



**Adalah's Expert Opinion:**

**Israel's 2016 Counter-Terrorism Law and 1945 Emergency Regulations Regarding the Outlawing of Six Palestinian Human Rights and Civil Society Groups**

**23 November 2021**

Israel deploys various legal measures in order to criminalize the activity of Palestinian human rights and civil society organizations, stop their operations, seize their assets, and levy penalties against their directors, staff, and supporters. One such measure is the 2016 Counter-Terrorism Law<sup>1</sup> – also referred to as the Anti-Terror Law – which, *inter alia*, authorizes Israel's Minister of Defense to designate organizations as “terrorist organizations”, even if they are engaged in lawful activities using legal means. In addition to the Counter-Terrorism Law, the 1945 Defense (Emergency) Regulations – introduced by the authorities of the British Mandate for Palestine – empowers a military commander to declare an organization as an “unlawful association”.

Recently, the Israeli Government and military have used these measures against six leading Palestinian human rights organizations. On October 19, 2021, Israel's Defense Minister Benny Gantz designated Addameer Prisoner Support and Human Rights Association, Al-Haq, the Bisan Center for Research and Development, Defense for Children International – Palestine (DCI-P), the Union of Agricultural Work Committees (UAWC), and the Union of Palestinian Women's Committees (UPWC), as “terrorist organizations”, pursuant to his authority under the Counter-Terrorism Law.<sup>2</sup> In addition to the designations as “terrorist organizations”, on November 3, 2021, the Israeli military's Commanding Officer of the Central Command, Maj. Gen. Yehuda Fuchs, in charge of the military regime in the West Bank, declared five of these organizations as “unlawful associations”, pursuant to his authority under the Emergency Regulations. The UAWC had been declared an “unlawful association” previously. These six

<sup>1</sup> Counter-Terrorism Law, 5776-2016, available at <https://www.justice.gov.il/Units/YeutzVehakika/InternationalLaw/MainDocs1/TheCounterTerrorismLaw.pdf> (English translation provided by Israel's Ministry of Justice).

<sup>2</sup> See Designation No. 371 (for UAWC); Designation No. 372 (for DCI-P); Designation No. 373 (for Al-Haq); Designation No. 374 (for the Bisan Center); Designation No. 375 (for Addameer); Designation No. 376 (UPWC), available at <https://nbctf.mod.gov.il/en/Pages/211021EN.aspx> (Hebrew).

organizations join a long and growing list of Palestinian groups outlawed by the Israeli Government and/or its military regime, including, among others, the Palestinian Health Work Committees (HWC) and the Northern Branch of the Islamic Movement.

The following expert opinion offers a discussion of the “terrorist organization” designation under Israel’s Counter-Terrorism Law and the “unlawful association” declaration under the Emergency Regulations, as well as relevant provisions of domestic criminal and military law. The opinion focuses on: (1) the overbroad and vague definitions of these two categories; (2) the vast power and discretion provided to both Israel’s Defense Minister and the Israeli military commander in issuing the designations and declarations; (3) the immediate and severe legal consequences of such designations and declarations; and (4) the extreme difficulty in challenging these designations and declarations, resulting from the use of secret evidence and other due process violations.

## **I. Overbroad and Vague Definitions of “Terrorist Organizations” and “Unlawful Associations” under Israel’s Domestic and Military Legal Frameworks**

The definitions of “terrorist organization” and “unlawful association” set forth in the Counter-Terrorism Law and the Emergency Regulations, respectively, are overbroad and vague. The expansive and imprecise nature of the definitions allows the relevant authorities to enforce these laws against organizations and groups that operate in accordance with the law and engage in lawful activities using legal means. While these legal measures may be used to proscribe a large number of organizations, in practice, the Minister of Defense and military commander have outlawed almost exclusively Palestinian organizations and groups, thereby violating the rights of Palestinian citizens of Israel and also breaching the duties and obligations of Israel, as an Occupying Power, towards Palestinian populations in East Jerusalem, the West Bank, and the Gaza Strip.

### *A. Definition of “terrorist organization” under the 2016 Counter-Terrorism Law*

The Counter-Terrorism Law allows Israel’s Minister of Defense to designate a “body of persons” as a “terrorist organization”, if the Minister believes that the group satisfies the definition provided in the Law. Section 2(a) of the Counter-Terrorism Law provides two definitions for a “terrorist organization”:

- (1) A body of persons in an organized and continuous structure that commits terrorist acts or that operates with the intention that terrorist acts will be committed — including an aforementioned body of persons that is engaged in training or instruction for the commission of terrorist acts, or that carries out an act involving weapons or performs a weapons transaction, in order to carry out terrorist acts—

whether or not it has been designated as a terrorist organization pursuant to Part B;

- (2) A body of persons in an organized and continuous structure that acts, directly or indirectly, to assist an organization mentioned in paragraph (1), or that acts with the intention of promoting the activity of such an organization, including by financing it – all of the foregoing, in a manner capable of making a substantial or ongoing contribution to the organization's activity, or [where such body of persons] has a substantial affiliation to [the organization], provided that the body of persons [defined in this paragraph] has been designated as a terrorist organization pursuant to Part B[.]

The definition of a “terrorist organization” according to paragraph 1 requires that the organization or group engage in activities amounting to “terrorist acts”. The Counter-Terrorism Law defines a “terrorist act” as: (1) a criminal offense or a threat to commit such offense; (2) with a political, religious, nationalistic, or ideological motive; (3) intended to provoke fear or panic among the public, or compel a government, a governmental authority (local or foreign), or an international organization “to do or abstain from doing an act”; (4) that causes or risks causing serious harm to a person’s body or freedom, public health or safety, property, religious objects, or infrastructure, systems, or essential services.<sup>3</sup> The designation of an organization satisfying the definition of a “terrorist organization” according to paragraph 1 is declarative, i.e., the organization is considered a terrorist organization whether or not it has been formally designated as such pursuant to the Counter-Terrorism Law.

The definition of a “terrorist organization” according to paragraph 2 does not require that the organization engage in “terrorists acts”. Rather, to satisfy the definition in paragraph 2, the organization needs only to engage in activities that, directly or indirectly, contribute to or assist in the activities of a “terrorist organization” meeting the definition in paragraph 1. Moreover, the Counter-Terrorism Law defines the “activity” of a terrorist organization” to include “legal activity or activity for legal purposes”. Thus, an organization may be designated as “terrorist organization”, even if it provides only lawful assistance to organizations engaged in activities amounting to “terrorist acts”. Such organizations may, for example, be humanitarian organizations that operate among the civilian population during wartime, and which do not promote violence of any kind. The designation of such organizations is constitutive, i.e., they are considered “terrorist organizations” only upon the issuance of a formal designation under the Counter-Terrorism Law.

#### *B. Definition of “unlawful association” under the 1945 Emergency Regulations*

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<sup>3</sup> For a legal analysis on the implications of this broad definition, as well as other problems arising from the 2016 Counter-Terrorism Law, see Adalah’s full position paper, available at [https://www.adalah.org/uploads/uploads/Anti\\_Terror\\_Law\\_Position\\_Paper\\_final.pdf](https://www.adalah.org/uploads/uploads/Anti_Terror_Law_Position_Paper_final.pdf) (Hebrew).

While the 2016 Counter-Terrorism Law repealed certain provisions of the 1945 Defense (Emergency) Regulations – a legal remnant of British colonial rule<sup>4</sup> – within the Green Line, the Regulations relating to “unlawful associations” remain valid in the Occupied Palestinian Territory (OPT). Regulation 84(1), as amended in 1947, defines an “unlawful association” as:

[A]ny body of persons, whether incorporated or unincorporated and by whatsoever name (if any) it may from time to time be known, which –

- (a) by its constitution or propaganda or otherwise advocates, incites or encourages any of the following unlawful acts, that is to say –
  - (i) the overthrow by force or violence of the constitution of Israel or the Government of Israel;
  - (ii) the bringing into hatred or contempt of, or the exciting of disaffection against the Government of Israel or its minister in his official capacity;
  - (iii) the destruction of or injury to property of the Government of Israel;
  - (iv) acts of terrorism directed against the Government of Israel or against its agents;or which has committed or has claimed to have been responsible for, or to have been concerned in, any such acts as are mentioned in sub-paragraph (ii), (iii) or (iv) of this paragraph; or
- (b) is declared by [the Israeli military commander] to be an unlawful association,

and includes any branch, center, committee, group, faction or institution of any such body.

Regulation 84(1) likewise provides two definitions for “unlawful associations”, one of which is declarative or descriptive and one that is constitutive, and these definitions differ from those of “terrorist organizations” under section 2(a) of Counter-Terrorism Law. Per the Emergency Regulations, the Israeli military commander in the West Bank may declare any organization to be an “unlawful association”, and the commander’s powers to make such declarations are completely unconditioned and discretionary. In such case, an organization need not engage in, support, or otherwise promote any of the acts described in regulation 84(1)(a) in order to be declared as an “unlawful association” under regulation 84(1)(b).

## **II. Wide Discretion and No Due Process in Designating Groups as “Terrorist Organizations” or “Unlawful Associations”**

There is little to no process for issuing orders to designate groups as “terrorist organizations” or declare them as “unlawful associations”: the Minister of Defense and the military commander have wide discretion in making such determinations. They do

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<sup>4</sup> The Israeli Supreme Court itself has expressed its reservations about these regulations, describing them as colonial measures legislated by an autocratic regime. See HCJ 680/88, Meir Schnitzer v. the Chief Military Censor, PD 32(4) 617, 626-27 (1988).

not need to justify such determinations, and, despite the immediate and far-reaching consequences of the designations and declarations, the orders are not immediately reviewable by any court or tribunal. Moreover, the organizations and their members do not have any opportunity to challenge the designation and declaration orders prior to their issuance, or even to review the information used to justify the orders. In the vast majority of cases, the organizations do not even receive a warning that they may be subject to such designations, or a chance to change their operations or activities.

According to section 3(a) to the Counter-Terrorism Law, the Minister of Defense may declare an organization as a terrorist organization “once he is convinced that paragraph (1) or (2) of the definition ‘terrorist organization’ applies and [he is convinced] that it [the organization] has a connection to Israel”. With the approval of Israel’s Attorney General, the head of Israel’s General Security Service (GSS or Shin Bet), either on their own initiative or on the initiative of the head of another security agency – i.e., Israeli Secret Intelligence Service (Mossad), the Israeli military, or the Israeli police – through a written request to the Minister of Defense. Alternatively, section 3(d) of the Law authorizes the Prime Minister to empower either a Ministerial Committee or the Government to issue a designation order. The same procedures apply to the process of formal designation of organizations, regardless of which of the two definitions of “terrorist organization” applies. However, in the case of an organization designated under paragraph 2 of the definition “that is acting in Israel through a party operating on its behalf,” section 3(c) provides that “the Head of the Security Agency shall only submit a [designation request] after a notice has been provided to the organization and it has continued its activity, provided that [the Head of the Security Agency] has determined that such a warning will not thwart the possibility of taking action against the organization”.

The Minister of Defense – or, alternatively, the Ministerial Committee or the Government – may issue a “temporary” designation order, pursuant to section 4(a) of the Counter-Terrorism Law. While the order is “temporary”, it is effective immediately. The temporary designation order remains in force: (1) until the Minister of Defense issues a permanent designation, following the “appeal” procedure discussed below; (2) unless the Minister of Defense decides to revoke the temporary order; or (3) until one month following the lapse of the stipulated period for submitting written claims, when the temporary designation automatically transforms into a permanent designation.

The Emergency Regulations do not outline any process for the declaration of an organization as an “unlawful association”. Regulation 84(b) simply states that the military commander may issue such a declaration. The Israeli military commander’s recent outlawing of the Palestinian Health Work Committees (HWC) provides an illustrative example. The HWC provides health care and other community services to Palestinians in the West Bank and East Jerusalem, with more than 200 full-time staff members operating a hospital, health clinics, and community centers in urban and

rural areas. On March 8, 2021, the Israeli military raided HWC's headquarters, seized office equipment, and detained an employee, while later arresting two others. At that time, none of the HWC's staff members, including members of its leadership and management teams, were aware of the fact that the military commander had declared the organization as an "unlawful association" a year prior to the raid, on January 22, 2020. HWC and its members received no notice of intent to declare the organization as such, nor a subsequent notice of the declaration upon its issuance, let alone an opportunity to review any collected evidence or to challenge the declaration beforehand. The staff members only learned of the declaration during a detention hearing in a military tribunal for one of HWC's employees in April 2021. Similarly, the six Palestinian human rights groups only learned of both their designations as "terrorist organizations" and declarations as "unlawful associations" from media reports, after such orders had been issued and had come into force, without any direct notification.

### **III. Severe and Immediate Legal Implications of these Designations and Declarations**

The consequences of the designations and declarations are severe, for the organizations, their staff and members, and their supporters. First, the organizations themselves can no longer operate and continue with any of their activities, including, for example, the crucial work the six groups conduct in defending the rights of Palestinians and exposing Israel's violations of international law. This consequence not only affects the organizations themselves, but also has immediate ramifications for the Palestinian individuals and communities whom the organizations serve and protect. It also threatens to exacerbate violations of the rights of Palestinian children, prisoners, women, and agricultural workers, among others, and impair efforts to secure justice and accountability for human rights violations and international crimes. The designations also greatly hamper the ability of the organizations to raise funds from international donors to support their work.

Both legal frameworks expand the range of terrorism-related offenses to activities that may be wholly unrelated to "terrorist acts" *stricto sensu*, and the penalties for the substantive offenses are much more severe than those established under the relevant domestic criminal and military laws. Both the Counter-Terrorism Law and military orders relating to the Emergency Regulations criminalize, *inter alia*, mere membership in the organizations and the provision of resources and services to these organizations, without any exemptions based on the nature or scope of the provision. Moreover, the two legal frameworks explicitly proscribe various forms of expression, including exhibiting "praise", "support", or "sympathy" with the organizations and/or its actions and objectives. Because these terms are left undefined and have broad application, Israeli authorities have and are likely to continue to selectively enforce expression-related offenses against Palestinians.

One of the immediate, threshold questions is whether Israeli law – specifically, domestic legislation such as the Counter-Terrorism Law – applies to the West Bank, as the current location of the offices of the six organizations, the residence of most of their staff members, and the site of their principal activities and operations. Under international law, as articulated by the International Court of Justice (ICJ), the West Bank, including East Jerusalem, is occupied territory, notwithstanding Israel’s attempts to alter this status through legislative and administrative actions.<sup>5</sup> Thus, it is international humanitarian law, together with human rights law, and not Israeli domestic law, that applies to the OPT, a distinction that the Israeli Supreme Court has generally accepted for the West Bank, excluding East Jerusalem, with the exception of Israeli settlements. However, certain provisions of the Counter-Terrorism Law apply extra-territorially, and any person may be charged before Israeli courts for certain offenses, including, *inter alia*, directing, managing, or being a member of a “terrorist organization” (section 41). Despite this extraterritorial application, Israel would find it difficult to justify using the Counter-Terrorism Law to enforce other penalties against the organizations, such as entering the offices of the Palestinian organizations and seizing their properties, which explains why the Israeli military commander also declared five of these organizations as “unlawful associations”, using the Emergency Regulations applicable to the West Bank.

#### A. *Legal liability under Israeli domestic law*

The designation of an organization as a “terrorist organization” under the Counter-Terrorism Law has several implications for the organization itself. According to section 56(b)(1) of the Law, the Minister of Defense may issue an order to seize or otherwise restrict the use of a designated organization’s property, if the Minister is convinced that such seizure is necessary to thwart the organization’s activity and reduce its ability to promote its objectives. Under the Law’s definitions in section 2(a), property includes immovable property, moveable property – such as laptops, electronic devices, documents, and vehicles – money, and rights.

Directors, managers, and staff members of an organization designated as a “terrorist organization” face severe criminal penalties. A person who heads or manages such an organization, or takes part in directing the organization as a whole, is liable to 25 years’ imprisonment (section 20), and a person who manages or takes part in directing the organization’s activity is liable to 10 to 15 years’ imprisonment (section 21). Mere membership in a designated organization carries a penalty of five years’ imprisonment (section 22(a)), while a member who takes part in the organization’s activity is liable to seven years’ imprisonment (section 22(b)). A person who provides services or resources to a designated organization is liable to five years’ imprisonment (section 23).

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<sup>5</sup> See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136, ¶ 78 (July 9).

The Counter-Terrorism Law further criminalizes the commission of “an act of identification with a terrorist organization”. Section 24(a) provides that a person who commits such an act – “including by publishing words of praise, support, or sympathy, waving a flag, displaying or publishing a symbol, or displaying, playing or publishing a slogan or anthem” – is liable to three years’ imprisonment. The Law does not provide a definition for the broad terms of “praise”, “support”, or “sympathy”, and these terms are not elsewhere defined in Israeli law. Moreover, possession, for the purposes of distribution, of a publication appearing to express identification with a terrorist organization may render a person liable to two years’ imprisonment (section 24(c)).

### *B. Legal liability under Israel’s military regime in the West Bank*

The consequences of an “unlawful association” declaration as defined in the Emergency Regulations include penalties for the organizations, their directors, staff members, and supporters under the legal regime of Israel’s military occupation. Under the Emergency Regulations, the Israeli military commander may, at their discretion, order the forfeiture of any immovable or moveable property under the custody or control of an organization declared as an “unlawful association” (regulation 84(2)(b)), and officers have the authority to enter any premise and seize such property (regulation 84(2)(d)).

Regulation 85 of the Emergency Regulations penalizes any person who, *inter alia*: (1) is or acts as a member of an “unlawful association”; (2) manages or holds an office within the association; (3) knowingly does any work or performs any service for an unlawful association; (4) attends a meeting of the association or allows any meeting to take place in a house, building, or place belonging to or occupied by them, or under their control; (6) has in their possession, custody, or control property that actually or purportedly belongs to, relates to, is issued by, or is in the interests of an unlawful association; (7) writes, prepares, reproduces, publishes, sells, distributes, or transmits a publication relating to the organization; (8) requests or collects donations for such an association; or (9) acts on behalf of or otherwise represents an unlawful association. Under the Emergency Regulations, a person convicted of any of the aforementioned offenses is liable to ten years’ imprisonment.

In addition to the Emergency Regulations, subsequent Israeli military orders establishes offenses related to “unlawful associations” that parallel those under the Counter-Terrorism Law. Following Military Order No. 1827 (Order Concerning Security Provisions (Amendment No. 67)), 2020, a person who heads or manages, directly or indirectly, an “unlawful association” is liable to 25 years’ imprisonment, while a person who manages or takes part in directing the activity of such an association is liable to 15 years’ imprisonment. Military Order No. 1827 also expands the definition of property to include not just immovable and moveable property, funds, and rights, but also any subsequent property derived from such property or its profits. This order then



proscribes the transfer of property to an “unlawful association” and other “property acts” of “unlawful association”, which include, *inter alia*, purchasing or receiving ownership or other right in the property as well as holding, converting, banking, investing, importing, and exporting such property. A person who commits these property-related offenses is liable to seven years’ imprisonment.

The military regime further prohibits praise, sympathy, and support for an organization declared as an “unlawful association”. Section 7A of Military Order No. 101 (Order Regarding the Prohibition of Acts of Incitement and Hostile Propaganda), 1967, proscribes the publication of “praise, sympathy or support for a[n unlawful association], its actions or objectives”, as well as public identification with such an association, its actions or objectives, including, *inter alia*, “by waving a flag, displaying a symbol or slogan or singing a hymn or sounding a slogan”. Under section 251 of the so-called criminal code promulgated by Military Order No. 1651 (Order Regarding Security Provisions), 2009, such publications and public acts of identification with an unlawful association are punishable by ten years’ imprisonment.

#### **IV. Lack of Due Process in Challenging the “Terrorist Organization” Designation and “Unlawful Association” Declaration, Based on Secret Evidence**

The Counter-Terrorism Law prescribes a process whereby groups and their members may challenge their designations as “terrorist organizations”; however, this process suffers from many procedural and substantive defects. In contrast, there is no process enumerated in or required by the Emergency Regulations whatsoever. Rather, the existence of a process, as well as its form and structure, are at the complete discretion of the Israeli military commander.

Both legal frameworks fail to provide the minimal standards of fair trial and due process. In particular, both permit the sweeping use of secret evidence, which are undisclosed to the affected parties and upon which the relevant Israeli authorities may rely in issuing final decisions. Following the aforementioned process under the Counter-Terrorism Law, and after appealing to the Israeli military commander, for “terrorist organization” designations and “unlawful association” declarations respectively, the groups may petition the Israeli Supreme Court. However, the Court’s great deference to the Israeli security apparatus in cases purported to involve national security matters, and its acceptance of and reliance on secret evidence, render the Court as an extremely unlikely forum for any meaningful judicial review or relief.

##### *A. Contesting the “terrorist organization” designation via the Advisory Committee*

###### 1. The “appeal” process under the Counter-Terrorism Law

While the Counter-Terrorism Law stipulates a process through which to immediately challenge the “terrorist organization” designation, this process is marred by critical due process flaws and shortcomings. Following the issuance of a temporary designation, under section 5(a) of the Counter-Terrorism Law, the head of the designated organization, or one of its members, may submit written arguments to the Minister of Defense, via the Advisory Committee, within two months of the publication date of the temporary designation order in the official government gazette. Appointed by the Minister of Justice, in consultations with the President of the Supreme Court and the Minister of Defense, the Advisory Committee consists of: (1) a retired Supreme Court or district court judge, acting as the chairperson; (2) a jurist qualified to serve as a district court judge; and (3) an expert in national security and counter-terrorism (section 14(a)). Pursuant to section 5(e) of the Law, the Advisory Committee is charged with the task of considering the arguments presented by the designated organization and by the security agency that submitted the designation request, and providing the Minister of Defense (or, as the case may be, the Prime Minister or the Ministerial Committee), within four months, with its recommendations on whether to make the designation order permanent.

Upon receiving the Advisory Committee’s recommendations, the Minister of Defense has complete discretion to decide, within a month (which may be extended by one more month), whether or not to make the designation permanent (section 6(a)). The Minister may accept the recommendation of the Advisory Committee, or completely disregard it, and is under no obligation to justify the action. However, if the designated organization fails to submit arguments, the temporary designation order becomes permanent after one month from the end of the two-month period allocated for the submission of arguments (section 6(d)). The Minister of Defense may revoke the permanent designation order if they are convinced that: (1) there was no basis for the designation; or (2) after two years have passed, the organization substantially changed its conduct, and there is a high probability that it will not engage in future “terrorist activity” (section 7(a)). For organizations designated according to paragraph 2 of the definition of “terrorist organization” in the Counter-Terrorism Law, the second instance for revocation is effectively inapplicable, as it is not claimed that such organizations are engaging in “terrorist acts”, and the definition of “terrorist activity” includes legal activity or activity for legal purposes. The Minister of Defense may issue a revocation order either by their own initiative or upon receiving a written request submitted by the designated organization to the Minister of Defense, via the Advisory Committee (section 7).

## 2. Lack of due process and the use of secret evidence

The Counter-Terrorism Law does not provide affected individuals who are entitled to submit written claims or a revocation application with the right to access all of the information gathered and evidence collected to justify the designation. Rather, these persons may have access to the request submitted by the head of the relevant security

agency, to the Advisory Committee's recommendations, and to the decision of the Minister of Defense. They are not granted access to any confidential information – i.e., secret evidence – or to other information that the Advisory Committee was requested not to consider in formulating its final recommendations, per section 8 of the Counter-Terrorism Law.

The Advisory Committee may consider secret evidence in formulating its recommendations. Section 9(a) of the Law requires the Advisory Committee to conceal information based on a request by the head of a security agency, provided that the Committee is convinced that disclosure of such information may harm State security, foreign relations, or public safety or security, or may reveal confidential work methods, and that "the interest in non-disclosure outweighs the necessity of its disclosure for the purpose of determining truth and attaining justice". To make such a determination, the Advisory Committee may review the material and request explanations from the security agency in an *ex parte* session. If the Committee wishes to base its recommendations on secret evidence, it must notify the party submitting the claims or revocation application and *may* provide the party with a summary of the secret evidence, prepared by the security agency (section 9(c)). In other words, the law grants the Committee broad discretion to determine the procedure of the hearings before it, as well as to decide the scope of the secret evidence.

Moreover, the designation order may be used as evidence in subsequent criminal proceedings against those accused of being associated with the organization, either as directors, members, or persons who have contributed to its objectives. Section 19 of the Counter-Terrorism Law bars a party in a legal proceeding, including defendants in criminal proceedings, from raising arguments against the legality or validity of a designation order. Thus, a person charged with one of the aforementioned offenses would not be able to challenge the designation order, both because they would not be allowed to review the secret evidence upon which such a designation order was based, and due to the procedural rule precluding such arguments from being considered by the court deciding the case. While, in general, secret evidence is inadmissible against the rights of the defendants in legal proceedings before Israeli domestic courts, including criminal proceedings, and cannot form the basis of court rulings, the Counter-Terrorism Law introduces such evidence into court proceedings through the back door, and insulates it from judicial review, except by way of a separate administrative petition to the Supreme Court, in which case the Court would most likely consider the classified information in an *ex parte* hearing.

Lastly, the Advisory Committee conducts its discussions in closed hearings, and protocols of its discussions are confidential with their disclosure prohibited unless determined otherwise (section 16(a-b)). Thus, the discussions are not subject to review by the affected organizations, and that there is no public transparency, oversight, or accountability over the Advisory Committee and its decision-making processes.

### *B. Contesting the “unlawful association” declaration through the military system*

In contrast to the contestation process provided by the Counter-Terrorism Law, the Emergency Regulations and other relevant military orders effective in the West Bank provide absolutely no process through which to challenge the declaration of an organization as an “unlawful association”. Whatever process there may be, if any, is at the full discretion of the Israeli military.

For example, in the case of the HWC, legal counsel sent a letter to the Israeli Military Advocate General (MAG), stating that HWC had never received notice of the declaration, after its staff members first learned of the declaration over a year after its issuance. Between the issuance of the declaration and HWC’s first learning about it, the organization continued its work without any significant changes in activities, despite the military’s baseless allegations that HWC is a front for a designated “terrorist organization” and that it poses a great threat to public security in the area. HWC sought to obtain the evidence upon which the declaration was based and requested a suspension in subsequent proceedings based on the declaration. However, to date, HWC has yet to receive any of the evidence, and HWC has not been afforded the opportunity to challenge the military declaration.

Another relevant example is the Northern Branch of the Islamic Movement, which was declared an unlawful association by the Israeli Government on November 17, 2015, when the relevant provisions of Emergency Regulations were still applicable within the Green Line. Following the split of the Islamic Movement in 1996, the Northern Branch shifted its activities from Israeli electoral politics to providing social services to local Palestinian communities, including humanitarian aid, food assistance, and academic preparation courses. The Israeli Minister of Defense issued the declaration following a decision by the Security Cabinet in Israel, and, in doing so, immediately turned one of the most important political and social organizations in Israel into an unlawful organization, alongside 17 affiliated organizations. Following the declaration, Israeli police forces and the GSS raided the Islamic Movement’s offices and seized computers and files, and confiscated its financial assets.

Initially, the Northern Branch of the Islamic Movement requested that the Minister of Defense provide it with the secret evidence underpinning the declaration. However, the Minister refused to provide any information related to the decision-making process, or the evidence provided to him by intelligence agencies. Given its inability to review and challenge the evidence, and the lack of due process, the Northern Branch decided not to challenge the declaration or request that the Minister of Defense revoke the order. With the passage of the Counter-Terrorism Law in 2016, under its transitional provision in section 101(a), the declaration of the Northern Branch as an “unlawful

association” was automatically converted to a permanent designation as a “terrorist organization”.

### C. *Challenging the orders before the Israeli Supreme Court*

The only way to challenge the final decisions of the Israel’s Minister of Defense, via the Advisory Committee, and of the Israeli military commander is through a petition to the Israeli Supreme Court, sitting as the High Court of Justice. The Court’s jurisprudence provides that the affected persons and groups must exhaust all available alternative remedies prior to petitioning the Court to review the decisions and actions of Israeli authorities, as well as relevant legislation. Therefore, in order bring a petition to the Court challenging either “terrorist organization” designations or “unlawful association” declarations, the affected organizations would need first to complete the process through the Advisory Committee, as prescribed by the Counter-Terrorism Law, or the undefined objection process within the Israeli military system, respectively. In both cases, however, the Supreme Court would not oversee an adversarial process that allows the parties to present, review, and challenge all collected evidence and examine and cross-examine witnesses. Rather, the Court would conduct a review of the reasonableness of the authorities’ final decisions, including the secret evidence upon which they relied, without disclosing such evidence to the affected organizations.

Moreover, in cases purportedly involving matters of national security, the Israeli Supreme Court overwhelmingly upholds the security apparatuses’ decisions, and does not intervene in their discretionary powers. The hundreds of administrative detention cases are clear examples of this phenomenon, whereby the Court, relying on secret evidence undisclosed to the detainees, accepted all the issued detention orders, and issued not a single judicial decision to release the detainee.<sup>6</sup> In reviewing secret evidence, the Court justices and the state and/or military authorities sit together in a room; the petitioners and their lawyers are not present and cannot review or interrogate any of the materials. While the Court views secret evidence only after the agreement of the petitioners’ lawyers, in practice, when the lawyers disagree – albeit rarely – the Court, by reference to the “presumption of legality” accorded to administrative acts, accepts the assumption that the authorities’ decision relies on fair and untainted facts. Challenging this presumption in security cases is practically impossible given the grounding of these decisions in secret evidence.

Indeed, relying on secret evidence has become a deeply-entrenched judicial norm of the Israeli Supreme Court in cases involving the rights of Palestinians, even when there is no clear legislation to allow for the admission of such evidence. Examples of cases in which secret evidence is used include: refusal to return the bodies of

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<sup>6</sup> Shir Krebs, *Lifting the Veil of Secrecy: Judicial Review of Administrative Detentions in the Israeli Supreme Court*, 45 VAND. J. TRANSNAT’L L. 639, 672 (2012) (examining more than 322 administrative detention cases); see also Dana Boulus, *Administrative Detention: A Mask for Political Control of a Fair Legal Instrument?*, International Centre for the Study of Radicalization (ICSR) Report (2018).

deceased Palestinians to their families; use of torture and other methods against detained Palestinians; preventing the unification of Palestinian families and deportation of their members; home demolition orders; restrictions on the right of movement; and the continued siege on the Gaza Strip.<sup>7</sup> The consistent history of these cases shows that, in dealing with the civil and political rights of Palestinians, the Israeli Supreme Court never challenges the validity of the secret evidence. Instead, the Court relies on the secret evidence before it without question, which in most of these cases also leads to the Court's endorsement of the authorities' final decision.

## V. Conclusion

Both Israeli measures to criminalize Palestinian human rights and civil society organizations – under the Counter-Terrorism Law and the 1945 Emergency Regulations regarding “unlawful associations – violate the fundamental right of due process. The first measure gives full discretion to Israel's Minister of Defense to designate a group as a “terror organization”, even when the group is not involved in any illegal actions such as “terror acts” as defined in the Counter-Terrorism Law. The Law does not provide clear norms to limit this discretion, and it uses overbroad and vague terms. Further, the designation may occur prior to any notice or hearing, and the Advisory Committee, which includes a member who is nominated in consultation with the security apparatus, has very wide discretion to decide on its procedures and on which materials should be disclosed. In addition to the total absence of due process, the Counter-Terrorism Law raises questions regarding the international law principle that prohibits the applicability of Israeli law to Palestinians living in the OPT. The second track involving the 1945 Emergency Regulations is arguably even worse, lacking in any written process. The recent examples provided above, including the cases of the HWC and the Northern Branch of the Islamic Movement, reveal the absolute power of the Israeli security apparatus to decide on these declarations in the absence of any due process.

In these cases, due process requires, at the bare minimum, the Israeli authorities to disclose to the Palestinian organizations and before the public, all of the materials that they claim show that the groups directly or indirectly support other organizations or groups outlawed by Israel, both before the designation and declaration orders are issued and alongside a meaningful opportunity to interrogate and challenge such evidence. The process of using and relying on secret evidence not only violates the principles of due process, but also opens opportunities for manipulation by the Israeli political and security apparatus, as recently exhibited in the case of Juana Ruiz Rishmawi, who worked as a fundraiser for HWC. While the indictment against Rishmawi has nothing to do with the other organizations' activities, the Israeli

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<sup>7</sup> See, e.g., Hassan Jabareen, *How the Law of Return Creates One Legal Order in Palestine*, 21 THEORETICAL INQUIRIES L. 459, 477 (2020); HCJ 4462/20, *Erekat v. Military Commander of the West Bank* (2021).

authorities have used her plea bargain in their propaganda to argue publicly and internationally that she confessed that some of the six groups were involved in illegal acts.<sup>8</sup> It was only because the criminal procedures and the hearing were open to the public and to the lawyers, that the military court itself later denied the authorities' claims and publicly revealed the facts of her case.<sup>9</sup>

While Israeli law precludes the use of secret evidence against the rights of defendants in criminal proceedings, this rule is breached in these cases. The same rules prohibiting, in principle, the use of secret evidence in criminal trials should apply to the administrative and military processes of designating groups as “terrorist organizations” or declaring them as “unlawful associations”. No secret evidence should be used against the six Palestinian human rights organizations to justify the decisions to outlaw them and criminalize their activities.

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<sup>8</sup> See Oren Ziv, *Israel Boasts New 'Proof' of NGO Terror Ties – by Getting the Facts Wrong*, +972 MAG (11 Nov. 2021), available at: <https://www.972mag.com/juana-ruiz-rishmawi-military-court-ngos/>.

<sup>9</sup> See Yonah Jeremy Bob, *IDF Court Findings Undermine Gov't Campaign Against NGOs*, Jerusalem Post (18 Nov. 2021), available at: <https://www.jpost.com/israel-news/idf-court-findings-undermine-govt-campaign-against-ngos-685413>.