

## HUMAN RIGHTS WATCH

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March 15, 2006

Constitution, Law and Justice Committee

Dear Member of Knesset,

We are writing in regard to a bill, *Criminal Procedure (Enforcement Powers –detention) (Non-Resident Detainee Suspected of Security Offense) (Temporary Provision) Law, 5765-2005*, that is scheduled for debate in your Committee on March 16.

The government introduced this bill, which sets forth rules for detaining non-resident security suspects, after the disengagement from Gaza and the consequent revocation of military orders pertaining to arrest and detention of Gaza residents. This bill, intended as a temporary supplement to the current Israeli detention law (pending more comprehensive reform), would create a two-tiered system: one set of rules for Israeli citizen and resident security suspects and a considerably more stringent set of rules for non-residents suspected of the same types of crimes

Under the bill, security officials would be able to hold non-resident suspects twice as long as residents suspected of the same crimes (96 hours rather than 48); a court could prolong the detention of non-resident suspects without them being present, a provision with no equivalent in the existing law applicable to residents; and a Supreme Court justice could prohibit a non-resident from meeting with an attorney for up to 50 days, more than twice the twenty-one-day period provided for in the existing law, and a period that contravenes international standards that call for prompt access to a lawyer for all those under detention.<sup>1</sup>

The Israeli Security Agency (Shabak) and Ministry of Justice have sought to justify the disparate treatment the law would impose with the argument that security authorities have less access to physical evidence, potential witnesses, and other sources of information when it comes to non-resident suspects (defined in the proposed law as persons with less than three years residency in Israel at the time of detention) Rather than building these considerations into existing law as factors to be considered by judges in determining what detention rules are appropriate in any given case, the Shabak

<sup>1</sup> Principle 7 of the Basic Principles on the Role of Lawyers: "Governments shall further ensure that all persons arrested or detained, with or without criminal charge, shall have prompt access to a lawyer, and in any case not later than forty-eight hours from the time of arrest or detention "

and justice ministry instead are proposing the creation of a separate system that automatically administers harsher treatment to non-residents.

Human Rights Watch appreciates that Israel faces grave security threats and has a duty to protect its citizens. As you know, Human Rights Watch has criticized in the harshest terms suicide bombing attacks against Israeli citizens as crimes against humanity.<sup>2</sup> While these types of security threats may lead governments to enact specific law enforcement measures, they must be proportionate to the threat and applied in a non-discriminatory manner. International human rights law is unequivocal on the latter point and the International Covenant on Civil and Political Rights (ICCPR), which Israel has ratified, obligates States parties to “respect and to ensure to all individuals within its territory the rights recognized in the ... Covenant.” The U.N. Human Rights Committee, the authoritative body responsible for interpreting the ICCPR and monitoring states’ compliance with their obligations under the Covenant, has stated in its General Comment 15 that “Aliens are entitled to equal protection by the law.” The Committee goes on to say that “Aliens shall be equal before the courts and tribunals, and shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law in the determination of any criminal charge or of rights and obligations in a suit at law...”<sup>3</sup>

The proposed law imposes limits on suspects’ rights that go beyond, in some aspects far beyond, international standards and the practices of other nations confronting serious security threats. The U.N. Security Council has stated that “States must ensure that any measure taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law.”<sup>4</sup>

While other countries have recognized the need to create different criminal procedures tailored to certain kinds of security threats, these differing standards are based on the type of crime, not the residency status of the individual suspected of planning or committing the crime. This bill may also be counterproductive; by introducing a clear double standard, it can be expected to become a lightning rod for domestic and international criticism

### **Increased period of detention without judicial order**

Under Israel’s current detention law (*Criminal Procedure (Enforcement Powers – Detention) Law, 5756-1996*), the Israeli police or Shabak can hold security suspects in their custody for a maximum of 48 hours before bringing them before a judge. This new bill would empower the security services to hold non-resident security suspects for additional 24-hour periods up to 96 hours before bringing them before a judge. This extended period is particularly problematic because the authorities can also prevent the detainee from meeting with an attorney during this period. Bringing a suspect promptly before a judge and guaranteeing a suspect the right to meet with an attorney promptly following his or her detention are essential safeguards against ill-treatment during interrogation.

### **Prohibition on Meeting with Counsel**

Under existing Israeli law, the police and the Shabak can bar a security suspect from meeting with an attorney for up to ten days. A District Court judge can authorize a prohibition on meeting with counsel for up to 21 days if requested by the security services with the support of the Attorney General. In this proposed law, the police and Shabak may, with the attorney-general’s approval, request a Supreme Court justice to prohibit a non-resident security suspect from meeting with a lawyer for up to 50 days.

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<sup>2</sup> Human Rights Watch, “Erased in a Moment: Suicide Bombing Attacks Against Israeli Civilians,” October 2004, available at [www.hrw.org](http://www.hrw.org).

<sup>3</sup> CCPR General Comment No. 15: The position of aliens under the Covenant: 11/04/86.

<sup>4</sup> On January 20, 2003, the United Nations Security Council passed Resolution 1456, which emphasizes that: “States must ensure that any measure taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law in particular international human rights, refugee, and humanitarian law.”

Past practice shows that high court justices have almost always ruled in favor of the state in refusing to allow detainees their right to legal counsel. In 2005 alone, the Public Committee Against Torture in Israel (PCATI) filed nearly 100 petitions challenging orders prohibiting Palestinian detainees from meeting their attorneys. None of the petitions heard by the High Court were granted.<sup>5</sup> This has been the trend of recent years and has been the case even where a petition included a detainee's allegation of torture or abuse during interrogation.

### **Increased period of detention under judicial order prior to indictment**

Under current Israeli law, when the Israeli police or Shabak bring a security suspect before a court, a judge can approve further periods of detention for as many as 15 days at a time, up to a total of 30 days. The new bill would allow a judge to prolong the initial period of detention for up to 20 days at a time, for a total of 40 days. (Under existing law as well as the new bill, the police and Shabak may request a further extension of detention prior to indictment up to a total period of 75 days, through a request that both the Attorney General and the court must authorize.

The proposed law furthermore, does not entitle the suspect to attend every hearing regarding the renewal of his or her detention. If the judge initially prolongs the detention for a period of less than 20 days, he or she can subsequently extend the time up to the 20 day maximum in a hearing at which the security services can request that the suspect not be present. In addition, the state may request, and the court may allow, that the suspect not be notified of such an extension. Under these circumstances, a suspect would have no way of knowing that his or her detention had been judicially extended and may believe that he or she is being held extra-judicially, at the whim of his interrogators, making him or her more susceptible to unlawful pressure.

### **Incommunicado Detention**

The proposed law creates a situation whereby non-resident security suspects may be held in incommunicado detention for periods that could amount to weeks at a time. The security services almost never grant security detainees visits from family members during the period in which they are under Shabak investigation and before they are indicted.<sup>6</sup> While the ICRC has the right to visit a detainee after the first 14 days of detention, the Shabak can prolong this period "for reasons of security," according to the Prison Superintendent Order. PCATI asserts that in their experience, where the ICRC has visited a detainee, they often do so closer to a month after arrest.<sup>7</sup> Finally, under Israeli law detainees are not entitled to a medical examination by a doctor of their choosing. While by law detainees may request and be granted medical attention, in practice the interrogator can delay such a request. Medics and doctors, moreover, are employees of the prison service or the police and are not trained in forensic medicine.

Incommunicado detention per se is not prohibited under international law, but there exists significant consensus among United Nations human rights bodies that it can give rise to serious human rights violations such as torture and ill-treatment. The Human Rights Committee has recommended that states take provisions to restrict

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<sup>5</sup> Email from Eliahu Abrams, Legal Advisor, Public Committee against Torture in Israel. In a report covering the 2002-2003 period, PCATI reported that out of 124 petitions filed with the High Court asking them to overturn orders prohibiting Palestinian detainees from meeting their attorneys, all were rejected.

<sup>6</sup> Section 12 (b) of the Criminal Procedure (Enforcement - Arrests) (Conditions of Detention) Regulations, 1997 states that detainees do not have a right to family visits before an indictment is filed against them, unless the officer in charge of the investigation affirms that the visit will not impede the investigation. Israeli human rights lawyers have testified to Human Rights Watch that in practice, detainees virtually never receive family visits. In addition, families of detainees from the Gaza Strip would face enormous impediments to enter Israel to visit their detained family member given Israeli regulations restricting entry into Israel.

<sup>7</sup> Prison Superintendent Order no. 3.12.00 states in section 3(a) that ICRC representatives are entitled to visit security detainees from Gaza, the West Bank, East Jerusalem and the Golan Heights in the course of an investigation after the fourteenth day of a detainee's detention. However, the Shabak may postpone the visit "for reasons of security," according to section 4(c) of these regulations.

and sharply reduce incommunicado detention, a position the U.N. Commission on Human Rights has consistently reaffirmed.<sup>8</sup>

In addition, U.N. treaty bodies that have examined Israel compliance with the provisions of international human rights treaties have repeatedly raised grave concern regarding Israel's practice of incommunicado detention of Palestinian detainees from the West Bank and Gaza.<sup>9</sup> For example, the Committee against Torture considered Israel in its November 2001 session and in its Concluding Observations stated that "[t]he continued use of incommunicado detention, even in the case of children, is a matter of grave concern to the Committee."<sup>10</sup> In August 2003, when reviewing Israel's second periodic report on its compliance with the ICCPR, the Human Rights Committee expressed concern "that the use of prolonged detention without any access to a lawyer or other persons of the outside world violates articles the Covenant (arts. 7, 9, 10, and 14, para. 3 (b))." The Committee at that time called on Israel to ensure that it does not hold anyone for more than 48 hours without access to a lawyer.<sup>11</sup>

These safeguards serve not only to preserve the legal rights of detainees, but also their physical well-being. It is well-established that the vast majority of abuses that detainees are subjected to happens during and after their initial detention, particularly in connection with their initial interrogation. It is during this critical initial period that a detainee most needs the protection and oversight that only independent judicial authorities and access to legal counsel can provide. The length of incommunicado detention allowed for in this bill also puts Israel outside the norm of other countries that have legislation permitting some form of incommunicado detention under counter-terrorism legislation. For example, the United Kingdom provides for up to 48 hours of incommunicado detention,<sup>12</sup> and Australia, seven days. Human rights organizations and U.N. treaty bodies have been extremely critical of countries that have passed laws permitting periods of incommunicado detention that are much shorter than what the current Israeli bill proposes, such as the 13 days permitted in Spain's recent counter-terror legislation.<sup>13</sup>

For the above reasons we urge you to reject this deeply flawed bill when it comes before your Committee for consideration.

Thank you for your attention to this important matter.

Sincerely,



Sarah Leah Whitson  
Executive Director  
Middle East North Africa Division  
Human Rights Watch

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<sup>8</sup> General Comment No. 20: Replaces general comment 7 concerning prohibition of torture and cruel treatment or punishment (Art. 7), 10/03/92. Commission on Human Rights Resolution 2005/39 of 19 April 2005 (Torture and other cruel, inhuman or degrading treatment or punishment) says "9. ...prolonged incommunicado detention or detention in secret places may facilitate the perpetration of torture and other cruel, inhuman or degrading treatment or punishment and can in itself constitute a form of such treatment, and urges all States to respect the safeguards concerning the liberty, security and the dignity of the person;"

<sup>9</sup> In these cases the U.N. treaty bodies were reacting to the use of incommunicado detention against Palestinian detainees under Israeli military orders that govern arrest and detention of Palestinian criminal and security suspects in the West Bank and Gaza (prior to the Israeli disengagement from Gaza).

<sup>10</sup> Conclusions and Recommendations of the Committee against Torture: Israel. 23/11/2001. CAT/C/XXVII/Concl.5. (Concluding Observations/Comments)

<sup>11</sup> Concluding observations of the Human Rights Committee: Israel. 21/08/2003. CCPR/CO/78/ISR. (Concluding Observations/Comments). The Committee also stated that Israel was "derogating from article 9 more extensively than what in the Committee's view is permissible pursuant to article 4."

<sup>12</sup> The U.K. parliament is currently debating this provision and there are U.K. proposals to extend the general period of detention for up to 90 days.

<sup>13</sup> See Human Rights Watch report "Setting an Example: Counter-Terrorism Measures in Spain" January 27, 2005