

Illegal Combatants



Fauzi Ayoub was released from prison on January 29, 2004 as part of a prisoner exchange agreement between Hezbollah and the Israeli government. Ayoub and others who were released in this deal were flown to Germany and from there to Lebanon. Until his release, Israel held Ayoub under the Imprisonment of Illegal Combatants Act of 2002.¹³ According to press publications, Ayoub entered Israel in October 2000 with a false American passport and was apprehended by the Palestinian police in Hebron. In June 2002 the Israeli military raided the detention facility in Hebron and took off everyone there. According to these sources, Ayoub – a Canadian citizen of Lebanese descent – was an active member of Hezbollah who entered the Territories through Israel in order to train Hamas activists in the use of explosives. Since November 2002, about one month after the Chief of Staff issued the order to apprehend Ayoub as an illegal combatant, HaMoked has represented Ayoub in various legal proceedings:

HaMoked filed a “prisoner petition” to the administrative court on Ayoub’s behalf, seeking to improve his conditions of detention. The Court instructed the Prison Service to provide the detainee with an orthopedic back belt and an orthopedic sock, and to give him the books and magazines sent by the Canadian Embassy. The Court also ordered that Ayoub be allowed to maintain records pertaining to his case and to present them to his attorney, but denied the inmate’s request for a radio, which he wanted in order to listen to Lebanese stations.

HaMoked represented Ayoub in the judicial

review conducted by the District Court regarding his continued incarceration under the Imprisonment of Illegal Combatants Act. Since his arrest, HaMoked represented Ayoub in the two judicial reviews held in his case. In the last one the judge wrote that based on the confidential material he reviewed, “the Respondent (Ayoub) is still dangerous” and permitted his continued detention.

HaMoked thereupon appealed this decision to the Supreme Court, asking that the Court examine the legality of the Imprisonment of the act under which Ayoub is being held. This Act was passed in order to provide a legal solution for the detention of persons who might serve as bargaining chips in future negotiations for the return of Israelis held by the enemy, including corpses. This need arose after the April 2000 HCJ ruling which held that persons who are not threats to the State of Israel and who are detained only as potential bargaining chips for such exchanges must not be held in administrative detention. The HCJ further held that “two wrongs don’t make a right”; Israel cannot hold hostages who do not represent a threat only because they might be useful in future negotiations. Following this ruling, Israel released 13 Lebanese citizens who were held in administrative detention; however, Israel refused to release another two detainees, Sheikh Abdel-Karim Obeid and Mustafa Dirani. In order to enable their continued detention as bargaining chips despite the HCJ ruling, the cabinet drafted this bill.

This Act, passed in 2002, circumvents the Court ruling and upholds some of the limitations imposed on administrative

detention. This statute blends the authority given by law to the military for handling civilians and combatants. International law in general and the Geneva Convention in particular, draw a clear distinction between combatants and civilians, leaving no room for any third category.¹⁴ Under the Geneva Convention, combatants can kill and use arms, and it is permitted to kill them as well. When combatants are captured by an enemy army, their situation is reversed: as a rule they are protected against legal proceedings, but they can be detained under the conditions stipulated in the Geneva Convention, until the acts of hostility subside.¹⁵ At the same time, international law provides absolute protection to civilians. However, if civilians operate against an occupying army, the army may start criminal proceedings against them, adjudicate their case in military court and keep them in prison until they have served their sentence.¹⁶ Under certain circumstances and conditions, international law allows the military commander to restrict the movement of a civilian in an occupied area and put him under administrative detention.¹⁷ The penal and incarceration system used by the Israeli military in the Territories is therefore founded on the legal status of civilians who operate against the military in occupied areas, and owes its existence to international law.

In order to hold people in Israel as bargaining chips, Israeli law now created the category of "illegal combatants", which refers to persons who took part in acts of hostility against Israel but are not entitled to the status of prisoners of war. On the one hand, Israel continues to indict such people for using weapons or for membership in "terror organizations" – under international

law, a permissible process in the case of civilians who have taken part in acts of hostility. On the other hand, the law now allows the Chief of Staff to arrest these people until the end of hostilities, as though they were captive soldiers.

In Ayoub's first judicial review, HaMoked argued that the Imprisonment of Illegal Combatants Act was unlawful and that it violates Israel's Basic Law: Human Dignity and Liberty, international law and the Geneva Conventions, and the spirit of the law and values practiced in the State of Israel, as expressed in the rulings of the HCJ. In its petition HaMoked referred to various articles challenging the legality of this Act, composed by celebrated jurists from Israel and abroad, and to the opinions that the legal advisors of the Knesset, the Ministry of Foreign Affairs and the Constitution, Law and Justice Committee of the Knesset had drafted when working on the bill. All these articles and opinions support HaMoked's arguments against the Act, and yet the District Court held that the law was not illegal and that Ayoub's detention was lawful. Since Ayoub and other detainees that were

¹³ **The Imprisonment of Illegal Combatants Act, 2002.** Published in official Gazette [*sefer ha-hukim*] 1834 (March 14, 2002), p. 192.

¹⁴ Even the Knesset's legal advisor stated in the opinion he submitted to the Chairman of the Foreign Affairs and Defense Committee on September 5, 2000: "The protection and categorization provided by the Third and Fourth Geneva Conventions contain no loopholes. A person is either a combatant or a civilian; there is no third option." (Paragraph 16.1.1).

¹⁵ **Geneva Convention Relative to the Treatment of Prisoners of War** dated August 12, 1949.

¹⁶ **Geneva Convention Relative to the Protection of Civilian Persons in Time of War** dated August 12, 1949, Article 68.

¹⁷ *Ibid.*, Article 78.

held in Israel as “illegal combatants” were released, the fate of this petition, as that

of others on this matter, is now unclear. (Case 23854)

Family Visitation

Until October 2000, relatives from the Territories were allowed to visit detainees regularly. After clearing the visit with the Israeli authorities, which issued permits for each relative according to clearly-defined criteria, the families were bused in by the ICRC. However, shortly after the onset of the current Intifada, the military halted all permits and in effect discontinued visitation.



Demanding that prisons and detention facilities be reopened for visitation HaMoked petitioned the High Court of Justice in December 2002 on behalf of three detainees at Ofer Camp as well as the mother of one, who had not seen their loved ones in a very long time.¹⁸ In its response, the State said that it had no objection in principle to visitation: the authorities are doing their best to make visits possible, but due to various problems, mostly because of the security situation, visitations have not yet been resumed. The State further noted that “family visits will commence in February.” The representative of the State later said that all the arrangements for the first round of visitors at Ofer had already been completed and that on March 9 the families of detainees from Qalqiliya, Jericho and Ramallah would be able to come by shuttle and visit their relatives. The HCJ therefore adjourned in order to check three months later whether visitation had in indeed been made possible.

The detainees at Ofer Camp discontinued the first visit of their families shortly after it began, in protest of the degrading conditions under which the visit was taking place. Statements collected by HaMoked reveal that visitors were separated from detainees by two partitions, 1.5 meters apart, so that around 20 detainees were standing on one side of the first partition and the families were on the other side of the other partition. There were no other partitions, and people had to shout in order to overcome the distance and the voices of other visitors. The visitation facility was designed in a way that detainees and visitors were unable to see each other: the bottom part of the partitions, up to 1.6 meters was opaque, so that people had to remain standing and anyone shorter than that could not see or be seen. Obviously, detainees and their children were unable to see each other this way. The time allotted by the prison authorities for the meeting between people some of whom had not seen each other for a year or more, was only half an hour once a month. The prison authorities did not prepare a suitable waiting area for families waiting their turn into the facility, and the many visitors, including children and elderly people, had to wait for hours on the buses without any bathrooms, drinking water or any room to walk around. The detainees were also protesting the criteria for visit permits: the