and only those persons should be detained as unlawful combatants, who themselves pose a danger to State security.

Administrative detention of unlawful combatants which is based only on their membership in some organization should not be lawful.[394] The Detaining Power should prove at least some contribution showing that an individual himself poses threat to national security. Indefinite administrative detention for the sole purpose of interrogation is prohibited.[395]

Administrative detention is a preventive measure. Thus, it should not be used instead of criminal proceedings. Once there is sufficient evidence that an individual has committed a crime, he should be charged with a criminal offence and subjected to trial.

2. The right to be notified

The detainee should be notified about grounds for his arrest/ detention. He should be given the description of allegations against him, which must be more than just a reference to the legal basis for the detention.[396] The notification should contain more than just a statement that the individual is suspected to be an unlawful combatant. He should understand the 'substance' of allegations against him.[397] Both the ICCPR and AP I require that the notification should come 'promptly' and in the language the detainee understands.[398]

The notification requirement is very important for detainees. Once they are aware of the cause for his detention, they have the chance to rebut the allegations. The appropriate due process requires the notification about detainees' rights as well.

[394] See e.g. Supra, note 87, at p. 54; or, Supra, note 76
[395] See e.g. UN Commission on Human Rights: Situation of Detainees at Guantanamo Bay, UN Doc. E/CN.4/2006/120, 27 February 2006, para. 23; or, Supra, note 281, at 521
[396] Supra, note 28, p. 83
[397] See Adolfo Drescher Caldas v. Uruguay, Communication No. 43/1979, U.N. Doc. CCPR/C/OP/2 at 80 (1990), para. 13.2
[398] See Article 9(2) ICCPR; Article 75(3) AP I

3. The right to be treated humanely

The right of detained persons to be treated humanely is considered non-derogable and must be recognized at all times even if it is not explicitly mentioned as a non-derogable right in the ICCPR.[399] Also the freedom from torture and other ill-treatment is formulated in absolute terms and its violation can never be justified. The humane treatment requirement is applicable before the proceedings, but also during and after them.

3. 4. 2 Rights Applicable during the Proceedings

1. The right to have one's status determined

The requirement of Article 9(4) of the ICCPR to bring the person detained before a court for the review of lawfulness of his detention without delay must be read in light of IHL – Article 5(2) of GC III, in particular. It provides for the status determination of a captured individual by a competent tribunal, if doubts exist. Such determination should be done without delay.

IHL prohibits mass of forcible transfers of population from the occupied territories.[400] Hence, the tribunal should be located within the occupied territory or on the territory where the respective persons were captured. The US and Israel act in violation of laws of war each and every time they transfer captured individuals in order to determine their status and to detain them.

The status determination should be done on the case-by-case basis. The length of the detention should be determined according to specific circumstances of each case. Otherwise a threat exists that innocent people will be detained. If this requirement is not fulfilled, we can

[399] Supra, note 51, para. 13(a)
[400] Supra, note 63, Article 49(1)

say that administrative detention is used as a form of collective punishment which is also prohibited by IHL.[401] No discrimination of any kind should be allowed.

The right to have own status determined serves the role of preventing arbitrary and unlawful detention. The appropriate balance would require that both parties to the proceedings should possess the right to file an appeal.

2. The requirement of an independent and impartial body

The status of captured persons should be determined by a tribunal that fulfils the requirements of independence and impartiality which are of similar nature. If both are fulfilled, it is more likely that the trial is fair even if the tribunal is military or mixed one (mix of military and civilian).[402]

For a tribunal to be independent it should be established and its members appointed rather by the Legislation than by the Executive or the military. However, the opposite sometimes cannot be avoided. In such situations, it is important that the tribunal members may not be repealed.

The requirement of impartiality is important from the separation of powers point of view. Administrative detention of unlawful combatants is ordered by the Executive and military officers. For that reason, it would be inappropriate if the power of review of such orders would also be with them. It rather should be carried out by courts. If it was carried out by other military officers especially of lower rank, the possibility of disagreement with officers of higher rank would be probably low.

[401] Supra, note 71, Article 75 (2)(d)
[402] See Peter Rowe: The Impact of Human Rights Law on Armed Forces, Cambridge University Press, 2006, p. 193

3. The right to a counsel

Every detainee should have a counsel at his disposal. It means that detainees could be represented by the counsel of their choice. In case they lack money to pay for the service, the counsel should be appointed by the court. The right to have a counsel is one of the main guarantees of adversarial proceedings. He should be allowed to take part in all hearings. The communications between the detainee and his representative shall be confidential.

Worthy of trying could be the idea of two counsels at the detainee's disposal. One of them would be the counsel of detainee's choice. The other one would be the legal representative with security certificate who would be the representative for the parts of hearings when the classified material is presented and discussed. He would have also access to all such material. Even though he could not reveal its substance, he would be able to represent the detainee properly.

4. The right to be present during the hearings

The exercise of this right prevents the tribunal to determine the status arbitrarily and secures the right of the detainee to defend himself. The right to be present can be carried out by the detainee as well as his legal counsel, unless the detainee waives his right. However, in certain circumstances, it is proper to hold part of the hearings without the presence of the detainee (for example, for the protection of methods of surveillance). In such cases, the presence of the legal representative with security certificate could be the solution against the misuse of absence of the detainee.

5. Publicity of a trial

The status determination trials as well as the review proceedings should be public. Presence of the public is important in relation to supervision of the hearings. It is another means to prevent the imposition of arbitrary detention.[403] The publicity is in the interest of the individual and the society as a whole. It prevents arbitrariness and, at the same time, it educates and makes it possible for the public to see justice being done.[404]

However, not all stages of proceedings can be public. The IHRL instruments foresee the exclusion of the public if some important interest so require. The public may be excluded for the duration of whole proceedings or their part, for example, when the interests of State security or public order so require. The final holding of the tribunal should be announced publicly, though.

6. The burden of proof

The burden should be on the State to prove that an individual fulfils the criteria to be designated as unlawful combatant. Once the Government is successful in providing evidence, the burden should switch to the detainee to rebut the evidence against him.

The appropriate standard of proof would probably be the 'clear and convincing evidence' standard. If the person is designated as unlawful combatant and subsequently charged with criminal offences, the standard of proof would change to 'beyond reasonable doubt' which is more demanding. Moreover, the tribunal should carry out fact-finding and should not presume the Government's evidence to be true and accurate. Hearsay testimony should not be allowed.

[403] Supra, note 78, p. 1130
[404] Supra, note 166, p. 344

7. The disclosure of evidence

In the course of proceedings on determination of status of unlawful combatants, sensitive materials often pop-up. Governments then try to protect the sources of such information (persons, means of surveillance) or their content. Hence, a dilemma exists, how to strike proper balance between the right of an individual to truly adversarial proceedings and the protection of sensitive information. In some countries, the laws enable State authorities to designate such material as 'secret' or 'classified' and prohibit its disclosure. However, how can then the detainee rebut the evidence against him if he is not aware of it?

The UN Working Group on Arbitrary Detention held that: "individual liberty cannot be sacrificed for the government's inability either to collect evidence or to present it in an appropriate form".[405] States should try to protect the means and sources of the evidence as well as its content in a manner that does not collide with the due process rights of the detainees. The material in favour of the person detained should be disclosed in any circumstances even if the sources are kept in secret.

One of the other options would be the use of the above-mentioned legal representative with the security certificate. He would substitute the detainee in those parts of hearings in which the sensitive material is discussed and would also have access to all evidence.

In any event, even if some evidence is classified and not disclosed to the detainee, the tribunal itself should guarantee that such regime is not abused. The ISC Justice E. Rubinstein described clearly the role of the court in such cases. He stated that the court (judges) must act as "an eye and mouth" for the detainees.[406]

[405] See UN WG on Arbitrary Detention Decision number 16/1994 addressed to the Government of Israel, 18 July 1994

[406] See Majdi Ta'imah v. State of Israel, Decision, Crim. Misc. Appl. 8920/06, 9 November 2006

8. The right to call and confront witnesses

The captured person whose status is to be determined should have the right to call and confront witnesses. The main purpose is to secure objective fact finding and that all facts, indeed, are presented before the tribunal.[407] The detainee should be allowed to do so under the same conditions as the other party to the proceedings. If the identity of some witnesses is to be protected, the legal representative with security certificate could be present. This right includes also the right to give an oral testimony. However, persons subject to trial must not be coerced to testify.

3. 4. 3 Rights Applicable after the Proceedings

1. The right to be registered

The right to be registered in the place of detention should preclude the occurrence of disappearances and secret prisons. The Human Rights Committee considers the prohibition of abductions and unacknowledged detentions as non-derogable during emergencies.[408] They are considered to be norms of general international law.[409]

The right to be registered is also important for the outside world to know who is detained and where. Members of the International Committee of the Red Cross and detainees' families should have knowledge about the place of detention. They should be allowed to visit detainees in detention camps. Even if the contact is denied for some time, it should not be for longer than few days.

[407] Supra, note 166, p. 348
[408] Supra, note 51, para. 13(b)
[409] Id.

2. The conditions in detention

Detained unlawful combatants have the right to certain level of treatment during their stay in detention camps or prisons. It consists of several rights which can be inferred from the standards afforded by GC IV and the UN Standard Minimum Rules. The most important one is the right to be treated humanely which has been already described. Other components are, for example, right to be given food, accommodation and clothing; right to medical assistance; right to exercise one's religion; etc.

3. The right to a periodic review

The right of detainees to have the lawfulness of their detention reviewed is an inevitable component of the appropriate due process regime. Both IHL and IHRL recognize this right and thus, it cannot be derogated from. States Parties to the ICCPR must provide effective judicial review of detention at all times.[410]

This right should prevent indefinite detention of unlawful combatants. It should take place at least once in six months (as required by IHL). Detainees should be released immediately when they cease to pose a danger to the State security. The latest possible time for release should be the end of hostilities unless the detainee is subjected to criminal proceedings.

The body carrying out the review should be independent and impartial and it should be composed of judges, not military officers. It must have real powers and be able to release the detainee if he does not pose a threat any more.

[410] See Concluding Observations of the Human Rights Committee: Israel, CCPR/C/79/Add.93, 1998, para. 21

4. The subsequent criminal proceedings

Unlawful combatants may be brought before court for criminal proceedings, too. As they do not have immunity (as lawful combatants) under IHL when they take part in hostilities, they can be prosecuted for murder, etc. They can be also charged with war crimes, crimes against humanity and crimes against peace. However, in criminal proceedings, the due process rights afforded to them should be wider. For example, the burden of proof for the Government should be heavier to bear (beyond reasonable doubt standard).

Concluding Remarks

In the last decade, the use of administrative detention has moved to another dimension as unlawful combatants became subject to it. In Israel, the measure has been predominantly used against the residents of the Gaza Strip. The US employed it in relation to detainee captured within the WoT after the 9/11 attacks.

The aim of this thesis was to carry out a comparative analysis of administrative detention of unlawful combatants in both States. In the light of findings, an appropriate standard of due process standard was proposed. It was set up as the result of careful balancing of the right to personal liberty of individuals and the right to security of the whole society.

The standard proposed aims to afford as much due process rights to detained unlawful combatants as are feasible. However, certain restrictions are necessary to reflect the problems related to proceedings with them. The right to disclosure of evidentiary material or the right to public trial may be presented as examples of rights whose limitations might be necessary for the protection of information designated as secret. Despite all the restrictions that are possible, the fairness of the trial as a whole should be maintained. The fairness is important not only because it is moral, but mainly because of the rights of innocent people who must not be detained if they do not deserve it. The regimes examined and safeguards afforded by them do not meet the proposed standard.

However, the proposed due process standard is not the only solution. Other (alternative) means could be used instead of administrative detention. When the criminal proceedings are involved, they afford more safeguards to suspects. Terrorist acts are (in almost all countries other than Israel and the US) generally defined as prohibited criminal offences in criminal

codes. New crimes which outlaw membership in terrorist organization have been established, too. Moreover, there are also international documents that define terrorism as a crime.[411]

If criminal detention was used instead of administrative, IHRL would apply fully (except derogations) including the rules on criminal proceedings. Also the probability of the slippery slope effect – that for the sake of detention of some dangerous persons, many innocent people are detained unlawfully, is much lower under the criminal regime than under the regime of administrative detention. Furthermore, there is no regional or international body under IHL provisions supervising whether States fulfil their obligations prescribed by the GCs. The violations of human rights are easier to carry out.

The Governments of Israel and the US claim that their countries wage armed conflicts. However, the rhetoric of war seems to be only a guise so that the restrictions of rights become permissible once IHL is claimed to be applicable:

> One of the underlying ideas probably is that in a war one can justify acts that could otherwise not be justified. The rhetoric of war aims at legitimizing a higher degree of violence and disregard for the law.[412]

On the other hand, the opponents of criminal proceedings state that they are not accustomed to deal with the threat posed by unlawful combatants. They also claim that members of armed forces do not have time, resources or training to secure evidence against captured persons.[413] There are solutions to these problems as well, though. Criminal law can become more flexible in order to serve not only as a punitive but also as a preventive measure. It can happen so if, for example, the act of financing terrorism or preparation of a terrorist acts will be determined as criminal offences. In relation to the securing of evidence, this problem would be solved if

[411] See e.g. European Convention on the Suppression of Terrorism, Strasbourg, 27 January 1977
[412] See Peter Leuprecht: Ways Out of the World Disorder?, In: Pablo Antonio Fernadez-Sanchez (ed.): IHL Series: The New Challenges of Humanitarian Law in Armed Conflicts, Martinus Nijhoff, 2005, p. 52
[413] Supra, note 78, p. 1088

the proceedings were conducted as soon as possible after the capture, and in the territory where the person in question was captured. It would make the fact-finding much easier.

Some authors are not willing to recognize even the applicability of the GCs to unlawful combatants.[414] While doing so, they refer to the ruling of the US SC in *Ex parte Quirin*. However, they seem to forget one irrebuttable fact – the GCs were adopted only after that ruling.[415] The International Criminal Tribunal for the former Yugoslavia, in the *Delacic* case, stated that if individuals do not fall within the cope of GC III, they necessarily fall within the ambit of GC IV.[416]

And what can be guessed in relation to future? The development in the last two years in the US indicates that the situation of detainees at GTNM has improved. Since the *Boumediene* case, dozens of habeas corpus petitions have been filed and some detainees released. Furthermore, President Obama ordered closing of the detention camp.[417] Still, a lot of detainees remain kept there and their future is not certain. As regards Israel, on the one hand, the detention under the IUCL has not been used very often. On the other hand, as the unrests did not cease to exist and the law is still in force, the possibility of wider use is not out of question.

[414] See e.g. Supra, note 6
[415] Supra, note 4, p. 59
[416] See Prosecutor v Delacic, case no. IT-96-21-A, para. 271
[417] Supra, note 389

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