

Mandate of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism

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24 May 2024

Excellency,

I have the honour to address you in my capacity as Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, pursuant to Human Rights Council resolution 49/10.

In this context, I would like to draw your Excellency's Government's attention to information I have received concerning recent amendments to the Incarceration of Unlawful Combatants Law 5762-2002,¹ in particular Amendment No. 4 and Temporary Order – Iron Swords) 5784-2023 of 18 December 2023 (in force from 18 December 2023 to 17 April 2024) and Amendment No. 4 and Temporary Order – Iron Swords) 2024 of 18 April 2024 (in force from 19 April 2024 until 1 July 2024).

The Law and its amendments have been applied to authorize the detention of Palestinians, including suspected members of Palestinian armed groups, in relation to the 7 October 2023 attack on Israel and the ensuing conflict in Gaza, including to detain some persons captured in Israel and a larger number in Gaza.

I am concerned that these amendments and aspects of the original law, still in force, are not consistent with the State of Israel's obligations under international humanitarian law (IHL), compliance with which in the context of countering terrorism has also been affirmed by the United Nations Security Council in successive resolutions and the United Nations Global Counter-terrorism Strategy of the United Nations General Assembly. I note that Special Procedures mandate-holders previously expressed concern about certain aspects of the Unlawful Combatants Law in communication [UA ISR 9/2023](#) and country visit report [A/HRC/6/17/Add.4](#).

I welcome that the Law itself is expressly intended to regulate detention 'in a manner conforming with the obligations of the State of Israel under the provisions of international humanitarian law' (s 1). I also note that Israel Supreme Court has previously expressed a commitment to interpret and apply the Law consistently with IHL: *A and B v Israel*, Israeli Supreme Court (Court of Appeal), CrimA 6659/06, 11 June 2008, para. 41. In the same spirit, I offer constructive comments and suggestions to ensure that recent amendments to the Law, and certain other elements of the Law, are consistent with IHL.

¹ Published in the Official Gazette 5762 No. 1834 on 14 March 2002, p. 192 (Proposed Bills 5760 No. 2883, p. 416), as amended.

His Excellency
Mr. Israel Katz
Minister for Foreign Affairs of the State of Israel

I kindly request your Excellency's Government to convey this letter urgently to the Supreme Court in view of its relevance to current proceedings before it.

The law and the 2023 and 2024 amendments

The Incarceration of Unlawful Combatants Law provides for the administrative detention without charge of a person defined as an 'unlawful combatant' under section 2. Initially, a temporary detention order can be issued where an authorized officer has 'reasonable grounds to believe that a person brought before him is an unlawful combatant (s. 3(a)). The initial detention may thereafter be confirmed by an 'incarceration order' issued by the Chief of the General Staff of the Israel Defense Forces if they have 'reasonable grounds to believe that an incarcerated individual is an unlawful combatant and that his release would endanger the security of the state' (s. 3(b)(1)). If such order is not issued within 96 hours of from the time when the temporary detention order is issued, the person must be released (s. 3(c)).

Following the renewal of hostilities in Gaza after the attacks on Israel by Palestinian armed groups on 7 October 2023, Amendment No. 4 of 18 December 2023 modified certain procedural safeguards under the Unlawful Combatants Law:

- An incarceration order must be issued within 45 days, not 96 hours as under the earlier Law, starting from the time of issuance of the temporary detention order;
- A detainee must be brought before a district court for a hearing within 75 days of incarceration, not 14 days as under section 5 of the earlier Law;
- The judicial review may be undertaken by video conference, even if the detainee is not represented by a legal counsel;
- The detainee may be denied access to a legal representative for 75 days on the order of an official (compared to 10 days under s 6(a1) of the earlier Law) or 180 days on the order of a district court (compared to 21 days under s 6(a2) of the earlier Law).

The 2024 amendment largely replicates the amendments above in the 2023 amendment, with the exception of reducing the court-ordered denial of a lawyer from 180 to 90 days.

Applicable international legal obligations

Israel is a party to and bound by the four Geneva Conventions of 1949.

Under international humanitarian law, the current armed conflict in Gaza qualifies as an international armed conflict because Gaza is under the effective control of Israel and thus constitutes one part of the larger Palestinian territory occupied by

Israel under common article 2 of the Geneva Conventions 1949,² initially after it was taken from Egyptian control in 1967. The occupation persisted after the withdrawal of Israeli ground forces from Gaza in 2005 due to Israel's continuing exercise of effective control through a combination of other means, including blockade and control over airspace and territorial waters, borders and contiguous restricted areas, land crossings, customs, migration, the supply of civilian infrastructure (such as construction materials and energy), financial systems (currency and taxes) and key governmental functions (such as the management of the Palestinian population registry, release of public sector revenue and salaries, and control of humanitarian relief operations by external actors), all in the context of a prior period of almost 40 years of complete dependency on Israel prior to 'disengagement'.

Israeli control over Gaza has increased further with the widespread presence and dominance of Israeli ground forces in Gaza since 7 October 2023, further cementing the effectiveness of its authority or its capacity to exercise authority³ and the displacement of Hamas' limited de facto authority. (Operations since 7 October 2023 alone are sufficient to establish occupation.)

The international community recognizes Gaza is occupied,⁴ including United Nations General Assembly resolutions and the International Committee of the Red Cross (ICRC).

Separately, Israeli military operations are taking place in the territory of the State of Palestine, a state party to the Geneva Conventions 1949 and a non-member observer state of the United Nations, without its consent, thus constituting an international (inter-state) armed conflict under common article 2 of the Four Geneva Conventions 1949.

The Unlawful Combatants Law itself provides that it is intended to regulate detention 'in a manner conforming with the obligations of the State of Israel under the provisions of international humanitarian law' (s. 1). In this context, the Israeli Supreme Court has held that the Unlawful Combatants Law is more specifically based on the 'premise... that an international armed conflict prevails between the State of Israel and the terrorist organizations that operate outside Israel': *A and B v Israel*, Israeli Supreme Court (Court of Appeal), CrimA 6659/06, 11 June 2008, para. 9 (and see other Israeli authorities cited there). In the same case, it applied the law of the Fourth Geneva Convention 1949 in relation to administrative detention.

The law of the Fourth Geneva Convention accordingly applies to govern the administrative detention of persons in relation to the present conflict. Under the Fourth Convention:

- (a) In occupied territory (i.e. persons apprehended in Gaza), persons may only be detained 'for imperative reasons of security': GCIV, article 78.

² Interpreted in the light of the test for occupation under article 42 of the Hague Regulations 1907, reflecting customary IHL.

³ ICRC Commentary 2020 to GCIV article 2, para. 338.

⁴ See e.g. A/HRC/50/21, para. 16; A/77/328, para. 19; A/78/198, paras. 5 and 49; A/HRC/37/75; International Criminal Court, Pre-Trial Chamber I, Decision on the Prosecution request pursuant to Article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine, 5 February 2021, para. 101.

- (b) In a state party's own territory (i.e. persons apprehended in Israel), persons may only be detained 'if the security of the Detaining Power makes it absolutely necessary': GCIV, article 42.

The two grounds of detention are substantially similar, although detention in occupied territory may be regarded as more exceptional than in the state party's own territory: ICRC Commentary 1958 to GCIV, article 78.

A person who takes a direct or indirect part in hostilities, as defined under IHL (see ICRC Guidance on Direct Participation in Hostilities 2009), could potentially fall within these security detention powers, depending on the nature of their individual activities and the continuing threat that they personally pose.

Minimum procedural guarantees apply to detention under IHL, discussed below.

It is noted that fundamental rights, including the right to liberty, under Israel's Basic Law also apply to persons detained under the Law, such that this domestic form of human rights law complements the applicable IHL and raises the level of legal protection. Further, when reviewing the Law for compliance with the domestic right to liberty, the Israeli Supreme Court has explicitly 'noted' the consistency of the domestic right with the international right to liberty under article 9 of the ICCPR (*A and B v Israel*, para. 41). As such, Israeli law recognizes that international human rights law standards are relevant in regulating detention authorized by IHL.

Justification for the amendments

Israel claims that the amendments are justified due to the extraordinary volume of people imprisoned as part of the current conflict and the continuation of that conflict. However, I draw attention to the finding of the Israeli Supreme Court in *A and B v Israel* (at para. 41) that the Law prior to the current amendments was already designed to address hostilities 'in the course of which a relatively large number of enemy combatants may fall into the hands of the military forces' and were found to be proportionate under Israeli law on that basis. It is not to the point that Israel has not previously found it necessary to use the Law to hold large number of detainees. The Law, as originally drafted, is already adapted to exigencies of the scale of the present conflict in Gaza, or indeed even for potentially larger scale conflicts.

The underlying rights at stake that are protected by IHL and human rights law – liberty and freedom from arbitrary detention – are too weighty to be sacrificed for the mere administrative convenience of the state. The burden is on Israel to increase the resources available to ensure that these rights can be adequately protected in a manner proportionate to the number of detentions, for example, by increasing the number of decision-makers qualified to issue incarceration orders in a timely fashion and allocating sufficient judges to the review of such orders. If it is accurate that Israel is reportedly holding up to 2,000 detainees under the Law, this number is not so burdensome as to overwhelm a Law in principle intended to cope with the administrative detention of many thousands of people.

Grounds of detention and issuing of incarceration order

I am concerned that the grounds of and authority for detention under the Unlawful Combatant Law are not consistent with Israel's obligations under IHL.

First, the Law does not appear to adequately regulate the grounds or duration of detention in the period between the apprehension of a person by Israeli forces and the issuing of a temporary detention order once the person is 'brought before' an officer authorized to issue such order. Detention is only authorized by IHL where it is imperative or absolutely necessary for security reasons, yet the Law does not specify on what basis Israeli forces are authorized to detain the person for the purpose of bringing them before the officer authorized to issue the temporary detention order. During this period, which could be protracted when persons apprehended under battlefield conditions need to be transported to the location of an authorized officer, the detainee appears to be in a legal black hole. IHL requires that a person's detention is necessary for imperative or absolutely necessary security reasons from the moment they are apprehended, not only from the moment they are brought before an authorized officer.

Secondly, the grounds for issuing a temporary detention order are not consistent with IHL. A temporary order may be issued where there are reasonable grounds to believe that the person is an unlawful combatant. An unlawful combatant is defined under s. 2 of the Law as person who has either (a) taken a direct or indirect part in hostilities or (b) is affiliated with a force conducting hostile activities against Israel, and who is not a prisoner of war under article 3 of the Third Geneva Convention 1949. Yet, the mere fact of past direct or indirect participation in hostilities, or affiliation with a hostile force, does not of itself automatically demonstrate that the person continues to pose a threat to Israel that their detention is imperative or absolutely necessary, as required by IHL. Rather, that requires a further assessment of the likelihood of the person's future conduct, albeit informed by their past behaviour.

In contrast, the threshold for the Chief of the General Staff to subsequently issue a incarceration order contains the additional requirement that the release of the person 'would endanger the security of the state' (s 3(b)(1)). The Israeli Supreme Court previously supported the Law's consistency with IHL on the basis that this additional element was an essential condition of establishing that the person continued to pose an individual threat necessitating detention(see *A and B v Israel*, para. 20). Because such element is absent in the test for the issuing of a temporary order, which relies on past conduct alone without any future risk assessment, the criteria for a temporary order do not meet IHL's requirement that detention is imperative or absolutely necessary. There are many reasons why a person who previously engaged in hostile behaviour may have disengaged from posing such a threat. In this context, it is emphasized that administrative detention is 'an exceptionally severe measure' that can only be applied if absolutely necessary for the security of the state: ICRC Commentary 1958 to GCIV, article 43. There must be 'serious and legitimate reasons' to believe the person may seriously prejudice the security of the state (*Delalic Judgment*, ICTY, para. 2643).

Thirdly, under Amendment No. 4, the increase in the maximum time in which to issue an incarceration order from 96 hours to 45 days after the temporary order was issued is not consistent with IHL. Since temporary detention orders do not meet the bar

for detention under IHL, as explained above, it is only at the late stage of issuing an incarceration order that the Law may ensure that detention complies with IHL. Delaying the issue of such order from 96 hours to 45 days dramatically expands the period during which detention has not yet been properly authorized under IHL and is arbitrary under international law.

Further, in the absence of a proper determination of future security risk according to IHL for 45 days, there is a high likelihood that the person will not have been sufficiently informed of the substance of the adverse security case against them. IHL requires that a detained person 'shall be informed promptly, in a language he understands, of the reasons why these measures [of detention] have been taken': Additional Protocol I article 75(3), reflecting customary IHL. Reasons for detention must be sufficiently specific so that the person can know and understand the basis of their detention and thus be in an informed position so as to be able to effectively exercise their right to challenge detention before a court or other competent authority under IHL. 'Promptly' means within a maximum of ten days: ICRC Commentary to Additional Protocol I, article 75(3); see also US Department of Defense, Law of War Manual, para. 8.14.1. Nothing in the Law requires the person to be sufficiently informed within 10 days. Indeed, the Law does not expressly require the person to be informed at all of the allegations against them: the person merely has an opportunity to present their claims prior to the issue of an incarceration order (s 3(b)(2)) and to receive reasons for the detention once the incarceration order is issued (s 3(b)(2)). The right to present claims is of limited effectiveness in the absence of an obligation under the Law to disclose the purported basis of detention.

Fourthly, the Law contains a problematic 'presumption' that a member of a force perpetrating hostile acts against Israel, or a person who participated in hostile acts of such force, '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' (s. 7). The Israeli Supreme Court rightly questioned whether this presumption could undermine the requirement imposed by the Court and IHL that the state must establish that the person is an individual security threat (*A and B v Israel*, para. 24). The Court nonetheless accepted that, at that time, Israel de facto refrained from relying on the presumption.

Such acceptance is not, however, consistent with the requirements of legality, certainty and precision in laws governing detention. The continuing availability of the presumption under the Law necessarily could raise legitimate doubts in the minds of detainees whether they have been detained on the basis of the application of the presumption in their individual case and forces them to second guess whether the state has exceeded the bounds of the power to detain under IHL. This is so particularly because, as mentioned earlier, there can be protracted delays in the provision of reasons for detention to a detainee, the non-disclosure of even essential adverse evidence, and protracted denial of the legal representation that may be necessary for a detainee to determine whether the presumption has in fact been applied or not. The legal framework itself, and not merely its de facto application, must be consistent with IHL, particularly given that the Law is now used in a large number of cases. As such the presumption must be repealed from the Law and thus de facto practice rendered de jure.

Fifthly, it is noted that a previous Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism correctly emphasized that the term ‘unlawful combatant’ in the Law has no meaning under international law (A/HRC/6/17/Add.4). Eligibility for administrative security detention under IHL depends solely on whether the detention of a person is necessary for imperative or essential security reasons. A person who takes a direct or indirect part in hostilities, as defined under IHL, could potentially fall within IHL’s security detention powers, depending on the nature of their individual activities and the continuing threat that they personally pose. Section 2 of the Law duly defines ‘unlawful combatant’ to include a person who has directly or indirectly taken part in hostilities. The previous Special Rapporteur nonetheless expressed concern at the lack of definition of ‘indirect’ participation in hostilities under the Law, giving rise to concerns about inconsistency with the principle of legality and the risk of abuse (A/HRC/6/17/Add.4, para. 26). The Israeli Supreme Court has held that the Law does not establish a new category of ‘unlawful combatant’ and has sought to interpret the definition of it under the Law consistently with IHL’s assessment of the individual conduct of persons classified as ‘civilians’ under IHL (*A and B v Israel*, paras. 12-14 and 18-21). It has further sought to interpret the concepts of direct and indirect participation in hostilities under IHL (see *Public Committee against Torture in Israel v Government of Israel*, HCJ 769/02, 14 December 2006). Such interpretation is not fully consistent with best practice interpretation of direct/indirect participation as set out in the ICRC Guidance on Direct Participation in Hostilities. It is preferable that a law authorizing detention should more clearly and concretely specify the range of activities which will be regarded as falling within the concepts of direct or indirect participation in hostilities.

Finally, it is emphasized that where detention under the Law is not properly authorized under IHL for any of the above reasons, the detention will violate the prohibition on: (a) unlawful confinement of civilians – a grave breach of IHL (GCIV article 147) constituting a war crime; (b) arbitrary detention under article 9 of the ICCPR; (c) enforced disappearance; and (d) the crime against humanity of imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law, where committed as part of a widespread or systematic attack on a civilian population.

Protracted delay in legal representation

The possibility to delay access to a legal representative for 75 days on the order of an official and 180 days (under the expired provision of Amendment No. 4) or 90 days under the current amendment in force is not consistent with IHL. There is ‘extensive practice to the effect that persons deprived of their liberty have access to a lawyer’ (Commentary to ICRC customary rule 99: Deprivation of Liberty), as an essential component of the right to liberty of person (ICRC, *Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence* 2005). International human rights law provides further relevant guidance. Prompt and regular access to legal counsel is necessary to facilitate effective review of any form of detention.⁵ The UN Human Rights Committee has previously

⁵ UN Human Rights Committee, general comment No. 35, para. 42 (concerning judicial review of detention under article 9(4) of the International Covenant on Civil and Political Rights); see also Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment 1998, principle 17 (any detained person ‘shall be entitled to have the assistance of a legal counsel’)

expressed concern that Israel's derogation from the ICCPR due to public emergency goes further than is permitted by article 4 of the ICCPR because of restrictions on access to counsel by detainees in the occupied Palestinian territory (CCPR/CO/78/ISR, para. 12).

Protracted delay of judicial review

The possibility to delay judicial review of detention for up to 75 days after incarceration is not consistent with IHL, which confers a right on a detainee to have detention 'reconsidered as soon as possible by an appropriate court or administrative board' (GCIV article 43, applicable to persons taken into detention in Israel) or a right of appeal 'with the least possible delay' (GCIV article 78, applicable to persons detained in Gaza). On no plausible interpretation, one wonders whether a two-and-a-half-month delay before judicial review can be regarded as occurring 'as soon as possible' or 'with the least possible delay', particularly given the importance of the right to liberty. The purpose of judicial review is to control against detention that is not authorized by law, or is otherwise arbitrary; to ascertain whether conditions have changed since the initial detention to the extent that detention may no longer be justified; and to check that the state is respecting the detainee's right to freedom from torture and cruel, inhuman or degrading treatment of punishment.

Furthermore, when previously considering the Law in force in 2008, the Israeli Supreme Court observed that the then maximum period of 14 days before judicial review satisfied the proportionality requirement of the right to liberty under Israel's Basic Law but indicated that periods of less than 14 days would likely be more proportionate in individual cases (*A and B v Israel*, para. 41). There was certainly no suggestion that any period longer than 14 days would be tolerable. As mentioned, the Court indicated that the Law then in force was already adapted to the potential exigencies of dealing with large numbers of detainees, and in that context, no more than 14 days was considered proportionate. The Court also indicated that its application of the domestic right to liberty to the Law was consistent with the requirement of prompt review under both IHL and article 9(3) of the ICCPR (at para. 41).

Personal attendance and legal representation at judicial review

In permitting judicial review to take place by video conference, including in the absence of a legal representative, the amended Law is not consistent with IHL. A detainee and their legal representative should be able to attend the proceedings in person: ICRC, *Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence* 2005. Given the importance of the right to liberty, personal attendance is necessary to ensure that the detainee has the fullest opportunity to interact with the judge, to confer in person with their lawyer and interact with the legal representatives of the state, to engage directly with any interpreter, to freely present and clarify evidence, and to contest the adverse evidence, including by examining witnesses and scrutinizing their demeanour and credibility in court. Appearance by video can undermine the integrity of the proceeding and prejudice the detainee's position. Under international human rights law, a detainee generally has the right to appear in person before the court, especially where such presence would serve the inquiry into the lawfulness of detention or where questions

regarding ill-treatment of the detainee arise (UN Human Rights Committee, General Comment No. 35, para. 42 (concerning article 9(4) of the ICCPR)).

Secret evidence

Section 5(e) of the Law permits the court to admit evidence in the absence of the detainee or their legal representative, and to not disclose evidence if the court is convinced that doing so could harm state security or public security. This provision is inconsistent with IHL. As mentioned, customary IHL, reflected in article 75(3) of Additional Protocol I of 1977, requires that a detainee ‘be informed promptly of the reasons why these measures have been taken’.⁶ Such right, in turn, presupposes that there must be some minimum level of disclosure that is essential to give effect to the purpose of the right, namely to ensure that the person is placed in a position to effectively challenge the purported basis of detention.

The restriction or redaction of security sensitive information and evidence may certainly be justifiable in certain circumstances. However, the Law permits an absolute approach to non-disclosure and does not require any minimum disclosure of evidence necessary to sufficiently inform the person of the basis of the case against them and thus to ensure the basic fairness and integrity of the proceeding. The person instead may be reduced to facing a bare allegation, and nothing more, without any meaningful balancing of the competing interests of liberty and security. The lack of disclosure is particularly problematic where the secret evidence is relied upon to substantiate the very broad grounds of detention, which involve undefined and contested concepts such as ‘indirect’ participation in hostilities and ‘affiliation’ with a hostile force.

While there must be ‘clear and convincing’ evidence to justify detention (*A and B v Israel*, para. 22), where the detainee themselves is unable to see and challenge the evidence before the court, the court itself cannot be satisfied that the threshold for detention is met. The court is unable to perform the adversarial function of contesting evidence on the detainee’s behalf, since it will usually have limited knowledge, or capacity to independently acquire the necessary knowledge, of the detainee’s version of events and explanations for their behaviour. This is precisely the reason why international law recognizes the right of a detainee personally to challenge the basis of detention, and to do so by seeing the adverse evidence. The UN Human Rights Committee has previously expressed concern that Israel’s derogation from the ICCPR due to public emergency goes further than is permitted by article 4 of the ICCPR because of restrictions on disclosure of evidence to detainees in occupied Palestinian territory (CCPR/CO/78/ISR).

Access by family members and the ICRC

I am concerned that the Law does not provide for notification, correspondence and visits with detainees’ family members, as required by IHL: GCIV articles 106, 107 and 116.

⁶ The Israeli Supreme Court accepts provisions of Protocol I that have customary status are part of Israeli law: *A and B v Israel*, para. 9.

I am also concerned that the Law does not provide for access to detainees by the ICRC, as required by IHL: GCIV articles 76(6) and 143; ICRC Customary IHL rule 124.

In view of these observations, I invite your Excellency's Government to provide responses to the points and concerns raised in this communication and to take promptly the necessary measures to ensure that the legal regime for the detention of unlawful combatants complies with the State of Israel's obligations under international humanitarian law and international human rights law.

In order to support your Excellency's Government's efforts to meet these requirements, I reiterate my full readiness to provide you with technical assistance and expertise on any issue raised in this communication.

As it is my responsibility, under the mandate provided to me by the Human Rights Council, to seek to clarify all cases brought to my attention, I would be grateful for your observations on the following matters:

1. Please provide any additional information and/or comment(s) you may have on the above-mentioned allegations.
2. Please explain how the Law will be amended to ensure that detention is authorized by law in accordance with international law at all stages of detention, including initial custody, temporary detention orders, and incarceration orders.
3. Please explain how the Law will be amended to guarantee access to legal representation in accordance with international law.
4. Please explain how the Law will be amended to ensure prompt access to judicial review in accordance with international law.
5. Please explain how the Law will be amended to ensure that the detainee and their lawyer have the right to attend judicial proceedings in person in accordance with international law.
6. Please explain how the Law will be amended to ensure that sufficient evidence is disclosed to a detainee to enable them to exercise their right to effectively challenge the adverse allegations against them.
7. Please explain how the Law will be amended to ensure access to detainees by family members and the ICRC in accordance with international law.

This communication, as a comment on pending or recently adopted legislation, regulations or policies, and any response received from your Excellency's Government will be made public via the communications reporting [website](#) after 48 hours. They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

Please be informed that a copy of this letter will also be sent to the Permanent Mission of the State of Palestine for their information.

Please accept, Excellency, the assurances of my highest consideration.

Ben Saul

Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism