HEINONLINE

Citation:
Emanuel Gross, Human Rights, Terrorism and the Problem of Administrative Detention in Israel: Does A Democracy Have the Right to Hold Terrorists as Bargaining Chips, 18 Ariz. J. Int'l & Comp. L. 721, 792 (2001)

Content downloaded/printed from *HeinOnline*

Fri Nov 24 22:51:10 2017

-- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at http://heinonline.org/HOL/License

-- The search text of this PDF is generated from uncorrected OCR text.

-- To obtain permission to use this article beyond the scope of your HeinOnline license, please use:

Copyright Information

Use QR Code reader to send PDF to your smartphone or tablet device

HUMAN RIGHTS, TERRORISM AND THE PROBLEM OF ADMINISTRATIVE DETENTION IN ISRAEL: DOES A DEMOCRACY HAVE THE RIGHT TO HOLD TERRORISTS AS BARGAINING CHIPS?

Emanuel Gross*

I. INTRODUCTION

> *There is no choice – in a democratic society seeking freedom and security but to create a balance between freedom and dignity on one hand and security on the other. Human rights cannot become a pretext for denying public and State security. A balance is needed – a sensitive and difficult balance – between the freedom and dignity of the individual and State and public security.*[1]

On April 20, 2000, in *Anon. v. Minister of Defence*, an expanded bench of the Supreme Court of Israel delivered a judgment that may be regarded as a cornerstone in the legal field of human rights in Israeli constitutional law.[2] The ruling was made in the context of a "further hearing"—a special procedure by which the Supreme Court considers a difficult issue it has previously decided. The Court held that the State of Israel was not entitled to hold the Lebanese petitioners in administrative detention under the Emergency Powers (Detention) Law of 1979 (the "Administrative Detention Law"). In addition, the Court declared that the State held the Lebanese petitioners as bargaining chips in an attempt to release an Israeli navigator who the *Amal* organization had captured and then transferred to other terrorist organizations. The Court added that although the goal of releasing the navigator was extremely important, not every method of achieving that goal was legal or justified.[3] In this particular instance, the Court held that detaining the Lebanese petitioners under the Administrative Detention Law could not be justified. As a result of the Supreme Court's judgment, Israel was compelled to release the ten petitioners from detention.

The decision overturned the Court's previous ruling in the same case.[4] In the initial decision, the majority view (with which the Chief Justice of the Supreme Court Aharon Barak concurred) adopted the State's contentions. The State argued that Israel had the right to hold the Lebanese petitioners on security grounds until those persons holding Israeli navigator

---

* Professor of Law, Haifa University, Israel. Thanks are due to my research assistant Dalit Ken-Dror, whose devoted work enabled this article.

1. Further Hearing [F.H.] 7048/97 Anon. v. Minister of Defence, 54(1) P.D. 721, 743 (hereinafter "F.H. Anon.") (Heb.).
2. *Id.*
3. *Id.*
4. Administrative Detention Appeal [A.D.A.] 10/94 Anon. v. Minister of Defence, 53(1) P.D. 97 (Nov. 13, 1997), (hereinafter "A.D.A. Anon.") (Heb.).

Ron Arad were prepared to talk about his release. Meanwhile, in a dissenting opinion, Justice Dalia Dorner held that the Administrative Detention Law did not support the detention of the ten petitioners.[5]

After the Supreme Court's first ruling, the petitioners submitted an application for a further hearing before the Court on the basis of a special provision in the Court's (Consolidated Version) Law of 1984.[6] The application for the second hearing was upheld, and as already noted, an expanded panel of justices on the Supreme Court overturned the earlier decision. Only six out of nine justices favored the position of the petitioners, while three dissenting justices supported the previous Supreme Court decision.

This Article discusses whether the second judgment produced the correct result. The Article proposes that according to the domestic law of the State of Israel, as well as under international law, the detention of the Lebanese petitioners was permissible. The petitioners were not innocent individuals who had been kidnapped and were being held hostage. Rather, they were members of terrorist organizations, and as such, they were not entitled to the benefit of the humanitarian laws; nor were they prisoners of war under the Geneva Conventions and the ancillary Protocols. Additionally, a democratic state occasionally is forced to hold terrorists, not only in order to place them on trial or for reasons of deterrence, but also in order to make their release conditional upon the release of the state's citizens held by terrorist organizations.

In order to support these propositions, the Article will be structured as follows: Part II reviews the Supreme Court's judgments with respect to the Lebanese detainees. Part III analyzes the decision of the Supreme Court in the second hearing, based on the facts and the Administrative Detention Law.[7] Part IV defines the term "administrative detention" and emphasizes the difference between administrative detention and other types of detention. Additionally, Part IV contains a brief overview of Israel's Administrative Detention Law as it compares to the laws in Great Britain and the United States. Part V discusses the response of the Israeli government to the second judgment and the proposed bill that describes persons such as the Lebanese detainees to be illegal combatants who may be detained for security reasons. The article argues that this bill is unnecessary because the existing law meets the exigencies of the current situation.

---

5. *Id.*

6. Section 30(b) of the Courts (Consolidated Version) Law of 1984 empowers the Chief Justice of the Supreme Court, or any justice of the Supreme Court designated for this purpose, to decide whether to accede to an application of a litigant to hold a second hearing of the matter before an extended bench of justices. The section provides this right shall be conferred where the petitioner proves the decision of the Supreme Court conflicts with a previous decision given by it, or if the petitioner proves the importance, difficulty or novelty of an issue.

7. Emergency Powers (Detention) Law 1979, *Sefer Hachukkim* 76 [hereinafter "Administrative Detention Law"].

PART II

A. The Supreme Court's Decisions in *Anon. v. Minister of Defence*

In *Anon.*, the petitioners were Lebanese citizens who were brought to Israel by Israeli security forces between 1986 and 1987.[8] Some were put on trial before an Israeli court on charges relating to terrorist activities against the Israel Defense Forces and South Lebanese Army.[9] The court convicted and sentenced those tried to varying terms of imprisonment. After completing their sentences, they were not released; rather, they remained in detention, initially on the basis of deportation orders, and afterwards, from May 16, 1991 for some, and from September 1992 for others, on the basis of orders issued by the Minister of Defense under the Administrative Detention Law.[10]

The Israeli government extended the period of detention of the petitioners from time to time in accordance with the Administrative Detention Law.[11] On August 22, 1994, the State of Israel applied to the District Court of Tel Aviv to further extend the period of detention.[12] The District Court's decision was subject to an appeal before the Supreme Court and a further hearing before an expanded bench of the Court. Between the time of the ruling of the District Court and that of the Supreme Court in the second hearing, the Minister of Defense decided to release two of the twelve petitioners.[13]

The District Court, in its decision of August 22, 1994, approved the State's application for an extension of the detention, although it also accepted the detainees' contentions.[14] The detainees argued that detention for reasons of State security, as set forth in the Administrative Detention Law, did not include detention solely for the purpose of creating bargaining chips, specifically in negotiations with terrorist organizations that could supply information about the missing Israeli soldier Ron Arad. Despite this decision, the District Court felt obliged to base its judgment on Supreme Court precedent.[15] Accordingly, it extended the detention for a further period.

In the second hearing, the Supreme Court emphasized that the parties did not dispute that the petitioners did not pose a threat to national security. Additionally, there was no apparent dispute as to the sole purpose behind their

---

8. F.H. Anon., *supra* note 1.

9. *Id.* Even though this army was composed of Lebanese citizens, it was friendly to Israel and co-operated with the IDF. *Id.*

10. *Id.*; *see also* Administrative Detention Law, *supra* note 7, sec. 2.

11. *Id.*

12. F.H. Anon., *supra* note 1.

13. *Id.*

14. *Id.*

15. Section 20 of Basic Law: the Judiciary provides that the decision of a court shall guide other courts, whereas the judgments of the Supreme Court shall bind all lower courts. The Supreme Court itself is not bound by its own precedents. *Id.* Nonetheless, it is not customary, and even rare, for the Supreme Court to overturn its own earlier decision, unless there are special reasons for doing so. *See, e.g.*, Criminal Appeal [Cr.A.] 2251/90 Haj Yichye v. State of Israel, 45(5) P.D. 221 (Heb.).

detention, namely, to exert pressure on the opposing party to provide information about missing Israeli soldiers.

This assertion is surprising. How is it possible that these terrorists, some of whom had been convicted for their activities against Israel and the South Lebanese Army, were no longer a threat to Israel? There was always a danger that the Lebanese detainees would revert to their previous ways upon their release. They would have been in a position to return to their former activities and continue to fight Israel through the terrorist and guerilla organizations with which they were affiliated, thereby posing a serious threat to national security. The fact that there has been no surveillance of the Lebanese detainees who were released after the Supreme Court's judgment and the fact that the public has no knowledge whether the detainees have resumed their fight against Israel is not relevant to the national security issue. At the time of the second hearing, the danger was real and potentially ongoing. Accordingly, it is surprising that the State did not assert that the release of the Lebanese petitioners posed such a danger. Justice Cheshin refused to accept the claim that the Lebanese detainees posed no threat:

> There is no truth in the contention that no danger would arise if the detained Lebanese were to be released. The petitioners, as *Hizbullah* fighters, have tied their fate to Israel's fight against the *Hizbullah*. In this, the matter of the petitioners is distinguishable from the matter of the demolition of the homes of terrorists, something which once came frequently before this Court. Indeed, it is one of our supreme values that every person is responsible for his own wrong and is punished for his own sin. For this reason I was even of the opinion—in a dissenting judgment—that a military commander was not vested with the right to demolish a home in which the family members of a terrorist murderer resided, even if that terrorist lived in that house . . . but it is precisely because of this reasoning that each person is responsible for his own wrong, that the case of the petitioners differs from the case of the families of terrorists; the petitioners—as enemy fighters, and unlike the families of the terrorists—have knowingly and deliberately tied their fate to the fate of the war.[16]

At the same time, there must be a standard of proportionality between the danger foreseen from the Lebanese detainees, which may conceivably decrease as time passes, and the period of detention during which they may be held. Part II addresses this issue in more detail.

The majority of the Supreme Court justices in the further hearing held that the legal basis for the petitioners' detention was the Administrative

16. F.H. Anon., *supra* note 1, at 748.

Detention Law.[17] This law remains in effect so long as the emergency situation in Israel continues to prevail.[18] Section 2 of the Administrative Detention Law provides:

> (a) Where the Minister of Defence has reasonable cause to believe that reasons of State security or public security require that a particular person be detained, he may by order under his hand, direct that such person be detained for a period, not exceeding six months, stated in the order.
>
> (b) Where immediately before the expiration of an order under subsection (a) (hereinafter referred to as 'the original detention order') the Minister of Defence has reasonable cause to believe that reasons of State security or public security still require the detention of the detainee, he may from time to time, by order under his hand, direct the extension of the validity of the original detention order for a period not exceeding six months; and the extension order shall in all respects be treated like the original detention order.
>
> (c) Where the Chief of the General Staff has reasonable cause to believe that conditions exist permitting the Minister of Defence to order the detention of a person under subsection (a), he may, by order under his hand, direct that such person be detained for a period not exceeding [forty-eight] hours and not capable of extension by order of the Chief of the General Staff.
>
> (d) An order under this section may be made in the absence of the person to whose detention it relates.[19]

Thus, two requirements must be met to uphold detention. First, the Minister of Defense must act within the framework of his powers, as set forth in

---

17. F.H. Anon., *supra* note 1.

18. Administrative Detention Law, *supra* note 7, sec. 1. The government of Israel declared a state of emergency immediately after the declaration of the State of Israel in 1948, as a result of the war the Arab countries waged against Israel. That initial declaration of a state of emergency remained in effect for many years without being reviewed by the legislature. In 1992, Israel adopted a different way of declaring the persistence of the state of emergency. In accordance with Section 49 of Basic Law: the Government, the *Knesset* (Israel's parliament) may declare a state of emergency for a period of up to one year, which period may be extended from time to time.

19. *Id.* sec. 2.

Section 2 of the Administrative Detention Law. Second, he must exercise his powers in an appropriate manner.

In order to examine whether the Lebanese detainees were being held in accordance with the Administrative Detention Law, in the second hearing, Chief Justice Aharon Barak attempted to elucidate the meaning of the term "reasons of State security or public security," which justify the detention of a particular person. Chief Justice Barak held that the term "reasons of state security" was sufficiently broad to embrace events where the danger to the security of the State or public did not ensue from the particular person himself.[20] Barak was not content merely with a linguistic interpretation of the term; such interpretation was the first stage in the process of construction, but it was insufficient in interpreting the law. The purpose of the law had to be identified; thereafter, the law had to be interpreted accordingly.

The purpose behind every law has both objective and subjective elements. From the subjective point of view, Chief Justice Barak clarified that there was nothing in *Knesset's* various bills that showed the legislature intended a particular purpose to be considered in the interpretation of the law or that enabled the detention of a person who did not directly imperil the security of the State or the public.[21]

As for the objective purpose, it has to be weighed against basic values that the law seeks to preserve. The Administrative Detention Law's objective goals are (1) the preservation and protection of State security and (2) the preservation of the basic values of dignity and freedom vested in every person.[22] Chief Justice Barak noted that in seeking to understand the scope of these basic values and the proper balance between them in cases of administrative detention, a genuine, difficult and intense conflict is encountered.[23]

Notwithstanding the supreme importance of human rights in a free society:

> There is no choice in a democratic society seeking freedom and security but to create a balance between freedom and dignity on one hand and security on the

20. The same interpretation and reasoning were applied by Chief Justice Barak in his earlier judgment. *See* A.D.A. Anon., *supra* note 4.

21. Chief Justice Barak admits that it is possible to infer from the *Knesset* sessions that at the time of legislation, the legislators contemplated a situation where a person was likely to directly endanger national security. However, it is uncertain what the legislature thought at the time of enacting the law and which circumstances it wished to include within its parameters.

22. These values are found in the Israeli Bill of Rights, secs. 2 and 4 of Basic Law: Human Dignity and Freedom. They apply to every human being, and therefore include persons being held in administrative detention.

23. As Chief Justice Barak noted, "[F]reedom ends where detention begins." F.H. Anon., *supra* note 1, at 738-39. Chief Justice Barak added that administrative detention has a particularly radical impact on human rights, since the person is detained without trial. *Id.* Occasionally, as in the instant case, the person may be held in detention for a lengthy period of time, and he may be prevented from knowing the nature of the evidence against him if such evidence is classified as secret. *See id.*

> other. Human rights cannot become a pretext for denying public and State security. A balance is needed—a sensitive and difficult balance—between the freedom and dignity of the individual and State and public security.[24]

This balance supports the argument that a democratic society may hold a person in administrative detention only if such person poses a real danger to the State. Accordingly, the core of Chief Justice Barak's decision in the further hearing was that this balance did not authorize the detention of a person who did not pose a direct threat to State security and who was being held solely as a bargaining chip.[25]

The Chief Justice's conclusion was based on the same reasoning he applied in his decision in the initial hearing:

> Administrative detention violates the freedom of the individual. When the detention is carried out in circumstances in which the detainee provides a 'bargaining chip,' this comprises a serious infringement of human dignity, as the detainee is perceived as a means of achieving an objective and not as an objective in himself. In these circumstances, the detention infringes the autonomy of will, and the concept that a person is the master of himself and responsible for the outcome of his actions. The detention of the appellants is nothing other than a situation in which the key to a person's prison is not held by him but by others. This is a difficult situation.[26]

Indeed, the distinction between a person who poses a threat to State security and a person who does not pose such a threat should not be measured on the basis of weight and quantity, but rather on the basis of quality. A state that detains a person, merely with the intention of negotiating his release with the opposing party, creates a situation that leads to violations of basic human rights, dignity and freedom. A free state should not permit such violations in spite of the prevailing security exigencies.

Only an express statutory provision may cause the Supreme Court to conclude that the law's intention is to allow for the detention of a person for bargaining purposes.[27] International law supports this assertion: it prohibits

---

24. *Id.* at 743. *See also* Election Appeals [E.A.] 2, 3/84 Neiman v. Chairman of the Central Elections Committee of the Elections to the Eleventh Knesset, 39(2) P.D. 225, 308 (Heb.).

25. F.H. Anon., *supra* note 1, at 743.

26. *Id.* at 743-44 (Chief Justice Barak quoting himself in the initial decision); *see also* A.D.A. Anon., *supra* note 4, at 107.

27. However, the legality of such a stipulation was left open and must be re-examined in the future, if and when the legislature adopts this concept.

the taking of hostages—a term that includes persons detained as bargaining chips.[28]

In the initial hearing before the Supreme Court, Chief Justice Barak held: "[T]he detention of individuals for the purpose of the release of our missing and captured [soldiers] for the purpose of the protection of this interest in this manner is conferred on the respondent [the State] within the framework of the Detention Law."[29] This assertion was contrary to his judgment in the second hearing. In the initial judgment, Chief Justice Barak, relying on secret information presented to him, held that it was almost certain that if the Lebanese petitioners were released, Israel's negotiations with the enemy for the release of captured and missing Israeli soldiers would be undermined.[30] With regard to the question of proportionality, in other words, whether there was a less harmful method of achieving the desired goal, Chief Justice Barak held in the earlier judgment that there were no alternative means at that time.[31] Further, he explained the comments of Justice Tal:

> The return of captured and missing [soldiers] is an integral part of the security of the State and fulfills an important function in relation to the morale of the army and its values. Accordingly, Justice Tal held that holding the detainees in this case falls within the boundaries of reasons of State security, and where it is proved that their release will harm the efforts to release the captured and missing [soldiers], the detention order becomes valid. Justice Tal added that the status of the petitioners is analogous to the status of prisoners of war in the sense that there is moral justification for holding them in detention and in captivity until they are exchanged for our soldiers. This is the situation according to Justice Tal, particularly when our missing and captured [soldiers] do not enjoy any of the rights of prisoners of war. . . .[32]

Moreover, in the initial hearing, Justice Dorner held in a dissenting opinion that the Administrative Detention Law did not permit detention of persons who posed no real danger and whose only purpose was to be used in negotiations for the release of missing and captured Israeli soldiers.[33] Justice Dorner based her opinion on a number of factors. First, she interpreted the Administrative Detention Law in accordance with the legislature's intent. Second, she explained the lack of an *express* prohibition of detention where the detainee did not pose a risk was immaterial. Third, Justice Dorner discussed the law's requirement that the Court confirm the validity of a

---

28. Chief Justice Barak referred in his comments to the Fourth Geneva Convention, 1949, art. 1.

29. A.D.A. Anon., *supra* note 4, at 108.

30. *Id.* at 109.

31. *Id.*

32. *Id.* at 106.

33. F.H. Anon., *supra* note 1.

detention order. In Justice Dorner's view, such confirmation was not part of routine judicial review; rather, it was an instruction to the Court to determine whether its decision was appropriate in the particular circumstances. Finally, Justice Dorner reasoned that the regulations preceding the new Administrative Detention Law were aimed at deterrence, not at providing a supplementary war measure. She explained that the position taken by Chief Justice Barak in the initial hearing "leads to an interpretation of the law which enables the detention, for an unlimited period of time, of a particular person, provided that the detention is of, even indirect, benefit to State security. Such inclusive and unlimited power is unrecognized even by the laws of war in the sphere of international law."[34]

Following the ruling in the initial hearing that the Lebanese detainees could be detained further, there was sharp criticism of the Supreme Court and of Chief Justice Barak in particular. People did not expect that a judge perceived as a liberal and a fighter for human rights could deliver such a judgment.[35] With regard to the Supreme Court as a whole, commentators said that the Court had refrained from intervening in a matter of great public sensitivity out of fear of losing public confidence by delivering a judgment that was contrary to the prevailing public view.[36] Another criticism was that the Court was not and should not be the keeper of the public's morals; rather, the function of the Court was to protect human rights in Israel.[37] The Court was not empowered to determine whether an emergency situation, which was required for the validity of the Administrative Detention Law, existed in the State. Further, a different interpretation of the Administrative Detention Law might have led the Court to a contrary decision.[38] It is impossible to know whether this criticism influenced the thinking of the Court. However, the Court overturned its initial decision. Chief Justice Barak, changing his position, joined five other justices to form the majority opinion in the second hearing.[39]

---

34. A.D.A. Anon., *supra* note 4, at 112 (noting that even though international law was mentioned, the justices decided the case on the basis of internal domestic law).

35. Eitan Barak, *With the Cover of Darkness: Ten Years of Games with Human Beings as 'Bargaining Chips' and the Supreme Court*, 8 PLILIM 77, 80-81 (1999) (Heb.).

36. *Id.* at 86-87. The author himself criticized the judgment and argued that the affair of the Lebanese petitioners was an example of a wrong committed by the legal system. *See id.* at 151-56; *see also* Orna Ben-Naftali & Sean S. Gleichgevitch, *Missing in Legal Action: Lebanese Hostages in Israel*, 41 HARV. INT'L L.J. 185 (2000), for additional criticism of the initial judgment.

37. *See* Ben-Naftali & Gleichgevitch, *supra* note 36, at 221.

38. *See id.*

39. Justice Dorner, who joined the dissenting opinion in the initial hearing and concurred with the majority opinion in the second hearing, continued to adhere to her position. She emphasized that the State did not argue the detainees were prisoners of war; thus, the Court had to make its decision accordingly. The State based the detention of the petitioners on the Administrative Detention Law, which prohibits the State from holding a person it cannot prove has committed a prohibited act or poses a danger to State or national security. Further, international law prohibits holding

At the same time, three justices dissented and wrote separate opinions. Each objected to the majority's conclusion that the Administrative Detention Law did not apply to the instant case. They also objected to the finding that the Lebanese detainees were innocent civilians. In the dissenting justices' opinions, the detainees were not innocent civilians who were being held by the State; they were members of terrorist organizations and terrorist groups fighting Israel.

What, then, was the status of the Lebanese petitioners? Justice Cheshin was the only one who referred to them as "*quasi* prisoners of war." Justice Cheshin also considered the terms "hostages"[40] and "bargaining chips," which had been employed by the majority, and held that such terms were incompatible with the facts:

> In fact, the petitioners enlisted into the forces of the enemy and describing them—when we hold them—as "hostages" and "bargaining chips"—*terms which give off a bad odor—distorts the language and the truth.* I protest

---

civilians as hostages or bargaining chips, even if the reason for detention is the release of missing and captured soldiers. In his opinion, Justice Barak explained that after he rethought the matter, he reached the conclusion that he had been mistaken in his first judgment:

> First, my conclusion now conflicts with the conclusion which I reached in the judgment which is the subject of this petition. This means that I changed my mind. Indeed, since delivery of the judgment—and on the basis of the further hearing itself—I have not stopped examining myself to see whether my approach was properly founded. I am not one of those who believe the finality of the decision testifies to its validity. Each one of us can make a mistake. Our professional integrity requires us to admit our mistakes if we are convinced that we were indeed mistaken . . . this was said in relation to the power of the Supreme Court to deviate from its precedents. This question does not arise before us, as we are in the midst of a further hearing process which establishes a formal framework for the abrogation of a decision which was made unlawfully. At the same time, these comments are true for each and every judge, who struggles with himself, and who examines his own judgments. In our difficult hours, when we examine ourselves, the North Star which should guide us is the discovery of the truth which leads to the realization of justice within the boundaries of the law. We must not enclose ourselves within our preconceptions. We must be prepared to admit our mistakes. This self-examination in the instant case is not easy. The balance is not a mechanical act. I understand my brethren who continue to believe that the Administrative Detention Law also applies to a detainee who comprises a "bargaining chip" without himself posing a danger to national security. This time I cannot join my opinion to theirs.

F.H. Anon., *supra* note 1, at 743.

40. *See infra* text accompanying note 103.

> with all my might against this description. First of all, what is a "bargaining chip?" I do not know and also have not heard of a "bargaining chip" game. A man is a man; a chip is a chip; and a man is not a chip. Never, never will a man be a chip. The petitioners too are human beings and are not chips. I find it difficult to understand how it is that the petitioners are chips. As to "bargaining," this concept too is hard for me, we are not dealing with bargaining. If Ron Arad were to return from captivity—or if we were to know what fate has befallen him—the petitioners would return home. The petitioners also are not "hostages," not according to accepted definitions in international law and not according to any other definition. We all know what "hostages" are—"hostages" were taken by the Germans during the Second World War and "hostages" are taken in bank robberies—*and we have never heard that those who are affiliated with fighting parties and who have fallen into the hands of the enemy are "hostages," even if they are held until the end of hostilities or until a release agreement.* Indeed, in the same way that holding prisoners of war is regarded as holding persons for a legitimate and appropriate purpose—and therefore prisoners of war are not described as either "hostages" or "bargaining chips"—so too, by analogy, is holding the *Hizbullah* fighters for the legitimate and appropriate purpose of State security. The petitioners do not possess the attributes of "hostages"—or even of "bargaining chips"—and in any event we know that they are not "hostages" or "bargaining chips."
>
> We must remember: *the petitioners are not innocent villagers who were taken by force to a country which is not theirs. It is true that the petitioners were merely simple fighters in the forces of the* Hizbullah. *At the same time, they themselves joined the enemies' forces and accordingly they are neither "hostages" nor "bargaining chips."* (Emphasis added).[41]

Thus, in Justice Cheshin's view, the Lebanese petitioners did not come within the purview of the conventions prohibiting the detention of hostages.[42] Unfortunately, the remaining justices did not address this issue, nor did they refer to Justice Cheshin's determination that the Lebanese detainees were *quasi* prisoners of war. This proposition shall be considered below.[43]

---

41. F.H. Anon., *supra* note 1, at 749.

42. *See, e.g.*, The International Convention Against the Taking of Hostages, Dec. 17, 1979, 1316 U.N.T.S. 205.

43. For a discussion of the term "*quasi* prisoners of war," see the text accompanying note 129 *infra*.

Another dissenting justice, Justice Y. Kedmi, supported further detaining the Lebanese petitioners on the grounds there was a close connection between their arrest and fruitful negotiations and that the redemption of captured Israeli soldiers was one of the basic values of the Jewish people.[44] Thus, in the same way that the home of a terrorist's family could be lawfully demolished, even though the family members had committed no crime, it was permissible to detain the Lebanese petitioners:

> In the instant case—as will be explained below—the petitioners "tied" themselves to the ground for their arrest, by joining the terrorist organizations in whose hands the navigator Ron Arad had fallen; and as such, they possessed a sufficient *nexus* for being held in administrative detention, for the purpose of exerting pressure on the leadership of their organizations to reveal what had happened to him.
>
> In summary, there are many facets to State security and the law establishes administrative detention as a uniform emergency measure to defend it, whatever the nature of the injury with which one has to contend. In this state of affairs, when the law employs general language which leaves room for a broad interpretation of its application, we shall miss the purpose of the legislation—defense of State security—if we choose a restrictive interpretation.
>
> In this context, it is necessary to recall that this is not the sole case where the law permits—in an emergency—the adoption of emergency measures against persons who are not personally attributed with having acted against State security, and where their personal "sin" is rooted solely in the existence of a "connection" between them and the persons performing this activity. Thus, for example, the law "accedes to" the adoption of deterrent measures—the demolition of homes—against the families of terrorists, in order that they should not provide the latter with shelter in their homes, notwithstanding that they themselves are not accomplices to the acts of the terrorists and their "connection" to the harm to security ensues only from their intention to provide the latter with shelter as aforesaid. It seems that without the existence of the said "connection," it would not have been possible to implement the power of demolition against the families of the terrorists . . . .[45]

---

44. F.H. Anon., *supra* note 1, at 757.

45. *Id.* I have reservations about the sufficiency of such a *nexus* for the purpose of demolishing homes. Justice Cheshin pronounced similar reservations in High Court

Furthermore, Justice Kedmi explained why a close connection existed between the detention of the Lebanese petitioners and the successful conduct of negotiations, and he clarified why he also did not consider the petitioners to be hostages or bargaining chips:

> The petitioners are numbered among the members of hostile terrorist organizations, who have declared a war to the death against Israel and who would not balk at any measure to advance their cause. The navigator Ron Arad, the discovery of whose fate is the reason the petitioners are being held in detention, fell into the hands of the said organizations during the course of operational activities . . . . *Underlying the detention of the petitioners are the following two points: first*, the assumption that the desire to preserve their image as persons concerned for the fate of their friends will motivate the leadership of the organizations to act to release their friends; and *second*, and it seems that this is the main point, the assumption that the family members of the petitioners, like all family members, will exert heavy and intense pressure on the leadership of the organizations to remove the cloak of secrecy spread over the fate of Ron Arad and in this way bring about the release of their sons. And if they cannot do so alone, they will enlist the help of the voice of the public in their own country and abroad . . . . [*I*]*n this state of affairs, use of the term "hostage"—which is frequently employed in this context—is not compatible with holding the petitioners in detention.* At the basis of the classic meaning of the term "hostages," stands a real and concrete "threat" of injury to the bodily integrity and even to the lives of those being detained, in that capacity, so as to prevent their "friends" from taking any particular measures within the framework of their routine activities. In these circumstances, detention comprises a "war measure" in the struggle between hostile parties, with its invalidity ensuing, primarily, from the inhuman threat involved therein. Whereas here: the petitioners are not subject to any threat whatsoever; and their detention is not equivalent to the use of a "weapon" which obliges the other side to refrain from any activity or to change his routine activities. The use of the term "bargaining chip" too, without a supplementary clarification that the "bargaining" is no more than placing pressure to pass over information, is a largely inaccurate description of the nature of the detention of the petitioners. In its purest

---

of Justice [H.C.] 2006/97 Meesun Muhammad Abu Farah Ghanimat v. General Commanding the Central Command, 51(2) P.D. 651 (Heb).

sense, a "bargaining chip" comprises an asset which is held by one party in the course of "negotiations," with the object of forcing the other party to moderate his demands. In the absence of negotiations with those organizations, it cannot be said that we are "trading" with the petitioners. *As noted, in my view, the petitioners are being held for a single purpose, namely, to cause the organizations concerned with the matter—including the states involved in the affair—to breach the wall of silence . . . .* [I]ndeed, even when the detention is exclusively directed at exerting pressure to disclose information—when no danger whatsoever is posed to the petitioners' lives or persons—it comprises, *per se*, serious harm to the freedom of the petitioners; and such harm is incompatible with the humane principles of cultured states and with the basic principles on which our country is founded. Nonetheless, in my view, where a terrorist organization takes a step which is heartless, cruel and inhumane, which is expressed by imposing a complete shroud of secrecy over the fate of our soldier who fell into their hands during the course of a military operation, a "balance" is required on our part between basic humane principles in the struggle with enemies who desire our lives and the interest in redeeming captured soldiers which heads our priorities. Such a balance justifies and vindicates detaining the fighters of the concerned terrorist organization, by virtue of the law, *when the objective is to exert pressure on the organization—through the families of the detainees—in order to find out what befell our soldier. This is the little, and in fact all, that we can do, without causing injury which is disproportionate in light of our commitment to the humane principles of freedom and liberty.* If we failed to do this, we would be transgressing against our soldiers and the security of our State; at the same time, the terrorist organizations would be encouraged to breach and break every basic human rule, even when this was incapable of contributing anything to the achievement of their goals.

One who joins a terrorist organization cannot claim to be innocent and argue that he does not bear personal responsibility for the conduct of his leaders, in so far as relates to the shroud of secrecy imposed on the fate of our navigator; and he will not be allowed to argue that he should be treated as an innocent civilian seeking peace who has been uprooted from his family and held behind lock and key without being guilty . . . ."[46] (Emphasis added).

46. F.H. Anon., *supra* note 1, at 758-60.

Immediately after the conclusion of the further hearing on April 12, 2000, Ron Arad's family filed a petition in the Supreme Court[47] against the release of the Lebanese petitioners. The hearing was held a week later, on April 19, 2000. Arad's family argued, *inter alia*, that the Lebanese detainees were prisoners of war who could be held in captivity by virtue of and in accordance with the Geneva Convention Relative to the Treatment of Prisoners of War.[48] The respondents to the family's petition contended that the detainees were not prisoners of war under the Geneva Convention. The Chief Justice of the Supreme Court, Justice Barak, upheld the respondents' contention and declared:

> It is sufficient that, in respect of [the petitioners], the provisions are not met of Article 4(2)(d) of the Third Geneva Convention, which provides that one of the conditions which must be met in order to satisfy the definition of "prisoners of war" is: "that of conducting their operations in accordance with the laws and customs of war." *The organizations with which the Lebanese detainees were affiliated are terrorist organizations, which operate in a manner contrary to the laws and practices of war.* Thus, for example, these organizations deliberately injure civilians and shoot from within civilian populations, which act as their shields. All these are activities which are contrary to international law. Indeed, *the consistent position of Israel over the years, was that the various organizations, such as the Hizbullah should not be seen as organizations to which the Third Geneva Convention applied.* We have found no reason to interfere with this position.[49] (Emphasis added).

The Lebanese detainees were not prisoners of war, nor were they hostages or bargaining chips, as claimed by their counsel. Rather, as Justice Cheshin pointed out in his opinion, they were *quasi* prisoners of war. The various international conventions do not refer to this status, and therefore, such conventions do not apply to them. The conventions establish a "negative arrangement" in the law, which means that the law is intentionally silent on a particular issue. International law intentionally does not mention persons who belong to the forces of the enemy but who are not prisoners of war—i.e., terrorists and guerilla fighters. International law is specifically designed this way so as to enable each state to regulate such matters within its own jurisdiction.

---

47. H.C. 2967/00 Batya Arad and others v. The Knesset and others (forthcoming) (Heb.).

48. *Id.*

49. *Id.* (citing judgment of Justice Barak).

PART III

A. The Factual Dimension: The Detainees as Lebanese Civilians

The factual assumption of the majority in *Anon.* was that the detainees were Lebanese civilians and, as such, they were entitled to the defenses established by domestic and international law. There is no question that the detainees were Lebanese. However, their status as civilians is an open issue. The Supreme Court itself noted that the detainees were affiliated with terrorist organizations fighting the State of Israel. The Court even indicated that some of the detainees had been tried for terrorist acts, convicted, and sentenced to terms of imprisonment. Accordingly, the relevant question is whether it is necessary to regard terrorists, who have been tried and convicted for their actions, as civilians protected by international law. In other words, when are terrorists considered civilians under international law?

In order to understand and assess the accuracy of the conclusions reached by the justices in the further hearing, it is necessary to have a factual background, which is manifestly lacking in this case. We have no information about the identity of the detainees; we do not know their names, ages, backgrounds, or even the circumstances under which they were seized. Possibly, such details were deliberately omitted from the published decision due to security reasons. However, whatever the reason for the omission, the absence of this information makes it difficult for the reader to analyze the judgment in light of the relevant facts.

Amnesty International has filled in some of the missing details in a 1997 report. However, one cannot be completely certain that the Lebanese persons Amnesty International refers to in its report are the same detainees discussed here. The report states that the group consists of twenty-one Lebanese.[50] Also, it contains the names of the detainees and some biographical information about each one. The report divides the group into the following three categories:

(1) Between 1986 and 1988, eleven people were captured in Lebanon and brought to Israel.[51] There, they were put on trial before military courts and sentenced to prison terms, ranging from eighteen months to ten years.[52] Upon completing their sentences, they remained in detention on the basis of the Administrative Detention Law.[53]

---

50. *See* Amnesty International, *Israel's Forgotten Hostages: Lebanese Detainees in Israel and Khiam Detention Center* (1997) *available at* http://web.amnesty.org/ai.nsf/Index/MDE150291997?OpenDocument&of=COUNTRIES\ISRAEL%5COCCUPIED+TERRITORIES (last visited Nov. 19, 2001).

51. *Id.*

52. *Id.*

53. *Id.*

(2) In 1987, a group of six people was captured in Lebanon and brought to Israel in 1990.[54] Since then, they have been detained without trial on the basis of the Administrative Detention Law.[55] One of the detainees is Ghassan Fares al Dirani, who may be a relative of Mustafa al Dirani, the former head of the *Shi'ie* militia—*AMAL*, which claimed on October 17, 1986 that it had captured the Israeli navigator Ron Arad.[56]

(3) Between 1989 and 1994, four people were seized and brought to Israel: Sheikh Abed al Karim Obeid, a *Shi'ie* Moslem, two of his bodyguards, and Mustafa al Dirani, who at that time was the leader of the Fateful Resistance militia group, which is connected to Iran[57] and which is thought to be responsible for holding Ron Arad and transferring him to Iran. Coincidentally, the Supreme Court's judgments in the first and second hearings of *Anon.* did not mention whether these detentions had been reported to the families of the detainees. Notice of the detention of a person is regarded as a basic right under the Criminal Procedure Law of Israel,[58] as well as under

---

54. *Id.*
55. *Id.*
56. *See id.*
57. *See id.* Israel long ago acknowledged the detention of these two terrorist group leaders. Recently, the Supreme Court, in a forthcoming opinion, rejected their appeal against the prolongation of their detention.
58. This demand, apart from being essential and mandatory as a matter of Israeli law, is also contained in Section 32 of the Criminal Procedure (Enforcement Powers – Detention) Law of 1996, which provides, "Where the officer in charge has decided to arrest the suspect, he shall immediately inform him of the arrest and the reasons for the arrest in so far as possible, in language which he understands, as well as (1) *his right to have notification of his arrest delivered* to a person close to him or to a lawyer . . . ." *Id.*

Section 33 of the same law, supplements the condition, providing:

> (a) Where the officer in charge has decided to arrest the suspect, notification of his arrest and of his whereabouts will be delivered without delay to a person close to him, whose name he has given, and who may be located with reasonable measures, save if the arrested person has requested that no notification as aforesaid should be given; where the location of the arrested person is changed, the police shall also give notice of the same.
>
> (b) At the request of the arrested person, and subject to the provisions of Section 14 of the Criminal Procedure Law, notification as aforesaid in subsection (a) shall also be delivered to the lawyer whose name has been given by the arrested person or to one of the lawyers whose name appears in the list stated in subsection (c) . . . ." (Emphasis added).

> international law.[59] If these detentions were not reported to the families,[60] this fact alone might have been sufficient to undermine the validity of the detentions.[61]

The next section discusses the substance and importance of the distinction between those who were tried, convicted, and detained upon the completion of their sentences and those who were detained immediately, without trial.[62]

B. The Normative Dimension

The central differences among the justices in *Anon.* lie in their distinct approaches to the legal status of the Lebanese petitioners. The

---

Id.

However, Section 36 of this law empowers a judge of the District Court to suspend delivery of the notice and delay it for up to fifteen days if there are security grounds justifying the same; grounds which are supported by written confirmation of the Minister of Defense. The Administrative Detention Law, under which the Lebanese petitioners were detained, is silent on this issue. In my opinion, only highly exceptional grounds of State security can justify delay in notification of detention, and even then only for a limited period of time.

59. *See, e.g.*, Amnesty International's *14-Point Program For the Prevention of "Disappearances:" Sources in International Instruments* (1993); *see also* United Nations Declaration for the Protection of All Persons From Enforced Disappearance, G.A Res. 47/133 U.N. GAOR, 47th Sess., Supp. No. 49, at 207, U.N. Doc A/47/49 (1993). In this respect, I completely agree with the criticism of Orna Ben-Naftali and Sean S. Gleichgevitch in their article, *supra* note 36, at 204, although I disagree with other conclusions reached by them, as I will discuss below.

60. As already indicated, in 1991, Israel signed the International Covenant on Civil and Political Rights. The Covenant grants every person the right to a protected and secure life as a person, and prohibits states from arbitrarily detaining people, in addition to the other substantive rights contained in the Covenant. Nonetheless, the Covenant permits the signatory states to breach their undertakings in times of emergency. Upon joining as a party to the Covenant, Israel made a reservation that indicated the existence of a continued state of emergency from the time of its establishment. The reservation expressed by Israel enables it to infringe upon its obligation under the Covenant; however, such infringement must be within the limits of what is "strictly required by the exigencies of the situation" and not more. Nevertheless, I am not certain that the state of emergency can support the infringement of the detainees' families' right to notice of detention. Delay in giving notice for more than a few days creates a situation that is not proportional to the state of emergency itself. International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171.

61. *See* Amnesty International report, *supra* note 50. In my opinion, under the domestic criminal procedural law of Israel (Criminal Procedural Law (Arrests Powers) of 1996, art. 33), if notice of the detention is not given, the detention will not be deemed constitutional. I see no distinction between this and the situation where detention is carried out by virtue of the Administrative Detention Law. There, notice to the detainees' families within a reasonable period of time also is necessary.

62. See text accompanying beginning of Part IV *infra*.

majority simply referred to them as "Lebanese citizens."[63] Undoubtedly, this is true. However, referring to them as mere citizens, without considering their affiliation to terrorist organizations,[64] is unrealistic and distorts the truth. To be a mere citizen who is a civilian and not a combatant is one thing; to be a citizen who fights a purported enemy is something totally different.[65] International law also distinguishes between those who take part in armed conflict and those who do not. The various Geneva Conventions distinguish between those who take an active role in combat and those who do not take an active role. Generally, soldiers and members of other armed militias fall within the definition of combatants.[66] Civilians are protected in situations where a military struggle is underway, and war combatants must prevent any possible harm or suffering to the civilian population. The Geneva Conventions also provide protection to combatants who have been captured by the enemy during the course of the war. Such captured combatants are regarded as prisoners of war, and the state holding these prisoners of war must ensure that the rights of the captured combatants are properly upheld. Among these rights is the right not to be tried for acts connected to the fighting, unless the combatant has breached a humanitarian law or committed a war crime.[67]

The majority opinion in the second hearing of *Anon.* regarded the Lebanese detainees as civilians protected by international law. As previously stated, these citizens were not innocent civilians; they were terrorists. They were convicted and had completed their sentences. However, do their convictions and sentences affect their legal status? Must they now be regarded as mere civilians protected by the Fourth Geneva Convention of 1949? I believe that the answer to this question should be no. Yet the answer is not completely clear cut. The various Geneva Conventions do not mention the legal status of civilians who do not fall within the definition of

---

63. For example, Chief Justice Barak refers to the petitioners in the second hearing as Lebanese citizens, whereas Justices Dorner refers to them as citizens who are detained as bargaining chips. F.H. Anon., *supra* note 1, at 731, 765.

64. For the definition of terror and who is regarded as a terrorist, see Emanuel Gross, *Legal Aspects of Talking Terrorism: The Balance Between the Right of a Democracy to Defend Itself and the Protection of Human Rights*, 6 UCLA J. INT'L L. & FOREIGN AFF. 89 (2001).

65. I shall discuss the issue of "freedom fighters" below. See text accompanying note 72 *infra*.

66. Protocol I to the Geneva Convention of 1949, Jun. 8, 1977, art. 43(3), 1125 U.N.T.S. 3 ("Whenever a party to a conflict incorporates a paramilitary or armed law enforcement agency into its armed forces it shall so notify the other Parties to the conflict."). One may argue that the Lebanese petitioners met the definition in Article 43(3) and therefore should have been regarded as prisoners of war. However, Lebanon did not bring the terrorist organizations with which the detainees are affiliated under its auspices, and it did not intend to assume responsibility for them. Lebanon only indicated that these organizations had acted as they saw fit in order to defend their land. This declaration is not sufficient to make Lebanon responsible for these organizations. For persons to be considered combatants under Article 43(3), the party to the armed conflict must notify and declare that it has adopted the paramilitary groups.

67. *Id.*

combatants, but who nonetheless take an active part in the fighting.[68] As previously discussed, the conventions' silence with respect to this situation is probably intentional.

Moreover, the Supreme Court had questioned whether the Lebanese petitioners were hostages.[69] The majority opinion indeed referred to the petitioners as hostages who could not be detained under international law.[70] Were the justices justified in their assertion? The majority noted that the Administrative Detention Law did not address the situation in which civilians are detained for bargaining purposes. Would the majority opinion have been different if the justices had regarded the petitioners as prisoners of war? Would it have been different if the justices did not regard the detainees as prisoners of war because they were terrorists? Bearing in mind these questions, the rest of this section addresses the following issues: (1) Was the Court right when it referred to the petitioners as civilian victims? (2) Was the Court justified in holding that the petitioners were held as hostages? (3) Was the Court correct when it held that the Administrative Detention Law did not enable the detention of persons as bargaining chips?

C. Was the Court Justified in Regarding the Lebanese Petitioners as Civilian Victims?

The two different decisions of the Israeli Supreme Court in *Anon.* do not reveal all the relevant details about the connection between the Lebanese petitioners and the various terrorist organizations with which they were affiliated. Little is known about the petitioners, apart from the fact that some of them had been tried for their activities as members of terrorist organizations. We have no information regarding their terrorist activities and the nature of their affiliation to terrorist groups.[71]

---

68. Bezelem, a human rights organization that examines violations of human rights in Israel, expressed the view that the Geneva Conventions would not recognize such civilians as combatants, but the conventions would not confer prisoner of war status upon them. *See* http://www.btselem.org. (last visited Dec. 1, 2000). I agree with this comment. However, I argue that the petitioners did not meet certain demands set out in Article 43(3), and therefore, they are not combatants entitled to the rights of prisoners of war.

69. F.H. Anon., *supra* note 1.

70. *Id.*

71. Amnesty International report, *supra* note 50. However, the Amnesty Report does provide some information about the petitioners, as well as the terrorist organizations with which they were affiliated. Further, Eitan Barak also claimed there was lack of information relating to the petitioners, at least in the initial hearing. *See* Barak, *supra* note 35, at 88. He argued that details had to be gathered from various sources in order to obtain a clearer picture, since the legal and political system did not provide the basic information. *See id.* Further, he argued that the shroud of secrecy was deliberate. *See id.* at 93-104. For example, in various debates in the *Knesset*, legislators claimed that state security required secrecy. *See id.* at 95-97. In addition, Barak contended that people had been misled by the distribution of false and mistaken information as a result of the denial that the Lebanese petitioners were being held in

Undeniably, the petitioners were affiliated with terrorist organizations and groups that targeted Israel. Some belonged to the military, and some were civilians. These terrorist organizations seek what they call the liberation of Palestine, as well as the expulsion of the Jews to their countries of origin. Israelis still remember the organizations' attacks on Jewish settlements along the northern border of Israel.

The Israeli courts have consistently rejected the notion that Lebanese citizens affiliated with terrorist organizations were freedom fighters, entitled to the status of prisoners of war.[72] Even though the parties to the Geneva Conventions of 1949 did not recognize "freedom fighters" to be combatants, over the years, they recognized the need for further development in this field. Thus, in 1977, Protocol I, which was added to the original Geneva Convention, defined freedom fighters as combatants.[73] The international community expanded the protection conferred by the Geneva Convention by applying it to combatants who do not belong to a party's official armed forces.[74] Also, as previously noted, the Geneva Conventions were amended to include a new class of combatants[75] and to grant such combatants the rights of prisoners of war if they acted in accordance with international law.[76]

Since we have little information about the terrorist activities of the petitioners, we do not know whether their situations complied with the requisite international rules. However, we do know that their organizations attacked civilians and declared war on Israel. Even if the petitioners had complied with the requisite international rules, they cannot be considered combatants entitled to the status of prisoners of war. The terrorist organizations with which they are affiliated are paramilitary groups under Article 43(3) of Protocol I.[77] Accordingly, if a party is interested in incorporating them into their armed forces, it must notify the other party

---

Israel and the contradictory judgments. *See id.* at 102-04. For further elaboration, *see id.* at 87-104.

72. H.C. 2967/00 Batya Arad and others v. The Knesset and others (Heb.) (forthcoming).

73. For a review of the debate prior to the adoption of the Protocol, see JUDITH GAIL GARDAM, NON-COMBATANTS IMMUNITY AS A NORM OF INTERNATIONAL HUMANITARIAN LAW 100-06 (Martinus Nijhoff, London 1993); *see also* KEITH SUTER, AN INTERNATIONAL LAW OF GUERILLA WARFARE: THE GLOBAL POLITICS OF LAW MAKING 165 (St. Martin's Press, New York 1984); HEATHER A. WILSON, INTERNATIONAL LAW AND THE USE OF FORCE BY NATIONAL LIBERATION MOVEMENT 166, 173-74 (Oxford Univ. Press 1988); Waldemar A. Solf, *A Response to Douglas J. Feith's Law in the Service of Terror - The Strange Case of the Additional Protocol*, 20 Akron L. Rev. 261 (1986).

74. Protocol I to the Geneva Convention, *supra* note 66, at 23 (the armed forces of a party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that party for the conduct of its subordinates, even if that party is represented by a government or an authority not recognized by an adverse party).

75. GARDAM, *supra* note 73, at 56.

76. Protocol I to the Geneva Convention, *supra* note 66 (armed forces shall be subject to an international disciplinary system which shall enforce compliance with the rules of international law applicable in armed conflict).

77. *Id.* art. 43(3).

involved in the conflict. To the best of my knowledge, Lebanon has never done this. In fact, Lebanon has stated that it is not responsible for these terrorist organizations.[78]

Moreover, these organizations carry out their attacks from within population centers, which is contrary to Article 44(3) of Protocol I. The purpose of Article 44(3) is to protect the civilian population and to discourage combatants from using the civilian population for their own purposes.[79] The drafters of Protocol I had difficulty expanding the term "combatant" to include freedom fighters and, at the same time, distinguishing them from civilians. The final version of the Protocol clearly shows that protection of civilian interests is preferred to full protection of freedom fighters. Protocol I requires that freedom fighters not intermingle with the civilian population, wear uniforms or other clear means of identification, and carry their weapons openly in order to ensure that other parties to the conflict know who they are fighting.[80] While Article 44(3) contains an exception to these conditions, the exception is inapplicable to the situation in the instant case.[81]

It is doubtful that the terrorist organizations targeting Israel can be described as "guerrilla" fighters or "freedom fighters," as these terms refer to organizations and persons who are attempting to liberate their homeland from unlawful occupation. Israel has never asserted that it has rights to any part of Lebanon. Although Israel did enter the southern part of Lebanon at one point,[82] it did so as an act of self-defense against the terrorist organizations that had emerged from Lebanon and repeatedly attacked Israel. When the government of Lebanon refused to take responsibility for the situation, Israel had no choice but to go into southern Lebanon in order to ensure that these terrorist organizations would not use Lebanon as a base for attacking Israel.

Accordingly, to give these organizations the title "freedom fighters" is an act of distortion.[83] Syria and Iran probably utilize these organizations to promote their political goals against Israel.[84] These countries are notorious for their support of terrorism, as is evident in their provision of training,

---

78. SHIMEON SHAPIRA, HIZBULLAH BETWEEN IRAN AND LEBANON 202-04 (1st ed., 2000) (Heb).

79. "In order to promote the protection of the civilian population from the effects of hostilities, combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack." Protocol I to the Geneva Convention of 1949, *supra* note 66, art. 44(3).

80. *Id.*

81. *See id.* (recognizing that there are situations in armed conflicts where, owing to the nature of the hostilities, an armed combatant cannot so distinguish himself and retain his status as a combatant). This is not the situation in the instant case. On the contrary, the terrorist organizations located themselves inside civilian villages in defiance of the agreements between Israel and Lebanon and contrary to Article 44(3).

82. Also known as "the security zone."

83. In the meantime, Israel has decided to withdraw its forces from southern Lebanon, primarily because it was paying too high a price in soldiers' lives.

84. *See generally* SHAPIRA, *supra* note 78, at 124-28.

equipment and financial support.[85] It is impossible to ignore the political arena when we consider the legal implications of the issue before us. In order to understand the nature and mode of operations of these terrorist organizations, one must understand the ideology of the terrorists' patrons. In the instant case, there is very little doubt regarding the nature of the organizations involved.[86]

In the past, prisoners of war were sold into slavery or executed.[87] Today, the prevailing view is that soldiers captured during a war have certain rights, such as the right to food and shelter, the right not to be tortured, the right not to be tried for activities carried out during the course of war (in the absence of such protection, they would be subject to such charges as murder and manslaughter), and the right to be released at the conclusion of the armed struggle.[88] Furthermore, the following protections are listed in the Geneva Conventions of 1949: a general protection of combatants,[89] humanitarian treatment of persons in captivity,[90] and minimal respect.[91] Similarly, the Geneva Conventions establish clear conditions, such as, where and how a person may be held in captivity,[92] the necessary food and medical treatment,[93] the prohibition of trial for activities carried out during the course of fighting,[94] and many others.

Israel, the United States and Great Britain have not signed Protocol I of 1977, which was added to the Geneva Convention.[95] As noted, Protocol I broadened the definition of combatants[96] to include freedom fighters.[97] Israel

---

85. *See id.*; *see also* BENNY CALVARY, KNOW THE MIDDLE EAST – FOCUS ISSUES – HIZBULLAH, THE PARTY OF GOD 3, 9-11 (Ministry of Education and Culture – Explanation Center 1989) (Heb.).

86. For example, *Hizbullah*, connected with Iran, is fully supported by it and receives operational orders from it. Almost certainly, *Hizbullah* was involved in the killing of Jews in Argentina some years ago, even though it never claimed responsibility for this attack. *See* S. Tanhai, *The Embassy Building Collapsed in a Great Explosion and Screams Were Heard From Every Side*, MA'ARIV, Mar. 18, 1992, at 3 (Heb.).

87. Cristopher C. Burris, *Re-Examining the Prisoner of War Status of PLO Fedayeen*, 22 N.C. J. INT'L LAW & COM. REG. 943, 964-65 (1997).

88. *Id.* at 965.

89. Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 12, 75 U.N.T.S. 135, 146.

90. *Id.* art. 13, at 146.

91. *Id.* art. 14, at 148.

92. *Id.* art. 23, at 156-58 (explaining the prohibition on detention in an area defined as a combat zone).

93. *Id.* arts. 25-32, at 156-62.

94. Protocol I to the Geneva Convention of 1949, Jun. 8, 1977, *supra* note 66, art. 75; *see also* Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, *supra* note 89, arts. 82-108, at 200-18 (respecting permitted trials).

95. *See* Red Cross website, *at* http:// www.icrc.org. (last visited Sept. 1, 2001), for a list of countries that have signed the Geneva Conventions and accompanying Protocols.

96. Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 89, art. 4, at 138-40, defines combatants:

A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:

(1) Members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces.

(2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfill the following conditions: (a) that of being commanded by a person responsible for his subordinates; (b) that of having a fixed distinctive sign recognizable at a distance; (c) that of carrying arms openly; (d) that of conducting their operations in accordance with the laws and customs of war.

(3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.

(4) Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization, from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model.

(5) Members of crews, including masters, pilots and apprentices, of the merchant marine and the crews of civil aircraft of the Parties to the conflict, who do not benefit by more favourable treatment under any other provisions of international law.

(6) Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.

B. The following shall likewise be treated as prisoners of war under the present Convention:

(1) Persons belonging, or having belonged, to the armed forces of the occupied country, if the occupying Power considers it necessary by reason of such allegiance to intern them, even though it has originally liberated them while hostilities were going on outside the territory it occupies, in particular where such persons have made an unsuccessful attempt to rejoin the armed forces to which they belong and which are engaged in combat, or where they fail to comply with a summons made to them with a view to internment.

and the United States refused to sign Protocol I and to accept it as binding on the ground that, *inter alia*, this new definition could allow for the recognition of terrorists as combatants, thereby undesirably affording them prisoner of war rights, including the right not to be tried criminally for their activities.[98]

If the Lebanese petitioners in *Anon.* had been recognized as prisoners of war, they could not have been tried for their acts of terror. However, since some of them were put on trial, the State of Israel probably never considered them to be prisoners of war. Professor Frits Kalshoven, who participated in a panel discussion on the topic in 1985,[99] contended that terrorist organizations and terrorists are not entitled to the status of combatants:

> (2) The persons belonging to one of the categories enumerated in the present Article, who have been received by neutral or non-belligerent Powers on their territory and whom these Powers are required to intern under international law, without prejudice to any more favourable treatment which these Powers may choose to give and with the exception of Articles 8, 10, 15, 30, fifth paragraph, 58-67, 92, 126 and, where diplomatic relations exist between the Parties to the conflict and the neutral or non-belligerent Power concerned, those Articles concerning the Protecting Power. Where such diplomatic relations exist, the Parties to a conflict on whom these persons depend shall be allowed to perform towards them the functions of a Protecting Power as provided in the present Convention, without prejudice to the functions which these Parties normally exercise in conformity with diplomatic and consular usage and treaties.

Id.

97. *See* Protocol I to the Geneva Conventions of 1949, *supra* note 66, art. 43(1) ("The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict....") *Id.*

See also Protocol I to the Geneva Conventions of 1949, *supra* note 66, art. 44(1) (stating that any combatant, as defined in Article 43, who falls into the power of an adverse Party, shall be a prisoner of war).

98. Burris, *supra* note 87, at 976; *see also* Gregory M. Travalio, *Terrorism, International Law, and the Use of Military Force*, 18 WIS. INT'L L.J. 145 (2000). Travalio discusses three alternatives for contending with terrorist attacks on the international level. One of the approaches is to recognize attacks on terrorists as armed attacks. *See id.* at 175-76. Thus, all soldiers captured by the organizations will be deemed to be prisoners of war with rights. *See id.* at 176. On the other hand, the terrorists also will be regarded as prisoners of war and will be immune from the trial process, a result which is undesirable. *See id.* at 176-77. Therefore, it is highly unlikely that this proposal will be implemented, and the terrorists will not be entitled to the protection of prisoners of war. *See id.* at 176, 190-91.

99. *See* Frits Kalshoven, *Should the Law of War Apply to Terrorists?*, 79 American Society of International Law Proceedings 109 (1987) (Antigoni Axenidou – Reporter).

> In these circumstances, a simple statement that the law of armed conflict is applicable to terrorists seems of little practical utility. Who would be bound by such an instrument, and to what effect? Would, for instance, the authorities acquire any additional legal powers that they do not already possess under their constitutional provisions? Would they become bound to respect any special rights of terrorists not ensuing from existing human rights instruments? Again, are we to assume that terrorists must respect the law of armed conflict—with its express prohibition on acts of terror? Or that they would become entitled to a special status upon capture—a status that governments rejected even for an internal armed conflict? All these questions are purely rhetorical. In other words, my answer to the question of whether the laws of war should be made applicable to the activities of terrorists in situations where they are at present inapplicable is: No . . . .[100]

The definition of the terms "civilian" and "civilian population" appear in Protocol I to the Geneva Convention of 1949, Jun. 8, 1977, art. 50:

> 1. A civilian is any person who does not belong to one of the categories of persons referred to in Article 4(A)(1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.
> 2. The civilian population comprises all persons who are civilians.
> 3. The presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character.[101]

Although one may believe that the Lebanese petitioners were civilians because they fell outside the category of combatants, in my opinion, this interpretation is incorrect. The provision never contemplated giving terrorists the status of civilians. Moreover, the protection conferred on civilians is broader than the protection granted to combatants. For example, Protocol I prohibits an attack on the civilian population.[102]

If it is not appropriate to regard terrorists as combatants and grant them the protection due to combatants, then terrorists also cannot be regarded as civilians entitled to even greater rights. In the present case, since the

---

100. *Id.*

101. *See* Protocol I to the Geneva Convention of 1949, *supra* note 66, art. 50.

102. *See id.* arts. 50-51.

Lebanese petitioners were terrorists—some of whom had been criminally tried and convicted for terrorist acts—then, they did not become civilians upon the completion of their sentences. The fact that they were imprisoned did not change their status as terrorists. Accordingly, I disagree with the majority opinion that the petitioners were mere civilians.

However, if some of the petitioners were detained merely because of an indirect link to terrorist organizations, for example, if some of them were family members of persons active in terrorist organizations, then those petitioners would be entitled to the status of civilians and all the rights ancillary to such a status. Insufficient facts leave this issue open in the instant case.

D. Were the Lebanese Detainees Hostages?

After the majority in the second hearing of *Anon.* concluded that the petitioners were Lebanese civilians and that they continued to be detained solely for the purpose of bringing about the release of missing Israeli soldiers, the Supreme Court was one step away from also concluding that the petitioners were hostages. In the past, no clear prohibition existed regarding the taking and holding of hostages.[103] During the Second World War, the Germans made the practice of taking hostages well known; in acts of reprisal and out of a desire to ensure that the population obey orders out of fear, the Germans took hostages, often executing them.[104] The execution of innocent

---

103. For a review of the rules which regulated the taking of hostages before 1949, *see* H. Wayne Elliott, *Hostages of Prisoners of War: War Crimes At Dinner*, 149 MIL. L. REV. 241 (1995); *see also* Ellen Hammer & Marina Salvin, *The Taking of Hostages in Theory and Practice*, 38 AM. J. INT. L. 20 (1944); Editorial Comment, *The Execution of Hostages*, 36 AM. J. INT. L. 271 (1942).

104. *See* Elliott, *supra* note 103, at 251:

> By World War II, the practice of providing and accepting hostages as surety of an agreement had left the battlefields. The German occupation of Europe was often resisted by a sizable percentage of the local population. Those responsible for much of the resistance generally were referred to as partisans. In response, the Germans sometimes took hostages. These hostages were held to put pressure on other inhabitants to comply with the security requirement of the occupation (indirect or third-party hostages) in short, to secure public order (at least the German concept of order). The Germans also used hostages to shield lawful military objectives, including trains, from partisan attacks (prophylactic hostages). If attacks of German forces and equipment continued, then a specified number of those held might be executed in response (reprisal hostages).

Id.; *see also* MORRIS GREENSPAN, THE MODERN LAW OF LAND WARFARE 417 (1959).

persons being held hostage in retaliation for attacks on military commanders became customary during the previous century.[105]

Surprisingly customary international law did not prohibit the taking of hostages.[106] Only after the Second World War, the Fourth Geneva Convention Relative to the Protection of Civilians in Time of War of 1949 expressly prohibited the taking of hostages in Article 34, which provides: "Taking of hostages is prohibited."[107] However, the prohibition is related to the civilian population. Thus, "the taking of hostages" does not include interning combatants, and a state that detains combatants will not violate Article 34.[108] This leads to the question who should be considered a civilian and who should be considered a combatant? The 1979 International Convention Against the Taking of Hostages, which reiterates the prohibition against taking hostages, defines the term "hostage."[109]

In my opinion, holding civilians in detention exclusively for the purpose of exerting pressure upon a third party to release captured soldiers or to provide information about the soldiers' conditions and whereabouts does amount to hostage taking. Accordingly, I cannot agree with Justice Kedmi's dissenting opinion opposing the notion that detaining a person for the purpose of exchanging him for another is hostage taking.[110] The Convention Against the Taking of Hostages of 1979 expressly provides that such a situation is considered taking a person hostage.[111]

The real problem is whether a detained person who is an illegal combatant, and who therefore is neither entitled to the status of a prisoner of war nor the status of a civilian, could be considered "hostage." The Geneva Conventions are silent on this issue. We may assume that the drafters of these Conventions did not want to protect terrorists as civilians or to include them

---

105. For example, as a reprisal for the assassination of the German who protected Bohemia and Moravia, the Germans executed a number of villagers in Lidice, Czechoslovakia; the survivors were transported to concentration camps. *See* WILLIAM L. SHIRER, THE RISE AND FALL OF THE THIRD REICH 992 (1960).

106. *See* Ben-Naftali and Gleichgevitch, *supra* note 36, at 240. "It is difficult to determine conclusively that the prohibition on the taking of hostages is part of the customary international law of war. In fact, ample evidence shows that the taking of hostages and the holding of such hostages in administrative detention by an occupying power used to be, at the time the Fourth Geneva Convention was drafted, a rather common practice." *Id.*

107. Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 89, art. 34.

108. *See, e.g.*, HOWARD S. LEVIE, TERRORISM IN WAR – THE LAW OF WAR CRIMES 85 (Oceana Publications, New Port, 1992).

109. "Any person who seized or detains and threatens to kill, to injure or to continue to detain another person (hereinafter referred to as the 'hostage') in order to compel a third party, namely, a State, and international intergovernmental organization, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage commits the offence of taking of hostages ('hostage-taking') within the meaning of this Convention." Convention Against the Taking of Hostages, *supra* note 42, art. 1.

110. *See* F.H. Anon., *supra* note 1, at 758-59.

111. The International Convention Against the Taking of Hostages, *supra* note 42, art. 1.

within the definition of combatants. It is more reasonable to assume that the Geneva Conventions regarded terrorists as criminals and therefore left the regulation of their status up to the individual states.[112]

If this is the case, and the Lebanese petitioners were terrorists who were not protected by the Geneva Conventions, then Israel clearly was entitled to try them as criminals and to imprison them. Nonetheless, this determination does not answer the questions whether Israel was entitled to continue holding the petitioners after the completion of their sentences and on what legal basis it could do so. In the second hearing of *Anon.*, the State of Israel contended before the Supreme Court that it was entitled to further detain the petitioners in order to bargain for the release of missing Israeli soldiers. Chief Justice Barak emphasized that counsel for the State had admitted that the petitioners did not pose any danger to State security and that normally, they would have been released upon completing their sentences.[113]

This declaration by counsel for the State is surprising and inconsistent with previous similar cases, in which detainees were described as endangering the State and the government of Israel.[114] The State's declaration also is unacceptable in view of the likelihood that upon release, the terrorist fighters would return to their units and resume their previous activities. The contention that they did not pose a danger to security was implausible.

International law supports the idea that the description of the petitioners as harmless persons yearning for peace after the completion of their sentences is illogical. A party to an armed conflict may detain combatants as prisoners of war,[115] and only upon cessation of the conflict must the parties release prisoners in their custody.[116] What is the logic underlying the internment of a combatant as a prisoner for the duration of the conflict? The central reason for taking this measure is to prevent the combatant from returning to his unit and continuing to fight. A combatant, by his nature, poses a danger to the opposing party; therefore, the government is entitled to detain him until the danger passes and the armed conflict ends.[117] The danger ceases when, and only when, the conflict ends. A combatant and a terrorist both endanger the security of the opposing party, and both cease to pose a threat when the conflict ends. Therefore, in principle, there can be no significant distinction between the two.

However, it is impossible to hold a person in detention for an indefinite period of time. The principle of proportionality[118] maintains that

---

112. *See* text accompanying note 129 *infra*.

113. *See* F.H. Anon., *supra* note 1.

114. *See* text accompanying note 15 *supra*.

115. Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 89, art. 4 (prisoners of war, in the sense of the present Convention, are persons belonging to one of the enumerated categories, who have fallen into the power of the enemy).

116. *Id.* art. 118 (prisoners of war shall be released and repatriated without delay after the cessation of active hostilities).

117. *See* Burris, *supra* note 87, at 966.

118. The principle of proportionality is a central factor in many areas of law, including constitutional law. The Bill of Rights in Israel adopted this principle in Section 8 of Basic Law: Human Dignity and Freedom; *see also* H.C. 2006/97 Meesun

everything must have an end. The danger posed by a person after a long period of imprisonment, say ten years, is not equivalent to the danger posed by him at the start of his detention. The purpose of the principle of proportionality is to act in a commensurable way in achieving the desired goal.[119] Indeed, a number of Supreme Court justices referred to this principle in the second hearing, holding that even if Israel had been entitled to continue detaining the petitioners, the outcome would have remained the same since many years had passed since the start of their detention.[120] Parts IV and V address the findings of the Supreme Court with regard to the constitutionality of holding the petitioners under the Administrative Detention Law.[121]

E. Were the Lebanese Detainees Bargaining Chips?

Chief Justice Barak concluded that the use of a person as a bargaining chip is prohibited under the Administrative Detention Law. I wish to challenge this finding. Who should be properly regarded as a bargaining chip? Most importantly, the person involved must be guilty. We must not exploit an innocent person in the attempt to achieve an appropriate and lawful purpose:

> The transition from the administrative detention of a person who poses a danger to State security to the

---

Muhammad Abu Farah Ghanimat v. General Commanding the Central Command, 51(2) P.D. 651 (Heb.).

119. *See* H.C. 2006/97 Meesun Muhammad Abu Farah Ghanimat v. General Commanding the Central Command, 51(2) P.D. 651 (Heb.).

120. Chief Justice Barak noted:

> With the passage of time the measure of administrative detention becomes so onerous as to cease being proportional. Indeed, even when there is power to infringe freedom by means of a warrant of arrest, use of this power must be proportional. The "breaking point" must not be passed beyond which the administrative detention is again disproportional. The location of the "breaking point" varies with the circumstances. Everything depends upon the importance of the goal which the administrative detention seeks to achieve; everything depends upon the likelihood of achieving the goal by using the detention, and the compatibility of the administrative detention with the achievement of the goal; everything is connected with the existence of alternative means for achieving the goal which causes less injury to the freedom of the individual; everything ensues from the severity of the injury to the freedom of the individual against the background of the appropriate purpose which it is hoped to achieve. Indeed, we are concerned with a complex range of considerations, which differ from case to case, and from time to time.

F.H. Anon., *supra* note 1, at 744-45.

121. *See infra* Parts IV and V.

> administrative detention of a person who does not pose a danger to State security, is not a "quantitative" transition. It is a "qualitative" transition. The State, by means of the executive authority, detains a person who did not commit any offence, and who does not pose any danger, and whose only "sin" is to be a "bargaining chip." The harm to freedom and dignity is so profound and substantive, that it cannot be tolerated in a State aspiring to freedom and dignity, even if grounds of State security lead to these steps being adopted.[122]

Accordingly, a democratic state cannot, in any circumstances, detain a person who is totally guiltless. A country that detains such a person offends the minimum standards established by cultured communities.[123] Indeed, the grounds for this absolute prohibition arise from the concept of justice. Based on this concept, Israel does not allow collective punishment,[124] and it discourages punishment based merely on suspicions without supporting evidence.[125] "A person will be liable for his own offenses and die for his own sins."[126]

In conclusion, I return to Justice Cheshin's rejection of the approach deeming the Lebanese detainees to be hostages or bargaining chips:

> In fact, the petitioners enlisted into the forces of the enemy and describing them—when we hold them—as "hostages" and "bargaining chips"—*terms which give off a bad odor—distorts the language and the truth.* I protest with all my might against this description . . . .[127] (Emphasis added).

Based on the forgoing analysis, the Lebanese detainees were in the nature of combatants. In other words, they were combatants who did not have the status of prisoners of war and who were not entitled to the rights conferred upon prisoners of war, but who were similar to prisoner of war combatants. Thus, it was possible to detain the Lebanese petitioners under Israel's Administrative Detention Law,[128] irrespective of Israel's ability to try them

---

122. F.H. Anon., *supra* note 1, at 744-45.

123. *See* H.C. 6026/94 Abdul Rahim Hassan Nazzal v. Commander of IDF Forces, 48(5) P.D. 338, 351-52 (Heb.); *see also* H.C. 4772/91 Iyad Diyab Ahmed Hizran v. Commander of IDF Forces, 46(2) P.D. 150, 155-61 (Heb.); H.C. 2722/92 Muhammad Alamrin v. Commander of IDF Forces, 46(3) P.D. 693, 701-06 (Heb.).

124. H.C. 4772/91 Iyad Diyab Ahmed Hizran v. Commander of IDF Forces, 46(2) P.D. 150, 159-60 (Heb.).

125. *See, e.g.*, Cr.A. 6147/92 State of Israel v. Cohen, 48(1) P.D. 62, 67-76 (Heb.).

126. H.C. 2006/97 Meesun Muhammad Abu Farah Ghanimat v. General Commanding the Central Command, 51(2) P.D. 651, 654 (Heb.).

127. *See* text accompanying note 41 *supra*.; F.H. Anon., *supra* note 1, at 749.

128. *See* Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 89, arts. 4-5, 21-24, 109-19, at 138-42, 152-56, 218-26.

for their activities beyond such detention. Therefore, there is a third status, in addition to the status of civilians and combatants—a status which refers to terrorists and members of terrorist organizations. The status of terrorist—a *quasi* combatant—comes with rights relating to appropriate detention conditions; however, the State can lawfully detain such terrorists until the end of a conflict.[129]

PART IV

This section discusses the nature of administrative detention, as distinct from other existing forms of detention. Moreover, it examines whether administrative detention in Israel differs from preventive administrative detention in Great Britain and the United States.

A. What is Administrative Detention?

The literal definition of "administrative detention" is detention carried out by an administrative power and not by a judicial power or authority.[130] However, this literal definition does not contribute much to an understanding of the substance and nature of administrative detention. Administrative detention, sometimes known as preventive detention, refers to a situation where a person is held without trial. The central purpose of such confinement is to prevent the detainee from committing offenses in the future.[131] Detention is based on the danger to state or public security posed by a particular person against whom the government issues a detention order. In other words, if the detainee were released, he would likely threaten the security of the state and the ordinary course of life.[132]

---

129. For the problem of establishing a date for the end of a conflict in cases involving terrorists, *see* Travalio, *supra* note 98, at 176-77.

130. *See* Louis Joint's report on *Administrative Detention for the Sub-Commission*, U.N Doc. E/cn.4/sub.2/1990/29, ¶ 22 (detention is considered "administrative detention" if . . . it has been ordered by the executive alone and the power of decision rests solely with the administrative authority, even if a remedy *a posteriori* does exist in the courts); *see also* Ruth Gavison and Miriam Gur-Arych, *Administrative Detention*, 3 CIVILIAN RIGHTS 1, 3-4 (1982) (Heb.) (an administrative detention order is issued by an administrative authority without public process; the authority has no duty to hear the person prior to issuing the order against him).

131. *See id.* at 4; *see also* Harold Rudolph, *The Judicial Review of Administrative Detention Orders in Israel*, 14 ISR. YEARBOOK ON HUM. RTS. 148, 152, 173 (1984).

132. A.D.A. 1/82 Kawasma v. Minister of Defence, 36(1) P.D. 666, 668-69 (Heb.). In *Kawasma*, the Minister of Defense issued an administrative detention order against Kawasma, who had been acquitted in a criminal trial. The appeal by the State against that acquittal had not yet been heard. Notwithstanding the argument that his release would pose a danger to public security, Chief Justice I. Cohen held that administrative detention was unlawful. The real reason for the refusal to release him was to keep him behind bars until his appeal was heard. The purpose of the administrative detention, according to the judges in the case, is not punishment for past

Administrative detention is not a substitute for criminal arrest and should not be approached as such.[133] Contrary to criminal arrest, where the suspect is arrested for a past offense and faces criminal proceedings, an administrative detainee may be lawfully held without probable cause and without future prosecution. Moreover, the government may detain a person even if such person has not committed an offense or if there is insufficient evidence for criminal charges against such person.[134] Accordingly, the goals of administrative detention are not arrest, trial, conviction, and punishment.[135] The government detains a person because of fear that such person could commit an offense upon release. This is a problematic issue. The government puts a person behind bars not because of a committed act, but because of something he may or may not do in the near or far future.

Another distinction between criminal arrest and administrative detention is that the latter is generally indefinite, whereas criminal imprisonment is for a known period of time. Often, in situations of criminal confinement, if the accused ultimately is convicted and sentenced to a term of imprisonment, the period of time already spent in confinement will be deducted from the term of imprisonment.[136] On occasion, a person who poses a danger to society is confined under ordinary criminal procedures until the commencement of trial and may be imprisoned until the completion of proceedings.[137] However, such a person is arrested because the government

---

offenses, but deterrence of future offenses which the particular person could commit. Accordingly, prior to issuing an order of administrative detention, it is necessary to carefully determine whether this is the appropriate and correct measure. In *Kawasma*, the court ordered the immediate release of the detainee. Nevertheless, there is nothing improper in relying on a person's past acts to draw conclusions about the future danger that person may pose. Generally, this is a legitimate consideration in the framework of administrative detention. *See id.*

133. Rudolph, *supra* note 131, at 175.

134. Shimon Shetreet, *A Contemporary Model of Emergency Detention Law: An Assessment of the Israeli Law*, 14 ISR. YEARBOOK ON HUM. RTS. 182 (1984).

135. RUTH GAVISON, CIVIL RIGHTS IN ISRAEL – THE BROADCAST UNIVERSITY 139 (1st ed. 1994) (Heb.).

136. According to the powers of the Court under Section 43 of the Penal Law, 1977 . . . "[w]here a person has been sentenced to a term of imprisonment, the term of imprisonment shall, *unless the Court otherwise directs*, be calculated from the date of sentence; where the sentenced person has been released on bail after sentence, the period of release shall not be reckoned as part of the term of imprisonment." *Id.* (Emphasis added); *see also* Cr.A. 4506/98 Ya'akov Sternheim v. State of Israel (Heb.) (forthcoming); Cr.A. 6256/99, 162/00 State of Israel v. Erez Vaknin (Heb.) (forthcoming).

137. *See generally* Louis M. Naftali Jr. & Edward D. Ohlbaum, *Redrafting the Due Process Model: The Preventive Detention Blueprint*, 62 TEMP. L. REV. 1225 (1989); *see also* Criminal Procedure (Powers of Enforcement – Arrest) Law, 1996, sec. 21 (remand after the filing of an indictment):

> (a) Where an indictment has been filed, the Court before which the indictment has been filed may order the remand of the defendant until the end of the legal proceedings, if one of the following applies:

had probable cause that such person had committed a crime and can be criminally charged. Meanwhile, a person held in administrative detention is not subject to charges for committed offenses. Generally, administrative detention is used during periods of crisis or war. For example, the Japanese attack against the United States in Pearl Harbor caused the United States to detain Japanese-Americans *en masse* because they were all declared to be disloyal to the State.[138]

B. Examination of Israel's Administrative Detention Law

Having distinguished administrative detention from other types of confinement, so as to examine the Administrative Detention Law in its present form, this section will show that the situation prevailing today under this law, even if not ideal for the person being detained, has greatly improved since earlier laws. It is likely that without such progress, the Supreme Court would not have upheld the petition of the Lebanese detainees in *Anon.*

At the time of the Declaration of Independence in 1948, Israel inherited the Defence (Emergency) Regulations of 1945 (the "Regulations"), which the British Mandatory regime had introduced.[139] Regulations 108 and 111[140] empowered the High Commissioner and Military Commander to order

---

> (1) The Court is of the opinion, on the basis of material presented to it, that one of the following applies:
>
> . . .
>
> (b) [T]here are reasonable grounds for suspecting that the defendant will endanger the security of a person, the security of the public, or the security of the State . . . .

Id.

138. Alan Dershowitz, *Preventive Detention of Citizens During a National Emergency – A Comparison between Israel and the United States*, 1 ISR. YEARBOOK ON HUM. RTS. 295, 308 (1979).

139. The Regulations were set forth in Section 11 of the Law and Administration Ordinance of 1948; *see also* Shetreet, *supra* note 134, at 183-84 (The courts held that neither the provisions of the Mandate nor the language of, or the qualifications contained in, Section 11 excluded the reception of the Defense Regulations, including Regulation 111 dealing with administrative detention. The application of Defense Regulations does not depend upon a proclamation of a state of emergency under Section 9 of the Law and Administration Ordinance 1948). Today, the Regulations are in Section 49 of Basic Law: the Government.

140. Regulation 108 states:

> An order shall not be made by the High Commissioner or by a Military Commander under this Part in respect of any person unless the High Commissioner or the Military Commander, as the case may be, is of opinion that it is necessary or expedient to make the order for securing the public safety, the defence of Palestine,

the detainment of a person if either official believed it was necessary or expedient for maintaining public order or securing public safety or state security.[141]

Prior to the Declaration of Independence of the State of Israel, the government used Regulations 108 and 111 primarily against members of Jewish underground organizations.[142] Accordingly, many criticized Israel's adoption of the Regulations and pressured the government to reform the law.[143] The first attempt to amend the law was in 1951, when administrative detention of the "Religious Underground" made headlines.[144] However, reform was never implemented. As a side note, the Regulations were valid in

---

> the maintenance of public order or the suppression of mutiny, rebellion or riot.

Regulation 111 states:

> A Military Commander may by order direct that any person shall be detained for any period not exceeding one year in such place of detention as may be specified by the Military Commander in the order. Where an order is made under this Regulation against a person in relation to whom an order under Regulation 109 or 110 is in force, the order under this Regulation shall be deemed to replace such other order.
>
> Any person in respect of whom an order has been made by the Military Commander under sub-Regulation (1) may be arrested by any member of His Majesty's forces or of the Police Force and conveyed to the place of detention specified in such order.
>
> For the purposes of this Regulation, there shall be one or more advisory committees consisting of persons appointed by the High Commissioner, and the chairman of any such committee shall be a person who holds or has held high judicial office or is or has been a senior officer of the Government. The function of any such committee shall be to consider, and make recommendations to the Military Commander with respect to, any objections against any order under this Regulation which are duly made to the committee by the person to whom the order relates.

Id.

141. Rudolph, *supra* note 131, at 148.

142. *Id.* at 149.

143. Shetreet, *supra* note 134, at 185.

144. *See* Kobi Ashkenazi, *The Emergency Defence Powers (Arrest) Law as a Model for Reforming the Defence Regulations*, 11-12 LAW AND ARMY 121, 124 (Heb.). The members of the "Religious Underground" were a group of anti-Zionist, ultra-orthodox Jews. They were suspected of acts of arson, stockpiling weapons, bringing explosives into the *Knesset* building and planning acts of violence against Israel. For more details see Michael Saltman, *The Use of Mandatory Emergency Laws by Israeli Government*, 10 INT'L J. OF SOCIOLOGY OF LAW 385 (1982).

Israel and were extended to the territories occupied in 1967, although the procedures were somewhat different in the administered territories.[145]

Reform came in 1979. A new Israeli statute, the Emergency Powers (Detention) Law of 1979 (the "Administrative Detention Law") replaced the previous Regulations. This law was valid only in Israel; however, the spirit of reform also was felt in the administered territories following the promulgation, in 1980, of regulations applicable to these territories. These regulations remained valid until 1987, when the violent uprising known as the *Intifada* broke out.[146]

The Administrative Detention Law contains a number of substantial changes from the previous Regulations. Judicial review is a cornerstone of this law and comprises a basic right. If authorities do not bring the detainee before the President of the District Court within forty-eight hours from the start of detention, the detainee must be released unless some other ground for detaining him exists.[147] Moreover, the detainee must be present in court during the hearing of his case.[148] The Minister of Defense has the primary power to issue a detention order. He may issue an order any time he has reasonable cause to believe the person subject to the order would endanger public or State security. Unlike the old Regulations, the orders of the Minister of Defense are limited in time; they are valid for six months only.[149] The Minister may extend the order for additional periods of six months.[150] The Chief of the General Staff has subsidiary power. If the Chief of the General Staff has reasonable cause to believe that conditions exist permitting the Minister of Defense to make an order, the Chief of the General Staff, and only he, may issue a detention order not exceeding forty-eight hours. He has no

145. Ashkenazi, *supra* note 144, at 125. The question of the validity of the Regulations in the administered territories was raised in H.C. 97/79 Abu Awwad v. Commander of Judea and Samaria, 33(3) P.D. 309 (Heb). The Chief Justice of the Supreme Court at that time, Justice Sussman, held that the Regulations had remained in effect in the West Bank throughout the years, even though the Jordanian monarchy ruled there between 1948 and 1967. However, even if the Court ruling had been different, the Regulations still would have been effective by virtue of the order issued by the military regime: Order Relating to Interpretation (Additional Provisions) (No. 5) (Judea and Samaria) (No. 224) (1986). For more details about the basic structure of the legal system in the administered territories in 1986, *see generally*, Cheryl V. Reicin, *Preventive Detention, Curfews, Demolition of Houses, and Deportations: An Analysis of Measures Employed by Israel in the Administered Territories*, 8 CARDOZO L. REV. 515 (1986-1987).

146. John Quigley, *Israel's Forty-Five Year Emergency: Are There Time Limits to Derogation from Human Rights Obligations?*, 15 MICH. J. INT'L L. 491, 494-95 (1994); *see also* Burris, *supra* note 87, at 961.

147. Administrative Detention Law, *supra* note 7, sec. 4.

148. *Id.*; *see also* Yehuda Weiss, *Administrative Detention—Trends, Procedure and Evidence*, 10 LAW AND ARMY 1, 7 (1989) (Heb.).

149. Administrative Detention Law, *supra* note 7, sec. 2(a).

150. *Id.* sec. 2(b).

power to extend the forty-eight-hour period.[151] These powers cannot be delegated.[152]

The Administrative Detention Law adds a further level of judicial scrutiny. Detention must be judicially reviewed three months after the District Court confirms the order; thereafter, the President of the District Court must re-examine the decision to detain every three months.[153] Such judicial review provides protection against improper exploitation of administrative detention.[154] There are a number of other statutory safeguards of the detainee's rights—the right to legal advice and the right to know the reason for detention—so as to enable the detainee to prepare a proper defense.[155] However, security reasons may preclude informing the detainee of these rights.

A detainee has the right to be present in court at the time of confirmation of the detention order and in the legal proceedings thereafter, unless the judge believes that State security requires otherwise.[155] The detention order must be the sole available means of achieving the desired result. If alternative means besides a detention order are available, the judge must declare the order invalid.[157] Administrative detention is intended only for situations where no alternatives exist for achieving the desired objective. Difficulty in convicting a person in ordinary criminal proceedings is not a reason for favoring administrative detention. However, if evidence is privileged and cannot be disclosed, administrative detention becomes an option.[158] The Administrative Detention Law is effective only when Israel faces a state of emergency, declared in accordance with Section 49 of Basic Law: the Government. However, this precondition has no substantive implications since Israel has been in a state of emergency since its establishment in 1948.[159] Whether an emergency situation truly exists in Israel will be considered below.[160]

---

151. *Id.* sec. 2(c).

152. *Id.*; *see also* Eyal Nun, *Administrative Detention in Israel*, 3 PLILIM 168, 178-79 (1992) (Heb.).

153. Administrative Detention Law, *supra* note 7, sec. 5.

154. *See* Shetreet, *supra* note 134, at 199.

155. Rudolph, *supra* note 131, at 157.

156. Administrative Detention Law, *supra* note 7, secs. 6(c) and 8; *see also* Shetreet, *supra* note 134, at 202; Rudolph, *supra* note 131, at 151.

157. Rudolph, *supra* note 131, at 152.

158. Ashkenazi, *supra* note 144, at 127, 129; *see also* Eyal Nun, *supra* note 152, at 169-70.

159. Administrative Detention Law, *supra* note 7, sec. 1. The *Knesset* recently announced the continuation of the state of emergency and prolonged it for another six months. However, MK Yossi Katz noted that the six-month period was not the maximum period allowed by the law. The law permits the declaration of the state of emergency to be extended for a period not exceeding one year. The primary difficulty of those wishing to annul the declaration of the state of emergency face is that the validity of many orders and laws depend on the existence of such a state of emergency. The Israeli government is presently working to address the situation and remove this dependency. Until then, the state of emergency must remain in effect in order to preserve the ordinary course of life in the country. *See Knesset* records, Sess. 135, July

C. Trends in Judicial Review of Administrative Detention in Israel

In the past, judges almost completely refrained from intervening in decisions made by the various security forces on the ground that those responsible for security knew best the country's security needs and how to achieve them.[161] Today, there is a new trend. Perhaps, the Supreme Court's decision in the second hearing of *Anon.* is a milestone in the new approach—that it is possible to intervene in security decisions and that there are no longer any sacrosanct issues.

Effective and fair judicial review is not only one of the basic rights in the Israeli legal system, it is also essential to the preservation of human rights and freedoms.[162] In the immediate aftermath of the State's establishment, the Supreme Court refrained from intervening in security decisions. The tendency of the judges was, until recently, not to intervene in security matters, as compared to other matters. One may say that in the case of the Lebanese petitioners, the Court intervened more than it was accustomed to in a security decision. Today, the Court's attitude is that everything is subject to judicial review; Chief Justice Barak has encapsulated this approach in the phrase "everything is justiciable."[163]

There are a number of theories explaining why judges refrained from intervening in security matters in the past. One theory is that judges were afraid that if they interfered in these issues, public confidence in the judicial system would diminish. Generally, the public displays broad interest in defense matters. Public discourse has taken place and people have voiced their views as to what the Supreme Court should do in security cases. Even though the Court is not obliged to consider public opinion when making its decisions, it feared that if its opinion differed from that of the public, confidence in the judicial system—upon which the system depends—would decrease and perhaps disappear altogether.[164]

24, 2000 (concerning the recommendation of the joint committee of the Foreign Affairs and Defence Committee and the Constitution, Law and Legislation Committee, regarding the Emergency Regulations). These remarks also may be read in Hebrew on the *Knesset* Internet site *at* http://www.knesset.gov.il/tql/mark01/Hooo1532.html#TQL (last visited Sept. 24, 2000); *see also* Nun, *supra* note 152, at 175-77; Shetreet, *supra* note 134, at 286.

160. *See* text accompanying note 209 *infra*.

161. *See, e.g.*, H.C. 46/50 Al Ayyubi v. Minister of Defence, 7 P.D. 222 (Heb.) (holding that judicial review of powers conferred by the Defense (Emergency) Regulations, 1959, is judicial review of a very limited nature).

162. Avinoam Sharon, *Administrative Detention: Boundaries of Power and Scope of Review*, 13 LAW AND ARMY, 205, 207 (1999) (Heb.).

163. H.C. 1635/90 Zharzhevski v. Prime Minister and others, 48(1) P.D. 749, 855-57 (Heb.).

164. Raphael Cohen-Almagor, *Administrative Detention in Israel and Its Employment as a Means of Combating Political Extremism*, 9 NEW YORK INT'L L. REV. 1, 12 (1996) (noting the importance of public confidence in the judicial system); *see also* H.C. 5364/94 Adv. Ze'ev Velner v. "Ha'Ma'arach", Labor Party, 49(1) P.D. 758 (Heb.); H.C. 2148/94 Gilbert Amnon v. Chief Justice, 48(3) P.D. 573 (Heb.); H.C. 910/86 *Maj. (Res.)* Yehuda Ressler v. Minister of Defence, 42(2) P.D. 441 (Heb.).

Following the 1979 reforms, judicial review of detention orders has been considered essential.[165] However, even after the reforms, judges have continued to examine the legality of detention orders without investigating the reasons for the detention itself. In other words, the courts have not substituted their own discretion for that of the security authority making the decision.[166] The *Knesset* provided by law that the authority issuing the order must do so on an objective and reasonable basis. Accordingly, in exercising judicial review, a court must examine the reasonableness of the decision to issue the order.[167]

Professor Klinghoffer, one of the most respected scholars of public law in Israel, has stated that according to the Administrative Detention Law, a detention order draws its effect from the Minister of Defense and the President of the District Court. In other words, an order is valid only when the two confirm it. Professor Klinghoffer's theory is based on the requirement that the detainee be brought before a judge within forty-eight hours for confirmation of the detention order.[168] The theory also finds support from the progression in the law benefiting the detainee. Although an order is confirmed and becomes valid by virtue of the Minister of Defense and the President of the District Court, in contrast, rescission of it requires a decision only of one of the two authorities. Therefore, a court must exercise its discretion when it decides whether to confirm or rescind an order. Professor Klinghoffer also bases his theory on the disretion of the President of the District Court to shorten the period of time prescribed in the order.[169]

Professor Klinghoffer's view, while original, fails to grapple with a number of issues. First, the language of Section 4 of the Administrative Detention Law, which states that "the President *may confirm* or set aside the detention order or shorten the period of detention," does not necessarily mean

---

165. *See* Administrative Detention Law, *supra* note 7, sec. 4 (if the order is not confirmed by the Court within forty-eight hours, the detainee must be released).

166. *See* A.D.A. 1/80 Rabbi Kahane et al. v. Minister of Defence, 35(2) P.D 253, 257-58 (Heb.):

> [T]he decision whether to detain a person is not left to the Court, but the detention order is made by the Minister of Defence, and he decides whether it is advisable to deny the freedom of a person for the reasons specified in Section 2 of the Law. The detention, even if subject to judicial review, is still an administrative detention. The function of the Court when dealing with an application for approval of a detention order is to examine the considerations of the Minister of Defence .... But it is clear from the provisions of Section 4(c) that the Court may not substitute its own considerations for those of the Minister of Defence, and there is no room to compare the Court's function of review under the Detention Law to the function of a court sitting in a criminal case.

Translation taken from Rudolph, *supra* note 131, at 158.

167. A.D.A. 2/86 Anon. v. Minister of Defence, 41(2) P.D. 508 (Heb.).

168. Izhak H. Klinghoffer, *Preventive Detention Based on Security Reasons*, 11 MISHPATIM 286 (1981) (Heb.).

169. *Id.*

that a judge must exercise discretion in the broad sense. This language also may be understood as imposing a duty to confirm or a duty to choose between one of the alternative options.[170] Furthermore, the order is valid from the moment the Minister of Defense issues it. In theory, there is no prohibition against or restriction on the release of the detainee prior to the expiration of the forty-eight-hour period and on the basis of a new detention order. Therefore, can one really say that the order becomes effective only upon confirmation by the Minister of Defense and the President of the District Court?[171]

A number of major problems have arisen regarding the scope and nature of judicial review. The checks and balances in the Administrative Detention Law are inadequate. There are insufficient guarantees that the detainee will know why he is being held.[172] For example, under Article 4 of the Declaration of Minimum Humanitarian Standards,[173] a detainee has the right to counsel and to judicial review of his detention, and the detainee's family has the right to know of the detention and the detainee's state of health:

> (1) All persons deprived of their liberty shall be held in recognized places of detention. Accurate information on their detention and whereabouts, including transfers, shall be made promptly available to their family members and counsel or other persons having a legitimate interest in the information.
>
> (2) All persons deprived of their liberty shall be allowed to communicate with the outside world including counsel in accordance with reasonable regulations promulgated by the competent authority.
>
> (3) The right to an effective remedy, including *habeas corpus*, shall be guaranteed as a means to determine the whereabouts or the state of health of persons deprived of their liberty and for identifying the authority ordering or carrying out the deprivation of liberty. Everyone who is deprived of his or her liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of the detention shall be decided

---

170. Sharon, *supra* note 162, at 210-11.

171. For another critique of Professor Klinghoffer's theory, see Shetreet, *supra* note 134, at 200-02.

172. Notwithstanding Professor Shetreet's assertion that the Administrative Detention Law includes the right to counsel and the right to be informed of the grounds for detention, these rights are not expressly prescribed in the statute.

173. The declaration was formulated and adopted in December 1990 by the Turku/Abo Akademi University Institute for Human Rights, as was mentioned in Theodor Meron & Allan Rosas, *Current Development: A Declaration of Minimum Humanitarian Standards*, 85 AM. J. INT'L L. 375, 375-77 (1991).

> speedily by a Court and his or her release ordered if the detention is not lawful.[174]

Moreover, judicial review of a detention order in Israel is inherently weak. For example, if a judge decides to examine the evidence in the absence of the detainee or his counsel, the judge generally will review written testimony only; the judge will not have the opportunity to observe the witnesses themselves and obtain an impression of them. Consequently, a court will not be able to establish the credibility of a witness, may have to assume that the witness is credible, or may be forced to rely on the impression created by the security officer who presents the written evidence. The procedure of presenting written evidence is somewhat reminiscent of the procedures used in regular criminal cases, where, in order to shorten the proceedings, the parties to the dispute submit written affidavits to the court, instead of providing oral testimony. In such cases, the court presumes that the parties agree to the credibility and content of the testimony. However, this procedure is possible only with the consent of the parties. In cases of administrative detention, the detainee has no right to agree to or reject the procedure of written testimony.

Recently, an interesting question arose[175] in relation to whether the military commander of Judea and Samaria could extend the validity of a detention order, after an appellate court held that the period of detention should be shortened. In the appeal, the military judge held that there was cause for detention, but not sufficient cause to detain for a long period of time.[176] Following this decision, the military commander extended the period of administrative detention. A petition was submitted in opposition to this decision. During the hearing on the petition, the court considered a number of different theories. One theory was that under the law, there was no prohibition against extending the period of detention even after the court had shortened it. The other theory (which the court ultimately accepted) was that the military commander could not extend the period of time of detention after the court had shortened it since otherwise, the military commander would challenge the court's determination and power of judicial review.[177]

---

174. *Id.*

175. H.C. 2320/98 Abdul Fatah Mahmoud Almuamleh v. Commander of IDF Forces, (Heb.) (forthcoming).

176. *Id.*

177. *Id.* Justice Zamir noted two exceptions that would allow for the extension of the period of detention even the period had been after judicial review:

> In conclusion, the rule is that a military commander is not entitled to extend the period of detention, after a judge decided to shorten the period, save if one of the following occurs:
>
> 1. The judge decided to shorten the period of detention in order that the military commander might reconsider, towards the end of the period which was shortened, whether there was justification for continuing the detention; or
>
> 2. After the judge decided to shorten the period of detention, new information is received or a change occurs in the

D. Possible Justifications for Administrative Detention

Notwithstanding the many disadvantages of administrative detention, which shall be discussed in greater detail below,[178] the procedure may be justified on a number of grounds. First, ordinary criminal proceedings usually are not effective in dealing with terrorist activities and crimes.[179] For example, it is very difficult to prove the existence of conspiracies on the part of secret underground terrorist organizations. Most of the evidence and testimony in such cases is inadmissible in court, partly because it is hearsay. There are cases in which some of the evidence is protected from disclosure under the national security privilege, such as intelligence that could expose an agent or informer. In such cases, the options are to hold the suspect in administrative detention or to set him free.

An additional justification for administrative detention is based on the idea that detention of a person is the lesser of two possible evils. In determining whether to detain a person, the government balances the freedom of the individual against the harm to society that the suspect may cause if set free. Accordingly, administrative detention must be employed only when the balance tips in favor of protecting society. The main difficulty with this justification for administrative detention is that there is no guarantee that detaining the person is indeed the least harmful means of achieving the goal of protecting society from a disastrous outcome. One of the difficult problems relating to administrative detention is ensuring the credibility of the evidence, particularly when the judge does not see the witnesses, but obtains testimony from secondary sources or writings. Further, the judge cannot know what impact the detention order will have and whether it will achieve the desired results.[180]

In one case, a court decided that not every form of hearsay evidence or unchecked assumption can be used to justify the administrative detention of a person. It is necessary to provide well-founded material that a reasonable person would regard as sufficient for holding a suspect in detention.[181] In

---

> circumstances which is capable of substantively changing the level of danger posed by the detainee.

Id. ¶ 12.

178. *See* text accompanying note 207 *infra*.

179. Shetreet, *supra* note 134, at 196-97.

180. *Id.* at 197-98.

181. H.C. 4400/98 Usama Jamil Ismail Baraham v. Legal Judge, 52(5) P.D. 337, 342-343 (Heb.).

In this context one knows the comments of Justice Agranat in H.C. 442/71 Lanski v. Minister of the Interior, 26(2) P.D. 337, at 357, to the effect that:

> [n]ot every piece of hearsay evidence will carry weight with the administrative authority, such as evidence which does not contain more than unfounded rumors . . . the evidence must be – bearing in mind the subject-matter, the content and the person producing it – such evidence that every reasonable man would regard it as having evidentiary value and would rely on it to

another case, the court set forth a test: whether there is sufficient evidence to point to the fact that if the detainee were released, he would *almost certainly* pose a danger to public or State security.[182] Elsewhere, the court noted that the judge must examine the material produced and decide whether it is sufficient to present a factual framework that would justify the issuance of a detention order. The court further emphasized that the judge must not substitute his functions for those of the Minister of Defense by deciding who should be detained and when.[183] The danger to public or State safety must be *so grave* as to leave no choice but to hold the suspect in administrative detention.[184]

A proposal has been made for the enactment of a separate criminal procedure concerning the admissibility of evidence in cases of administrative detention. However, the moment when hearsay evidence is admissible within the framework of criminal proceedings, there is a danger of a slippery slope, as well as the possibility of a breach of other safeguards against the use of inadmissible evidence. Moreover, the experience in Northern Ireland shows that when an effort is made to moderate procedural or evidentiary requirements, as was done in the Diplock cases,[185] the cost is likely to be too high.[186]

> some extent or another.' In accordance with these principles, it was held that the Minister of Defence, when ordering administrative detention by virtue of his power under the Emergency Powers (Detention) Law – 1979 . . . is entitled to rely on evidence which is not admissible in Court . . . .

182. A.D.A. 1-2/88 Agbariyya v. State of Israel, 42(1) P.D. 840, 844-45 (Heb.).

183. A.D.A. 2/86 Anon. v. Minister of Defence, 41(2) P.D. 508, 514-16 (Heb.); *see also* A.D.A. 6/94 Baruch Ben Yosef v. State of Israel, (Heb.) (forthcoming):

> The proceeding conducted before the President of the District Court in accordance with the provisions of Section 4 of the [Administrative] Detention Law, is a process of "authorization" of an order of administrative detention, which is made by the Minister of Defence within the framework of his administrative power under the said law. "Authorization" in this context, means – as also follows from the margin note alongside the said Section 4 – placing the legality of the decision of the Minister of Defence to order administrative detention up for "judicial review" and this review is characterized by an examination of the legality of the considerations which led to the order being made, on the basis of the "factual framework" which was presented to the Minister of Defence by the security officials who asked for the order . . . .

Id. ¶ 3.

184. Nun, *supra* note 152, at 187.

185. These cases were conducted in court before a single judge, and not before a jury, as should have been the case. The percentage of convictions based on admissions of guilt was very high. After a number of years, it was determined that a significant proportion of these convictions were factually mistaken.

As previously explained, a state may justify administrative detention only in the context of an emergency. In democratic countries, the means of dealing with emergency situations are likely to infringe on substantive human rights. On one hand, the state must defend itself against destruction, maintain public order, and preserve state and public security. On the other hand, the state may violate a number of basic rights in achieving these goals. Accordingly, in order to balance security interests against human rights, the state must define the type of emergency that entitles it to derogate from the

---

For more details see http://www.serve.com/pfc/dpp/part2.html (last visited Dec. 9, 2000):

> However, the standard of admissibility is lower in the single-judge no-jury (Diplock) courts in operation in Northern Ireland for hearings of alleged scheduled offences. The Diplock courts admit all confessions through Section 11 of the Emergency Provisions Act which allows any written or oral statement by the accused to be admitted as evidence. It is then the defence who must, if relevant, raise *prima facie* evidence showing the accused was subjected to "torture, to inhuman or degrading treatment, or to any violence or threat of violence in order to induce him to make the statement," whereupon, the prosecution must disprove it beyond reasonable doubt. This is the reverse of the procedure in Britain whereby it is for the court to determine whether a confession may have been obtained by oppression and for the prosecution to prove it was not. The significance of this lies in the fact that the majority of convictions under emergency legislation in Northern Ireland involve confessions . . . . This is especially significant when reflecting that many people have alleged that they have been prosecuted, and in many cases convicted, on the sole basis of contested confessions that they claim were obtained through coercion and were made in the absence of a lawyer. These contested confessions are typically a result of a combination of the following factors: physical brutality of the detainee within the holding centre; verbal abuse; verbal threats made against the detainee or his/her family, and verbal death threats, including of the detainee's lawyer. There have also been complaints regarding denial of medical examinations and of detainees not receiving prescribed medication promptly.
>
> The UN Special Rapporteur on the Independence of Judges and Lawyers, following a fact-finding mission in October 1997, recommended that the standards in emergency legislation for admitting confession evidence should be abolished. He further recommended that the "*restoration of the jury system, which has been a culture within the criminal justice system in England, would help to restore public confidence in the administration of justice.*" (Emphasis added).

Id.

186. Shetreet, *supra* note 134, at 198-99.

protection of human rights.[187] There is no requirement that the threat be against the entire nation.[188]

Israel ratified the International Covenant on Civil and Political Rights (the "International Covenant") in 1991.[189] However, its ratification was accompanied by a declaration that the State of Israel was not subject to Article 9 of the International Covenant, which prohibits arbitrary detention and arrest, because Israel was in a persisting state of emergency.[190] In order for this declaration to be valid, Israel must meet a number of criteria contained in Article 4 of the International Covenant:

> In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures do not involve discrimination solely on the grounds of race, colour, sex, language, religion or social origin.[191]

Israel's declaration sets forth the reasons its situation satisfies the requirements of Article 4. The declaration states, *inter alia*, that since its establishment, Israel has been the victim of repeated attacks and threats to its very existence, that there still are threats of war, armed attack and terrorist activity, which all could cause loss of life and damage to property.[192] Israel's

---

187. In relation to the dilemma in democratic States, *see also* George J. Alexander, *The Illusory Protection of Human Rights by National Courts During Periods of Emergency*, 5 HUM. RTS. L. J. 1, 2-3 (1984).

188. Thomas Buergenthal, *To Respect and to Ensure: State Obligations and Permissible Derogations, in* THE INTERNATIONAL BILL OF RIGHTS 72, 73-74 (L. Henkin ed. 1981) (public emergency need not engulf or threaten to engulf an entire nation before it can be said to "threaten the life of the nation"). International conventions that declare protections of human rights generally contain clauses enabling a state to derogate from such protections in times of national emergencies. Such clauses, including Article 15 of the European Convention for Protection of Human Rights and Fundamental Freedoms of 1950, Article 27 of the American Convention on Human Rights of 1969, and Article 4 of the International Covenant on Civil and Political Rights of 1976, provide a state with the necessary tools to deal with national emergencies.

189. *See* International Covenant on Civil and Political Rights, *supra* note 60, art. 4.

190. Quigley, *supra* note 146, at 491-92.

191. International Covenant on Civil and Political Rights, *supra* note 60.

192. H.C. 5100/94 The Public Committee Against Torture in Israel and others v. The Government of Israel and others (forthcoming) (Translated into English by the Supreme Court of Israel):

> The State of Israel has been engaged in an unceasing struggle for both its very existence and security, from the day of its founding. Terrorist organizations have established as their goal Israel's annihilation. Terrorist acts and the general disruption of order are

declaration also complies with all the guidelines and provisions in the International Covenant[193] as to the existence of a state of emergency, even though Israel did not give detailed reasons behind the state of emergency. The declaration did not specify the anticipated date of the end of the period of emergency, and it omitted data relating to the identity of those currently threatening Israel. Israel also did not mention the various wars in which it had engaged since its establishment.

A state of emergency is a situation in which the state is justified in breaching certain norms established by the International Covenant in order to preserve minimal public order.[194] In the case of *Lawless v. Ireland,* [195] the European Court of Human Rights interpreted the requirement of a threat to the life of the nation as "an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organized life of the community of which the State is composed."[196] Professor John Quigley, who has queried the existence of a persistent state of emergency in Israel, asserts that the hiatus between one war and the next proves that no genuine

---

> their means of choice. In employing such methods, these groups do not distinguish between civilian and military targets. They carry out terrorist attacks in which scores are murdered in public areas, public transportation, city squares and centers, theaters and coffee shops. They do not distinguish between men, women and children. They act out of cruelty and without mercy . . . . The facts presented before this Court reveal that one hundred and twenty one people died in terrorist attacks between 1st January 1996 to 14th May 1998. Seven hundred and seven people were injured. A large number of those killed and injured were victims of harrowing suicide bombings in the heart of Israel's cities. Many attacks—including suicide bombings, attempts to detonate car bombs, kidnappings of citizens and soldiers, attempts to highjack buses, murders, the placing of explosives, *etc.*—were prevented due to the measures taken by the authorities responsible for fighting the above described hostile terrorist activities on a daily basis.

Id.

193. International Covenant on Civil and Political Rights, *supra* note 60, art. 4(3):

> Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other State Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.

Id.

194. Quigley, *supra* note 146, at 500.
195. (1979) 1 E.H.R.R. 15, 1961 E.C.H.R. 332/57.
196. *Id.*

state of emergency existed in Israel during the periods between the wars; a genuine state of emergency exists only during war time.[197]

Generally, a state of emergency is temporary. Often, it is limited to a definite period of time, such as 30 to 60 days, although the time period is subject to the nature of the threat and its level of intensity. This is not the situation in Israel. Since 1948, there has been a persistent state of emergency, which is renewed periodically by the *Knesset*, Israel's parliament. The state of emergency in Israel is not a temporary situation, but a permanent one. According to Professor Quigley, Article 4 of the International Covenant does not contemplate a continuous state of emergency like the one that exists in Israel,[198] even though Article 4 does not demand that a state of emergency be limited in time. If the state of emergency in Israel does not meet the requirements of Article 4, Israel would be accused of breaching Article 9 of the International Covenant.

However, even though Article 4 refers to an extreme situation, where there is a threat to the life of the nation as a whole, Israel's state of emergency meets the requirements of Article 4. In Professor Quigley's view, terror is a problem in many countries, and not every one of those countries has declared a state of emergency.[199] Yet the terror prevailing in Israel poses a genuine and immediate threat to public safety. No one knows where or when the next bomb will explode. Accordingly, there is a threat to the nation as a whole. The recent terrorist incidents and disquiet, which started in October 2000 and which are reminiscent of the *Intifada* (the violent uprising of 1987), prove that there are continuous threats to public security, even if war has not existed throughout the entire period. Such continuous threats validate Israel's declaration of a state of emergency.

The Paris Minimum Standards of Human Rights Norms in a State of Emergency[200] require that a state of emergency be limited to a fixed term; however, its duration can be extended from time to time.[201] This is precisely

---

197. *See* Quigley, *supra* note 146, at 506-11. The author further contends that a few terrorist attacks do not satisfy the conditions established by Article 4.

198. *Id.* at 502-03.

199. *Id.* at 505-07.

200. *See* Richard B. Lillich, *Current Development: The Paris Minimum Standards of Human Rights Norms in a State of Emergency*, 79 AM. J. INT'L L. 1072, 1073 (1985).

201. The Paris Minimum Standards of Human Rights Norms in a State of Emergency, art. 3:

> (a) The declaration of a state of emergency shall never exceed the period strictly required to restore normal conditions.
>
> (b) The duration of emergency (save in the case of war or external aggression) shall be for a period of fixed term established by the constitution.
>
> (c) Every extension of the initial period of emergency shall be supported by a new declaration made before the expiration of each term for another period to be established by the constitution.
>
> (d) Every extension of the period of emergency shall be subject to the prior approval of the legislature.

the course of action Israel has adopted when it declared a state of emergency and extended its validity every year.[202] The expression "public emergency" in the Declaration of Human Rights is explained in Article 1(b):

> The expression 'public emergency' means an exceptional situation of crisis or public danger, actual or imminent, which affects the whole population or the whole population of the area to which the declaration applies and constitutes a threat to the life of the community of which the State is composed.[203]

Article 15 of the European Convention for Protection of Human Rights and Fundamental Freedoms of 1950 also allows for the infringement of rights in times of an emergency.

In *Lawless v. Ireland*,[204] the majority of the European Human Rights Court held that the term "a threat to the life of the nation" includes activities which endanger foreign relations.[205] Judge G. Maridakis, who wrote a separate opinion, took a particularly strict view. He held that an emergency situation entails a threat to society as a whole, not a threat to a certain locality. Moreover, the threat must have a logical basis:

> When the State is engaged in a life and death struggle, no one can demand that it refrain from taking special emergency measures: *salus rei publicae suprema lex est*. Article 15 is founded on that principle... By 'public emergency threatening the life of the nation' it is to be understood a quite exceptional situation which imperils or might imperil the normal operation of public policy established in accordance with the lawfully expressed will of the citizens, in respect alike of the situation inside the country and of relations with foreign Powers . . . .[206]

Lillich, *supra* note 200.

202. In accordance with the provisions of Section 49 of Basic Law: the Government.

203. Lillich, *supra* note 200, at 1073.

204. (1979) 1 E.H.R.R. 15, 1961 E.C.H.R. 332/57.

205. John F. Hartman, *Derogation from Human Rights Treaties in Public Emergencies*, 22 HARV. INT'L L.J. 1, 24-27 (1981); *see also* Lawless v. Ireland, (1979) 1 E.H.R.R. 15, 1961 E.C.H.R. 332/57.

206. (1979) 1 E.H.R.R. 15, 1961 E.C.H.R. 332/57. In their article, Ben-Naftali and Gleichgevitch state that the national interest in bringing home missing and captured soldiers does not justify the declaration of a state of emergency. *See* Ben-Naftali & Gleichgevitch, *supra* note 36, at 119.

E. Which Rights May Be Breached and Which Rights Must Be Safeguarded?

In declared periods of emergency, human rights are imperiled. The most vulnerable right is the right to a fair trial.[207] In my opinion, a state is prohibited from negating the basic rights of a person without a fair process. Thus, for example, a person cannot be deprived of freedom and imprisoned without the fair process of judicial review. A detainee already has limited rights and should not be deprived of his remaining rights completely.[208] In periods of emergency, there generally is not enough time to institute all the usual processes and proceedings that attempt to preserve a just balance between the rights of the individual and the interests of the state. In such times, the state has an interest to make the decision-making mechanism more efficient. Thus, for example, in times of emergency, the executive branch has the power to legislate. Correspondingly, judicial review becomes less strict.[209]

The purpose of due process is to ensure an objective judicial process, conducted by an unprejudiced judge[210] who is committed to adjudicating in accordance with the law; this process must be open and subject to the keen eyes of the public.[211] The hearing or trial must take place within a reasonable period of time. The person who is the subject of the process must know the charges against him, the reason for the proceedings against him, and the nature of the evidence gathered against him. Such a person must be given the opportunity to challenge the evidence against him and to present the court with his own version of events.[212] The decision of the court must be rational, and it must contain detailed particulars and explanations of the final outcome.[213] Additionally, a person should have the right to appeal to a higher court or to another judicial power.[214] In all proceedings, a person should have the right to be represented by counsel.[215] This all applies to cases of administrative detention. However, in administrative detention cases, the executive branch has the authority to issue a detention order,[216] and judicial review is conducted in a more flexible manner.[217]

---

207. GAVISON, *supra* note 135, at 137.

208. For a more elaborate discussion, *see* Emanuel Gross, *Criminal Code in Time of Emergency*, 3 LAW & GOV'T 263, 267-68 (1995-1996) (Heb.).

209. GAVISON, *supra* note 135, at 137.

210. Gavison & Gur-Aryeh, *supra* note 130, at 3.

211. *Id.*

212. *Id.*

213. *Id.*

214. There is a dispute concerning whether the right of appeal is a basic constitutional right. In Israel, the right of appeal is not considered a basic constitutional right. *See* H.C. 87/85 Arjub v. Commander of IDF Forces in Judea, 42(1) 353; *see also* H.C. 188/99 Gad Zirinsky v. Deputy President of the Magistrate Court (Heb.) (forthcoming); Cr.A. 111/99 Arnold Schwartz v. State of Israel (Heb.) (forthcoming).

215. Gavison & Gur-Aryeh, *supra* note 130, at 3; *see also* Emanuel Gross, *supra* note 208, at 272 (1995-1996) (Heb.).

216. The Minister of Defense, etc. *See* text accompanying note 151 *supra.*

217. In relation to inadmissible evidence, see text accompanying note 172 *supra.*

Due process is one of the many rights that may be infringed during a state of emergency. A number of proposals have been made to transform this right into one that cannot be violated under any circumstances.[218] However, such proposals have been rejected[219] since no country has been willing to accept the inflexibility of the right to due process. The right to due process is complex because it has a variety of facets, such as the requirement that a hearing be conducted in public.[220]

The Fourth Geneva Convention of 1949 provides for minimum rights that must be protected even in times of emergency.[221] Article 75 of Protocol I, which entered into force in 1977 and which is titled "Fundamental Guarantees," provides a number of safeguards for the maintenance of due process:

> (3) Any person arrested, detained or interned for actions related to the armed conflict shall be informed promptly, in a language he understands, of the reasons why these measures have been taken. Except in cases of arrest or detention for penal offences, such persons shall be released with the minimum delay possible and in any event as soon as the circumstances justifying the arrest, detention or internment have ceased to exist
>
> . . .
>
> (6) Persons who are arrested, detained or interned for reasons related to the armed conflict shall enjoy the protection provided by this Article until their final release, repatriation or re-establishment, even after the end of the armed conflict.[222]

Initially, Article 75 conferred protection only on prisoners of war, a number of entities in the territory of a party to the conflict, and protected persons in occupied territories. Following the entry into force of the 1977 Geneva Protocol II Additional to the Geneva Conventions of 12 August 1949, Article 75 of Protocol I was expanded to include every person affected by the armed

---

218. Stephanos Stavros, *The Right to a Fair Trial in Emergency Situations*, 41 INT'L & COMP. L. QUARTERLY 343, 343-44, 347 (1992).

219. *Id.* at 347.

220. *See generally id.*

221. *Id.* at 348-49. As the author notes, the International Court held that the obligation to comply with the requirements of Article 3 is directed toward all states by virtue of customary international law, including states that are not parties to the Convention. This creates a minimal threshold of rights which cannot be breached in times of emergency.

222. Protocol I to the Geneva Convention of 1949, *supra* note 66, art. 75.

conflict.[223] The Inter-American Court held that a court must always be vested with the power to engage in judicial review:[224]

> The European Court appears to have recognized this in *Lawless v. Ireland* and in *Ireland v. United Kingdom.* In both these cases it stressed the importance of a review of the actual need for the detention, within a reasonable time of the arrest, which would be comprised of an investigation to determine whether the suspicion against the detainee is well-founded.[225]

In December 1990, the Abo Akademi University Institute for Human Rights in Turku/Abo, Finland adopted the Declaration of Minimum Humanitarian Standards. The Declaration does not permit a violation of certain rights in any circumstances; in other words, the Declaration sets forth the core human rights that must be preserved in every situation and at all times. Unlike other international conventions, the Declaration is directed at almost all bodies, not just governments.[226] Article 11 of the Declaration addresses the right to fair process with respect to administrative detention:

> If it is considered necessary for imperative reasons of security to subject any person to assigned residence, internment or administrative detention, such decisions shall be subject to a regular procedure prescribed by law affording all the judicial guarantees which are recognized as indispensable by international community, including the right of appeal or to a periodical review.[227]

Article 9 of the International Covenant on Civil and Political Rights grants the detainee the right to be informed of the reasons for his detention and to be brought immediately before an official judicial officer.[228] In other

---

223. Protocol II to the Geneva Convention of 1949, Jun. 8, 1977, art. 2, 1125 U.N.T.S. 609 (stating that this Protocol shall be applied without any adverse distinction founded on race, color, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or any other similar criteria to all persons affected by an armed conflict as defined in Article 1).

224. Stavros, *supra* note 218, at 360.

225. *Id.* at 361-62.

226. Meron & Rosas, *supra* note 173, at 375-78. Article 1 of the Declaration states: "This Declaration affirms minimum humanitarian standards which are applicable in all situations, including internal violence, disturbances, tensions, and public emergency, and which cannot be derogated from under any circumstances. These standards must be respected whether or not a state of emergency has been proclaimed." Article 2 of the Declaration states: "These standards shall be respected by, and applied to all persons, groups and authorities, irrespective of their legal status and without any adverse discrimination."

227. Meron & Rosas, *supra* note 173.

228. International Covenant on Civil and Political Rights, *supra* note 60, art. 9:

words, even if a person is detained, the government is prohibited from preventing such person from turning to the courts or other legal tribunals. Although Israel has ratified the International Covenant, it is not obliged to comply with all of its requirements since the country is in a state of emergency, despite the doubts expressed regarding the validity of such a state.[229] Thus theoretically, Israel, without violating the International Covenant, may detain a person for an unlimited period of time, without informing him of the reasons for his detention and without granting him the possibility of challenging the charges against him.[230]

Even if Israel is not subject to Article 9 of the International Covenant, as a result of its declaration of a state of emergency, it is still subject to humanitarian rules and domestic law. Israel's domestic laws prohibit the deprivation of a person's basic rights, except to the extent necessary in light of the state of emergency. For example, it would be inconceivable to leave a person in administrative detention for his entire life. Similarly, the State is subject to all existing humanitarian laws.

Apart from the right to due process, administrative detention may curtail other rights, such as freedom of movement, freedom of expression, and freedom of association. Although, unlike other persons in confinement, the detainee may wear his own clothes in the detention center,[231] he is deprived of may other rights. Israel's Administrative Detention Law ameliorates detention conditions. While the old Regulations did not contain any requirements with regard to detention conditions, the current law sets forth

---

> 1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
>
> 2. Anyone who is arrested shall be informed, at the time of the arrest, of the reasons for his arrest and shall be promptly informed of any charges against him
>
> . . .
>
> 4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.
>
> 5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

Id.; *see also* Shetreet, *supra* note 134, at 207-10. The author believes that even though there is no guarantee of compensation in Israel, the other conditions of Article 9 are met.

229. *See* text accompanying note 189 *supra*.

230. Quigley, *supra* note 146, at 492.

231. GAVISON, *supra* note 135, at 140; *see also* Gavison and Gur-Arych, *supra* note 130, at 2. The Declaration of Minimum Humanitarian Standards does not require that the detainee be allowed to wear his own clothes. However, Article 4(4) contains a much stronger provision: "All persons deprived of their liberty shall be treated humanely, provided with adequate food and drinking water, decent accommodation and clothing, and be afforded safeguards as regards health, hygiene, and working and social conditions." *Id.*

requisite conditions so as to ensure that the detainee does not feel like a convicted felon. These provisions emphasize that the purpose of the detention is preventive rather than punitive.[232] However, detention is conducted on the premises of the prison in an isolated section.[233]

The principle of legality, which requires, *inter alia*, that no person be deprived of any rights except by an express statutory provision, also is abrogated when a person is subjected to administrative detention.[234] The detainee generally is held not because he has breached a statutory provision, but in order to prevent him from committing a future offense. Therefore, the detainee's rights are violated without any written, previously known law. The Administrative Detention Law is not written law for purposes of the principle of legality because it grants the power of detention, but does not set forth the precise details and specific modes of behavior that enable the exercise of this power. The law makes use of vague terms, such as "reasons of State security" or "reasons of public security," but it does not specify what these terms signify.

When authorizing a detention order, a court may base its decision on evidence and testimony that would be inadmissible in an ordinary trial, such as hearsay evidence, if the court decides that such evidence will lead to the discovery of the truth and to just results.[235] Whenever a court decides to deviate from the rules of evidence, it must record the reasons for its decision. Occasionally, the evidence may be second- or third-level hearsay.[236]

Moreover, a court may decide not to disclose certain evidence to the detainee or his counsel if such disclosure would threaten security.[237] In deciding whether or not to disclose the evidence, the court must consider and examine such evidence. Only after an examination, the judge will decide which evidence to disclose and which evidence to keep privileged. Generally, the judge also will hear evidence on the relevant issues from the representative of the State, who usually is affiliated with the security forces. The State generally bears the probative and persuasive burden of showing that the evidence should remain privileged.[238] However, the law does not expressly address the burden of proof and the standard of proof. The accepted view is that the requisite standard of proof is "clear and convincing evidence."[239] At the end of the proceedings, the judge delivers the decision, discloses all evidence that is not privileged, and affirms the privilege of the

232. *See* text accompanying note 133 *supra*.

233. Nun, *supra* note 152, at 168.

234. Gavison and Gur-Aryeh, *supra* note 130, at 2-3.

235. Administrative Detention Law, *supra* note 7, secs. 6(a) and 6(b).

236. Weiss, *supra* note 148, at 11-14.

237. Administrative Detention Law, *supra* note 7, sec. 6(c).

238. *See* Nun, *supra* note 152, at 178-79.

239. *See* Emanuel Gross, *Human Rights in Administrative Proceedings: A Quest for Appropriate Evidentiary Standards*, 31 CAL. W. INT'L L.J. 215 (2001).

remaining evidence.[240] The claim of privilege is based on Section 44 of the Evidence Ordinance (New Version) of 1971.[241]

In the case of the Lebanese detainees, it is necessary to distinguish between two central groups. Some of the detainees were tried and convicted, and, only after completing their sentences, they were placed in administrative detention.[242] In contrast, other detainees were held in administrative detention from the outset, without ever having been tried. This distinction is important from an evidentiary point of view in proving the danger posed by a particular detainee. If a person has been tried for and convicted of terrorist activities, it is easier to prove that he poses an ongoing danger. If the government has proven the person's terrorist activities in criminal proceedings, the criminal standard of proof being "beyond a reasonable doubt," it is easier to prove that person poses a threat to public or State security.[243] In contrast, in a case where a person has not been tried for terrorist acts, greater evidentiary proof is needed to prove that person poses a danger to security. The threshold of proof is identical in both types of cases. However, in the former instance, it will be easier, from an evidentiary point of view, to support the contention of danger. Additionally, unlike a regular trial, the standard of proof is not "beyond a reasonable doubt" since most of the evidence and testimony is in writing.[244] Accordingly, in such a case, great care must be taken to meet the clear and

---

240. *See* H.C. 497/88 Bilal Shachshir v. Commander of IDF Forces, 43(1) P.D. 529 (Heb.). Justice Bach held that a negligible and distant risk to security did not justify the privilege of evidence.

241. Evidence Ordinance [New Version] – 1971, sec. 44:

> Privilege in the public interest
>
> (a) A person is not bound to give, and the Court shall not admit, evidence regarding which the Prime Minister or the Minister of Defence, by certificate under his hand, has expressed the opinion that its giving is likely to impair the security of the State, or regarding which the Prime Minister or the Minister of Foreign Affairs, by certificate under his hand, has expressed the opinion that its giving is likely to impair the foreign relations of the State, unless a Judge of the Supreme Court, on the petition of a party who desires the disclosure of the evidence, finds that the necessity to disclose it for the purpose of doing justice outweighs the interest in its non-disclosure.
>
> (b) Where a certificate as referred to in subsection (a) has been submitted to the Court, the Court may, on the application of a party who desires the disclosure of the evidence, suspend the proceedings for a period fixed by it, in order to enable the filing of a petition for disclosure of the evidence or, if it sees fit, until the decision upon such a petition.

Id.

242. *See* beginning of Part IV *supra*.

243. This does not mean the evidentiary standard of clear and convincing evidence will inevitably be satisfied. The detainee may cease to pose a danger, or the danger may have lessened during the period was imprisoned.

244. *See* text accompanying note 172 *supra*.

convincing evidence standard.[245] The standard of proof does not change even if the period of detention is prolonged; however, in such a case, it becomes necessary to adduce more evidence to show that the detainee continues to pose a danger, thereby requiring further detention. In other words, the more time passes, the stronger the presumption that the danger posed by the detainee is diminishing.[246] Therefore, while the standard of proof remains the same, a greater quantity of evidence becomes necessary.

A court may decide to conduct some of the hearing in the absence of the detainee or his counsel for reasons of State or public security. This power resembles the power provided by Section 128 of the Penal Law of 1977.[247] However, in a routine criminal trial, Section 128 provides that the accused will be assured a full defense, including defense counsel for the secret proceedings.[248]

The Israeli Administrative Detention Law provides no clear guarantee that a detainee will be represented by counsel.[249] While the Sixth Amendment to the United States Constitution guarantees that a person charged with a crime is entitled to legal representation, the person who is detained does not have the same guarantee.[250] In a number of cases in the

---

245. *See* Gross, *supra* note 239.

246. See the discussion on proportionality in the text accompanying note 118 *supra*.

247. Penal Law of 1977, sec. 128:

> Secrecy of proceedings
> If a court, which tries an offence under Article Two [treason] or Four [espionage] is of the opinion that the security of the State require secrecy to be maintained to an extent which cannot be achieved by means provided by any other law, it may order –
> (1) that the accused or his counsel shall not be present at a particular proceeding or shall not inspect some particular evidence;
> (2) that in a particular proceeding the court shall sit in a place other than the court building;
> (3) that something said or some evidence produced in a particular proceeding shall be kept secret in such manner and to such extent as the court shall prescribe; but the court shall not exercise its power under paragraph (1) unless the accused is assured, to its satisfaction, of a full defence, including defence counsel appointed by it or chosen by him instead of the counsel who will be absent or will not inspect the said evidence.

Id.

248. *Id.*

249. *See* comment *supra* note 172.

250. The Sixth Amendment of the Constitution of the United States:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; which district shall have been previously ascertained by law, and to be

United States,[251] the Supreme Court attempted to decide whether the right to counsel also applied to stages preceding the commencement of criminal proceedings. There were conflicting decisions in different cases.[252] If the right to counsel is guaranteed in criminal proceedings, there is no clear determination as to the stage in the criminal process at which such right arises. A detainee who has not yet been charged with any offense has no constitutional right to counsel in the United States.[253]

According to Article 5 of the Paris Minimum Standards of Human Rights Norms in an Emergency, certain conditions must be met before proceeding with administrative detention. These conditions include the right to know the reasons for the detention within seven days from the commencement of the detention, the right to consult with a lawyer, and the right to judicial review either by a judicial or a *quasi*-judicial body within 30 days (in contrast to the forty-eight-hour period under the Israeli Administrative Detention Law).[254]

> informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

U.S. CONST. amend. VI.

251. The cases are mentioned in Deborah L. Yalowitz, *Sixth Amendment - Right to Counsel of Prisoners Isolated in Administrative Detention*, 75 J. CRIM. L. & CRIMINOLOGY 779 (1984); *see generally* Gideon v. Wainwright, 372 U.S. 335 (1963).

252. *See generally* Yalowitz, *supra* note 251.

253. *Id.*

254. Paris Minimum Standards of Human Rights Norms in a State of Emergency, art. 5:

> 1. No one shall be deprived of his right to liberty and security of the person except on such grounds and in accordance with such procedures as are established by law.
>
> 2. Any law providing for preventive or administrative detention shall secure the following minimum rights of the detainee:
>
> (a) The right to be informed, within seven days, of the grounds of his detention; however, disclosure of such facts in support of the grounds as the detaining authority considers to be prejudicial to the public interest need not be made to the detainee, without prejudice to the power of the reviewing authority in its discretion to examine in camera such facts if it considers it necessary in the interests of justice.
>
> (b) The right to communicate with, and consult, a lawyer of his own choice, at any time after detention.
>
> (c) The right to have his case reviewed within 30 days from the date of his detention by a judicial or *quasi*-judicial body constituted in accordance with the procedures designed to make such guarantees effective.
>
> (d) No person shall be detained for a period longer than 30 days unless the reviewing authority before its expiry has reported that there is in its opinion sufficient cause for such detention.

The United Nations Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment of 1984 provides additional guarantees to the detainee.[255] By virtue of this Convention, the Committee for the Prevention of Torture has power to conduct periodic examinations of a State Party's institutions. The Committee may conduct visits to the region subject to its legal authority, including every place where persons are deprived of their liberties by public authorities. The Committee may visit facilities used for administrative detention. Following the Committee's visit to a particular site, it must give its opinion about the detention conditions in order

---

(e) Even if the reviewing authority reports that in its opinion there is sufficient cause for a person's detention, such detention shall not be continued beyond a period of one year. If, however, circumstances then prevailing warrant detention, the detaining authority may, subject to the same conditions and safeguards, order further detention of such person.

(f) Regular visits by members of the family of the detainee shall be permitted.

(g) The detainee should be treated with humanity and respect for the inherent dignity of the human person and, in any event, such treatment, consistent with security, shall not be less favourable than that afforded to convicted prisoners.

(h) The names of the detainees with the dates of their orders of detention shall be published in an official gazette; the names of persons released should be similarly published, with the dates of their release.

3. In every case of detention without trial, during an emergency, the remedy of *habeas corpus* (or *amparo*) must be available to the detainee at least for the limited purpose of ensuring the supervisory jurisdiction of a competent court of law in five respects:

(a) for determination whether the relevant law of preventive or administrative detention is in compliance with the relevant constitutional requirements;

(b) whether the order of detention is in compliance with the law of preventive or administrative detention;

(c) whether the detainee is the person against whom the order of detention was issued and whether the order was made *mala fides* or in violation of natural justice;

(d) for ensuring that every detainee is treated with humanity and with respect by directing, *inter alia*, his medical examination and inspection of the prison or place of detention; and

(e) for ensuring that the minimum rights of the detainee mentioned in the preceding paragraphs are duly implemented by the detaining authority.

Lillich, *supra* note 200, at 1076-78.

255. International Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85.

to ensure appropriate treatment in the future.[256] The Committee usually provides an objective review of the detention conditions and makes this information available to the general public.

F. Administrative Detention in Great Britain and the United States

1. Great Britain, the Irish Terror and Detention

During the Second World War, the British government had the right to promulgate any order which it believed necessary for the protection of the country and the preservation of public order. While this power was conferred on the sovereign without any qualification, the judiciary was not given any jurisdiction to engage in judicial review of the sovereign's orders.[257]

In the early 1970s, following the increase in terrorist activities in Great Britain, the government decided to establish arrangements similar to those during the Second World War, although in a different manner. By 1975, more than 1,100 people had been killed and about 11,500 people had been injured in Britain as a result of terrorist activities. Further, as a result of a bombing campaign by the Irish Republican Army (IRA) in population centers, there was approximately £140,000,000 in property damage.[258] In an effort to fight terrorism, the British Parliament passed the Northern Ireland (Temporary Provisions) Act in 1972.[259] In 1974, continued terrorist activities, particularly the Birmingham Pub bombings, where twenty-one people were killed and more than 180 injured,[260] led Parliament to enact the Prevention of Terrorism (Temporary Provisions) Act of 1974. Although intended to be temporary, continued violence led Parliament to prolong the Act from time to time until it became almost permanent in nature.[261] Widespread use was made of the powers granted by the Act. In the first year following its enactment, the government detained about 1,330 people, although it ultimately charged only sixty-five with criminal offenses.[262]

In 1989, Parliament replaced the Act with the Prevention of Terrorism (Temporary Provisions) Act of 1989 (the "PTA"), which remains in

---

256. Roberta M. Harding, *In the Belly of the Beast: A Comparison of the Evolution and Status of Prisoners' Rights in the United States and Europe*, 27 GA. J. INT'L & COMP. L. 1, 31-38 (1998).

257. Michael P. O'Boyle, *Emergency Situations and the Protection of Human Rights: A Model Derogation Provision for a Northern Ireland Bill of Rights*, 28 N. IRE. LEGAL Q. 160, 169-70 (1977).

258. The Republic of Ireland v. The United Kingdom, in (1979) 2 E.H.R.R. 25, 30.

259. *Id.* at 40.

260. David R. Lowry, *Draconian Powers: The New British Approach to Pretrial Detention of Suspected Terrorists*, 8-9 COLUM. HUM. RTS. L. REV. 185 (1976-1977).

261. The Parliament ratified the Act a number of times, replacing it with a new statute in 1976. Parliament also ratified the Act periodically, until it replaced the Act with a new statute in 1984. *See* Prevention of Terrorism (Temporary Provision) Act, 1989, sec. 2 (Eng).

262. Lowry, *supra* note 260, at 202.

effect today. Unlike the prior Acts, the PTA does not require express renewal to remain valid; however, a number of sections do require extensions from time to time.[263] In adopting the PTA, Britain changed course from enacting temporary provisions to enacting permanent emergency legislation allowing for the administrative detention of any person posing a danger to public and national safety, even if that person had no connection to the IRA.[264] The PTA's purpose was to provide a mechanism for combating repeated terrorist attacks. The PTA assisted in obtaining convictions based on confessions during the intensive investigations conducted while the person suspected of paramilitary activity was in administrative detention. It was possible to convict a person solely on the basis of his confession, without objective corroborating evidence. As a result, there were a number of injustices. For example, in one case, evidence came to light that three people had been convicted on the basis of forged police investigative reports and police perjury. Following this revelation the three convictions were overturned, but only after the prisoners had served a portion of their prison sentences.[265]

Additionally, with the enactment of the PTA, there was a shift to the premise that an accused enjoys the right to maintain silence—the right against self-incrimination. Originally, if a person chose to remain silent during a police investigation, the silence could be used against him in court. The government would argue that the right to silence would assist the police in reaching the truth without making use of various investigative measures. The government's assumption was that an innocent person would voluntarily seek to be heard in order to prove his innocence. However, the outcome of this approach clearly may facilitate the conviction of an innocent person.[266]

---

263. Prevention of Terrorism (Temporary Provisions) Act, *supra* note 261, sec. 27.

264. It should be noted that even though it is possible to detain any person who belongs to a terrorist organization, and gives financial support to a terrorist organization, or commits terrorist acts, the First Schedule to the Act expressly lists the organizations which are recognized as terrorist organizations: the IRA and the Irish National Liberation Army. Any connection to these organizations may result in the person being detained under the law. The Secretary of State may add additional organizations to this list. Terrorism is defined in Section 20(1) as follows: "'[T]errorism' means the use of violence for political ends, and includes any use of violence for the purpose of putting the public or any section of the public in fear." *Id.*; *see generally* Wilson Finnie, *Old Wine in New Bottles? The Evolution of Anti-Terrorist Legislation*, 1990 THE JURID. REV. 1.

265. Fionnuala Ni Aolain, *The Fortification of an Emergency Regime*, 59 ALB. L. REV. 1353, 1353-55, 1379-80 (1996); *see also* Martin Flaherty, *Human Rights Violation Against Defense Lawyers: The Case of Northern Ireland*, HARV. HUM. RTS. J., Spring 1994, 87, 94-96.

266. Aolain, *supra* note 265, at 1382-83; *see also* Gregory C. Clark, *History Repeating Itself: The (D)evolution of Recent British and American Antiterrorism Legislation*, 27 FORDHAM URB. L.J. 247, 256 (1999); Kevin D. Kent, *Basic Rights and Anti-Terrorism Legislation: Can Britain's Criminal Justice (Terrorism and Conspiracy) Act 1998 be Reconciled with Its Human Rights Act?*, 33 VAND. J. TRANSNAT'L L. 221, 223 (2000):

Section 14(1) of the PTA grants broad powers to every police officer to arrest, without an arrest warrant, any person whom he has reasonable cause to suspect is a member of a terrorist organization, has committed one of the offenses set forth in Part Two of the PTA, or has contributed in any manner to a terrorist act, even if only giving financial support. Under the PTA, detention may last forty-eight hours without confirmation by any judicial authority, and if the Secretary of State believes necessary, the period may be extended to an additional five days.[267] Thus, British authorities may detain a person for a week without any judicial scrutiny or review. This ability to detain a person for a week, without that person being able to challenge the detention before a judicial authority, is incompatible with the provisions of Article 5(3) of the European Convention of Human Rights of 1950 (the "European Convention").[268] Article 5(3) requires that the detainee be brought before a judicial tribunal for the purpose of examining the legality of and need for detention. This requirement to bring the suspect before the tribunal as soon as possible is incompatible with the power to detain the suspect for seven days.[269]

> At trial, the judge or jury hears a high-ranking police officer testify your refusal to answer questions during interrogation and that in his professional opinion you are a member of a terrorist organization. On cross-examination, defense counsel asks the officer on what information he bases his opinion, but the officer declines to answer on the basis that disclosing such information would jeopardize national security or would be contrary to the public interest. You decide to maintain your right to silence at trial. Based on the above evidence, the verdict comes back – "Guilty."

Id. This presents a scenario under the Criminal Justice (Terrorism and Conspiracy) Act 1998.

267. *See* Prevention of Terrorism (Temporary Provision) Act, *supra* note 261, sec. 14.

268. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221. Article 5(3) states:

> (3) Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this Article shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

Id.

269. *See also* the judgment of the European Court of Human Rights in relation to Brogan v. United Kingdom, (1988) 11 E.H.R.R. 117, in which the judges criticized the situation which had resulted. In that case, the suspect was detained for seven days without any possibility of the judicial system engaging in a close examination of the reasons and grounds for his detention. The court examined the legality of the detention in the light of the provisions of the European Convention of Human Rights and held that the British Act did not meet the standards of the Convention. The case dealt with the 1984 Act, which also contained the provision. The Act of 1989 reconfirmed the seven-day period of detention.

An additional problem arising from the PTA is the lack of clear criteria regarding when it is possible to extend the detention from forty-eight hours to seven days. The absence of such criteria precludes practical examination of the legality of the extension of the detention, even if it were subject to judicial review. There is no requirement that the extension of the detention be accompanied by *prima facie* evidence of the danger posed by the particular person.[270] In contrast, in Israel it is possible to detain a person for forty-eight hours; however, during that period or at the end of the forty-eight hours, the suspect must be brought before a court for confirmation of the detention order. This is in accordance with the requirement set out in the European Convention that the suspect be brought before a judicial tribunal as soon as possible.[271]

The European Court of Human Rights addressed the European Convention in *The Republic of Ireland v. The United Kingdom*.[272] In that case, the Court considered the detention and torture of a large number of Irish suspects during British investigations conducted in the 1970s. In the beginning of the 1970s, emergency legislation granted power to every official of the Royal Ulster Constabulary to detain any person for a period of forty-eight hours if that official believed that the person posed a danger to public or national security or to public order. Another provision enabled any police constable or any person authorized by the civil authority to detain a person suspected of an activity harming public or national security or disturbing public order. The law did not establish the period of such detention, although in practice it was limited to seventy-two hours.[273] Under the first provision, there was no requirement that the detainee be suspected of having committed an offense or of being about to commit one. The only requirement was that the detention be intended to prevent a breach of public order and peace, and on occasion, such detention was used as a means of interrogating the detainee with respect to the activities of another.[274]

In view of the difficult situation Great Britain faced in the early 1970s, the British government promulgated a special regulation that enabled the Secretary of State to issue a detention order against any individual suspected of carrying out or attempting to carry out a terrorist activity or of organizing persons for the purpose of terrorist activity. This regulation was described in *The Republic of Ireland*:

> The individual had to be released after [twenty-eight] days, if his case had not by then been referred to a commissioner but, in fact, all cases, including those of

---

270. J. Hatchard & A. Harding, *Preventive Detention and Security Law*, 31 INT'L STUDIES IN HUM. RTS. 267.

271. *See* European Convention for Protection of Human Rights and Fundamental Freedoms, *supra* note 268.

272. *See* The Republic of Ireland v. The United Kingdom, in (1979) 2 E.H.R.R. 25, 30.

273. *Id.* at 51-52 (applying the two powers together, it was possible to detain a person continuously for a period of 120 hours).

274. *Id.* at 87-88.

> persons originally detained or interned under the Special Powers Regulations, were so referred. During the order's initial [twenty-eight] days and during its extension pending the commissioner's adjudication, which could take up to six months, the individual had no means under the Terrorists Order of challenging the lawfulness of his detention.[275]

Thus, the special regulation did not demand that the government bring the detainee before a judicial authority for confirmation of the detention order. Nonetheless, the detainee could, within twenty-one days, appeal the validity of the order before an appeals tribunal comprising of no less than three persons with at least ten years of legal or judicial experience.[276] On December 5, 1975, the Secretary of State signed orders for the release of seventy-five detainees who were still in detention by virtue of this emergency legislation.[277]

According to Article 15 of the European Convention of Human Rights, a country could breach Article 5, which deals with detainees' rights, subject to the conditions set forth in Article 15. In times of an emergency that threatens the life of the nation, a country may breach the European Convention (except for certain provisions not including Article 5).[278] Article 15 may not provide for a proportional balance with respect to protecting human rights. An arrangement that permits deviation from the protection of human rights, without that deviation being proportional, is unreasonable and unbalanced.

In *The Republic of Ireland,* the European Court of Human Rights held, in a unanimous decision, that the conditions enumerated in Article 15 of the European Convention had been met. Accordingly, even though the British government violated Article 5, it was entitled to deviate from the provisions of the article due to the state of emergency prevailing in Northern Ireland and the massive wave of violence at the time.[279] Thus, detaining a person solely for the purpose of obtaining information regarding others also was justified, even if that person did not pose a danger:

> [A] person who was in no way suspected of a crime or offence or of activities prejudicial to peace and order could be arrested for the sole purpose of obtaining from him information about others . . . . This sort of arrest can be justifiable only in a very exceptional situation, but the

---

275. *Id.* at 55.

276. *Id.* at 56.

277. *Id.* at 58.

278. Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 89, art. 15, at 149.

279. *See* The Republic of Ireland v. The United Kingdom, *in* (1979) 2 E.H.R.R. at 93, 97, 107-08.

> circumstances prevailing in Northern Ireland did fall into such a category.[280]

Therefore, in certain cases, the governmental authorities may detain a person, not because he poses a danger to public or national security, or because he is suspected of terrorist activity, but solely for the purpose of collecting information. Consequently, in an extraordinary state of emergency, the government can detain an innocent citizen, not for obtaining information, but for exchanging that person for another.

Furthermore, under the British Prevention of Terrorism Acts of 1974 and 1976, Great Britain could detain a person without the detention being subject to judicial review:

> If Parliament had chosen the words "reasonable cause to suspect" rather than "reasonably suspects" such an arrest could have been subject to judicial scrutiny. However, this choice of words may possibly deny judicial review regarding the manner of the arrest, and as no reasons need be given to the suspect at the time of the arrest, the established rules of criminal procedure are statutorily circumvented.[281]

Under these statutes, the government detained persons whose only offense was that their names were mentioned during the course of the interrogation of others. Some of these persons were detained for the entire week permitted by law for the purpose of interrogation. Families of the detainees also were detained for purposes of interrogation. In some cases, there was evidence that even when the investigators understood that a detainee did not have relevant information, they would leave that person in detention until the last possible moment, *i.e.*, until the end of the seven-day period.[282]

In addition to all the restrictions the detainees faced, the detainees' legal representatives also had difficulties. During the first stages of the investigation, they were prevented from contacting the detainees and obtaining information—all in the name of security.[283]

2. Detention in the United States in General and During the Second World War in Particular

The United States did not go untouched by administrative detention. Although the term "administrative detention" was not used in the United States, the objectives and characteristics of certain detentions were similar to the administrative detentions in Israel. During the Second World War, the

---

280. *Id.* at 94.
281. Lowry, *supra* note 260, at 192-93.
282. *Id.* at 203-04.
283. *See generally* Flaherty, *supra* note 265.

United States detained many of its residents. The majority of the detainees were of Japanese origin, others were of German and Italian origin. However, there was an important distinction between these groups of detainees. The detainees having German and Italian roots were detained on an individual basis, on the basis of the danger each detainee purportedly posed. In contrast, Japanese Americans were detained *en masse* and without distinction.

The United States government detained about 109,650 citizens of Japanese origin, on the ground that it was impossible to trust any Japanese person. The fact that this operation occurred fairly quietly is explicable by the events of Pearl Harbor[284] and the rumors that spread thereafter.[285] In other words, unlike the detainment of the German and Italian Americans, the detainment of Japanese Americans was conducted on grounds of race. The detentions resulted from rumors concerning the Japanese race and Japanese Americans' loyalty to the United States, not from firm and conclusive evidence of any wrongdoing. Special temporary procedural rules enabled the detention of dangerous persons, who could not have been convicted of any crime under the ordinary rules of evidence.[286]

One of the most famous cases, which reached the Supreme Court, was *Korematsu v. United States*.[287] In that case, Korematsu, an American citizen of Japanese origin, refused to comply with Exclusion Order No. 34, issued by the government and which required persons of Japanese origin to vacate a particular locality declared to be a military zone. Korematsu's loyalty to the United States was not in any doubt. Justice Black, who delivered the majority opinion, noted that the government had adopted a number of measures against the Japanese. One such measure was similar to house arrest, whereby people were restricted in their movements on the streets. Another measure entailed the transfer of Japanese Americans from their homes to a ghetto. According to Justice Black, the government issued these orders so as to prevent Japanese Americans from causing injury. These orders seemed necessary because certain disloyal individuals caused a shadow of suspicion to be cast upon the Japanese American population. Even though the majority of citizens of Japanese origin were loyal to the United States, they were still subject to "collective" punishment, because there was not

---

284. For the story of Pearl Harbor and its consequences, see Dershowitz, *supra* note 138, at 307. The author explains that after the Japanese attack on Pearl Harbor, the governor of Hawaii proclaimed a military regime, suspended the right to *habeas corpus*, closed the civil courts, and empowered the military tribunals to try criminal cases. The governor promised that upon the end of the state of emergency, everything would return to the way it had been. Indeed, this is what happened, although the military regime remained. Eventually, it was declared that this situation was improper, but this was after many illegal detentions. Compared to the later wave of detentions of Japanese citizens, the extent of the 1941 detentions in Hawaii was relatively limited.

285. Dershowitz, *supra* note 138, at 307-08. Some of the rumors were that all Japanese were enemies, that they were poisoning sources of water, etc. These were matters that were never proved. There were also complaints that the silence on the part of the Japanese was a bad omen. United States General De Witt remarked, "A Jap's a Jap. There is no way to determine their loyalty . . . ." *Id.* at 308.

286. Dershowitz, *supra* note 138, at 304.

287. 323 U.S. 214 (1944).

enough time to conduct the necessary investigation of who was loyal and who was disloyal.[288] In addition, the Supreme Court held that the legality of the orders had to be examined on the basis of the situation that prevailed when they were issued, while taking into account all the problems and the special circumstances surrounding the issue of the orders.[289] Justice Black noted that the coasts of the United States had been exposed to air attack by the Japanese military and that the defense had to be proportional to the threat.[290] The Supreme Court's decision left open the question whether the transfer orders were legal since this issue was immaterial to the action. Ultimately, the Court held, "We cannot by availing ourselves of the calm perspective of hindsight now say that at that time these actions were unjustified." However, Justices Murphy, Roberts and Jackson dissented and held that the government's provisions and orders were in violation of the Constitution.[291]

A similar case was *Mochizuki v. United States*, which was filed in federal district court in Los Angeles and ultimately settled.[292] The parties agreed that the federal government would pay symbolic compensation to citizens of Japanese origin who had been injured by the government's treatment of them during the Second World War and that the United States government would publish an apology with respect to the notorious detentions. The action, which was filed in 1996, concerned the United States government's detention of citizens of Japanese origin. These detentions were conducted with the intention of exchanging citizens of Japanese origin at the end of the war for American soldiers held in captivity in Japan. At the end of the war, the government transferred more than 900 citizens of Japanese origin to Japan against their will.[293] The settlement in *Mochizuki* did not overturn the decision in *Korematsu*. At the same time, the settlement may be regarded as a tacit agreement that the United States government had violated the rights of citizens of Japanese origin when it kidnapped and detained them without charges or a hearing.[294]

---

288. *Id.* at 216-18.

289. *Id.* at 219 (upholding the exclusion order as of the time it was made when the petitioner violated it).

290. Korematsu v. United States, 323 U.S. at 219-20.

291. *See id.* at 226-48. Justice Roberts stated: "I dissent, because I think the indisputable facts exhibit a clear violation of Constitutional rights .... If this be a correct statement of facts disclosed by this record, and facts of which we take judicial notice, I need hardly labor the conclusion that Constitutional rights have been violated ...." *Id.* at 225-26.

292. The case was settled out of Court. See the report of it in the American Civil Liberties Union, *Japanese Latin American Win Bittersweet Victory from Justice Department*, (Los Angeles, Jun. 12, 1998), *at* http://www.aclu.org/news/n061298a.html (last visited Dec. 9, 2000): "A federal class action lawsuit seeking reparations and a formal apology from the United States government for the forcible kidnapping and imprisonment of Japanese Latin Americans During World War II was settled today."

293. *See* Natsu Taylor Saito, *Justice Held Hostage: U.S. Disregard for International Law in the World War II Internment of Japanese Peruvians – A Case Study*, 40 B.C. L. REV. 275, 275-76 (1998).

294. *See id.* at 275-76. After the Second World War, the taking of hostages was prohibited by international conventions.

In *Mochizuki*, the plaintiffs raised the argument that the United States government held Japanese Americans as hostages for the purpose of exchanging them for American prisoners.[295] This argument is equivalent to the "bargaining chip" argument with regard to the *Anon.* case. However, the difference lies in the fact that in the United States, civilians were detained, whereas in Israel, the detainees were guerilla fighters based outside of the country. Japanese Americans were held as hostages prior to the Geneva Convention of 1949, so that their internment did not breach the international law prevailing at the time.[296] Until the Geneva Convention of 1949, customary international law did not recognize a prohibition against the taking of hostages.[297]

Today, the majority of administrative detentions in the United States involve illegal aliens attempting to enter the country. For example, the government has detained Cuban refugees in federal detention centers and similar places while the refugees awaited decisions in their cases.[298] The Fourth and Eleventh Circuit Courts of Appeals have held that the Attorney General has the power to intern illegal immigrants for an unlimited period of time and that these immigrants have no constitutional rights whatsoever with respect to their confinement.[299] A few years later, the First Circuit Court of Appeals came to the opposite conclusion, holding that the Attorney General has no power to intern illegal immigrants beyond a reasonable period of time. Following this period of time, the detainees have to be released.[300] There are those who argue[301] that these immigrants are entitled to a fair process, because, for them, internment was in the nature of a punishment unlimited in time, and because a person cannot be deprived of his freedom by an arbitrary procedure.[302] Further, commentators have claimed that while these illegal immigrants have no right to be in the United States, they have the natural right to freedom from arbitrary detention, which is distinct from the right to apply for an entry visa. Based on this distinction, the claim is that the detainees

---

295. *See id.* at 292-97. The author claims that the idea of exchanging Japanese citizens for American prisoners was not a new idea; such exchanges had already taken place in the past.

296. The prohibition against taking prisoners, which was contained in the Geneva Convention Regarding the Protection of Civilians in Times of War and in the International Convention against Taking Hostages, supports the claim that until then, there had been no such prohibition in customary international law. Justice Dorner in the second hearing of *Anon.* indicated that there are those who believe that even before these conventions, the prohibition had become a custom. *See* F.H. Anon., *supra* note 1, at 765-67.

297. *See* Ben-Naftali & Gleichgevitch, *supra* note 36, at 241-43.

298. Mark D. Kemple, *Legal Fiction Masks Human Suffering: The Detention of the Mariel Cubans Constitutional, Statutory, International Law, and Human Considerations*, 62 S. CAL. L. REV. 1733, 1735-38 (1989).

299. Palma v. Verdeyen, 676 F.2d 100,104 (1982); *see also* Garcia-Mir v. Meese, 788 F.2d 1446, 1447-48 (1986).

300. Amanullah v. Nelson, 811 F.2d 1 (1987).

301. Kemple, *supra* note 298.

302. *Id.* at 1744-47.

have the right to due process in accordance with the Fifth and Sixth Amendments of the Constitution.[303]

Accordingly, a federal district court in New Jersey released a person who the Immigration and Naturalization Service detained because he stayed in the United States beyond the period of time permitted by his student visa. His detainment accorded with the immigration laws of the United States. The court held that the detainee had to be released because the detention violated his due process rights since he had not been given the opportunity to examine and contest the evidence against him and because the government's testimony and evidence against him was hearsay.[304] One scholar has proposed replacing the detention of persons who seek political asylum in the United States and who face danger in their country of origin with a less harmful option, such as release on bail.[305]

Unlike Great Britain and Israel, the United States has not been involved in much discussion regarding the use of administrative detention in the fight against terrorism. This may be because the United States has not faced the same difficulties and repeated terrorist attacks that Israel and Great Britain have confronted, at least not until recently. However, in 1996, the United States enacted the Antiterrorism and Effective Death Penalty Act.[306] The Act provides that evidence not disclosed to the accused may be brought before a judge, and it imposes penalties reaching 10 years imprisonment and $50,000 in fines.[307] Thus, the situation in the United States is somewhat uncertain.

PART V

A. The New Draft Bill

In *Anon.*, the Supreme Court of Israel held that the government could not hold the Lebanese petitioners in administrative detention based on the Administrative Detention Law. At the same time, the Court opened a window of opportunity to allow for legislation that would enable the detention of members of hostile forces who are not prisoners of war. As a result, the

303. *Id.* at 1757, 1759-61.

304. Kiareldeen v. Reno, 71 F. Supp. 2d 402 (D.N.J. 1999); *see also Immigration Secret Evidence Issue Before the House Judiciary Committee*, 107th Cong. (2000) (Statement of Bruce Kramer, President, American Jewish Committee).

305. *See* Michele R. Pistone, *Justice Delayed Is Justice Denied: A Proposal for Ending the Unnecessary Detention of Asylum Seekers*, 12 HARV. HUM. RTS. J. 197 (1999).

306. Pub. L. 104-132, 110 Stat. 1214 (1996) (amending 28 U.S.C. §§ 2241-2255).

307. This law prohibits association with persons or terrorist organizations and financial support of terrorist organizations. *See* Jennifer A. Beall, *Are We Only Burning Witches? The Antiterrorism and Effective Death Penalty Act of 1996's Answer to Terrorism*, 73 Ind. L.J. 693, 703-04 (1998); Nadine Strossen, *Criticisms of Federal Counter-Terrorism Laws*, 20 HARV. J.L. & PUB. POL'Y 531, 539 (1997).

legislature drafted the Imprisonment of Members of Hostile Forces Who Are Not Entitled to the Status of Prisoners of War Bill of 2000 (the "Bill").[308]

Since Israel can rely on international law regarding prisoners of war and can regulate the detention of terrorists and guerilla fighters,[309] the Bill is superfluous and unnecessary. Existing law provides for the legal justification for the continued detention of Lebanese detainees being held in Israel. The government can hold them in administrative detention as long as Israel has not recovered its missing and captured soldiers, or as long as the struggle waged by terrorist forces against Israel has not ended. At best, the Bill is a more explicit arrangement that provides statutory validity to the existing law.

Clause 1 of the Bill states the purpose of the proposed legislation:

> This law is intended to anchor the imprisonment of members of hostile forces who are not entitled to the status of prisoners of war in Israeli law, in a manner which is compatible with the provisions of international humanitarian law, and in particular the Geneva Conventions of 12 August 1949.[310]

The Bill defines "a member of a hostile force who is not a prisoner of war" in Clause 2 as follows:

> A person who is a member of a hostile force or a person who takes part in hostile acts of a force as aforesaid, whether directly or indirectly, who does not meet the conditions provided in Articles 1, 2 and 3 of the Annex to the 1907 Hague Convention IV Respecting the Laws and Customs of War on Land or Article 4 of the Geneva Conventions III Relative to the Treatment of Prisoners of War of 12th August, 1949, and accordingly is not entitled to the status of a prisoner of war.[311]

This clause actually strengthens the argument that a "negative arrangement" prevails in international law. Clause 2 provides that any person who does not fall within the paradigms indicated in the various conventions, participates in hostile acts, or is a member of a hostile force will be embraced by this definition.

A comparison between the Bill and the Administrative Detention Law reveals that the spirit of the two laws is similar—both attempt to preserve the fine balance between security needs and public order on the one hand and human rights on the other.[312] Like the Administrative Detention Law, which

---

308. *Hatzaot Hok* No. 2883, Jun. 14, 2000 (hereinafter: "The Bill") (Heb.).

309. *See* text accompanying note 129 *supra*.

310. *Hatzaot Hok* No. 2883, *supra* note 308.

311. *Id.*

312. As is stated in the explanatory notes to The Bill: "Similarly, the Bill is intended to ensure, *inter alia*, that the imprisonment of a member of a hostile force, as aforesaid, will be subject to judicial review and will be examined periodically, and that

confers upon the Minister of Defense (and in certain circumstances, the Chief of the General Staff) the power to issue a detention order against a person, the Bill empowers the Chief of the General Staff to issue an order for the imprisonment of a person whom the Chief believes to be a member of a hostile force (who is not a prisoner of war). The Bill limits the term of imprisonment to the date on which the Minister of Defense gives notice of the cessation of hostilities between the State of Israel and the hostile force of which the imprisoned person is a member.[313]

The Chief of the General Staff may issue an order in the absence of the detainee; however, the existence of the order must be reported to the detainee at the earliest possible date. Further, the detainee must have an opportunity to be heard with respect to the order before an officer with the rank of Lieutenant-Colonel, who the Chief of the General Staff especially appoints for this purpose. All the contentions raised before that officer must be recorded in writing and brought to the attention of the Chief of the General Staff.[314] Moreover, like the Administrative Detention Law, the Bill enables deviation from the customary laws of evidence and provides that privileged evidence must be adduced before the court.[315] The detainee has the right to meet with counsel as soon as possible, at least seven days prior to being brought before the District Court judge.[316]

In addition, like the Administrative Detention Law, the Bill requires periodic review of a detention order. Under the Bill, the Chief of the General Staff must consider, every six months, whether there are special reasons, including humanitarian reasons, which justify the release of the detainee. This review takes place prior to the cessation of the struggle between Israel and the force with which the detainee is affiliated. A person may petition the District Court to overrule a decision of the Chief of the General Staff. The President of the Court or the Deputy would consider such a petition.[317]

---

the prisoner will enjoy suitable prison conditions, which will not violate his dignity and health."

313. Clause 3 of The Bill, *supra* note 308, provides:

> (a) Where the Chief of the General Staff has cause to believe that a person held by the authorities of the State is a member of a hostile force who is not a prisoner of war, he is entitled to issue an order, signed by him, for his imprisonment in a place which shall be determined.
>
> (b) An order issued under the provisions of subsection (a) shall be valid until the date on which the Minister of Defence gives notice, by a certificate given under his hand, of the cessation of the hostile activities between the State of Israel and the hostile force of which the imprisoned person is a member or in the activities of which the imprisoned person participated, or until an earlier date which shall be ordered by the Chief of the General Staff. . . .

Id.

314. The Bill, *supra* note 308, cl. 3(c) and (d).

315. *Id.* cl. 4(c).

316. *Id.* cl. 5.

317. *Id.* cl. 6.

Nonetheless, the Bill and the Administrative Detention Law differ in certain respects. With regard to periodic review of a detention order, there is a substantive difference between the approaches of the two laws. Under the Administrative Detention Law, the court must consider whether the circumstances that required detention still prevail. In other words, the premise is that the detainee must be released from detention unless the contrary is proven. However, under the Bill, the premise is that the person should remain in detention unless there are good grounds for releasing him. Therefore, the bases of the two laws differ. The legislature must consider whether or not it intended this outcome.

Furthermore, judicial review under the Bill is not as broad as judicial review under the Administrative Detention Law. Under the Bill, the order need not be authorized immediately, but within twenty-one days from its promulgation. Meanwhile, the Administrative Detention Law requires review of the order within forty-eight hours. Secondly, the Bill provides that the only issue which the President of the District Court or his Deputy must decide is whether or not the person falls within the definition of "a member of a hostile force who is not a prisoner of war."[318] This provision is insufficiently balanced and may be unconstitutional.

The twenty-one-day period without judicial review under the Bill may not be proportional and therefore, not legal. It conflicts with the provisions of Section 8 of Basic Law: Human Dignity and Freedom. Certainly, it is unnecessarily long. If the Chief of the General Staff has decided that a person is "a member of a hostile force who is not a prisoner of war," and the District Court classifies this person as a hostage at the end of the twenty-one-day period, then that person has been in detention for twenty-one days for no purpose. Perhaps, the person was detained in a manner that was contrary to international law. The Bill also makes no arrangements for compensation for wrongful detention and imprisonment.

In sum, the Bill is unnecessary since the government has the authority to detain hostile forces under present law. However, there is no doubt that if the Bill enters into force, there no longer will be any question as to the source of the State's power to issue detention orders against persons who are members of terrorist or guerilla organizations.

VI. CONCLUSION

In the second hearing of *Anon. v. Minister of Defence*, the Supreme Court of Israel overturned its earlier decision in the same case and held that the government had to release the Lebanese detainees in question. Shortly thereafter, the detainees were released and returned to Lebanon. While no steps, at least no overt steps, have been taken to establish whether these persons returned to their struggle against Israel, at the time *Anon.* was decided, the Lebanese detainees posed a threat to national security.

318. *Id.* cl. 4.

Therefore, I disagree with the factual assertions of the State and some of the justices of the Supreme Court that the Lebanese detainees did not pose a real danger to Israel upon their release. Although it is true that the level of danger had diminished with the passage of time, it was necessary to determine what danger still ensued from the Lebanese detainees. The State should have raised this point in the beginning. Furthermore, I do not accept the majority's view in the second hearing that the Lebanese petitioners were completely innocent "civilians" or "hostages." Some of the petitioners had been convicted for terrorist offenses. They were not untainted, innocent civilians.

Under the definitions of the various international conventions, the Lebanese petitioners were neither civilians who were taken hostage nor combatants. Rather, they were terrorists. Therefore, those international conventions which concern combatants or civilians in time of war do not apply to the Lebanese petitioners. As I explained in Parts II and III, these conventions contain a deliberate "negative arrangement" with regard to terrorists. In other words, they are intentionally silent on the issue. Thus, they enable each state to deal with terrorists as it sees fit.

In the same way as it is possible to hold prisoners of war until the cessation of hostilities and to exchange them for prisoners held by the other side at the conclusion of a conflict, it is also possible to hold terrorists until the cessation of a struggle. At the end of the hostilities, they too may be exchanged for missing and captured Israeli soldiers. Therefore, terrorists must be granted a third status—that of *quasi*-combatants. Quasi-combatants are not combatants or freedom fighters, and they certainly are not civilians. Morally, it is inconceivable that terrorists should enjoy the protected status of combatants or civilians under international law.

The Imprisonment of Members of Hostile Forces Who Are Not Entitled to the Status of Prisoners of War Bill, which is being considered by the *Knesset*, is superfluous. Under the existing law, the Israeli government has the authority to regulate the detention of Lebanese terrorists remaining in Israel.

In conclusion, a democratic country such as Israel, which is forced to defend itself against terrorist and guerilla organizations, must have the necessary tools to survive and exist. While Israel cannot use arbitrary means to justify its valid security interests, it should not forego the democratic, lawful and legitimate measures that are available under domestic and international law.